ISSUES

1. Whether Claimant established by a preponderance of the evidence that the following treatment modalities are reasonably necessary to relieve the effects, or prevent further deterioration of Claimant's industrial injury:

    a. Belbuca;

    b. Tens Unit;

    c. Massage therapy; and

    d. Physical therapy.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his back on August 13, 2010. As a result of the back injury, Claimant underwent five work-related spinal surgeries over a period of approximately eight years. The surgeries have included lumbar fusion procedures from L3-S1, with the most recent surgery being performed in November 2018.

2. On January 21, 2020, Claimant's authorized treating physician (ATP), Elizabeth Bisgard, M.D., at UC Health Occupational Medicine, placed Claimant at maximum medical improvement (MMI). Dr. Bisgard recommended maintenance care to include medication management with Dr. Huser, 12 physical therapy sessions and 12 massage therapy sessions. (Ex. 4).

3. On June 12, 2020, Caroline Gellrick, M.D., performed a Division Independent Medical Examination (DIME). Dr. Gellrick opined that Claimant was at MMI effective January 21, 2021. With respect to maintenance care, Dr. Gellrick recommended that Claimant continue with an active exercise program with swimming and land therapy, and using an elliptical to build up core stabilization and strengthening for a period of two years. She also indicated Claimant required ongoing pain management in the form of buprenorphine (*i.e.*, Belbuca), muscle relaxers and Tramadol, as needed. She indicated that should continue unless Dr. Huser found Claimant stable long-term. With respect to physical therapy, she recommended two years of physical therapy and massage therapy. Dr. Gellrick did not make recommendations regarding the use of a TENS unit. (Ex. 4).

4. Claimant has been followed by Christopher Huser, M.D., at Metro Denver Pain since at least 2017 for pain control. Claimant's treatment regimen has included multiple medications for pain control, generally including opioid pain medication, and a muscle relaxant. In early 2019, Claimant overused opioids and unilaterally stopped taking opioids in April 2019 without tapering off the medication. Subsequently, Claimant began taking opioids again under Dr. Huser's care. From approximately February 2020, Claimant's

medication regimen prescribed by Dr. Huser or other providers at Metro Denver Pain included buprenorphine, another opioid for breakthrough pain, and a muscle relaxant. In December 2021, Dr. Huser changed Claimant's prescription from Belbuca to Suboxone, another form of buprenorphine. (Ex. 3).

5. On October 14, 2020, Dr. Bisgard prescribed Claimant an "E-Stim" unit for pain management. The ALJ infers from the totality of the evidence that the E-Stim unit recommended is a TENS unit.

6. At various times between July 2019 and May 2021, Insurer submitted Claimant's requests for authorization of Belbuca to outside consultants. On July 16, 2019, the outside reviewer approved Claimant's prescription for Belbuca. (Ex. K). On February 25, 2020, a different outsider reviewer denied approval for Belbuca. (Ex. K). Three subsequent reviews were performed on October 15, 2020, November 10, 2020, and May 5, 2021, by two different providers. Each of the reviews conducted in 2021 indicated that Belbuca was not medically necessary, primarily based on the opinion that Dr. Huser's records did not record "specific, objective, functional gains, attributable to ongoing use." One such peer reviewer noted: "However, despite that the injured worker's medication regimen (including ongoing Belbuca, Oxycodone, Flexeril, and Gabapentin) decreased the injured worker's pain and improved activities, there is no clear evidence of functional benefit specific to the use of Belbuca film." (Ex. K). The rationale stated by the peer reviewers for the proposition that Claimant's use of Belbuca is not reasonably necessary to improve function or prevent deterioration of Claimant's work-related condition is not persuasive, given the recognition that Claimant's medication regimen (which included Belbuca) improved Claimant's activities (*i.e.*, improved function). (Ex. K).

7. On November 29, 2021, Eric Shoemaker, D.O., at Respondents' request, issued a report based on his review of Claimant's medical records. Dr. Shoemaker is board-certified in sports medicine and pain management. Respondents presented Dr. Shoemaker's testimony through deposition, and he was admitted to testify as an expert in pain management. Dr. Shoemaker opined that massage therapy, physical therapy, and opioid medications were not reasonable or appropriate for Claimant's condition, and indicated insufficient documentation existed to support the use of a TENS unit. (Ex. H).

8. With respect to opioid management, Dr. Shoemaker's opined that Claimant is "an extremely poor candidate for ongoing opiate therapy." Dr. Shoemaker noted Claimant's overuse of medications in early 2019, and Claimant's providers' concerns expressed at that time concerning ongoing opioid use. Dr. Shoemaker expressed concern that a urine toxicology screen performed on May 24, 2018 was positive for a non-prescribed medication -- hydromorphone. He was also concerned a urine toxicology screen performed on January 15, 2020 was positive for a non-prescribed benzodiazepine, and non-prescribed opiates, and negative for tramadol. Ultimately, Dr. Shoemaker opined that Claimant should not be prescribed any ongoing opiates for chronic pain. (Ex. H).

9. Dr. Shoemaker testified he does not believe physical therapy is appropriate for Claimant at this point because Claimant should be independent in a home exercise program. Dr. Shoemaker noted that the "role of physical therapy is to instruct the patient

in an appropriate home exercise program," and that Claimant "should remain active with his home exercise program on a daily basis." Dr. Shoemaker opined the requested physical therapy exceeds that recommended by the Colorado Medical Treatment Guidelines, WCRP Rule 17, Ex., 9, G.18 and 19. Dr. Shoemaker did not credibly address whether a limited annual course of physical therapy to keep Claimant current on his home exercise program would be reasonable or appropriate. (Ex. H).

10. With respect to massage therapy, Dr. Shoemaker testified that ongoing massage therapy is not typically beneficial in the "chronic phase" of an injury and can be counterproductive. He also opined that ongoing massage therapy is not supported by the medical treatment guidelines, Rule 17, Ex. 1, Section F.13 and Ex. 9, Section G.19.g. (Ex. H).

11. Finally, Dr. Shoemaker opined that Claimant's medical records did not contain sufficient information to justify a TENS unit, but If documentation commenting on the "use, efficacy, or any instructions sessions" existed, a TENS unit would be reasonable and appropriate. (Ex. H).

12. Claimant submitted Dr. Huser's deposition In lieu of live testimony. Dr. Huser is double board-certified in anesthesiology and chronic pain management, and he was admitted to testify as an expert in pain management. Dr. Huser has treated Claimant since at least 2017, and is providing ongoing treatment to Claimant. As of January 2022, Dr. Huser was prescribing Claimant buprenorphine (Suboxone) as a long long-acting pain medication, oxycodone 10 mg for breakthrough pain, and cyclobenzaprine as a muscle relaxant.

13. Dr. Huser testified that Suboxone is a "partial opioid" that is "a little bit safer, long-acting medicine to be on for someone who's going to be on opioids long term" and "one of the safest opioids there is." Claimant was previously prescribed Belbuca which is also buprenorphine but was recently switched to Suboxone due to higher doses of buprenorphine being available with Suboxone. He testified that Claimant has an opioid contract with his office, that his office routinely performs lab tests and urine screens for patients who are on opioids or controlled substances, and that his office checks the Prescription Drug Monitoring Program (PDMP) on a monthly basis. Dr. Huser testified that Claimant's medications decrease his pain levels and improve his ability to function.

14. He further testified that the Claimant's past urine drug screens did not raise concerns for abuse of opioid medications, and Claimant's potential for misusing or selling medications is extremely low. With respect to Claimant's May 24, 2018 urine toxicology screen, Dr. Huser noted the positive hydromorphone test was explained by the Claimant's transition to hydrocodone from hydromorphone on that date. With respect to the January 15, 2020 urine toxicology screen, Dr. Huser explained that Claimant's positive benzodiazepine test was consistent with a prescription for Xanax. Dr. Gellrick's IME report also indicates that Claimant was prescribed Xanax by his primary care provider in 2019. Dr. Huser explained that Claimant's negative test for tramadol was not concerning, given tramadol's 48-hour half-life and that Claimant was using tramadol on an "as-needed" basis at the time. Thus, it would not be unusual for Claimant to test negative for

Tramadol if he had not taken it within two days of the test. Given his long-standing physician-patient relationship with Claimant, the ALJ finds Dr. Huser's opinions concerning Claimant's use of buprenorphine credible.

15. With respect to massage therapy, Dr. Huser opined that Claimant would benefit from ongoing massage therapy two to four times per month to assist with chronic pain control. He testified that massage would activate muscles, improve blood flow and stretch muscles.

16. He testified that the ongoing use of a TENS unit was reasonable and necessary to maintain Claimant's condition, and that a TENS unit would activate and relax muscles, improve blood flow, and decrease pain. Claimant testified that he currently uses a TENS unit and that it improves his pain and helps him sleep at night.

17. Finally, Dr. Huser testified that Claimant would benefit from an annual course of physical therapy to instruct Claimant and keep him current on exercise and techniques to incorporate into Claimant's home exercise program. Dr. Huser recommended four to six weeks of physical therapy per year, indefinitely. The ALJ infers from Dr. Huser's testimony that the physical therapy recommended is not passive, but rather active therapy to help Claimant maintain, indefinitely, a home exercise program. Dr. Huser's opinion was credible and persuasive.

18. Claimant testified at hearing that the physical therapy and massage therapy he received improved his pain and ability to function. He testified he is no longer receiving either massage or physical therapy, and that he is vigilant about performing his home exercise program. Claimant is currently using a TENS unit which he indicated decreases his muscle tension and allows him to sleep at night. Claimant testified that that using buprenorphine had increased his level of function and decreased his pain. Claimant testified that Respondents since Insurer stopped authorizing buprenorphine, he has paid for the medications out of pocket. Exhibits 6 and I include demonstrate Claimant self-paid for seven Belbuca prescriptions from April 2021 to October 2021, in the total amount of $1,291.91.

CONCLUSIONS OF LAW

Generally

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

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

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

MAINTENANCE MEDICAL BENEFITS

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

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

Here, Claimant seeks specific care in the form of reimbursement for past prescriptions and ongoing use of buprenorphine (i.e., Belbuca or Suboxone), two-to-four massage therapy sessions per month; an annual course of four to six weeks of physical therapy; and use of a TENS Unit.

Buprenorphine Prescription

Claimant has established by a preponderance of the evidence that use of buprenorphine prescribed by Dr. Huser is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. The Claimant persuasively testified that use of buprenorphine permits him to function by reducing his pain. Dr. Huser credibly testified that Claimant is currently at a low risk for abuse or misuse of pain medication, and that buprenorphine, as a partial opioid, is a safe form of pain relief for Claimant. The Claimant is also subject to a opioid contract, regular lab tests and urine drug screens and PDMP monitoring for aberrant use or behavior. Dr. Shoemaker's opinion regarding the suitability of opioid prescriptions are not persuasive, given that Claimant has been taking buprenorphine for more than two years without incident. Claimant's request for current authorization of buprenorphine and reimbursement of past buprenorphine prescriptions is granted.

Physical Therapy

Claimant has established by a preponderance of the evidence that a limited, annual course of physical therapy is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. The ALJ has considered the Medical Treatment Guidelines recommendations regarding physical therapy. W.C.R.P. Rule 17, Exhibit 1, Section F, 12,G. of the Medical Treatment Guidelines for Low Back Pain indicates that "Patients should be instructed in and receive a home exercise program that is progressed as their functional status improves," and also that "Home exercise should continue indefinitely." Both Exhibit 1 and W.C.R.P. Rule 17, Exhibit 9, Section G. 18, cited by Dr. Shoemaker, recommend a maximum of 8 to 12 weeks of therapeutic oversight for therapeutic exercise, with 4 to 8 weeks being the optimum duration. Exhibit 9, Section G. 18 also indicates: "Additional sessions may be warranted during periods of exacerbation of symptoms."

Dr. Huser persuasively testified that the goal of the recommended physical therapy is to allow Claimant to stay current on his home exercise program. Dr. Shoemaker noted that the "role of physical therapy is to instruct the patient in an appropriate home exercise program," and that Claimant "should remain active with his home exercise program on a daily basis." The ALJ finds this rationale consistent with the Medical Treatment Guidelines to permit Claimant to receive instruction to progress his home exercise program as his functional status improves over time. Given the purpose of the physical therapy recommendation, Dr. Shoemaker's opinion that physical therapy is not reasonable and appropriate is not persuasive.

Because the recommended physical therapy is to permit a physical therapist to provide instruction and direction to permit Claimant to remain active in a home exercise

program, the ALJ finds that a short, annual course of physical therapy is reasonably necessary to permit Claimant to learn new techniques and adjust his home exercise program thereby relieving the effects of Claimant's work-related injury or preventing further deterioration of Claimant's work-related condition. Because the recommended course of physical therapy is instructional in nature, the ALJ finds that four weeks of physical therapy per year is reasonable.

TENS UNIT

Claimant has established by a preponderance of the evidence that the use of a TENS unit is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. Claimant persuasively testified that the use of a TENS unit helps him function. Dr. Huser persuasively testified that a TENS unit would activate and release muscles, improve blood flow and decrease Claimant's pain. Dr. Shoemaker's opined that Claimant's medical documentation was insufficient to support a TENS unit, but if documentation on the efficacy or instructions sessions were present the unit would be reasonable and appropriate. Given the testimony of Dr. Huser and Claimant, the ALJ finds a TENS unit to be reasonably necessary medical maintenance treatment.

MASSAGE THERAPY

Claimant has failed to establish by a preponderance of the evidence that ongoing massage therapy at the frequency of two-to-four sessions per month is reasonably necessary to relieve the effects of his work-related injury or prevent further deterioration of his work-related condition. Dr. Huser testified that the goal of massage therapy was to increase blood flow, activate muscles and stretch muscles. No credible evidence was offered to demonstrate how these benefits differ significantly from the benefits offered by the use of a TENS unit, physical therapy or a home exercise program. The ALJ finds credible Dr. Shoemaker's opinion that ongoing massage therapy is not reasonable or appropriate at this stage of Claimant's condition. Claimant's request for authorization of ongoing massage therapy is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of prescriptions for buprenorphine is granted.

2. Respondents shall reimburse Claimant for prescriptions for Belbuca from April 2021 through October 2021 in the amount of $1,291.91.

3. Claimant's request for authorization of an annual course of physical therapy, not to exceed four weeks per year, is granted.

4. Claimant's request for authorization of a TENS unit is granted

5. Claimant's request for authorization of massage therapy is denied.

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

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

DATED: April 1, 2022

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

ISSUES

- Whether Claimant has overcome the opinion of the Division-sponsored Independent Medical Examination ("DIME") physician with regard to the opinion of maximum medical improvement ("MMI") by clear and convincing evidence?

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to a scheduled rating of 32% of the upper extremity?

- Whether Claimant has proven by a preponderance of the evidence that she sustained an impairment to a part of the body beyond the schedule of impairment set forth at Section 8-42-107(2), C.R.S.?

- Whether Claimant has proven by a preponderance of the evidence that she is incapable of earning wages in the same or other employment and entitled to an award of permanent total disability ("PTD") benefits?

- Whether Claimant has proven by a preponderance of the evidence that as a result of the injury she has a disfigurement that is normally exposed to public view and entitled to additional compensation pursuant to Section 8-42-108(1), C.R.S.

- Whether Respondents have proven by a preponderance of the evidence that Claimant was overpaid workers' compensation benefits in the amount of $9,139.10?

FINDINGS OF FACT

1. Claimant was employed with employer as a road supervisor beginning in February 2017. Claimant sustained an admitted industrial injury on December 7, 2017 when she was fueling a bus and the fuel line became twisted and pulled tightly. Claimant testified the fuel line became twisted and when she pulled back on the fuel line to unhook it, the nozzle flipped and struck her on the dorsum of the left hand at the carpometacarpal part of her left wrist. Claimant continued working but eventually sought treatment at St. Mary's Occupational Health on December 7, 2017.

2. Claimant was examined on December 7, 2017 by nurse practitioner ("NP") Harkreader. Cliamant reported a consistent accident history and NP Harkreader diagnosed Claimant with a wrist contusion and referred Claimant for an x-ray of her left wrist. The x-rays showed no fracture or dislocation of the left wrist. Claimant was provided with work restrictions and prescribed tramadol.

3. Claimant was examined by Dr. Rose on December 22, 2017. Dr. Rose diagnosed acute de Quervain's tenosynovitis and recommended occupational therapy and performed a steroid injection of the left first dorsal compartment of her wrist.

4. Claimant was examined by Dr. McLaughlin with St. Mary's Occupational Medicine on January 2, 2018. Claimant reported to Dr. McLaughlin that the injection performed by Dr. Rose was quite painful, but she was markedly improved after a few days. Dr. McLaughlin diagnosed Claimant with carpal tunnel syndrome in addition to the de Quervian's tenosynovitis. Dr. McLaughlin recommended ongoing conservative treatment including a prescription for Voltaren gel.

5. Claimant eventually underwent surgery on her left upper extremity under the auspices of Dr. Rose on March 13, 2018. Dr. Rose performed a left cubital tunnel release in situ, left de Quervain release of the wrist, and left carpal tunnel release. Claimant returned to Dr. Rose post-surgery evaluation and suture removal on March 22, 2018. Claimant reported she was doing well and Dr. Rose recommended Claimant undergo a short course of therapy and provided her with work restrictions of no lifting over 2 pounds.

6. Claimant was evaluated by NP Harkreader on March 29, 2018. NP Harkreader noted that towards the end of the examination, Claimant reported that xince the surgery, she had approximately 10 to 12 episodes where she will just go blank for a few seconds. Claimant also reported some blurred and double vision. NP Harkreader recommended that Claimant go to the emergency room to determine if she was having a transient ischmetic attack ("TIA"), but Claimant indicated that she would just make an appointment with her doctor to get that evaluated.

7. Claimant returned to Dr. Rose on April 12, 2018 and reported doing well overall, but it was noted that she was starting to set up a significant amount of scar tissue and having some edema. Dr. Rose recommended she start occupational therapy twice a week to work on her swelling and scar massage. Dr. Rose provided Claimant with work restrictions that included no use of the left upper extremity.

8. Claimant returned to NP Harkreader on April 25, 2018. NP Harkreader noted Claimant reported she would have pain in her left axilla at night if she hyperflexes her elbow with tingling in the ulnar distribution of her left hand. NP Harkreader noted Claimant was depressed and recommended she consult with Dr. Carris, a psychologist. NP Harkreader took Claimant off of work.

9. By May 10, 2018, Claimant reported to Dr. Rose that she had considerable improvement in her hand numbness and much less pain with thumb abduction. Claimant reported some burning paresthesias and hypersensitivity up the dorsum of her operative hand in approximately the radial sensory nerve distribution. Claimant also reported that with elbow hyperflexion, she has pain running down the course of her ulnar nerve down her forearm, into her small finger and the upper medial arm to her shoulder. Dr. Rose reported Claimant had palpable scar tissue related

peripheral neuropathies around the dorsal radial sensory nerve and the ulnar nerve at the elbow. Dr. Rose recommended a topical agent with some gabapentin to assist her hypersensitivity, along with another month of therapy. Dr. Rose also recommended Claimant begin working in the field as opposed to the office.

10. Claimant was examined by Dr. Burnbaum on June 4, 2018 in relation to her complaints of blacking out. Dr. Burnbaum opined the blanking out spells could be related to sleep loss. Dr. Burnbaum referred Claimant for an EEG to determine if there was any seizure activity associated with the spells. The EEG was performed on July 7, 2018 and showed no epileptiform abnormalities. The EEG was noted to be mildly abnormal due to predominant low voltage fast activity which could have been a medication effect.

11. Claimant returned to Dr. Rose on June 6, 2018. Dr. Rose noted that from a surgical perspective, there were no discrete signs of post surgical pathology that were able to be detected. Claimant complained of diffuse hypersensitivity around the radial sensory nerve with no discrete Tinel's sign indicative of a neuroma. Claimant reported her fingertip numbness and paresthesias were improved. Dr. Rose noted he was unsure of the origin of Claimant's neurologic symptoms. Dr. Rose noted he anticipated maximum medical improvement ("MMI") at the next visit.

12. Claimant returned to Dr. Stagg on July 31, 2018. Dr. Stagg noted Claimant still complained of the episodes which she described as occurring when the pain was really bothering her on the right side. Dr. Stagg recommended a repeat neurologic evaluation and ultimately referred Claimant to Dr. Collier for this examination. Dr. Stagg also recommended Claimant be seen by Dr. Price for evaluation.

13. Claimant was examined by Dr. Price on August 31, 2018. Dr. Price noted Claimant's complaints including her reports of not doing well post-operatively with issues involving ongoing pain. Claimant also reported developing some left calf pain and spasm post-surgery. Dr. Price noted that in response to the syncopal episodes, she had an EEG and CT scan, but Dr. Price did not have the results of those diagnostic tests.

14. Dr. Price noted that Claimant may have some form of sympathetically maintained pain now, and recommended a triple phase bone scan. Dr. Price also recommended massage therapy, acupuncture and recommended Ketamine cream instead of the current cream she was using.

15. Claimant returned to Dr. Rose on September 5, 2018 with Dr. Rose noting that Claimant's postsurgical course had been complicated by residual hypersensitivity in the radial nerve distribution, which was now mostly resolved, and some hypersensitivity and pain around the ulnar nerve in the cubital tunnel, which continued to give Claimant trouble, and a feeling of soreness in the pain. Dr. Rose noted Claimant's ulnar nerve symptoms were overall improved, but Claimant continued to have pain over the course of the ulnar nerve itself, which had been refractory to gabapentin, topical agents, and a

course of therapy. Dr. Rose noted Claimant had been referred to a pain specialist, and recommended against further surgical intervention.

16. The triple bone scan recommended by Dr. Price was performed on September 26, 2018. The triple bone scan showed bilateral polyarticular, periarticular increased radiopharmaceutical activity suggesting underlying arthopathy and asymmetric hyperemia within the distal left upper extremity without increased soft tissue or periarticular activity to definitely suggest CRPS.

17. Claimant returned to Dr. Price on September 27, 2018. Dr. Price reported that Claimant reported that the massage therapy had helped her, but that she did not like the stickiness of the Ketamine cream. On examination, Dr. Price noted both hyperpathia and allodynia.

18. Claimant returned to Dr. Rose on November 5, 2018. Dr. Rose noted Claimant complained of developing an allergy to the extended release gabapentin. Dr. Rose further noted that Claimant was having some significant hypersensitivity over the course of the ulnar nerve. Dr. Rose noted he could not find any instability at the elbow, and given her hypersensitivity over the median nerve decompression in the palm, he did not believe further decompression and anterior transposition at the elbow would be of any help.

19. Dr. Stagg issued a medical report on December 27, 2018 after reviewing surveillance video of Claimant provided by Respondents. Dr. Stagg opined that based on his review of the surveillance video that Claimant was exaggerating her restrictions which included no lifting, pushing or pulling over one pound.

20. Claimant was examined by Dr. Stagg on January 7, 2018 at which time they discussed the surveillance video. Dr. Stagg ultimately increased Claimant's work restrictions to include no lifting pushing or pulling greater than 25 pounds. Dr. Stagg also referred Claimant for a function capacity evaluation. ("FCE").

21. Claimant underwent an independent medical examination ("IME") with Dr. Hammerberg on January 3, 2019. Dr. Hammerberg reviewed Cliamant's medical records, obtained a medical history and performed a physical examination as a part of his IME. Dr. Hammerberg opined that Claimant was not at MMI and recommended Claimant undergo additional medical treatment including sympathetic blocks and treatment with Dr. Price. Dr. Hammerberg recommended that Claimant be prohibited from driving based on her reports of black out spells.

22. The FCE was performed on January 28, 2019. The FCE concluded Claimant was capable of lifting and carrying 3 pounds with her left hand and 10 pounds bilaterally, with no power gripping or repetitive gripping with the left hand, and grasping and handling with the left hand rarely.

23. Claimant returned to Dr. Stagg on February 7, 2019. Dr. Stagg noted in his report that Claimant demonstrated an ability on the surveillance video to perform activities in excess of what was depicted in the FCE. Claimant reported to Dr. Stagg that she had been self medicating with alcohol during this time which allowed her to perform activities depicted in the surveillance video. Dr. Stagg noted the recommendations of Dr. Hammerberg and agreed that she should undergo additional treatment. Dr. Stagg noted Claimant's work restrictions should include lifting limitations of between 1 to 5 pounds and no working at heights due to the possible seizures.

24. Dr. Stagg provided a prescription for an additional 12 acupuncture treatments recommended by Dr. Price on April 4, 2019. Claimant returned to Dr. Stagg on April 19, 2019 and it was noted that they were having difficulty getting the EEG recommended by Dr. Hammerberg approved.

25. Claimant returned to Dr. Stagg on May 17, 2019. Dr. Stagg noted Claimant was scheduled to undergo the EEG in early July. Dr. Stagg increased Claimant's work restrictions to no lifting greater than 5-10 pounds.

26. Claimant underwent a series of three stellate ganglion block injections performed by Dr. James on May 9, 2019, June 18, 2019 and June 19, 2019.

27. Claimant was re-examined by Dr. Stagg on July 19, 2019. Dr. Stagg noted Claimant reported headaches following the injections with Dr. James. Dr. Stagg recommended Claimant seek prompt medical attention for the reported headaches with Dr. James. Claimant returned to Dr. Stagg on August 15, 2019 and indicated that she had not been able to get ahold of Dr. James. Claimant further reported that she continued to experience the headaches she reported to Dr. Stagg on her previous visit.

28. Claimant underwent a repeat EMG and nerve conduction study on July 23, 2019. The EMG showed no electrodiagnostic evidence of left carpal tunnel syndrome, cervical radiculopathy, peripheral neuropathy, ulnar neuropathy, or brachial plexopathy.

29. Claimant underwent examination with Dr. Merrell on September 3, 2019 after complaints that she was having headaches along with trouble swallowing and having problems with her throat swelling after the ganglion block injections. The examination revealed no identifiable cause of Claimant's complaints.

30. Claimant was examined by Dr. Price on September 24, 2019. Claimant reported symptoms to Dr. Price which included headaches, throat swelling, bowel and bladder loss and arm pain. Dr. Price noted that it was unclear as to what could be causing Claimant's symptoms and noted Claimant could be depressed and there may be a somatization of symptoms.

31. Claimant returned to Dr. Merrell on October 2, 2019 for her ongoing complaints involving her throat, which Claimant maintained had been ongoing since her

stellate ganglion block injections. Dr. Merrell diagnosed Claimant with globus sensation and noted that the esophagram was normal. Dr. Merrell opined that any issues with Claimant's complaints involving her throat were not related to the stellate ganglion block injections.

32. Claimant underwent a stress infrared thermogram and QSART on October 24, 2019 under the auspices of Dr. Schakaraschwili. Dr. Schakaraschwili noted the QSART and stress infrared thermogram was positive for complex regional pain syndrome ("CRPS").

33. Claimant underwent a psychological IME with Dr. Moe on January 20, 2020. Dr. Moe reviewed Claimant's medical records and examined Claimant in association with his IME. Dr. Moe opined that Claimant's current depression and anxiety symptoms were due, in part, to Claimant's work injury. However, Dr. Moe opined that the evidence showed Claimant had a propensity for somatization which existed pre-injury and was not the product of the injury. Dr. Moe opined that Claimant had a psychological impairment of 3% mental impairment related to the work injury.

34. Respondents obtained an IME with Dr. Cebrian on January 15, 2020. Dr. Cebrian issued a report in connection with his IME in which he opined that Claimant's left carpal tunnel syndrome and left cubital syndrome were not causally related to the December 7, 2017 work injury as there was not a mechanism of injury that would cause these conditions. Dr. Cebrian opined that a hose striking the Claimant's hand would not cause an injury to the median nerve at Claimant's elbow.

35. Dr. Cebrian opined that Claimant's other reports of symptoms, including the headaches, throat swelling, black out spells, neck pain, upper back pain, dizziness and memory loss were explained by Dr. Moe's report which cited to Claimant's pre-existing somatic symptom disorder. Dr. Cebrian opined that Claimant was at MMI as of January 15, 2020 and that her impairment rating was limited to the left thumb.

36. Claimant was examined by Dr. Price on February 7, 2020. Dr. Price noted she felt there was some somatization of her pain and opined that she needed to review the IME reports before opining on Claimant's permanent impairment rating.

37. Claimant was examined by Dr. Stagg on March 11, 2020. Dr. Stagg noted Claimant should return to Dr. Price for a determination of MMI and permanent impairment. Dr. Stagg further opined the Claimant should follow up with Dr. McKee-Cole. Dr. Stagg provided Claimant with work restrictions that included no lifting, pushing, or pulling greater than 10 pounds.

38. Dr. Price examined Claimant on April 10, 2020 at which time Dr. Price opined Claimant was at MMI. Dr. Price provided Claimant with a permanent impairment rating of 32% scheduled impairment of the upper extremity based on loss of range of motion of the wrist, median neuropathy, motor impairment of the median nerve and

sensory loss in the ulnar nerve. Dr. Price also provide Claimant with an impairment rating of 3% mental impairment based on the IME of Dr. Moe.

39. Dr. Stagg issued a note on May 15, 2020 in which he clarified his opinion with regard to Claimant's work restrictions and noted Claimant was limited to 10 pounds lifting with her left upper extremity. Dr. Stagg opined that Claimant did not have restrictions with regard to her right upper extremity.

40. Respondents requested a DIME which was performed by Dr. Hughes on September 1, 2020. Dr. Hughes reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Hughes opined that Claimant had reached MMI as of January 15, 2020. Dr. Hughes provided Claimant with a permanent impairment rating of 4% of the upper extremity based on loss of range of motion in the left wrist and elbow. Dr. Hughes opined that Claimant was not entitled to an impairment rating for a diagnosis of a left upper extremity neurological condition since the electrodiagnostic and clinical findings were inconsistent with entrapment neuropathy. Dr. Hughes opined that Claimant had a negative clinical presentation for CRPS. Dr. Hughes provided Claimant with a 3% psychiatric impairment. Dr. Hughes opined that there was no medical basis for permanent work restrictions and no nerves or other tissues were at risk from performance of full activity on an as tolerated basis.

41. Respondents filed a final admission of liability ("FAL") on September 24, 2020 admitting to the 3% psychiatric impairment and 4% upper extremity scheduled impairment rating provided by Dr. Hughes. The FAL noted that Respondents had continued paying temporary total disability ("TTD") benefits from January 15, 2020 through September 16, 2020, totaling $17,422.20. Respondents applied this overpayment of benefits again the $8,28310 in PPD benefits owed to Claimant and claimed a remaining overpayment of $9,139.10.

42. Claimant's counsel issued an inquiry to Dr. Price on January 23, 2021 which discussed the issues of MMI and permanent impairment. Dr. Price opined in response to the inquiry that Claimant was at MMI as of February 7, 2020. Dr. Price further opined that Claimant's impairment rating was properly established as 32% of the upper extremity and noted that Claimant's impairment rating was due to her diagnosis of CRPS.

43. Respondents obtained a supplemental report from Dr. Cebrian on February 5, 2021. Dr. Cebrian reviewed Dr. Price's updated records and Dr. Hughes' DIME report and opined Dr. Hughes properly found Claimant to be at MMI as of January 15, 2020. Dr. Cebrian noted that there was no new treatment after January 15, 2020 after that date that would justify a different MMI date. Dr. Cebrian opined that Dr. Price erred in providing Claimant with an impairment rating that included permanent impairment related to her ulnar and median nerves as these were not related to the industrial injury. Dr. Cebrian noted that if Dr. Price were to provide Claimant with an impairment rating for CRPS, it should have been under Table 1 of page 109 of the *AMA*

Guides to Permanent Impairment, 3rd Edition, Revised, and not as an impairment rating for the median or ulnar nerves. Dr. Cebrian further reiterated his opinion that Claimant's left cubital and left carpal tunnel syndrome were not causally related to the December 7, 2017 work injury. Dr. Cebrian further opined that Claimant's appropriate work restrictions would include no lifting of more than 20 pounds with the left hand. Dr. Cebrian further opined that Claimant would not be under any restrictions with regard to driving as there was no evidence of seizure activity.

44. Claimant obtained a vocational assessment report from Bob Van Iderstine dated February 8, 2021. Mr. Van Iderstine reviewed Claimant's medical records, performed an interview with Claimant and performed labor market research in connection with his vocational assessment. Mr. Van Iderstine indicated in his report that this was a difficult case to assess due to the differences of opinions regarding Claimant's work restrictions. Mr. Van Iderstine indicated in his report that for purposes of his vocational assessment he was relying on the work restrictions set forth in the January 28, 2019 FCE. Mr. Van Iderstine identified Claimant's commutable labor market as being in the Grand Junction, Colorado area. Mr. Van Iderstine opined in his vocational assessment that Claimant was incapable or returning to her previous employment and it was unlikely that she could obtain employment in the competitive labor market.

45. Respondents obtained a vocational assessment report from Katie Montoya dated January 6, 2021. Ms. Montoya reviewed Claimant's medical records, performed an interview of Claimant and performed labor market research in connection with her report. Ms. Montoya opined that the work restrictions provided by Dr. Stagg allowed Claimant to return to work in a light duty capacity with lifting restrictions of up to 20 pounds bilaterally. Ms. Montoya identified multiple positions in the Grand Junction labor market which she opined represented positions Claimant was capable of performing.

46. Dr. Price testified at hearing in this matter. Dr. Price testified her diagnosis of Claimant was possible CRPS and possible depression, but noted on cross-examination that Claimant did not meet confirmed criteria for CRPS. Dr. Price testified it was appropriate to provide Claimant with a permanent impairment rating of 32% of the upper extremity based on her determination that Claimant had probable CRPS based on the positive thermogram study and positive QSART test. Dr. Price testified that not everyone with CRPS presents the same way. Dr. Price testified Claimant's black out spells could be related to her high blood pressure, and testified she did not know if the black out spells were related to her work injury. Dr. Price testified she agreed with Dr. Merrell's statement that the stellate ganglion block would not cause the symptoms Claimant complained had developed after the injections. Dr. Price testified surgeries can result in complications including neuropathic pain. Dr. Price testified Claimant was properly placed at MMI as of February 7, 2020.

47. Dr. Price testified she adopted the work restrictions set forth in the FCE of January 2019. Dr. Price testified Claimant continued to complain of pain and the pain

complaints may lead Claimant to need to take breaks at work. Dr. Price testified she disagreed with Dr. Cebrian's opinion regarding Claimant's work restrictions.

48. Dr. Cebrian testified by deposition in this case. Dr. Cebrian's testimony was consistent with his IME report. Dr. Cebrian testified that work restrictions for a patient are to prevent reinjury and not to avoid any discomfort. Dr. Cebrian testified that the surveillance of Claimant supported the opinion of Dr. Hughes that Claimant did not need any work restrictions related to her December 7, 2017 work injury.

49. Claimant testified at hearing with regard to her injury. Claimant testified consistently with regard to the injury occurring on December 7, 2017 when the fuel line twisted and flipped over and hit Claimant on the back side of her thumb on her left hand. Claimant testified that the pain behind her thumb has remained and she continues to have problems grasping with her thumb. Claimant testified her entire left arm itches and she feels shocks down into her fingers.

50. Claimant testified she had three stellate ganglion block injection on May 9, June 18 and June 19, 2019. Claimant testified after the injections, she developed swelling of her throat and she had to gag after the second injection. Claimant testified that she only sleeps 2-3 hours at a time per night because she wakes up from gagging.

51. Claimant testified she has occasional bad days and when she has a bad day, she would not be able to show up and complete work. Claimant testified that she would be unable to work at a grocery store due to having to do frequent lifting. Claimant testified she couldn't work in a restaurant because she would be unable to carry plates. Claimant testified she had trouble focusing due to her pain.

52. Claimant testified she discussed the surveillance video with Dr. Stagg on January 7, 2019 and advised Dr. Stagg that she was self medicating with alcohol when the video was taken. Claimant testified Dr. Rose advised her to drink alcohol with her medications and offered to prescribe Claimant with an elixir to take with the medications. Claimant's testimony in this regard is found by the ALJ to be not credible as it is inconsistent with the medical records of Dr. Rose.

53. Claimant testified she continued to receive TTD benefits up until the DIME appointment with Dr. Hughes on September 16, 2020.

54. Claimant's husband, WR[Redacted], testified at hearing. Mr. WR[Redacted] testified consistently with Claimant's testimony regarding her activities of daily living.

55. Mr. Van lderstine testified at hearing consistent with his vocational assessment report. Mr. Van lderstine testified after Claimant's injury she returned to work for Employer as a dispatcher and continued to work there until June 2018. Mr. Van lderstine testified he utilized the restrictions from the FCE in developing his opinion regarding whether Claimant could earn wages in the commutable labor market. Mr. Van lderstine testified the FCE reported Claimant gave a full effort during the FCE.

56. Mr. Van Iderstine testified Claimant's medical condition and restrictions resulted in a sedentary profile primarily using her right upper extremity. Mr. Van Iderstine testified he thought Claimant was capable of working a job with one arm on a part time basis. Mr. Van Iderstine testified that because Claimant had difficulty grasping things with her thumb, she would have limited use of the left hand, as the thumb is crucial for pinching things

57. Mr. Van Iderstine testified Dr. Price had opined that Claimant may have to miss days at work if her condition flared up and would need to take breaks during the day. Mr. Van Iderstine testified this would affect her ability to maintain employment if she were able to find a job. Mr. Van Iderstine testified if Claimant were to have bad days and miss multiple days per month due to pain, this would be unacceptable in a competitive labor market. Mr. Van Iderstine testified Claimant's depression and anxiety could impact her ability to perform customer service type of work.

58. Mr. Van Iderstine testified he disagreed that Claimant could perform the job duties in the positions identified by Ms. Montoya in her voacational assessment. Mr. Van Iderstine testified many of the jobs would require bilateral use of the upper extremities. Mr. Van Iderstine testified that the cashier job identified by Ms. Montoya could include cleaning. Mr. Van Iderstine opined that Claimant was incapable of earning wages in her commutable labor market.

59. Mr. Van Iderstine admitted on cross examination that the work restrictions set forth by Dr. Stagg when Claimant was placed at MMI were higher than the restrictions set forth in the FCE.

60. Ms. Montoya testified at hearing consistent with her vocational assessment. Ms. Montoya testified that at the time Claimant was placed at MMI, the restrictions set forth by Dr. Stagg included no lifting greater than 10 pounds with the left upper extremity, with no restrictions on the right upper extremity. Ms. Montoya testified that based on these work restrictions, Claimant would be capable of working a job in the light duty classification of work. Ms. Montoya noted that there were no restrictions on Claimant's standing, walking or sitting.

61. Ms. Montoya further noted that Dr. Hughes had opined that Claimant had no work restrictions. Ms. Montoya also noted Dr. Cebrian's opinion that Claimant was capable of lifting 20 pounds. With regard to Claimant's report of missing work on bad days, Ms. Montoya opined that missing work 1-2 days per month would be tolerated, but missing more than two days per month would not be tolerated.

62. Ms. Montoya opined based on the work restrictions set forth by Dr. Stagg, Claimant would be capable of working in the commutable labor market. Ms. Montoya noted that the FCE in this case was performed over a year before Claimant was placed at MMI and approximately two months after the surveillance was obtained.

63. The ALJ credits the opinions set forth by Dr. Hughes in his DIME report over the opinions expressed by Dr. Price with regard to Claimant's date of MMI and finds that Claimant has failed to overcome the opinion of the DIME physician with regard to MMI by clear and convincing evidence. The ALJ notes that the opinion by Dr. Hughes with regard to the date of MMI is consistent with the opinions expressed by Dr. Cebrian in his IME reports and testimony at hearing. The ALJ further notes that Claimant's medical treatment after January 15, 2020 did not change and Claimant did not report any significant improvement to establish that she continued to remain not at MMI after January 15, 2020.

64. The ALJ credits the opinions of Dr. Stagg with regard to Claimant's work restrictions and finds that Claimant's proper work restrictions would be those set forth by Dr. Stagg. The ALJ notes that the restrictions set forth by the FCE were established well before Claimant was placed at MMI. The ALJ further credits the medical records from Dr. Stagg that established that the work restrictions set forth by the FCE were inconsistent with what Claimant was depicted as being capable to perform on the surveillance video as supportive of his opinion regarding Claimant's work restrictions.

65. The ALJ credits the opinions of Dr. Price with regard to Claimant's permanent impairment rating and finds that Claimant has established that it is more probable than not that she sustained a permanent impairment rating of 32% of the upper extremity as a result of the work injury. The ALJ notes that Claimant's work injury and medical treatment are consistent with an impairment rating that includes the thumb, wrist and elbow of Claimant's left upper extremity. The ALJ therefore finds that Claimant has failed to establish that it is more probable than not that the situs of impairment in this case is contained on a part of the body not set forth on the schedule of impairments set forth at Section 8-42-107(2).

66. The ALJ finds that Claimant has provided insufficient evidence to establish that the impairment rating in this case should be converted to a whole person impairment rating with the impairment being contained on a part of the body that is not on the schedule. The ALJ finds that the situs of Claimant's impairment in this case is limited to the left upper extremity. The ALJ notes that Claimant has made numerous complaints of issues involving areas of the body that are not on the schedule of impairments set forth at Section 8-42-107(2), including, but not limited to, headaches, neck pain, trouble swallowing and shooting pains into the lower extremity. However, the ALJ finds that none of these complaints are related to injuries sustained in the December 7, 2017 work injury.

67. The ALJ credits the opinions expressed by Ms. Montoya over the opinions expressed by Mr. Van Iderstine and finds that Claimant has failed to establish that it is more probable than not that she is incapable of earning wages in the same or other employment. The ALJ notes that Mr. Van Iderstine's opinion relied on the work restrictions set forth by the FCE that occurred prior to Claimant being placed at MMI. Because the ALJ finds the work restrictions set forth by Dr. Stagg to be more credible and persuasive than the work restrictions from the FCE, the ALJ finds the opinions

expressed by Ms. Montoya which relied on these restrictions to be more persuasive in this case.

68. The ALJ notes that Dr. Price opined that she would adopt the work restrictions set forth in the FCE. Insofar as this opinion is in conflict with the opinion of Dr. Stagg with regard to Claimant's proper work restrictions, the ALJ credits the opinions of Dr. Stagg over the contrary opinions of Dr. Price.

69. The ALJ rejects the opinions expressed by Mr. Van Iderstine that Claimant would be incapable of maintaining employment in this case based on Claimant's potential of missing employment due to having bad days or needing to take breaks. The ALJ notes that this argument is speculative in this case as there is no indication of Claimant having been unable work for periods of time due to bad days or excessive breaks. Claimant was provided with light duty work by Employer up until June 2018, and there is insufficient evidence in the records that Claimant was incapable of performing that job due to the consequences of her work injury.

70. The ALJ further notes that while Mr. Van Iderstine testified he did not believe Claimant was capable of working the jobs that Ms. Montoya identified as being appropriate for Claimant, it is not the Respondents' responsibility to find a position Claimant is capable of working. The ALJ further notes that while Claimant does not need to prove that the industrial injury is the sole cause of her inability to earn wages, she must establish that the injury is a significant causative factor in her inability to earn wages. In this case, the ALJ credits the opinions expressed by Ms. Montoya in her report and testimony at hearing and finds that Claimant has failed to establish that it is more probable than not that the industrial injury is a significant causative factor to her inability to earn wages.

71. As a result of the injury, Claimant has noticeable disfigurement in an area normally exposed to public view. The disfigurement in this case includes scarring of the left upper extremity measuring 1 ½ inch in length and ¼ inch in width on the palmar side of the left wrist; scarring measuring 1 inch in length an ¼ inch in width on the ulnar side of the wrist on the wrist bone; scarring measuring three (3) inches in length and ½ inch in width on the left elbow. Additionally, Claimant has noticeable bruising on the left tricep, left bicep and left deltoid.

CONCLUSIONS OF LAW

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

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

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

5. As found, Claimant has failed to overcome the opinion of the DIME physician with regard to the opinion that Claimant reached MMI as of January 15, 2020 by clear and convincing evidence. As found, the opinions expressed by Dr. Hughes and Dr. Cebrian in their reports are credible and persuasive with regard to the issue of MMI. As found, the medical treatment after January 15, 2020 provided by the authorized providers in this case did not change in a significant manner which would support a finding that Claimant had overcome the opinion of MMI by clear and convincing evidence.

6. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. §8-40-201(16.5)(a), C.R.S. (2007). A claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO,* 948 P.2d 115 (Colo. App.

1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the Claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances. *Weld County School Dist. R.E. 12 v. Bymer, Id.*

7. The claimant is not required to establish that an industrial injury is the sole cause of her inability to earn wages. Rather the Claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds*, *Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is incapable of earning wages in the same or other employment. As found, the opinions expressed by Dr. Stagg with regard to Claimant's work restrictions are found to be credible and persuasive as it applies to Claimant's condition in this case.

9. As found, the opinions expressed by Ms. Montoya with regard to Claimant's ability to earn wages in her commutable labor market are credited over the contrary opinions expressed by Mr. Van Iderstine. As found, Ms. Montoya utilized the work restrictions set forth by Dr. Stagg and credibly opined that Claimant was capable of earning wages in her commutable labor market.

10. As found, the testimony of Mr. Van Iderstine that Claimant would likely be incapable of maintaining gainful employment based on her potential to miss days from work due to pain related to her industrial injury or need to take excessive breaks while at work is found by the ALJ to be not persuasive. As found, Claimant has failed to establish by a preponderance of the evidence that the industrial injury of December 7, 2017 would a significant causative factor in her inability to earn wages.

11. When an injury involves an extremity impairment that is subject to scheduled awards in §8-42-107(2), the clear and convincing burden of proof that would be attached to a whole person permanent impairment rating from a DIME physician does not apply and the usual preponderance burden of proof applies for the claimant to prove entitlement to benefits. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App.1998) and *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

12. The courts have noted that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. *See Egan v. Industrial Claim Appeals Office, supra.* In *Egan* the court noted that requiring causation questions to be challenged through a DIME applies only to injuries resulting in whole person impairment, but when a dispute concerning causation is in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute.

13. Here there was no dispute at the hearing over whether the impairment was limited to a schedule award and the parties agreed that the preponderance of the evidence burden of proof applied.

14. As found, the ALJ credits the opinions of Dr. Price over the contrary opinions expressed by Dr. Hughes and Dr. Cebrian and finds that Claimant has established by a preponderance of the evidence that she sustained a permanent impairment rating of 32% of the upper extremity. As found, the ALJ credits the medical records entered into evidence and finds the opinion expressed by Dr. Price with regard to the scheduled impairment rating to be credible and persuasive.

15. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8–42–107(1)(a), C.R.S. The term "injury" contained in §8–42–107(1)(a), C.R.S. "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo.App. 1997); see also *Strauch v. PSL Swedish Healthcare System, 917 P.2d 366* (Colo.App.1996). Depending upon the facts of a particular claim, therefore, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. See *Strauch v. PSL Swedish Healthcare System, supra.*

16. As found, Claimant has failed to prove establish by a preponderance of the evidence that the situs of impairment in this case is not contained on the schedule of impairments set forth at Section 8-42-107(2). As found, Claimant's situs of impairment is contained on the left upper extremity and at the elbow, wrist and thumb. Although Claimant alleged numerous other complaints that she maintained were related to the industrial injury, the ALJ finds that the situs of the impairment in this case was confined to the left elbow, left wrist and thumb.

17. Pursuant to Section 8-42-108, C.R.S., claimant is entitled to a discretionary award up to $5,019.83 for her serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the ALJ concludes claimant is entitled to disfigurement benefits in the amount of $2,509.91, payable in one lump sum.

18. Based on the finding that Claimant did not overcome the finding of MMI by clear and convincing evidence, and Claimant's testimony that she received TTD

benefits up until the September 16, 2020 DIME, along with the FAL filed by Respondents in this case in which the overpayment was documents, the ALJ determines that Respondents have established that Claimant received TTD benefits through September 16, 2020 which resulted in an overpayment of $9,139.10 after the initial offsets were taken with the first FAL.

19. After consideration of the benefits due Claimant pursuant to this Order, Respondents may claim an overpayment of $9,139.10 in TTD benefits paid after MMI against any further benefits owed to Claimant. If there is any dispute with regard to the application of the overpayment against future benefits owed to Claimant, the parties may bring that issue before the Office of Administrative Courts.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the opinions expressed by the DIME physician regarding the issue of MMI is incorrect.

2. Claimant has failed to establish by a preponderance of the evidence that she is entitled to an award of Permanent Total Disability. Claimant's claim for an award of Permanent Total Disability is therefore denied and dismissed.

3. Claimant has proven by a preponderance of the evidence that she is entitled to an award of Permanent Partial Disability benefits based on a rating of 32% of the upper extremity.

4. Claimant has failed to prove by a preponderance of the evidence that she sustained a functional impairment that is not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S. Claimant's request to convert the impairment rating from a scheduled impairment to a non-scheduled award pursuant to Section 8-42-107(8), C.R.S. is denied and dismissed.

5. Respondents shall pay Claimant disfigurement benefits in the amount of $2,509.91.

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

access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 2, 2022

Keith E. Mottram

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the C5-C6 interior cervical discectomy and fusion surgery recommended by Dr. David Lee is reasonable, necessary, and related to the admitted work injuries she suffered on August 23, 2019.

FINDINGS OF FACT

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

1. Claimant was an equipment operator and laborer for Employer, who is in the business of oil pipeline installation, including construction, cleanup, repair, seating pipelines, and other dirt work. Claimant's various job duties included ground work and land repairs on properties where pipelines had been laid by Employer and operating a tractor and skid steer. Claimant worked in multiple locations around the United States, including Keenesburg, Colorado, Cheyenne, Wyoming, and eventually Kansas.

2. Claimant was injured on August 23, 2019 while working for Employer in Kansas. Claimant was hit on the left side of her body, by an industrial back hoe bucket with a mop pipe attachment, knocking her hard hat off, and throwing her in such a way that she landed on her right arm, injuring her back and neck knocking her to the ground, causing her to lose consciousness. The bucket weighed approximately 3,500 lbs. and the mop pipe that was attached to it with a chain was approximately 5 foot wide and 20 inches in circumference, weighing approximately 550 lbs.

3. Following being struck, Claimant had onset of severe headache, neck pain, back pain, right shoulder pain, wrist pain, ankle pain, elbow pain, and scapular pain. All on the right side. She stated she was directed to not attend the emergency room but would be contacted by the company physician from Texas. Claimant stated that she had a medical appointment from her room in Lyons, Kansas over FaceTime with Dr. Homsten and did not travel to Texas from Kansas. She stated that she moved around following the injury from Hutchinson, Kansas to Wichita, Kansas to see the neurosurgeon, then to Seward, Nebraska where she was treated for physical therapy. She reported at that time that she continued having pain in her neck, shoulder, headaches and radiating pain down her right arm, together with numbness and tingling as well as burning sensations but had sporadic care as one provider was waiting on results from the other.

4. Claimant was virtually seen by Walter Holmsten, M.D. of RediMD of Texas, on the day of her injury by a telemedicine. Dr. Holmsten documented Claimant injured her whole right side when she was struck by a bucket and knocked down. As a result of the accident, Claimant suffered severe headaches, neck pain, back pain, right shoulder

and scapular, wrist, knee ankle and elbow injuries. On inspection, Dr. Homsten noted bruising, swelling and discoloration of the neck and the right shoulder. He noted that x-rays were all negative for fractures. The lumbar spine x-ray was read by Gazaway Rona, M.D. on August 26, 2019 noting a mild lumbar spondylosis, greatest at the L3-4 level and the cervical spine x-ray showed moderate degenerative changes at the C5-6 level. Claimant was returned to full duty and advised not to aggravate her injuries. He also recommended over the counter Tylenol for pain and ordered an MRI of the lumbar spine.

5. On September 25, 2019 Dr. Rona interpreted the cervical MRI. The history noted was that Claimant was hit by a large piece of machinery and lost consciousness causing headaches, loss of short term memory, neck pain, and right arm pain. She found grade 1 retrolisthesis of C5 on C6. Dr. Rona noted degenerative changes of the endplates at C5-6 with a small focal central disc protrusion andosteophyte complex producing mild central spinal stenosis with narrowing of the AP diameter spinal canal to 6-7 millimeters at the C4-5 level. She also found a moderate disc bulge and posterior osteophyte complex and bilateral uncovertebral joint hypertrophy producing moderate central spinal stenosis with narrowing of the AP diameter spinal canal to 5 millimeters with effacement of the ventral cord at the C5-6 level. There was also severe bilateral neural foraminal stenosis at this level.

6. On October 1, 2019 Dr. Erik Severud of Alliance Orthopedics in Kansas diagnosed displacement of cervical intervertebral disc and ordered an epidural steroid injection (ESI) but did not specify the level. He noted that the MRI showed severe narrowing at C5-6 and C4-5 to a lesser extent. He documented numbness, tingling, and swelling and that Claimant needed to see a spine surgeon as this was not his area of expertise. He also limited Claimant to sedentary duty and no driving of heavy machinery.

7. Dr. Mark Whitaker examined Claimant on October 21, 2019. He noted that Claimant complained of neck and upper extremity pain accompanied by numbness and tingling in the arms and hands as well as headaches. During strength testing he did not document deltoid, biceps and wrist extensors on the right, only the left. Following examination and discussion of her options, Dr. Whitaker recommended cervical epidural steroid injection at the C6-7 level. X-Rays showed a complete displaced collapse of C5-C6.

8. Claimant had a C6-7 epidural steroid injection on November 4, 2019, in Wichita, KS by Jon Parks, M.D. of Advanced Pain Medicine Associates, for neck pain and cervical neuritis.

9. Claimant followed up with Dr. Whitaker on November 13, 2019. He noted that Claimant retuned with cervical stenosis as well as a right labral tear in the right shoulder. He noted that the ESI in the neck did not relieve symptoms and continued to have predominant right shoulder pain. He recommended right shoulder surgery and repair prior to any further treatment of Claimants cervical spine.

10. On November 22, 2019 therapist William Long of Enhanced Physical Therapy noted that Claimant was being discharged from their clinic after four visits as Claimant was moving back home to Mississippi. He further documented that she would continue to benefit from physical therapy at a clinic in Mississippi. She was demonstrating ROM, strength, and functional mobility limitations noting significant pain. Claimant

advised she would be following up with her physicians to plan a surgical date to address her right shoulder, as well as the neck, and low back complaints.

11. Claimant continued to work with the crew in a light duty position with Employer following the date of the injury as they travelled throughout several towns in the Midwest including Kansas and Nebraska until she returned home to Mississippi around Thanksgiving 2019, where Claimant established consistent medical care for her workers compensation injury. Claimant testified that, as a result of her injury, she continued with pain in her neck, right shoulder, and down her arm, as well as continued headaches, since the accident.

12. Claimant was evaluated by Dr. John Berry in Mississippi for her right shoulder on December 2, 2019. He noted that he reviewed the right shoulder MRI that demonstrate an anterior labrum tear, degenerative changes with increased Intensity over the AC joint, supraspinatus tendinosis, and edema at the posterior humeral head. He documented that Claimant had radicular pain down to the arm, but that her shoulder was bothering her more than anything. Dr. Berry diagnosed internal derangement in her right shoulder and recommended surgical repair of the right labrum, distal clavicle excision, decompression, and debridement of the right shoulder. He referred Claimant to Dr. Lee for an evaluation of her cervical spine.

13. Claimant was evaluated by nurse practitioner Jessica Bush, of Southern Bone and Joint Specialists, on December 7, 2019. Nurse Bush documented a history of injury consistent with Claimant's testimony. She noted that Claimant had neck pain that radiated down the right arm to the fingers, which sometimes included completely numbness of the right hand. On exam she documented that Claimant had recreation of pain with cervical extension and when looking to the left. Upper extremity strength was normal except for right sided biceps, grip strength, and hand intrinsics. Claimant also had a positive right shoulder impingement exam and mild decreased sensation of the right upper extremity compared to the left with palpation. She diagnosed cervical disc displacement and spinal stenosis. She recommended cervical epidural steroid injection at the C5-6 level but if this did not help her pain, they would likely refer her to a surgeon. She prescribed physical therapy for the cervical and lumbar spine to include heat, massage, TENS, local modalities, and cervical traction, and Claimant was taken off work until she followed up after the injection.

14. Claimant was attended by Dr. Joe Leigh on December 16, 2019 who documented that Claimant had pain in the neck and radiation of pain into the right shoulder and further radiation of pain into the right arm with numbness and tingling in the fingertips of the right hand. He noted decreased range of motion of the neck in all quadrants, posterior cervical paraspinous tenderness bilaterally, greater on the right, tenderness in the trapezius on the right, marked limitation in range of motion of the right shoulder, and muscle mass symmetric in both upper extremities. He recommended proceeding with a right C6-7 and C5-6 ESI, but the procedure performed was at the right C4-5 and C5-6 cervical levels.

15. On December 31, 2019 Claimant was again seen by Nurse Bush who documented that Claimant had the cervical steroid injection with Dr. Joe Nick Leigh at the Pain Treatment Center on December 16. She continued to complain of neck pain that

radiated down the right arm into the fingers with numbness and weakness. She stated that right C4-5 and C5-6 cervical ESI caused side effects from the injection, including swelling of her face. She noted Claimant continued to have recreation of pain with cervical extension when looking to the left. Her upper extremity strength was still 5/5 except for her right biceps grip and hand intrinsic weakness, a positive right shoulder impingement exam, and decrease sensation in the right upper extremity when compared to the left upon palpation. She continued to diagnose cervical disc displacement, cervical spinal stenosis with radiculitis and low back pain with facet arthrosis. She continued to keep Claimant off work.

16. On January 10, 2020 Dr. Berry documented that Claimant continued with a lot of pain. On exam he found positive Neer's, positive Hawkins, positive empty can testing, positive tenderness over the AC joint, positive O'Brien's testing[1] and pain related in most all planes of the right shoulder. He performed a corticosteroid injection into the right shoulder and stated they would send a new request for prior authorization for the right shoulder surgery due to the anterior labrum tear, ACJ arthrosis, supraspinatus tendinosis and posterior humeral edema.

17. Claimant continued to require the right shoulder surgery but before it could be performed Claimant suffered a mild heart attack on January 17, 2020. The shoulder surgery was delayed until July 2020, to allow Claimant to recover from her heart attack and be released by her physicians for surgery.

18. Dr. Berry performed a right shoulder intra-articular arthroscopic bicep tenodesis, subacromial decompression, distal clavicle excision and extensive debridement on July 9, 2020 at Forrest General Hospital. Dr. Berry stated that there was an obvious tear at the superior labrum at the insertion of the biceps tendon and the undersurface of the labrum had a tear that propagated medially towards the glenoid. He also found extensive bursitis covering the underlying rotator cuff and he removed the subacromial spurring and overhanging osteophyte spur of the calcific and frayed coracoacromial ligament.

19. Claimant testified that the shoulder surgery helped with some problems with the shoulder area itself but did not help with the ongoing pain and problems in her neck, shoulder and right arm that continued through the date of hearing. Claimant has ongoing pain in the neck (both sides), the area between the neck and shoulder, with pain, numbness and tingling that runs down her arms, right worse than left. Claimant had lost strength in her right arm, bicep, forearm and some fingers, though she noted that on occasion the pain, burning, numbness and tingling involve both arms and hands. The shoulder surgery did not help her symptoms into her right arm.

20. Nurse Bush documented on September 21, 2020 that Claimant continued with neck pain. Though her right shoulder had improved after Dr. Berry performed surgery. She stated that she had one episode of tightness in the cervical spine after a long day of activity. She diagnosed cervical disc displacement, cervical spinal canal stenosis with radiculitis, low back pain with bilateral radiculitis, lumbar disc displacement, lumbar spinal stenosis, foraminal stenosis, and lumbar facet arthrosis. She

[1] Neer's, Hawkins, empty can, and O'Brien's tests are tests commonly used to identify possible impingement syndrome or other pathology of the shoulder.

recommended physical therapy for the cervical and lumbar spine including work-hardening and conditioning. She provided sedentary work status of walking or standing only occasionally, lifting 10 lbs. max., including for frequent lifting or carrying of objects.

21. Following Claimant's shoulder surgery, she was referred to a work hardening program for her cervical and lumbar pain on November 2, 2020. Ms. Bush, NP noted that since beginning this program her pain had returned to the previous status when she was first seen in the clinic. She was unable to undergo cervical epidural steroid injections due to a reaction to a previous one. She ordered a CT myelogram and referred Claimant back to Dr. Lee.

22. The CT myelogram, read by Dr. Mark Molpus, revealed that the C5-6 level demonstrated disc osteophyte complex with a minimum AP diameter spinal canal of 8.1 mm at the midline and encroachment upon the neuroforamina bilaterally secondary to bony hypertrophic changes.

23. Claimant was evaluated by Dr. David Lee, a board-certified neurosurgeon in Mississippi, on December 21, 2020. He noted Claimant had complaints of neck pain, headaches daily along with pain across her right shoulder, back pain with facet loading type pain, pain down her right greater than left leg into her foot, with some grip weakness. On physical examination he noted Claimant kept her neck in a forward position, had loss of range of motion in extension and rotation to the right. She had a positive Spurling test[2] on the right but not the left. Dr. Lee reviewed the September 25, 2019 MRI scan and compared it to the CT Myelogram of December 11, 2020. He noted Claimant initially had a disc herniated at C5-6 level with cephalad extension. It caused moderate stenosis of the spinal canal without cord signal change with foraminal stenosis. The new diagnostic showed that the disc that herniated had migrated cephalad but improved, but the disc had almost collapsed with endplate changes with moderately severe stenosis. He further noted that there was no high grade stenosis at the thoracic or lumbar spine levels. On exam he noted that Claimant had loss of range of motion of the neck, primarily extension and rotation to the right and had a positive Spurling sign on the right. Dr. Lee diagnosed Claimant with cervical disc displacement, radiculopathy cervical region, and spondylosis cervical region. Dr. Lee ordered an updated cervical MRI for a better look at the canal and spinal cord itself and an upper extremity EMG.

24. The cervical MRI of February 4, 2021, showed a C5-6 mild to moderate multifactorial developmental and acquired central stenosis (6-7 mm) and severe foraminal stenosis due to minimal retrolisthesis at C5, moderate broad based disc osteophyte complex and additional spondylosis. It also showed slight flattening of the ventral cord and impingement on bilateral C6 roots.

25. Dr. Lee saw Claimant on February 18, 2021 noting that the December 16, 2020 ESI for the neck cased facial swelling and she also had another cervical spine ESI that caused facial swelling. She was advised not to have any further cervical spine ESIs due to the side effects. Claimant did report that she continued to benefit from the lumbar spine ESIs. Claimant continued to complain of neck issues and grip weakness, with pain going down her arm, right greater than left. On exam she continued to keep her neck in

[2] A Spurling's test is to assess nerve root pain.

a forward posture and had loss of range of motion. He commented that Claimant had an EMG which was oddly unremarkable and recommended a home cervical traction unit for her neck.

26. On April 26, 2021 Dr. Lee recommended a cervical myelogram/post myelogram CT to get a better idea of whether Claimant would need surgical intervention for her cervical spine. On May 3, 2021 he noted that based on the myelogram of December 11, 2020 Claimant would require a C5-6 anterior cervical discectomy fusion.

27. Claimant was reevaluated by Dr. Lee on June 7, 2021, on physical exam he found her neck in a forward postured, with limited neck range of motion in rotation and extension, and mild wrist strength weakness on the right. He noted a disc protrusion at C5-6, as well as bilateral foraminal stenosis at C5-6 that is fairly severe. He noted the negative EMG results. He recommended an anterior cervical discectomy and fusion (ACDF) at C5-6 due to severe foraminal stenosis and continued neck and upper extremity pain. He wanted some follow up regarding medication and cervical spine X-rays prior to any surgical procedure. She had some additional images at Southern Bone and Joint of the cervical spine on June 17, 2021. The films revealed evidence of modic changes at C5-6 with prominent foraminal stenosis as well as central stenosis without cord signal change.

28. On August 9, 2021, Dr. Lee recommended a C5-6 ACDF via a left approach and discussed the risks, complications and alternative treatments with Claimant. The anterior cervical discectomy and fusion at C5-C6 is as a result of the injury that occurred on the job on August 23, 2019. He based his opinion on Claimant's history, his physical examination and the objective findings on MRI, CT scan, X-ray and discography, that the Claimant currently requires surgery.

29. At the time of the injury Claimant had a preexisting degenerative cervical stenosis and spondylosis that was asymptomatic. Following her work injury, Claimant's neck became symptomatic and has stayed symptomatic. She has received medical care for her neck condition as part of the claim. As a result of the aggravation of this preexisting condition, Claimant requires the recommended cervical surgery.

30. Respondents retained Dr. N. Neil Brown who provided multiple IME reports dated January 22, 2021, November 4, 2021, November 17, 2021, and December 13, 2021. Dr. Brown examined Claimant one time on November 4, 2021. Dr. Brown reviewed the medical records particularly noting that there were "no medical records preceding the date of injury of August 23, 2019." Dr. Brown reported that Claimant had the following:

> Currently, she complains of neck and low back pain. Her neck pain varies from 6 to 7 /10 and is primarily described at the base of her neck, but the pain can radiate to the top of her shoulders bilaterally. She has occasional numbness and tingling sensation extending down her biceps to her dorsal aspect of her forearm, right side worse than left, and this can extend into her "pinky" and ring finger more than the other fingers. She also has associated daily headaches which involve the occipital region bilaterally with radiation frontally subsequently. Occasionally these are associated with nausea but more often they are a generalized ache. She states that she had an epidural steroid injection while in Kansas and this was complicated by facial swelling and headache, though otherwise the epidural steroid helped transiently. She uses a TENS unit with minor benefit. Her neck pain is worsened

> more with extension than flexion, though both of these do cause pain. Prolonged sitting also worsens her neck pain. Her neck is improved using Epsom salt baths, Icy-Hot patches or Biofreeze. She states she feels weak in her right shoulder and her grip is decreased in her right hand. She has received a surgical recommendation to treat the C4-5 and C5-6 levels with fusions.

On exam, Dr. Brown found Claimant had a positive Phalen sign on the right side associated with tingling in her index, middle, ring and fifth fingers, the worst in the fifth finger, normal power, bulk and tone in all major muscle groups of the upper and lower extremities though he questioned mild antalgic weakness graded at 4+/ 5 in her right deltoid, Spurling's testing bilaterally caused some discomfort at the base of the neck in the midline and this was worse in severity with right-sided maneuver compared to the left. She also had tenderness in the midline at the base of her neck extending bilaterally over her trapezius musculature toward the shoulders and significant cervical loss of range of motion.

31. Dr. Brown stated that Claimant undoubtedly sustained at least a cervical strain related to the impact injury and that "[W]ith the mechanism of injury, it is certainly possible that her neck pain and occasional radicular symptomatology could relate to facet-mediated pain." He did not agree that Claimant required ACDF surgery at this time as related to the August 23, 2019 work injury. Dr. Brown is of the opinion that even without surgery, Claimant still requires medical care for her work related neck condition which includes medical branch blocks, and radiofrequency ablations if the blocks are successful.

32. On November 22, 2021 Claimant was seen by Micah Childs, P.A. due to increased symptoms following the IME with Dr. Neil Brown. He noted that Claimant did not have preexisting symptoms prior to her August 23, 2019 work injury and that there were no records of diagnostic testing prior to this time either that would show severe cervical stenosis. Claimant explained that during examination, what seemed to be a Spurling's maneuver that Dr. Brown performed, Claimant's pain symptoms were exacerbated also causing significant increase in headaches. Claimant reported she was in significant and constant pain. She had her neck in a forward posture. He recommended a new MRI to assess whether there was a worsening and was to follow up with Dr. Lee.

33. At hearing Claimant credibly testified that she continued to have constant neck pain. The pain sometimes gets to the point that the pain is severe, with burning that goes down both her arms and into her hands, and she cannot use them. The pain and symptoms affected her activities of daily living. She depends on others to do things she always used to do, and has to pace herself with breaks. She sleeps on the couch that has a 4 inch memory foam, because of her back and neck pain, and has to take medications, which she does not like taking. She also uses a heating pad daily. She has learned to use her left hand because of the weakness in her bicep, forearm and some of her fingers on the right side.

34. Dr. Brown testified at hearing as well. He opined that he could not determine if Claimant would benefit from the surgery proposed by Dr. Lee because the records and his particular exam did not establish a specific source of Claimant's pain and complaints within the C6 dermatome. Dr. Brown suggested that the pain and symptoms Claimant feels going up to the neck and down into the bicep could be related to the

shoulder injury. He testified that EMG findings only help when the patient has injury or damage to the nerve, but that patients can have inflammatory conditions without permanent nerve injury. He stated that any neurosurgeon that sees the amount of narrowing on an MRI scan as Claimant has, would be likely to recommend surgery despite whether it is work related or not, including himself. Anything less than 9 mm is considered potentially significant stenosis for the spinal cord and Claimant's AP diameter is 5 mm, which is very narrow, puts her at risk and is a potential safety issue.

35. Dr. Brown suggested that Claimant have medial branch blocks to better zero in on the pain generator. He explained that the mechanism of injury on August 23, 2019 was consistent with a cervical sprain/strain syndrome, and that, if significant enough, it can cause torn muscles and tendons, which heal by scarring. He explained that the healing scar tissue could cause a capsule around the facet joint, which can cause persistent neck pain, all of which cannot be seen on MRI. He suggested that after two MBBs, if they are successful in relieving pain for the duration of the anesthetic, then the pain is localized and a radiofrequency ablation could be performed, all of which would be related to the work related injury. He continued to opine that the stenosis and the need for fusion was not related.

36. Dr. Brown stated that he found weakness of the deltoid muscle, which, if it is nerve related weakness, would correspond to the C5 dermatome. The distribution of a C6 radiculopathy goes down from the neck over the shoulder, into the bicep, to the dorsal forearm, and into the thumb, sometimes the index finger. He further stated that a Spurling's maneuver is a provocative test for the presence of radiculopathy, if the pain goes down the arm, the biceps, dorsal forearm and into the thumb and would be consistent with a C6 radiculopathy. Dr. Brown stated that if Claimant had a cervical spine ESI that did not relieve symptoms, it was a bad prognosticator for successful surgery. However, the ESI of November 4, 2019 was performed at the C6-7 level, not the C5-6 level, which is the level Dr. Lee was proposing for surgery. This testimony is not persuasive.

37. Dr. Lee testified by post-hearing deposition on February 28, 2022. He stated that he continued to diagnose cervical spondylosis, cervical stenosis without myelopathy and cervical disc degeneration. The diagnosis was supported by neurological examination which showed claimant kept her neck in a forward posture and her mild wrist weakness on the right. The right wrist extension weakness was from the C5-6 disc level issues. He explained that patients that keep their neck in a forward posture is because, when you extend the neck, it decreases the area of space where the root exits and the area in the central spine canal where the cord resides. Her neurological findings, the nerve root compression together with the long history of symptoms and ongoing stenosis make it appropriate and reasonable for her to proceed with the surgery. Dr. Lee stated he anticipated that Claimant's symptoms would improve with the surgery at the C5-6 level because Claimant has obvious pathology confirmed by the dermatome with her wrist weakness and objective examination confirmed by a positive Spurling's sign. Further, Dr. Lee opined that Claimant would be unlikely to improve without surgery given her level of stenosis and foramen, which would continue to worsen with time, potentially causing further stenosis, bruising of her spinal cord and significant permanent nerve root damage.

38. Dr. Lee opined that the August 23, 2019 work related injury aggravated Claimant's underlying asymptomatic degenerative condition to such an extent that from the date of the injury forward, the C5-6 disc collapsed and justify the recommended surgery. He stated that the changes seen in the year and one half between the MRIs, would normally take a considerable amount of time generally and the cause of the quick collapse was the fact that the injury accelerated the process causing the need for the surgery.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Medical Benefits that are Reasonably Necessary and Related

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The issue of whether medical treatment is necessary for a compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

As found, Dr. Lee testified that he offered Claimant a one-level cervical discectomy and fusion of her neck because of the severe foraminal stenosis and the disk collapse associated with the spinal stenosis. Dr. Lee testified that damage at the C5-6 level was documented by his physical examination, including the way Claimant held her neck during his physical examination and the strength and sensory loss in muscles that are innervated by the C5-6 nerve roots. According to Dr. Lee the two muscles that are affected by that nerve root level are biceps strength and wrist extension strength to see if there is a weakness. Dr. Lee noted that Claimant had some wrist strength weakness on the right side during exam. Dr. Lee was of the opinion that Claimant did have spinal cord compression at the C5-6 level and objective evidence of a C5-6 radiculopathy in addition to the significant cervical stenosis that supported that recommendation for surgery. He also was of the opinion that the recommended surgery would improve the C5-6 nerve root symptoms, but even if it would not, that the narrowing had to be addressed because it would not improve. As ultimately found, Dr. Lee's opinions that the work-related accident caused the need for the surgery is credible and more persuasive than the contrary opinions of Dr. Brown. This is reinforced by the other authorized treating providers that Claimant's degenerative condition was asymptomatic prior the work related event.

As found the work related incident was a trauma of significant force, causing Claimant to be thrown several feet away, bruised in multiple parts of Claimant's body and also sufficient to cause loss of consciousness. As found, Claimant complained of neck pain from the inception of the injury, including numbness, tingling and pain travelling from her neck down to her arm and hand. Dr. Homsten noted bruising, swelling and discoloration of the neck and the right shoulder. As found, while the underlying degenerative changes documented by Dr. Rona, including degenerative changes to the endplates C5-6 are not proximally caused by the work injury. As further found, the fact that Claimant was asymptomatic prior to the work injury, and worked a heavy laboring job at the time of the injury, in addition to the trauma suffered, is sufficient nexus to prove that the accident caused or aggravated the central disc protrusion at the C5-6 levels, which now produce the severe stenosis. As found, it is more likely than not the aggravation caused the need for treatment including correction of the 5 millimeter stenosis with effacement of the ventral cord and severe bilateral neural foraminal stenosis. Nurse practitioner Bush documented that Claimant had recreation of pain with cervical extension and when looking to the left, loss of strength for right sided biceps, grip strength, hand intrinsics and mild decreased sensation of the right upper extremity compared to the left with palpation. Based on medical testimony all of these findings are indications of a radicular nerve problem at the indicated level.

As found, Claimant continued to complain of headaches, neck, shoulder and arm pain during her care with her medical providers, including difficulty utilizing her right upper extremity, and, at times, her left upper extremity. The medical records show a consistent deterioration of function and decline from the date of the admitted August 23, 2019 injury. The reports of Dr. Lee, Dr. Barry, Nurse Practitioner Bush and other treating providers are more persuasive than the contrary opinions of Dr. Dr. Brown. This is further bolstered and supported by the credible testimony of Claimant that she that she did not have any problems with her neck or upper extremities prior to the traumatic incident of August 23, 2019, 2019. The lack of prior medical records showing a history of similar complaints is also a material fact considered by this ALJ and is additionally persuasive. Claimant has no prior history of neck problems. Ultimately, it is found that the Claimant's need for the surgery as recommended by Dr. Lee is proximately caused by the work injury of August 23, 2019 and is reasonably necessary to address the work-related injury and aggravation of Claimant's previously asymptomatic degenerative condition. From the totality of the evidence, the C5-6 interior cervical discectomy and fusion surgery recommended by Dr. Lee is found reasonable, necessary, and related to the injuries Claimant suffered in her workplace incident on August 23, 2019.

Respondents argue that Dr. Lee did not follow the recommendations of The Medical Treatment Guidelines (MTGs) as he had not obtained a psychological evaluation prior to recommending surgery. The MTGs are regarded as the accepted professional standards for care in *Colorado* under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from

under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, Section 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*Emphasis added*).

Pursuant to W.C.R.P. Rule 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. Rule 17-5(C) provides "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the MTGs are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive). Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the Guidelines upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As found in this case, while the MTGs may provide for specific recommendations for psychological evaluation pursuant to W.C.R.P. Rule 17, Exhibit 8(A)(III)(F) as cited by Respondents,[3] Claimant has shown by a preponderance of the evidence that she suffered an aggravation of her preexisting underlying stenosis, complained of neck pain

[3] Current Rule 17, Exhibit 8 Cervical Spine Injury Medical Treatment Guidelines effective January 30, 2022 reorganized and revised the sections, and now is under Section 8.b.iii for Spinal Fusion, p. 54, Recommendation 144.

immediately following the injury, and subsequent upper extremity problems, including tingling and numbness down her arm into her hand. Neither Dr. Lee nor Dr. Brown recommended psychological testing before the surgery, and providers outside of Colorado cannot be compelled to comply with the requirements of Colorado guidelines. Further, neither provider found any confounding psychological issues in this case as Dr. Brown indicated that Claimant had a normal mental status and Dr. Lee found no confounding psychological issues.

As found, Dr. Lee has indicated that Claimant continues to have radicular symptoms, and without the surgery at this point Claimant is at serious risk of further consequence if the stenosis is not corrected. This ALJ infers from the records that there is some urgency to proceed with the surgery as Claimant's stenosis is serious and places Claimant as risk. Dr. Brown also indicated that anything less than a 9 millimeters is considered very narrow spinal canal and requires corrective surgery, which he would also have recommended for Claimant. This ALJ has considered the experts' opinions and testimony with regard to the MTGs and has rejected the opinions of Dr. Brown in reference to the need for psychological evaluation before recommending surgery. In fact, this ALJ infers from Dr. Lee's testimony that, but for the August 23, 2019 work related traumatic accident, Claimant's functional decline and subsequent need for surgery would not have been accelerated. Dr. Lee discussed the natural progression of a disc collapse when there is an injury superimposed on spinal stenosis. Dr. Lee testified that his opinion that the work injury had aggravated her preexisting degenerative condition based on the changes he noted between the post injury September 25, 2019 MRI and the MRI scan in early 2021 which showed changes in the disc that would not be expect to be see in a year but in a much longer period of time without the presence of a traumatic injury. As further found, the medical records document a significant worsening while Claimant was participating in a work hardening therapy in November of 2020 that necessitated additional treatment and referral back to Dr. Lee, which are casually related to her work injury. Claimant has shown by a preponderance of the evidence that the August 23, 2019 accident precipitated Claimant's complaints of neck, arm and hand symptoms aggravating her underlying asymptomatic degenerative condition and proximately caused the need for the surgery proposed by Dr. Lee. Claimant has proven by a preponderance of the evidence that the cervical spine surgery proposed by Dr. Lee is reasonably necessary and related to the August 23, 2019 injury.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for the anterior cervical discectomy and fusion of the cervical spine as recommended by Dr. David Lee as reasonable, necessary and related to the admitted workers compensation injury of August 23, 2019.

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

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

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

DATED this 4th day of April, 2022.

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable back injury on July 21, 2021?

- Did Claimant prove entitlement to TTD benefits from July 26, 2021 to February 15, 2022?

- The parties agreed to reserve the issue of potential TPD benefits commencing February 15, 2022, if the claim is compensable.

- The parties stipulated to an average weekly wage of $437.72.

FINDINGS OF FACT

1. Claimant worked for Employer as a sandblaster. He typically worked from a bucket at the end of a telescoping boom lift, which enables him to reach various parts of railroad cars. On July 21, 2021, Claimant and a co-worker, [Redacted, hereinafter NM], were sandblasting an old railroad car using the boom lift. Mr. NM[Redacted] was operating the controls and Claimant was using the sandblasting gun. Claimant alleges he injured his back when the bucket abruptly "dropped" several feet and "bounced" up and down.

2. Claimant felt no back pain or other symptoms during or immediately after the incident. He finished his shift and went home. Within a couple of hours, he noticed mid and low back pain.

3. Claimant awoke the next morning and felt "excruciating" pain in his back. He went to work and reported the symptoms to Employer's HR director, [Redacted] AB. Claimant said he attributed the pain to an incident when the boom suddenly "dropped" and "jerked him." Ms. AB[Redacted] completed an Employers' First Report and offered to send Claimant to Concentra. Claimant declined treatment and started his shift. After working five hours, Claimant informed Ms. [Redacted] AB his back was bothering him and asked to go home. Ms. [Redacted] AB approved his request and Claimant left.

4. Claimant did not work the next day (Friday). He returned to work on Monday (July 26) and worked a complete shift. Ms. [Redacted] AB credibly testified Claimant exhibited no sign of pain or limitations.

5. Claimant went to the Parkview Medical Center emergency department after work on July 26, 2021. He complained of pain in his mid and low back. The ER physician wrote:

> Patient states that last week while he was at work on a forklift, it abruptly dropped several feet and then jolted back up into his legs as the machine

> was malfunctioning. He essentially notes an axial force transmitted through his legs to his back.

Physical examination showed moderate tenderness in the upper thoracic region and mild tenderness in the lumbar area. There were no lower extremity strength or sensory deficits. Lumbar and thoracic CT scans showed Schmorl's nodes at multiple levels but no fracture or other acute abnormality. The ER physician diagnosed a soft tissue "sprain versus strain" and gave Claimant a Toradol injection. Claimant stated Employer did not have light duty, so he was given a one-week work excuse.

6. Claimant did not return to work for Employer after July 26, 2021.

7. Claimant saw NP Jennifer Livingston at Concentra on August 4, 2021. Claimant provided the following history of injury:

> He was in a boom lift on the 21st. He was going down in the left when it dropped 4-5 feet suddenly, stopped, and then went back up. Patient reports of jarring feeling but no pain at the time. He continued to work for about 20 minutes. Within 1 ½ hours the pain started in his back. He states he has a stabbing pain that spreads from his spine out in the thoracic area. Some pain in the lower back but it is "all over" and he can't pinpoint an origination point.

Claimant told Ms. Livingston the imaging performed at Parkview showed Schmorl's nodes "which patient feels are associated with his injury." Claimant stated his pain ranged from "4-5/10 at its best, 10/10 at its worst." Examination showed limited thoracic range of motion, but no tenderness or muscle tone abnormalities. The lumbar exam was completely normal with full range of motion and no tenderness. Ms. Livingston diagnosed "thoracic injury" and ordered an MRI. She gave Claimant another Toradol injection, prescribed a muscle relaxer, a Medrol Dosepak, Tylenol, and Voltaren gel. She referred Claimant to physical therapy and imposed a 5-pound lifting restriction. Based on Claimant's description of the accident, Ms. Livingston concluded his condition was work-related.

8. Claimant underwent lumbar and thoracic MRIs on September 1, 2021. The thoracic MRI showed a benign hemangioma and mild spondylosis. The lumbar MRI showed loss of lumbar lordosis and multilevel "chronic" Schmorl's nodes. There was no canal or neural foraminal stenosis at any level. The facet joints appeared "unremarkable" throughout the lumbar spine.

9. Claimant ultimately received extensive conservative treatment, including medications, physical therapy, massage therapy, and chiropractic treatment. None of these interventions has provided any substantial benefit.

10. Claimant also saw Dr. Kenneth Finn on October 26, 2021. Dr. Finn noted "subjective complaints out of proportion to physical findings, making objective picture difficult." He thought Claimant had a soft-tissue injury but ordered a bone scan to rule out a stress fracture and lab work to assure no systemic inflammatory condition. Dr. Finn

doubted any intervention would improve Claimant's outcome and suggested Claimant consider a different line of work.

11. The bone scan and the lab work came back normal.

12. Claimant had an IME with Dr. Jack Rook on December 1, 2021. Claimant's main complaints were mid and low back pain. Dr. Rook described the mechanism of injury as being inside the lift bucket when it descended abruptly, approximately five feet, and then bumped up and down several times before coming to rest. Claimant stated he had no pain immediately after the injury but started having pain approximately two hours after his shift. Dr. Rook noted Claimant had no prior history of any mid or low back problems. On examination, Dr. Rook noted severe tenderness from the thoracic vertebrae just below his shoulder blades to the L4 level. There was also severe tenderness of the underlying facet joints at these levels. Range of motion was decreased. Dr. Rook diagnosed facet mediated pain and myofascial pain syndrome. He opined that Claimant suffered a work-related injury from the incident he described in the boom lift. He reasoned that Claimant developed back pain shortly after the incident, had no prior medical history of back problems, had no restrictions before this incident, filed his claim timely, and there was no alternate explanation for the development of symptoms the evening after the incident. Dr. Rook opined the drop of five feet—as reported by Claimant—applied acute compressive forces to Claimant's back. When the discs compress, the facet joints come into direct opposition, which irritates the joints and the supporting myofascial structures. This can also result in micro-tearing of the thoraco-lumbar musculature.

13. Dr. N. Neil Brown performed an IME for Respondents on December 2, 2021. Claimant told Dr. Brown the boom lift "malfunctions every time" it is used. Claimant stated the boom "suddenly goes down once the gear is engaged and then goes up accompanied by a jolting sensation." He estimated the bucket traveled approximately five feet, which led to his injury. Dr. Brown observed that the distribution of Claimant's reported symptoms was "unusual and in a non-physiological rectangular fashion." He also noted "significant psychological overlays with symptom magnification any preoccupation with pain as well." He was somewhat puzzled that Claimant had received no benefit from the multiple treatment modalities he received. Nevertheless, based on Claimant's description of a significant "axial loading mechanism and secondary vibration," Dr. Brown concluded Claimant probably suffered a thoracolumbar strain/sprain. He also opined the treatment provided was causally related to the alleged injury.

14. On January 17, 2022, Dr. Brown issued an addendum report stating, "I agree with Dr. Rook that the claimant sustained an acute injury to his mid and lower back as a result of an occupational injury on July 21, 2021. I agree with his listed rationale to support this opinion." However, he questioned whether the additional treatment recommended by Dr. Rook would be helpful, given Claimant's poor response to all prior treatment and several psychological "red flags."

15. Based on Claimant's statements that the boom lift routinely "malfunctions" with abrupt drops and vigorous bouncing, Employer investigated the operation of the lift to determine whether it was malfunctioning or if any repairs were necessary. Employer's maintenance supervisor [Redacted, hereinafter MC], inspected the machine on several

occasions and could find no defects. He also attempted unsuccessfully to recreate the incident Claimant described. He took the lift to the location where Claimant had been working on July 21 and "kinda performed it all over again just to see if maybe we were missing something. And there was nothing, as far as a drop or anything like that." Mr. [Redacted] MC explained there is a "small bounce" when the machine is lowered, but nothing he could consider "jarring" or "jolting."

16. Ms. [Redacted] AB recorded a video of the testing conducted by Mr. [Redacted] MC on her phone, which was entered into evidence as Exhibit U. Mr. [Redacted] MC testified the operation of the lift depicted in the video is consistent with his experience using that machine on multiple occasions. He testified the slow movement shown in the video is the only speed at which the lift can move, and it has safety valves to prevent it from moving or dropping if there is a hydraulic failure other malfunction.

17. [Redacted, hereinafter RS] is one of Claimant's former co-workers. He worked for Employer for approximately six years before taking another job that offered more hours. Mr. [Redacted] RS participated in the testing performed by Mr. [Redacted] MC and depicted in the video. He explained "we tried to make it do [what Claimant described], and we could not." They could not force any "abrupt stop" or "find anything that may have been wrong with it." In his experience, it was "impossible" for the machine to drop several feet or jolt the occupants of the bucket as Claimant has described. Mr. [Redacted] RS explained that when the bucket is finished lowering, it slows down over approximately one foot and stops with a "cushion motion" and "bounces just a little bit." This description is consistent with the motion shown on the video. Mr. [Redacted] RS also testified he saw the boom being lowered on July 21, 2021 while Claimant was in the bucket, and observed it bouncing slightly. However, the motion of the boom on July 21 was "nothing abnormal."

18. [Redacted] NM was working in the lift with Claimant at the time of the alleged accident. Mr. [Redacted] NM disputed Claimant's allegations regarding the operation of the boom lift. He was unaware of any malfunction and testified the boom lift was operating normally on July 21. He experienced no sudden drops or jerking on July 21 or any other occasion. He could recall no time where Claimant appeared surprised or affected by motion of the boom. Mr. NM testified the movement of the boom depicted in the video is consistent with the machine's usual operation. Based on his prior experience with the boom lift, he could not understand how Claimant could have been injured.

19. Respondents obtained a record review from Dr. Michael Rauzzino. In addition to the medical records, Dr. Rauzzino was furnished a copy of the video and a written statement from Mr. Miera. Dr. Rauzzino noted the imaging of Claimant's spine showed no objective evidence of any acute injury or trauma. He also cited the concerns raised by multiple providers regarding possible symptom magnification. Regarding causation, Dr. Rauzzino opined,

> One needs to understand the mechanism of injury. There is a discrepancy between [Claimant's] account, which is consistent with what he described initially in the emergency room and subsequently to other providers, and that of Mr. Miera who was in the boom lift with him at the time of the reported

> injury. I watched video footage of the boom lift going up and down; it is difficult to imagine that the boom lift would have suddenly fallen five feet based on the footage I observed. Ultimately, the mechanism of injury would likely be determined by the ALJ. If the ALJ or both parties believe that [Claimant] did not sustain a fall of four to five feet while in the boom, potential occupational injury would not be likely.

20. Ms. Livingston and Dr. Johansen at Concentra reviewed Dr. Rauzzino's report and agreed Claimant did not injure his back at work.

21. Employer's witnesses are credible and persuasive. Although Mr. [Redacted] NM was mistaken about how far the boom was extended, this discrepancy does not materially detract from his testimony.

22. Claimant's account of an abrupt drop and vigorous bouncing is not credible. Claimant conceded the movement of the boom shown in the video was "pretty close" to what he experienced on July 21, 2021.

23. Dr. Rauzzino's analysis is credible and persuasive. The gentle bouncing of the boom lift would not, and did not, injure Claimant's spine. This conclusion is buttressed by the complete absence of symptoms during or immediately after the incident. Dr. Rook and Dr. Brown's conclusion that Claimant suffered a work-related injury are based on the faulty assumption that Claimant's description of the alleged accident is accurate.

24. Claimant failed to prove he required any medical treatment or suffered any disability proximately caused by his work.

25. Claimant failed to prove he suffered a compensable injury on July 21, 2021.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The fact that a claimant experiences symptoms after performing work activity does not necessarily establish a causal connection to the work activity. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). And a referral for treatment by the employer after receiving a report of symptoms does not automatically establish a compensable injury. *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017). Similar logic applies to the fact that an employee was given restrictions or taken off work by a designated provider. Rather, the claimant must prove the symptoms and need for treatment and/or disability were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

As found, Claimant failed to prove he suffered a compensable injury. Employer's evidence regarding the operation of the boom lift is credible. The incident described by Claimant probably did not occur. Dr. Rauzzino's analysis is persuasive. Dr. Rook and Dr. Brown's causation determinations are predicated on the faulty assumption that the bucket abruptly fell 4-5 feet and "bounced." Had such an incident actually happened, the ALJ would have no difficulty concluding Claimant suffered a compensable injury. But based on the credible testimony of Mr. [Redacted] MC and Mr. RS, such uncontrolled motion does not even appear possible, much less probable. The boom lift probably functioned as depicted on the video and described by Employer's witnesses. Regardless of how Claimant may have perceived the motion, it is unlikely he was subjected to sufficient force to injure his spine. And having made a 4-5 foot "drop" and vigorous "bouncing" central to his story from the outset, it is too late for Claimant to change horses at the hearing and assert that the actual mechanics of the incident are unimportant. The persuasive evidence fails to show that the back symptoms Claimant experienced starting in July 2021 were proximately caused by his work.

ORDER

It is therefore ordered that:

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

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

DATED: April 5, 2022

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that his 23% scheduled upper extremity impairment rating should be converted to a 14% whole person rating.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant began working for Employer in January 2019. On May 12, 2019 Claimant developed right shoulder pain while lifting a 55-pound drum of wet cheese.

2. On May 23, 2019 Claimant visited Authorized Treating Physician (ATP) Aline Coonrod, M.D. for an examination. He reported stinging pain in the anterior part of his right shoulder. Claimant also noted numbness into his right hand and fingers.

3. On September 19, 2019 Claimant visited orthopedic surgeon Joshua Snyder, M.D. for an evaluation. He reported significantly decreased range of motion as well as muscle spasms, popping and catching within his right shoulder. Claimant also noted hand swelling and difficulties with activities. Dr. Snyder reviewed a June 3, 2019 right shoulder MRI and described Claimant's condition as consistent with adhesive capsulitis, biceps subluxation and subscapularis tendinopathy. He recommended right shoulder arthroscopy.

4. On October 30, 2019 Dr. Snyder performed a right shoulder arthroscopy, labral debridement and subacromial decompression. The postoperative diagnoses included a partial thickness rotator cuff tear of the subscapularis, rotator cuff impingement and a labral tear.

5. During a January 23, 2020 visit Dr. Snyder noted full range of motion of Claimant's neck, but painful range of motion of the right shoulder in all planes. Dr. Snyder was uncertain about Claimant's continued significant pain. Claimant had "very minimal labral fraying" and "minor impingement" in the right shoulder. Addressing the conditions surgically did not improve his discomfort.

6. On February 20, 2020 Dr. Snyder reported that Claimant's right shoulder was still very uncomfortable, but he still continued to have good range of neck motion. Dr. Snyder noted that a February 5, 2020 MRI revealed no significant changes from the prior MRI. He did not have anything more to offer Claimant and recommended a neurology consultation.

7. ATP Dr. Coonrod referred Claimant to orthopedic surgeon John David Hart, M.D. for a consultation. On March 16, 2020 Dr. Hart commented that a February 5, 2020 right shoulder MRI revealed AC joint arthropathy, inflammation around the long head of the biceps and a partial thickness tear of Claimant's rotator cuff. Because therapy was not improving Claimant's symptoms, Dr. Hart recommended a distal clavicle resection and tenodesis of the long head of the biceps.

8. On May 26, 2020 Eric McCarty, M.D. performed an arthroscopic distal clavicle excision, a mini-open subpectoral biceps tenodesis, an arthroscopic capsular release and manipulation under anesthesia, and an arthroscopic subacromial decompression of Claimant's right shoulder. The postoperative diagnosis was right shoulder acromioclavicular joint inflammation, biceps tendinitis, adhesive capsulitis and subacromial impingement. Dr. McCarty recommended continued physical therapy.

9. At a physical therapy appointment on July 21, 2020 Claimant reported that his right shoulder was improving and there was a decrease in biceps cramping. Nevertheless, he still experienced occasional popping in the right AC joint. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

10. On July 27, 2020 Dr. Hart reported that Claimant was doing well with physical therapy and had improved range of motion. However, he still demonstrated some residual stiffness. Claimant had some pain in his right shoulder at the extremes of motion and soreness around the elbow.

11. On August 7, 2020 Ashley Chrisman, P-AC reported that a right shoulder glenohumeral joint injection performed on July 27, 2020 had not provided Claimant with any relief. She noted Claimant was continuing physical therapy but having difficulties with external rotation and abduction. Claimant's pain was localized to his anterior shoulder at the biceps groove.

12. On August 24, 2020 Claimant returned to Dr. McCarty for an examination. Following the May 26, 2020 surgery, the July 27, 2020 glenohumeral injection, and an August 7, 2020 biceps tendon sheath injection, Dr. McCarty remarked that Claimant was doing well. He recommended continuing physical therapy and home exercises to improve strength and range of motion. If Claimant failed to improve, Dr. McCarty would consider manipulation under anesthesia with capsular release.

13. On October 6, 2020 Dr. McCarty performed manipulation under anesthesia and an injection of Claimant's glenohumeral joint. The postoperative diagnosis was right shoulder adhesive capsulitis.

14. On November 19, 2020 Claimant visited Gregory Reichhardt, M.D. for a physiatry consultation and electrodiagnostic evaluation. Claimant reported pain over the right shoulder anteriorly and laterally. Aggravating factors included raising his arm to bend his elbow and bending it back. On physical examination Claimant demonstrated no tenderness on palpation of the cervical spine, normal cervical range of motion, and

negative Spurling's and Lhermitte's signs. He exhibited tenderness to palpation over the right shoulder anteriorly or laterally and exhibited moderate range of motion limitations. The electrodiagnostic evaluation was normal, with negative suprascapular, long thoracic, and bilateral spinal accessory neuropathy.

15. At a December 17, 2020 visit with Dr. Coonrod, Claimant reported increased spasms mostly in the front of his right shoulder. Dr. Coonrod assessed Claimant with impingement syndrome and noted little improvement since his tenodesis surgery. Claimant was actually experiencing more pain around the anterior capsule of the shoulder. He had ceased physical therapy several weeks earlier because it was not helping him, but he continued home exercises.

16. On December 21, 2020 Dr. McCarty reported that Claimant was still experiencing similar symptoms without much improvement. He recommended continuing with physical therapy and home exercises to improve strength and range of motion. Dr. McCarty suggested continued visits with Dr. Reichhardt to assess and treat the painful periscapular musculature. He remarked that a gym membership might be helpful, and commented that Claimant was approaching Maximum Medical Improvement (MMI).

17. On January 8, 2021 Claimant underwent an independent medical examination with Mark Failinger, M.D. Claimant reported stiffness and tightness in the right shoulder, but no swelling in the shoulder area. He also occasionally experienced numbness and swelling in his right hand. Claimant denied any neck pain or radiating symptoms from his neck down through the arm. He was not taking any medications for right shoulder pain.

18. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical, and upper back regions. Dr. Failinger determined that Claimant had likely reached MMI when he last visited Dr. McCarty on November 23, 2020 or at least by December 21, 2020. He reasoned that Claimant did not require lifting restrictions below waist level. However, he recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI. He assigned Claimant a 19% right upper extremity impairment, consisting of 14% for range of motion deficits and 6% for other disorders of the upper extremity.

19. On April 19, 2021 Claimant visited Dr. Coonrod for an examination. He noted improved range of motion, but not full abduction. External rotation was also limited. Claimant's pain was mostly located in the front of his right shoulder. Dr. Coonrod commented that Claimant was approaching MMI, but would leave the determination to Dr. Reichhardt.

20. On April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he experienced pain specifically over the

anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There was normal cervical range of motion with no cervical paraspinal muscle spasms. Dr. Reichhardt concluded that Claimant had reached MMI on April 21, 2021. He recommended six follow-up visits with a physician over the following two years. Claimant stated that he would like to follow-up with Dr. McCarty. Dr. Reichhardt assigned a 22% upper extremity impairment consisting of a 13% rating for range of motion deficits and a 10% rating for the distal clavicle excision. The extremity rating would convert to a 13% whole person impairment rating.

21. On August 16, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Alicia Feldman, M.D. In her physical examination, Dr. Feldman reported tenderness to palpation over the anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman determined that Claimant had reached MMI on April 19, 2021 when he last visited Dr. Coonrod. She assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. The extremity rating would convert to a 14% whole person impairment. Dr. Feldman did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine. She agreed that Claimant did not require work restrictions below waist level. However, Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Feldman did not recommend maintenance care because Claimant had already received extensive treatment and plateaued.

22. On February 25, 2022 Respondents filed a Final Admission of Liability (FAL) acknowledging Dr. Feldman's 23% scheduled impairment rating and denying maintenance medical care. Claimant challenged the FAL seeking to convert the extremity impairment to a whole person rating and requesting medical maintenance benefits.

23. Claimant testified at the hearing in this matter. He explained that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident at work Claimant remarked that he underwent physical therapy and massage therapy for his neck and right shoulder region. He complained of pain in the neck, back, and in the front and back of his right shoulder. Claimant commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

24. Claimant noted that, since reaching MMI on April 19, 2021, he has continued to experience pain on a permanent basis in not only his right shoulder, but also the upper back and neck regions. The symptoms occur especially when he attempts to raise his arm overhead or out in front of him. He also suffers symptoms when he engages in any type of lifting in excess of 10 pounds at waist level.

25. Claimant has failed to prove it is more probably true than not that his 23% scheduled right upper extremity impairment rating should be converted to a 14% whole person rating. Initially, on May 12, 2019 Claimant developed right shoulder pain when lifting a 55-pound drum of wet cheese while working for Employer. Claimant specified that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident. He remarked that he underwent physical therapy and massage therapy for the neck and right shoulder region. Claimant complained of pain in the neck, back, and in the front and back of his right shoulder. He commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

26. Although Claimant testified that physical therapy and massage therapy were directed to his shoulder and neck area, the record fails to support his testimony. The only therapy note in the record, from July 21, 2020, involved his subjective report of right shoulder popping and pain in the anterior and posterior areas. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

27. The medical records also generally reflect that Claimant did not report pain to his neck or back area. During a January 8, 2021 evaluation with Dr. Failinger, Claimant noted stiffness and tightness in the right shoulder but no swelling in the shoulder area. He occasionally experienced numbness and swelling in his right hand, but denied any neck pain or radiating symptoms from his neck down through the arm. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical and upper back regions. Similarly, ATP Dr. Coonrod documented pain only to the shoulder when he stated that Claimant was approaching MMI on April 19 2021.

28. On April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he had pain specifically over the anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There were also no cervical paraspinal muscle spasms and normal cervical range of motion. Finally, during Dr. Feldman's DIME she reported tenderness to palpation over Claimant's anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. She did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine.

29. The preceding medical records reflect that Claimant's functional disability is limited to right arm movements and reaching. Furthermore, Claimant's testimony reveals that the primary catalyst for his pain is the use of his right arm. Although Claimant's pain may extend to a portion of the body beyond the schedule of impairments, it does not constitute a functional impairment. The record thus reveals that the situs of Claimant's

functional impairment is in his right upper extremity. Specifically, Claimant's right upper extremity symptoms are limited to his arm and do not extend into a portion of his body beyond the schedule of impairments. Accordingly, Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

30. Claimant has failed to demonstrate that is more probably true than not that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Initially, at an April 21, 2021 permanent impairment evaluation Dr. Reichhardt recommended medical maintenance benefits in the form of six follow-up visits with a physician over the following two years. Claimant expressed that he would like to follow-up with Dr. McCarty.

31. However, the record reveals that the only recommendation for maintenance care came from Dr. Reichhardt. Notably, he did not recommend any particular course of treatment. Specifically, DIME physician Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. However, she did not recommend maintenance care because Claimant had already received extensive treatment and plateaued. Similarly, at an independent medical examination, Dr. Failinger recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger also did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI.

32. The preceding persuasive opinions of DIME physician Dr. Feldman and Dr. Failinger reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's May 12, 2019 right shoulder injury. The record reveals that Claimant has received extensive treatment and there are no further interventions that are reasonably be expected to change his condition or maintain MMI. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Shoulder Conversion

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

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

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

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68*.* Depending on the particular facts of a claim, damage to the structures of the "shoulders" may or may not reflect a "functional impairment" that is enumerated on the schedule of disabilities. *Walker v. Jim Fouco Motor Co.,* 942 P. 2d 1390 (Colo. App. 1997)*; see Henke v. United Airlines,* W.C. Nos. 4-456-163, 4-490-897 (ICAO, Sept. 10, 2003).

8. As found, Claimant has failed to prove by a preponderance of the evidence that his 23% scheduled right upper extremity impairment rating should be converted to a 14% whole person rating. Initially, on May 12, 2019 Claimant developed right shoulder pain when lifting a 55-pound drum of wet cheese while working for Employer. Claimant specified that he suffered injuries to his right hand, shoulder and neck during the May 12, 2019 incident. He remarked that he underwent physical therapy and massage therapy for the neck and right shoulder region. Claimant complained of pain in the neck, back, and in the front and back of his right shoulder. He commented that he had difficulty reaching overhead and straight out in front with his right arm. The motion caused pain in the front of his right shoulder, neck and upper back.

9. As found, although Claimant testified that physical therapy and massage therapy were directed to his shoulder and neck area, the record fails to support his testimony. The only therapy note in the record, from July 21, 2020, involved his subjective report of right shoulder popping and pain in the anterior and posterior areas. All treatment modalities listed involved the shoulder region including rhomboids, trapezius and scapula. There was no therapy to the neck region.

10. As found, the medical records also generally reflect that Claimant did not report pain to his neck or back area. During a January 8, 2021 evaluation with Dr. Failinger, Claimant noted stiffness and tightness in the right shoulder but no swelling in the shoulder area. He occasionally experienced numbness and swelling in his right hand, but denied any neck pain or radiating symptoms from his neck down through the arm. Upon physical examination, Dr. Failinger noted Claimant's neck was non-tender with full range of motion. There were no spasms, warmth, or redness throughout the neck, paracervical and upper back regions. Similarly, ATP Dr. Coonrod documented pain only to the shoulder when he stated that Claimant was approaching MMI on April 19 2021.

11. As found, on April 21, 2021 Claimant presented to Dr. Reichhardt for a permanent impairment evaluation. Claimant reported that he had pain specifically over the anterior aspect over the right shoulder. He did not mention symptoms in the neck or back area. A physical examination did not reveal tenderness to palpation over the cervical spine or paraspinal region. There were also no cervical paraspinal muscle spasms and normal cervical range of motion. Finally, during Dr. Feldman's DIME she reported

tenderness to palpation over Claimant's anterior shoulder, biceps tendon, upper trapezius, scapula and lats on the right side. Claimant exhibited pain in all planes with range of motion of the right shoulder, but no pain with range of motion of the neck. Dr. Feldman assigned a 14% right upper extremity impairment for loss of range of motion and a 10% rating for the distal clavicle resection for a combined 23% right upper extremity impairment rating. She did not assign an impairment rating for the neck because there was no injury and no work-related pathology in the cervical spine.

12. As found, the preceding medical records reflect that Claimant's functional disability is limited to right arm movements and reaching. Furthermore, Claimant's testimony reveals that the primary catalyst for his pain is the use of his right arm. Although Claimant's pain may extend to a portion of the body beyond the schedule of impairments, it does not constitute a functional impairment. The record thus reveals that the situs of Claimant's functional impairment is in his right upper extremity. Specifically, Claimant's right upper extremity symptoms are limited to his arm and do not extend into a portion of his body beyond the schedule of impairments. Accordingly, Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

Medical Maintenance Benefits

13. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Initially, at an April 21, 2021 permanent impairment evaluation Dr. Reichhardt recommended

medical maintenance benefits in the form of six follow-up visits with a physician over the following two years. Claimant expressed that he would like to follow-up with Dr. McCarty.

15. As found, however, the record reveals that the only recommendation for maintenance care came from Dr. Reichhardt. Notably, he did not recommend any particular course of treatment. Specifically, DIME physician Dr. Feldman assigned restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. However, she did not recommend maintenance care because Claimant had already received extensive treatment and plateaued. Similarly, at an independent medical examination, Dr. Failinger recommended restrictions of intermittent lifting not to exceed 50 pounds to the shoulder level from the waist as well as intermittent lifting above shoulder level of 50 pounds. Dr. Failinger also did not recommend maintenance care because there was no further intervention that would reasonably be expected to change Claimant's condition or maintain MMI.

16. As found, the preceding persuasive opinions of DIME physician Dr. Feldman and Dr. Failinger reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's May 12, 2019 right shoulder injury. The record reveals that Claimant has received extensive treatment and there are no further interventions that are reasonably be expected to change his condition or maintain MMI. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

ORDER

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

1. Claimant's request to convert his 23% right upper extremity scheduled impairment to a 14% whole person rating is denied and dismissed.

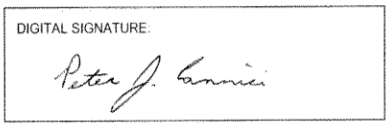
2. Claimant's request for maintenance medical benefits is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

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

OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 5, 2022.



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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with Employer?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury and were provided by a physician authorized to provide treatment to Claimant?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of July 20, 2021 to July 27, 2021?

- If Claimant has proven a compensable injury, what is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified she was employed with Employer as a store manage at Employer's store in Palisade, Colorado. Claimant testified her job duties included performing all jobs needed at the store. Claimant testified she initially worked at the store from 2011-2012 and then returned to work at the store in 2013 and continued to the present time.

2. Claimant testified that on January 27, 2021, she was at work trying to kneel down to get into the safe that is located in the store behind the register. Claimant testified that when she kneeled, she felt a sharp pain going through her right knee. Claimant testified at hearing that she accessed the safe every day.

3. Claimant testified she reported the injury that day to her district manager and then called the Employer's injury hotline. Claimant testified she got off of work at approximately noon and sought medical treatment at Community Care of Grand Valley. Claimant was examined by physicians' assistant ("PA") Goodman on January 27, 2021. Claimant reported a history of developing pain in her right knee while at work about five (5) hours earlier as a result of kneeling down. Claimant reported that when she went to

kneel down in front of the safe, her knee felt unstable and suddenly hurt. PA Goodman diagnosed Claimant as having suprapatellar bursitis of the right knee and recommended ice and rest. PA Goodman provided Claimant with restrictions that included squatting, kneeling, and crawling and recommended that she avoid anything that required a knee bend past 90 degrees.

4. Claimant had a prior injury to her right knee while employed with Employer on August 7, 2014. Claimant sustained this injury as she was standing up from stocking a bottom shelf and her knee popped. As a result of that injury, Claimant underwent two surgeries to repair a tear of her medical meniscus. Dr. McLaughlin eventually put Claimant at maximum medical improvement for her injury on September 2, 2015 and provided with an impairment rating of 16% of the lower extremity. Dr. McLaughlin released Claimant to return to work without restrictions.

5. With regard to her present injury, Claimant was evaluated by nurse practitioner ("NP") Harkreader in Dr. McLaughlin's office on February 1, 2021. NP Harkreader noted Claimant's report of putting her left knee on concrete and bringing her right knee down to kneel when she felt a sharp pain in her right knee. NP Harkreader diagnosed Claimant with right knee infrapatellar bursitis and distal quadriceps strain and referred Claimant for an x-ray of her right knee. The x-rays were performed on February 2, 2021.

6. Claimant testified at hearing that after her left knee injury, she began experiencing pain in her left groin and left hip that she associated with trying to take weight off her right knee. Claimant testified that over the next few weeks, her knee would lick up and she developed swelling behind her right knee which she associated to a Bakers' cyst.

7. Claimant testified she had a prior injury to her right knee which resulted in two knee surgeries. Claimant testified that after being placed at MMI, she would have occasional discomfort, but was otherwise fine. Claimant testified that prior to the January 27, 2021 injury, the last treatment she had for her right knee was in 2015. Claimant testified that prior to the January 27, 2021 injury, she was not having pain, instability, and locking in her right knee. Claimant testified that the pain she is experiencing now in her right knee is different than what she experienced in the 2014 injury.

8. Claimant returned to Dr. McLaughlin on February 10, 2021. Dr. McLaughlin noted Claimant's prior workers' compensation injury to her right knee. Dr. McLaughlin noted Claimant reported doing well for some time following her previous injury. Dr. McLaughlin noted Claimant's complaints of pain and reviewed her x-rays. Dr. McLaughlin reported concerns with regard to joint and joint space narrowing in the medial joint and degenerative joint disease evidenced on the x-rays. Dr. McLaughlin noted Claimant reported problems getting in and out of chairs. On examination, Dr.

McLaughlin noted Claimant had markedly antalgic gait as Claimant did not appear to want to bear weight on her right leg.

9. Dr. McLaughlin diagnosed claimant with a right knee strain and bursitis with a pre-existing right knee injury. Dr. McLaughlin recommended Claimant be seen by an orthopedist and consider injections into the knee. Dr. McLaughlin referred Claimant to Dr. Dorenkamp for chiropractic treatment for her right and left sacroiliac tenderness. Dr. McLaughlin further recommended additional x-rays of the right knee to determine how severe the degenerative joint disease was, including notch views and standing x-rays.

10. Claimant underwent a magnetic resonance image ("MRI") of her right knee on March 16, 2021. The MRI revealed an extensive tear of the body, posterior horn, and posterior root of the medial meniscus which was severely diminutive in caliber. Grade 3 chondral changes in the medial compartment and to a lesser degree, the patellofemoral compartment were also noted.

11. Claimant was examined by Dr. Mitch Copeland on March 29, 2021. Dr. Copeland noted Claimant reported she was kneeling down to get into a safe when her knee twisted wrong. Claimant reported to Dr. Copeland symptoms that included pain, locking, swelling and giving away. Dr. Copeland reviewed Claimant's MRI and performed a physical examination of Claimant. Dr. Copeland diagnosed Claimant with osteoarthritis of the right knee with a tear of the medial meniscus. Dr. Copeland noted that Claimant had sustained a knee injury at work 2 months ago that caused the meniscus tear. Dr. Copeland noted that while the tear was symptomatic, he believed there was too much arthritis to consider a knee arthroscopy. Dr. Copeland opined that the osteoarthritis was the main driver of her pain and noted that a total knee arthroplasty would be her only surgical option.

12. Dr. Copeland provided Claimant with a steroid injection in the right knee and recommended Claimant stop smoking. Dr. Copeland further noted that Claimant was complaining of hip pain which Dr. Copeland noted he believed to be related to her altered gait.

13. Claimant continued to treat with Dr. McLaughlin and was referred to Dr. Kim, an orthopedist with the Steadman Group. Claimant was examined by PA Dvoirkin in Dr. Kim's office on April 28, 2021. PA Dvorkin noted Claimant reported right knee pain that was exacerbated in January at work while she was trying to kneel, when she had a significant sharp pain and noticed moderate to severe swelling afterwards. PA Dvorkin further noted Claimant reported havin progressively worsening right knee pain since an incident while trying to kneel back in January.

14. PA Dvorkin noted Claimant had reportedly quit smoking 1 week earlier. PA Dvorkin ordered x-rays of the right knee. PA Dvorkin diagnosed Claimant with right

knee osteoarthritis. PA Dvorkin recommended a right total knee replacement based on a review of the x-rays and clinical examination.

15. Claimant returned to Dr. McLaughlin on May 5, 2021. Dr. McLaughlin noted that Dr. Kim's office had indicated she would be an excellent candidate for knee replacement surgery. Claimant noted that she did not like hearing from Dr. Copeland that she would need knee replacement surgery when she was evaluated by him, but had come to grips with it. Dr. McLaughlin recommended she return to Dr. Copeland for evaluation and treatment and to get his opinion with regard to knee replacement surgery.

16. Claimant was examined by Dr. Copeland on May 17, 2021. Dr. Copeland again indicated that Claimant's only surgical option would be a total knee replacement.

17. Respondents obtained an independent medical examination ("IME") with Dr. Bernton on June 8, 2021. Dr. Bernton reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted Claimant reported that on January 27, 2021, she was in the process of kneeling when she felt a sharp pain in the front of her kneecap. Dr. Bernton diagnosed Claimant was a meniscal tear superimposed on degenerative arthritis of the medial patellofemoral compartments, along with evidence of probable patellar tendinitis. Dr. Bernton noted that Claimant had an upcoming IME with Dr. Ciccone to determine whether the knee condition was work related. Dr. Bernton noted Claimant reported some trapezius pain that developed concurrent with her use of a crutch. Dr. Bernton opined that trigger point injections may be helpful for treating the trapezius strain. Dr. Bernton noted that the transient SI symptoms were related to Claimant's gait abnormalities.

18. Dr. Bernton did not offer and opinion as to whether the knee condition was work related, and deferred to Dr. Ciccone regarding this issue.

19. Claimant underwent an IME with Dr. Ciccone on June 23, 2021. Dr. Ciccone reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Ciccone noted that while she was at work, she was squatting down to open a safe when she had increased pain in her knee. Dr. Ciccone opined that Claimant did not have a fall or twisting event in connection with her knee injury. Dr. Ciccone opined that opined that Claimant did not have a work related injury. Dr. Ciccone noted that while Claimant had more pain in the knee while kneeling, there was no injury. Dr. Ciccone noted that the kneeling could have occurred anywhere and was not specific to work.

20. Claimant returned to Dr. McLaughlin on July 20, 2021. Dr. McLaughlin noted Claimant's ongoing complaints of pain and noted Claimant was off of work. Dr.

McLaughlin issued a not taking Claimant off of work for the period of July 20 through July 27, 2021.

21. Claimant was examined by Dr. Matsumura on August 17, 2021. Dr. Matsumura noted that Claimant had a prior injury in December 2015 resulting in chronic back pain. Dr. Matsumura noted Claimant was referred to her by Dr. McLaughlin for evaluation of chronic pain issues involving her right knee. Dr. Matsumura further noted Claimant's MRI had revealed a torn meniscus. Dr. Matsumura noted that Dr. Copeland and Dr. Kim had recommended a total knee arthroplasty, which she agreed with. Dr. Matsumura recommended a Flector patch and instructed Claimant to follow up in three to four weeks.

22. Dr. McLaughlin testified by deposition in this matter. Dr. McLaughlin testified that PA Harkreader noted swelling over Claimant's distal quadriceps just over her right patella. Dr. McLaughlin testified that swelling could be considered objective evidence of an acute injury. Dr. McLaughlin testified as to his recollection of the Claimant's report of injury, notably that she was getting into a squatting position getting ready to put one knee down, when she felt pain in her knee. Dr. McLaughlin opined in his deposition that Claimant's reported knee pain was caused by Claimant getting into the squatting position which she described.

23. Dr. Ciccone testified by deposition in this matter consistent with his IME report. Dr. Ciccone testified that Claimant had a pre-existing condition in her knee which included the two prior knee surgeries and osteoarthritis. Dr. Ciccone opined that Claimant did not have an injury on January 27, 2021 because she was just performing normal activity. Dr. Ciccone testified that Claimant could have been doing that activity either inside or outside of work and there was nothing work specific about the activity. Dr. Ciccone noted that Claimant had degenerative changes in her knee and did not report a falling or twisting event. Dr. Ciccone opined that he did not believe Claimant's mechanism of injury (kneeling) was sufficient to cause any injury.

24. The ALJ credits Claimant's testimony at hearing along with the opinions expressed by Dr. McLaughlin in his reports and his testimony and finds that Claimant has established that it is more probable than not that Claimant sustained a compensable work related injury to her right knee on January 27, 2021 when she was kneeling down to get into the safe and experienced sharp pain in her right knee.

25. The ALJ notes that while Claimant had a history of prior knee injuries, there is a lack of credible evidence that Claimant was experiencing issues with her right knee after being placed at MMI in September 2015. The ALJ credits Claimant's testimony that the only symptoms she experienced after being placed at MMI in September 2015 was occasional discomfort as being credible and persuasive. The ALJ therefore finds that Claimant has demonstrated that it is more probable than not that the kneeling at work to get into the safe on January 27, 2021 aggravated, accelerated or

combined with Claimant's pre-existing condition to cause the need for medical treatment. Moreover, the ALJ credits the testimony of Dr. McLaughlin that the swelling that was noted by NP Harkreader on February 1, 2021 was objective evidence of an acute injury, and therefore, related to the kneeling incident at work on January 27, 2021.

26. Moreover, the MRI in this case revealed a torn medial meniscus which is consistent with Claimant's complaints of pain and swelling following the kneeling incident. The ALJ therefore finds that Claimant has established that it is more likely than not that the kneeling incident in this case aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment, and is therefore, a compensable work injury.

27. The ALJ credits the opinions expressed by Dr. Copeland along with the reports of Dr. Bernton and finds that the medical treatment for Claimant's back, hip and trapezius are related to her compensable January 27, 2021 work injury.

28. The ALJ credits the medical records entered into evidence along with the opinions expressed by Dr. McLaughlin and Dr. Copeland and finds that the medical treatment in this case rendered by Dr. McLaughlin, Dr. Copeland, Dr. Matsumara Dr. Dorenkamp, and the Steadman Group has been reasonable and necessary to cure and relieve Claimant from the effects of her industrial injury.

29. Claimant testified at hearing that she missed some time from work during the summer of 2021. Claimant argues in her position statement that she should be entitled to temporary disability ("TTD") benefits for the period of July 20 through July 27, 2021. The wage records entered into evidence show Claimant did not receive a paycheck for one week, as the paycheck for August 6, 2021 is missing. This corresponds with Dr. McLaughlin's July 20, 2021 report which took Claimant off of work for one week.

30. The ALJ credits the testimony of Claimant at hearing along with the wage records entered into evidence and the medical records from Dr. McLaughlin and finds that Claimant has proven that it is more likely than not that she is entitled to TTD benefits for the period of July 20 through July 27, 2021.

31. At the time of Claimant's injury, Claimant was receiving weekly paychecks in the amount of $1,019.63. Additionally, according to the wage records, in the year prior to Claimant's injury, she earned $5,000 in bonuses. The ALJ credits Claimant's testimony at hearing along with the wage records entered into evidence and finds that the financial bonuses Claimant received were regularly provided to Claimant on a consistent basis and should be included in the calculation of her AWW.

32. The ALJ therefore determines that Claimant's average weekly wage should include the bonuses, averaged out over the prior year, ($5,000 divided by 52 =

$96.15). Therefore, the ALJ calculates Claimant's AWW to be $1,115.78 ($1,019.63 + $96.15 = $1,115.78).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2020. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. As found, Claimant has established that it is more probable than not that her injury arose out of and in the course and scope of her employment with employer. As found, Claimant has established by a preponderance of the evidence that she sustained an injury to her right knee on January 27, 2021 when she was kneeling down to get into the safe and experienced pain and swelling in her right knee, which resulted in the need for medical treatment.

5. The ALJ recognizes that Respondents argue that the knee injury could have happened at any time based on Claimant having degenerative joint disease in her knee. However, the fact that Claimant had a prior injury or pre-existing condition does not negate the fact that a compensable injury occurs if the injury aggravates, accelerates or combines with the preexisting disease or infirmity to produce disability or the need for treatment. In this case, the ALJ finds that the kneeling at work combined with Claimant's preexisting condition to cause the need for medical treatment, including the treatment for the torn meniscus, resulting in the recommended total knee replacement.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

7. As found, Claimant has proven by a preponderance of the evidence that treatment provided by Dr. McLaughlin, Dr. Copeland, Dr. Matsumura, Dr. Dorenkamp and the Steadman Clinic along with the recommended total knee replacement is reasonable medical treatment necessary cure and relieve the Claimant from the effects of the industrial injury.

8. As found, the medical records from Dr. McLaughlin, Dr. Copeland and the Steadman Clinic, along with the testimony of Claimant and Dr. McLaughlin at hearing are found to be credible and persuasive with regard to this issue. Additionally, the ALJ credits the opinions expressed by Dr. Bernton in his IME report with regard to the treatment provided to Claimant for her hip, back and trapezius pain and finds that Claimant has established by a preponderance of the evidence that this medical treatment is reasonable and necessary to cure and relieve Claimant from the effects of her industrial injury.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume

his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. McLaughlin that took Claimant off of work completely between July 20, 2021 and July 27, 2021, resulting in a wage loss to Claimant as evidenced by the wage records entered into evidence. As found, claimant has established that he is entitled to TTD benefits for the period of July 20, 2021 through July 27, 2021.

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

12. As found, Claimant was earning weekly wages in the amount of $1,019.63 at the time of the injury. As found, Claimant had earned bonuses in the previous year of $5,000, which the ALJ finds were regularly received by Claimant and should be included in calculating Claimant's AWW. As found, Claimant's AWW at the time of the injury is determined to be $1,115.78.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the treatment from Dr. McLaughlin, Dr. Copeland, Dr. Matsumura, and Dr. Dorenkamp, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay Claimant TTD benefits based on an AWW of $1,115.78 for the period of July 20, 2021 through July 27, 2021 pursuant to Section 8-42-105, C.R.S.

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

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

DATED: April 6, 2022

Keith E. Mottram

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

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that this claim should be reopened pursuant to Section 8-43-303, C.R.S., due to fraud.

If the claim is reopened, whether the respondents have demonstrated, by a preponderance of the evidence, that they are entitled to recover benefits paid to the claimant in the amount of $16,364.90.

FINDINGS OF FACT

1. On June 4, 2019, the claimant suffered a work injury while employed with the employer. The body parts injured at that time included the claimant's neck and back.

2. On July 8, 2019, the respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits. The claimant's TT□ benefits were paid at a rate of $558.80 per week.

3. The claimant's authorized treating physician (ATP) for this claim has been Dr. Larry Kipe. Beginning on June 20, 2019, Dr. Kipe restricted the claimant from all work.

4. On August 20, 2019, the claimant was seen by Dr. Kipe. At that time, the claimant reported that he had not returned to work and "does not feel he can work." The claimant also reported constant neck pain, paresthesia down his arms, and pain in his lumbar spine. Based upon the statements made by the claimant on that date, Dr. Kipe continued to restrict the claimant from all work.

5. On August 21, 2019, the claimant attended a Department of Transportation (DOT) medical examination for purposes of obtaining a commercial driver's license (CDL) medical certificate. The medical examination was performed by Noel K. McKey, DC.

6. In preparation for the DOT examination, the claimant completed a Medical Examination Report Form. In that form, the claimant reported that he had no neck or back problems. The claimant also reported no bone, muscle, joint, or nerve problems. On exam, Dr. McKey noted that the claimant's back and spine were normal. The claimant was cleared to receive a two year medical certificate.

7. On December 4, 2019, the claimant returned to Dr. Kipe. At that time, the claimant reported problems with pain and an inability "to get around". Dr. Kipe continued to restrict the claimant from all work. On that same date, Dr. Kipe authored a letter in which he stated that the claimant should remain off of work "indefinitely".

8. On January 30, 2020, Dr. Kipe issued a report in which he determined that the claimant reached maximum medical improvement **(MMI)** on January 28, 2020. Dr. Kipe also noted that the claimant could return to full duty work, with no permanent impairment.

9. Based upon Dr. Kipe's January 30, 2020 report, on January 31, 2020, the respondents filed a Final Admission of Liability (FAL). The FAL was amended on February 12, 2020 to accurately reflect the amount of TTD paid to the claimant.

10. Dr. Kipe testified that each time he restricted the claimant from all work he did so based upon the claimant's subjective reports that he could not work. Dr. Kipe testified that he relied upon the statements made by the claimant in determining whether the claimant had any work restrictions. Upon learning of the August 21, 2019 DPT examination and the statements made by the claimant as part of that examination, Dr. Kipe determined that the claimant had reached MMI, was released to full duty, with no permanent impairment.

11. MV[Redacted], Senior Resolution Manager with the insurer was the individual that filed the FALs in January and February 2020. Ms. MV[Redacted] testified that the claimant's TTD benefits were terminated on January 28, 2020 because the claimant had reached MMI with no permanent impairment rating.

12. Ms. MV[Redacted] also testified that between August 20, 2019 and January 28, 2020, the respondents paid the claimant $16,364.90 in TTD benefits.

13. The ALJ credits the medical records, the DOT examination records, and the testimony of both Dr. Kipe and Ms. MV[Redacted] . The ALJ finds that it is more likely than not that the claimant intentionally misled Dr. Kipe regarding his inability to work. This is evidenced by the contradictory information he provided Or. McKay on August 21, 2019. The ALJ finds that the claimant was kept off of work by Dr. Kipe because of the claimant's subjective report that he could not work. However, it is clear that the claimant was capable of working as evidenced by his report to Dr. McKey.

14. Based upon the evidence and testimony presented, the ALJ finds that the claimant did engage in fraud in this matter. In reaching this determination, the ALJ finds the following. 1) The claimant's claim that he could not work was a false representation of a material fact. 2) The claimant knew that he was not providing Dr. Kipe with accurate information when he continued to report he was unable to work. 3) Dr. Kipe relied upon the claimant's false representations. 4) The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations. 5) The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant,

resulting in damage to the respondents. The ALJ infers that the claimant also knew that his false representations would result in continued TTD payments.

15. The ALJ also finds that the respondents have successfully demonstrated that they are entitled to recover amounts paid to the claimant between August 20, 2019 and January 28, 2020. The ALJ finds that the amount overpaid as a result of the claimant's misrepresentations to Dr. Kipe totals $16,364.90.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos,* 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers,* W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim.

Berg v. Industrial Claim Appeals Office, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission,* 646 P.2d 399 (Colo. 1981).

5. In the present case, the respondents seek to reopen the claim on the basis of fraud. The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.,* W.C. No. 4-156-147 (ICAO, Dec. 15, 2005), *citing Morrison v. Goodspeed,* 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra*

6. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.,* W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

7. As found, the respondents have successfully demonstrated, by a preponderance of the evidence, that the claim should be reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud. The elements of fraud identified above are found to exist in the present matter. Specifically:

- The claimant's claim to Dr. Kipe on August 20, 2019 that he could not work was a false representation of a material fact.
- The claimant knew that he was not providing Dr. Kipe with accurate information when he reported he was unable to work.
- Dr. Kipe relied upon the claimant's false representations.
- The claimant knew that Dr. Kipe would continue to restrict him from all work based upon his false representations.
- The respondents relied upon the reports of Dr. Kipe and continued to pay TTD benefits to the claimant, resulting in damage to the respondents.

8. As found, the respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

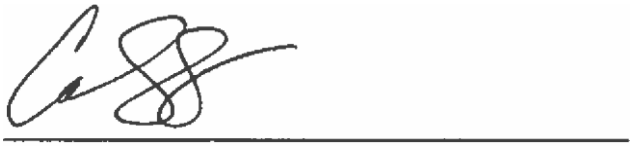
ORDER

It is therefore ordered:

1. The claim is reopened pursuant to Section 8-43-303, C.R.S. on the basis of fraud.

2. The respondents are entitled to recover $16,364.90 from the claimant for benefits paid to him between August 20, 2019 and January 28, 2020.

Dated this 7th day of April 2022.



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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable electric shock injury to her left upper extremity on July 21, 2021.

II. If Claimant established that she suffered a compensable injury, whether she also established that a sonographic analysis of the left upper extremity recommended by Dr. Scott Primack is reasonable, necessary and related to her July 21, 2021 injury.

III. If Claimant established that she sustained a compensable injury, whether she also established that the right to select the authorized provider to attend to her injury passed to her.

FINDINGS OF FACT

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

Background and Claimant's Testimony

1. Claimant is employed as a cashier. (Transcript "Tr." p, 13:10-13). She testified that while working the drive through window on July 21, 2021, she placed her left hand on the corner of a metal table near the leg that ran to the ground and felt an electrical shock to her hand that travelled through her arm and up into her neck. (Tr. p, 13:21-25; p, 14:1-4; p. 17:1-6). She testified that an electronic register with an attached computer and a credit card machine were plugged in on top of the metal table. (Tr. p, 17:1-16). She testified that there was water on the floor nearby the table. (Tr. p, 17:23-25; 18:1-6). The July 21, 2021, incident was the second time Claimant claimed to have been shocked while working the drive through window. The first shock occurred July 7, 2021. (Rs' Ex. C, p. 20). Claimant did not seek treatment following her first electric shock.

2. Claimant lifted her left hand from the table and began screaming and waiving her left arm as if to shake the electricity out. (Tr. p, 14:1-9). Her supervisor was notified and an accident report was completed. *Id*. She rated the immediate pain to her left arm at 9/10. (Tr. p, 14:9-19; p, 15:14-24). She described the triceps of the left arm as feeling weak, sore, and heavy, with a display of blotchy redness and swelling appearing within an hour of being shocked. (Tr. p, 21:5-25).

3. Claimant testified that her current symptoms include a jabbing feeling in the palm of her left hand, a prickly feeling in her fingertips, and weakness, heaviness

and soreness in her left biceps and triceps. (Tr. p, 23:14-19). Claimant testified that there are times when she does not feel pain, but when she does experience pain, it is different every day. (Tr. p, 23:20-25). According to Claimant, her pain comes and goes as it "pleases". Sometimes its pain that she can deal with" and sometimes it is so unbearable that she just wants to cry. *Id.*

4. Claimant testified that her skin was dry at the time she was shocked. (Tr. p, 20:6-10).

5. In addition to her work at [Employer Redacted], Claimant owns and operates a cleaning business. Despite her alleged electric shock and persistent symptoms, Claimant testified that she has been able to continue her cleaning jobs without income loss. (Tr. p, 24:9-14). Moreover, she did not lose any time from [Employer Redacted]. (Tr. p, 26:21-23).

Claimant's Treatment at Concentra Medical Centers

6. On July 23, 2021, Claimant presented to her authorized treating physician, Dr. Bradley at Concentra Medical Centers.[1] (Rs' Ex. C, p. 8). She reported numbness, burning, and weakness to her left arm. *Id*. at 20. Claimant advised Dr. Bradley that her first shock on July 7, 2021 caused some "chest pain [and] heart racing [for] 4-5 days. *Id*. at p. 20. On physical exam, it was noted that the left arm was puffy and red, with mild tenderness in the dorsal aspect of the upper arm. *Id*. at 21. She displayed full range of motion, normal strength, normal sensation, no muscle weakness, and no muscle atrophy. *Id*. An EKG was normal. *Id*. at 12. Dr. Bradley assessed a work-related electrical shock to the left upper extremity. *Id*. at 12. Claimant was prescribed diclofenac sodium, methocarbamol, and naproxen, and kept at full duty with the limitation of wearing rubber gloves while working. *Id*. at 23.

7. On July 26, 2021, Claimant returned to Concentra and was evaluated by Nurse Practitioner (NP) Jennifer Livingston. (Rs' Ex. C, p. 24). She reported no improvement to her left arm and described a shaky feeling, soreness, and weakness. *Id*. at p. 27. Claimant reported not having "full control" over her left arm, complaining that she was "unable to fix her own hair" and had difficulty "shampooing her hair and bathing/dressing due to weakness and pain in [the] arm". *Id*. She reported persistent redness and swelling in the left arm. *Id*. Physical examination revealed mild erythema and swelling of the upper and lower (forearm) portions of the left arm but no weakness. *Id*. Sensation was intact for light touch in all dermatomes tested. *Id*. at p. 28. The remainder of the upper extremity examination was normal, as was examination of the neck and chest. *Id*. The medications prescribed by Dr. Bradley were reportedly helping and no further medications were prescribed. *Id*. at p. 29. Referrals were made to Dr. Scott Primack for an EMG, diagnostics, and physical therapy. *Id*. While the history and mechanism of injury (MOI) were obtained directly from Claimant, NP Livingston opined that the relationship between the MOI and the presenting symptoms could not be

[1] Claimant testified that she chose to go to Concentra on July 23, 2021. (Tr. p, 27:2-4).

determined. *Id*. at 30. NP Livingston concluded by indicating that Claimant's objective clinical findings were not consistent with Claimant's history and/or a work related mechanism of injury/illness. *Id*.

8. On July 28, 2021, Claimant underwent her first physical therapy session. (Rs' Ex. C, p. 31). During this encounter, Claimant reported, "shooting" pain in her left shoulder. *Id*. at p. 33. According to Claimant's report, her symptoms, including radiating pain and tingling would occur intermittently. *Id*. Claimant's symptoms were reportedly aggravated by movement and alleviated by rest. *Id*. Claimant exhibited no significant findings on palpation and observation, normal range of motion, normal muscle tone, and negative upper limb tension testing to the median, ulnar and radial nerves. *Id*. at 34. No objective musculoskeletal pathology was identified. (Rs' Ex. C, p. 31; Rs' Ex. E, p. 102). She was discharged that same day. *Id*.

9. On August 3, 2021, Claimant returned to Concentra and was evaluated by NP Livingston. (Rs' Ex. C, p. 38). Claimant reported that she was "kinda ok, kinda not". *Id.* She described persistent sensory symptoms in left arm, noting she woke up one morning with hard, heavy and weird tingling in the left arm. *Id*. According to Claimant, when she raised her arms away from her sides in the shape of a "T", an electrical sensation ran from arm to the other and back. She reported that she was still cleaning homes and one of her clients, who is a physical therapist, told her that her symptoms were emanating from her median nerve. NP Livingston explained that the majority of Claimant's symptoms were in the area of the ulnar nerve rather than the median nerve. *Id*. NP Livingston reiterated her opinion that the objective findings on exam in inconsistent with Claimant's history and/or a work related MOI. *Id*. at 41.

10. On August 20, 2021, Claimant returned to Concentra and was evaluated by Dr. Bradley. (Rs' Ex. C, p. 42). Dr. Bradley opined that the objective findings were not consistent with a work-related mechanism of injury. *Id*.

11. On August 23, 2021, Respondents filed a Notice of Contest, citing the need for further investigation into causation and the extent of the alleged injury. (Rs' Ex. B, p. 5).

12. On September 1, 2021, Claimant presented to Dr. Primack for an EMG. (Rs' Ex. D, p. 90). The evaluation of the left median motor nerve was within normal limits; however, the rest of the study was not completed secondary to Claimant's inability to tolerate even the lowest of electrical stimulation. *Id*. NP Livingston spoke with Dr. Primack following Claimant's EMG during which Dr. Primack informed her that with the first level of testing, Claimant was screaming, crying, and cursing. (Rs' Ex. C, p. 45). Consequently, Dr. Primack suggested that Claimant undergo a neuro-musculoskeletal ultrasound with emphasis on the median and ulnar nerves. *Id*., see also, Rs' Ex. D, p. 90.

13. On September 9, 2021, Claimant returned to Concentra and was evaluated by NP Livingston. (Rs' Ex. C, p. 56). She reported tingling in her left arm

down to her hand, which travelled to her right hand, and stabbing pain in the thoracic back area around the scapula. *Id*. She was assessed for situational mixed anxiety and depressive order. *Id*. at 58.

14. On September 23, 2021, Claimant returned to Concentra and was evaluated by Dr. Bradley. (Rs' Ex. C, p. 63). On physical exam, Claimant's left arm appeared normal with no tenderness, no muscle weakness, no atrophy, and no deformity. *Id*. at 69. Dr. Bradley noted that further treatment was not approved as the claim had been denied on August 23, 2021. *Id.* at p. 70. Dr. Bradley concluded that the objective findings were not consistent with a work-related mechanism of injury. *Id*. at 71. Although he did not indicate that Claimant was at maximum medical improvement (MMI), Dr. Bradley opined that Claimant did not require maintenance care, and had no permanent impairment. *Id*.

15. Dr. Bradley placed Claimant at MMI on September 30, 2021 without permanent impairment and without maintenance medical treatment needs. (Rs' Ex. C, p. 73).

Claimant's Independent Medical Examination (IME) with Dr. Burris

16. On December 14, 2021, Claimant presented to Dr. John Burris for a Respondent requested IME. (Rs' Ex. E, p. 93). She reported 5-6/10 pain, in a "circumferential glove-type distribution" throughout her left arm from the upper arm distally into all digits. *Id*. at 94. She reported an internal shaking sensation and a feeling as if her left hand was not part of her body. *Id*. She described jabbing/twisting pain and noted that while she is occasionally pain free, she experiences sharp, achy, shooting, burning, stabbing, tight, and pins and needles pain. *Id*. At times, the pain feels like hot water running over a cold hand. *Id*. She was unable to identify any alleviating factors and noted that her pain is worse with activity. *Id*.

17. According to Dr. Burris, Claimant demonstrated an extreme somatic focus during her IME. (Rs' Ex. E, p. 99). He described that she held her left arm in front of her body with the hand in a guarded claw-like position, but inconsistent with that posture repetitively the hand without difficulty to adjust her facemask. She was emotional and tearful throughout the examination. *Id.* When asked to make a fist with her left hand, Claimant balled the hand into a normal appearing loose fist and then began crying hysterically, stating that she could not make a fist. Physical examination of the cervical spine and left upper extremity were benign.

18. Follow his records review and physical examination, Dr. Burris opined that Claimant's pain complaints did not "follow a dermatomal pattern and [were] out of proportion to her examination which [was] benign with no objective findings". (Rs' Ex. E, p. 100). He explained that a "sudden exposure to an electrical current of significance usually results in direct tissue necrosis (i.e. skin burn or lesion) at the sites where the current enters and leaves the body". *Id.* Noting that Claimant's physical examinations had not exhibited objective signs consistent with significant electrical injury, i.e. burns or

abnormal EKG, Dr. Burris questioned whether an actual exposure to electrical current took place. *Id*. at p. 100-101. Assuming that Claimant had been shocked as she described, Dr. Burris concluded that the electrical exposure was "very minor" and did not result in "identifiable physical pathology. *Id*. at p. 101. Giving Claimant the benefit of the doubt that an exposure to an electrical current occurred, Dr. Burris testified that her original complaints could have been related to that exposure. *Id.* Nonetheless, Dr. Burris opined that her persistent symptoms more than five months after the reported incident and without evidence of physical pathology were likely unrelated to the July 21, 2021 incident and were probably psychosocial in nature. *Id*.

19. Dr. Burris opined that Claimant had reached MMI for the workplace event without impairment. (Rs' Ex. E, p. 102). Noting that a psychiatric referral had been made for "situational mixed anxiety and depressive disorder", Dr. Burris recommended 6-8 claim related maintenance psychological sessions to include cognitive behavioral therapy and (sic) assist with pain coping strategies. *Id*. at. P. 103.

Dr. Burris' Testimony

20. As noted, Dr. Burris testified at hearing. He was qualified as a Board Certified expert in Occupational Medicine. Dr. Burris testified that he has had experience in treating electrical energy injuries. (Tr. p, 30:15-19). In injuries associated with electrical energy, physical contact with an energized electrical circuit provides a pathway for electricity to traverse the body as it seeks ground. (Rs' Ex. E, p. 100). Factors influencing the severity of electrical injury include the voltage, amperage, current type, duration of contact, area of contact, pathway of the current through the body, and amount of tissue resistance. *Id*. Depending on the contact site and the pathway, the flow of electricity can cause damage to nerves, muscles, or major organs such as the heart, brain, eyes, kidneys, or gastrointestinal track. (Tr. p, 34:23-25; 35:1-7). Because exposure to an electric current of significance usually results in direct tissue necrosis (skin burn or lesion) at the sites where the current enters and leaves the body, (Rs' Ex. E, p. 100) a search must be made for both an entry and exit wound on the skin to determine the electrical pathway through the body. *Id*. Moreover, Dr. Burris testified that it is standard medical practice for patients sustaining any type of electrical exposure have an immediate EKG to assess damage to the heart. (Tr. p, 34:23-25; 35:1-7).

21. Dr. Burris testified that most tissue damage is related to the heat produced by the electric current and tissue resistance, which is largely influenced by the water content of the tissue. (Tr. p, 54:1-25). Dry skin is more resistant to electrical current, so the energy is dissipated at the skin resulting in skin burns. (Cl's Ex. 1, p. 4). The more resistant the skin, the less damage to internal structures of the body. *Id*.

22. Dr. Burris testified that the arm possesses three nerves that travel distally into the forearm and hand – the median, ulnar, and radial. (Tr. p, 32:13-25). The median nerve goes through the carpal tunnel and supplies sensation to the palm of the hand and the thumb, index and middle fingers. *Id*. The ulnar nerve has a similar tunnel at the elbow and supplies sensation to the little and ring fingers and the palmar side of the

hand. *Id*. The radial nerve supplies sensation to the backside of the hand. (Tr. p, 33:1-2). These nerves also innervate the muscles of the arm, and if there is a disconnect, such that the muscle is not getting the appropriate signal from the nerve, the muscle will waste away (atrophy). (Tr. p, 33:5-12). Dr. Burris testified that Claimant had no sign of atrophy and had normal muscle bulk and tone; normal reflexes, normal nerve function, and normal strength, signifying that her nerve and muscle function are intact. (Tr. p, 33:3-17).

23. Dr. Burris reiterated his opinion that because Claimant's treating providers did not document tissue pathology, the EKG was normal, and there were no entry or exit wounds, any exposure she had to an electric current would have been relatively mild. (Tr. p, 35:1-7; 40:4-22). Consistent with this opinion, Dr. Burris testified that if Claimant had experienced a significant exposure to electrical current resulting in tissue damage her pain would be relentless. (Tr. p, 48:22-25; 49:1-4). According to Dr. Burris, Claimant's description of waxing and waning symptoms and periods of being completely pain free supported a conclusion that a "psychological process" was contributing to her symptom complex. *Id.*

24. Dr. Burris testified that he disagrees with Dr. Primack's recommendation for a diagnostic ultrasound because Claimant's physical and neurologic examinations are normal. (Tr. p, 35:8-20). The purpose of the ultrasound would be to determine whether there is excessive inflammation around the nerves at the tunnels they traverse as they come out through the extremity. *Id*. In testing the median nerve as part of the EMG, Dr. Primack completed initial motor testing of the nerve. (Tr. p, 34:5-10). The testing revealed that the median nerve was normal. *Id*. As for the radial and ulnar nerves, Claimant's sensory and motor nerve testing revealed normal results suggesting that the radial and ulnar nerves are functioning normally. *Id*. Thus, there is no indication that an ultrasound is reasonable or necessary. *Id*.

25. Dr. Burris testified that, had Claimant been exposed to electrical energy, it is possible that it would have irritated the tissue and caused some redness and swelling as the body's natural response. (Tr. p, 38: 5-15). However, because the swelling and redness dissipated and was no longer documented after the first week post exposure, Dr. Burris testified that it could be inferred that it resolved. (Tr. p, 56:1-3).

26. Assuming that the statements contained in Claimant's Exhibit 1 come from a reputable source, Dr. Burris testified that he had no reason to question the material and actually agreed with much of the content read into the record from Claimant's Exhibit 1. (Tr. pp, 51-55).

27. As presented, the evidence, including the testimony of Dr. Burris, persuades the ALJ that Claimant sought treatment as a direct result of the pain, numbness, tingling, redness and puffiness (swelling) in her left arm after being exposed to electrical current on July 21, 2021. Accordingly, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury. While the evidence presented supports a finding that Claimant's left upper extremity

injury is compensable, the ALJ is convinced that Claimant's electrical exposure was relatively minor and probably did not cause the necessary tissue damage to explain her ongoing symptoms. Indeed, the evidence presented supports a finding that Claimant has normal muscle bulk, normal reflexes, normal sensation and normal strength in the left upper extremity. This suggests strongly that both the sensory and motor components of the nerves innervating the left arm are intact. When combined with the intermittent nature of Claimant's symptoms, the lack of abnormal examination findings supports a conclusion that psychosocial factors are playing a role in her persistent symptoms.

28. Based upon the evidence presented, the ALJ finds that Claimant has failed to establish that the recommended sonogram is reasonable or necessary. In finding that Claimant has failed to establish that the recommended sonogram is reasonable or necessary, the ALJ credits the testimony of Dr. Burris to find that Claimant's sustained symptoms are, more probably than not, related to her extreme somatic focus and psychosocial factors.

29. Based upon the evidence presented, the ALJ finds that the right to choose the physician to attend to the injuries in this case passed to Claimant. Moreover, the ALJ is persuaded that Claimant exercised her choice in medical providers by electing to attend medical appointments at Concentra Medical Centers with Dr. Bradley, NP Livingston and their referrals.

CONCLUSIONS OF LAW

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

Generally

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

B. In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). In this case, the ALJ rejects the suggestion that Claimant was not exposed to an electric current prompting her to seek treatment on July 23, 2021. While Dr. Burris questioned whether Claimant was actually exposed, no persuasive evidence was produced tending to establish that Claimant fabricated the MOI in this case. Moreover, Dr. Bradly's physical examination performed on July 23, 2021 demonstrated objective signs of injury including puffiness and redness on the left arm. Nonetheless, the testimony of Dr. Burris and Claimant's subsequent examinations, which fail to document objective findings consistent with tissue damage/pathology, support a conclusion that Claimant's electric shock was relatively minor and not the cause of her persistent symptoms. As found, the ALJ credits the testimony and opinions of Dr. Burris to conclude that Claimant's ongoing symptoms are likely being driven by an extreme somatic focus and psychosocial factors.

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

Compensability

D. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements before an alleged injury will be determined to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo.

1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, there is little doubt that Claimant's alleged injuries occurred during the time and place limits of her relationship with Employer and during an activity connected to her job-related functions, namely filling fast food orders at a drive through window. Accordingly, the ALJ concludes that Claimant has proven that she was in the course and scope of her employment at the time she was exposed to an electrical current causing pain, swelling and redness in the left upper extremity. While the evidence supports a conclusion that Claimant was in the course and scope of her employment, the remaining question is whether Claimant's injuries arose out of her work duties.

F. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra; Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

G. As found here, the content of the July 23, 2021 examination of Dr. Bradly supports a conclusion that Claimant had puffiness and redness in the proximal aspect of the left arm following her complaint of being exposed to electric current after touching an energized metal table while working to fill fast food orders at the drive through window at work. While it is unclear how the table became energized, Dr. Bradly's July 23, 2021, physical examination documents objective findings (redness and swelling) consistent with an electrical exposure. Based upon the evidence presented, the ALJ concludes that this MOI probably caused Claimant's initial subjective complaints of pain, weakness, tingling and cardiac symptoms (racing heart), which in turn prompted her to seek treatment on July 23, 2021. Dr. Burris could not think of a more likely explanation for Claimant's symptoms than the electrical shock. Moreover, when asked about the cause of the swelling and redness seen on July 26, 2021, Dr. Burris could not think of anything else besides the electrical shock that could have caused those objective findings. The evidence presented supports a conclusion that Claimant has established a sufficient "nexus" or causal relationship between her employment and the electric shock giving rise to her need for treatment.[2] Accordingly, the injury is compensable.

[2] Whether Claimant established the requisite causal connection between her work and her injuries is one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question*

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970);* § 8-41-301(1)(c), *C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

I. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, the evidence demonstrates that Claimant's physical examinations after July 26, 2021 were essentially normal and without objective findings consistent with pathology/injury. Despite the lack of any objective medical finding to explain her persistent symptoms, Claimant continued to report "weird" paresthesias and shooting pains in the left arm. During her IME with Dr. Burris, she complained of pain in a "circumferential glove-type distribution" throughout her left arm from the upper arm distally into all digits. She reported an internal shaking sensation and a feeling as if her left hand was not part of her body and described jabbing/twisting pain in the left arm. Her extreme somatic focus in the absence of any objective evidence of muscle or nerve damage led Dr. Burris to raise concern that psychosocial factors were driving her ongoing symptoms. Regarding the recommendation for sonographic analysis, the ALJ credits the testimony of Dr. Burris to conclude that Claimant's nerve function is, more probably than not, normal and there is an absence of objective pathology to support further diagnostic testing. Accordingly, the Claimant has failed to establish that the ultrasound recommended by Dr. Primack is reasonable or necessary.

Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

Right of Selection

J. Under § 8-43-404(5)(a)(I)(A), the employer or insurer has the right in the first instance to designate the authorized provider to treat a claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .” In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor."

K. An employer /insurer’s duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011). In this case, the evidence presented persuades the ALJ that Claimant reported her injury to Respondent-Employer the same day it occurred. The ALJ is also convinced that, Respondent took no action to designate a provider to attend to Claimant’s injuries following that report. Accordingly, the ALJ concludes that the initial right to select a provider to treat Claimant’s injuries passed to her. Based upon the evidence presented, including Claimant’s testimony that she “chose” to attend medical appointments at Concentra Medical Centers, the ALJ concludes that Claimant exercised her right of selection by choosing to treat with Dr. Bradly and NP Livingston. Indeed, the evidence presented supports a conclusion that Claimant attend multiple appointments at Concentra through September 23, 2021 when Dr. Bradley placed Claimant at MMI. Based upon Claimant’s designation, the authorized provider(s) in this case include Dr. Bradley, NP Livingston and their referrals, including Dr. Primack.

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she suffered a compensable left upper extremity injury on July 21, 2021.

2. Claimant's request for additional medical treatment in the form of diagnostic sonographic analysis is denied and dismissed as she failed to prove, by a preponderance of the evidwence, that such testing is reasonable or necessary.

3. Dr. Bradley, NP Livingston and their referrals, including Dr. Primack comprise the authorized providers in this case. Respondents are liable for Claimant's treatment with Concentra Medical Centers and Dr. Primack's offices though September 23, 2021 when Claimant was placed at MMI by Dr. Bradley.

4. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: April 7, 2022

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-181-279-001

ISSUES

1. Whether Claimant the right knee injury Claimant sustained on August 8, 2021 arose out of his employment with Employer, and is therefore compensable.

PROCEDURAL MATTERS

Claimant objected to Dr. Lesnak's deposition testimony on the ground that Dr. Lesnak provided opinions not disclosed in his report as required by C.R.C.P. 26(a)(2). However, the disclosure provisions of C.R.C.P. 26 are not applicable in workers' compensation cases. *See Wilkinson v. Colowyo Coal Co.*, W.C. No. 4-723-603 (ICAO Aug. 28, 2009); *Kelly v. Kaiser-Hill Co. LLC*, W.C. 4-332-063 (ICAO Aug. 11, 2000); *Bullock v. Continental Serv.*, W.C. No. 4-810-664 (ICAO Feb. 8, 2011). Accordingly, Claimant's objection is overruled.

STIPULATIONS

At hearing, the parties stipulated to the following, which were accepted by the ALJ:

1. If Claimant's injury is deemed compensable, Respondent is liable for reasonable and necessary medical treatment provided by Claimant's authorized treating physicians.

2. If Claimant's injury is found compensable, Respondent is liable for temporary partial disability benefits from August 8, 2021 to September 16, 2021.

3. If Claimant's injury is found compensable, Respondent is liable for temporary total disability benefits September 17, 2021 until November 19, 2021.

4. Claimant's average weekly wage is $812.82. (Claimant reserves the right to seek an increase in average weekly wage in the future if applicable).

FINDINGS OF FACT

1. Claimant has been employed by Employer for approximately two years. On August 8, 2021, while performing his job duties, Claimant was walking in the back area of Employer's store carrying a piece of cardboard from a display that had been dismantled to the cardboard baler. While walking, Claimant felt a "pop" in his right knee and fell, sustaining an injury to his right knee.

2. Exhibit C is a video of Claimant's injury. The video shows Claimant taking approximately 8-10 steps, most of which are obscured by the cardboard Claimant was

carrying or other objects in the screen. The video shows Claimant taking three visible steps with his right leg. The first step, Claimant moves from right to left across the screen and only the medial side of his right leg is visible. The next unobstructed view of Claimant's right leg is when he took one step away from the camera, during which his right leg appeared to flex laterally. Immediately upon taking the third visible step, Claimant grasped his right knee, and falls to the ground. The area where Claimant was injured was free of debris, dry and unobstructed. The cardboard Claimant was carrying did not appear to contribute to his injury.

3. Claimant credibly testified that when the injury occurred, he did not recall twisting his knee, stepping on anything, or slipping. Prior to August 8, 2021, Claimant had no injuries to his right knee, no symptoms and had not previously received treatment for his right knee.

4. Claimant saw Lori Long Miller, M.D., at Concentra on August 9, 2021. Claimant reported he was walking at work while carrying cardboard to a baler and felt a sudden pop in his right knee and fell to the floor, without slipping or tripping. Claimant was unable to bear weight and was using crutches. Claimant reported no prior knee injuries. On examination, Dr. Miller noted that Claimant's knee was swollen with diffuse tenderness over the anterior knee and in the popliteal fossa, limited range of motion, and crepitus on palpation. (Dr. Miller's note indicates that the examination was of the Claimant's left knee, but the ALJ infers that this was a dictation or typographical error based on the diagnosis of a right knee injury). Dr. Miller recommended an MRI and physical therapy for pain relief. (Ex. 4).

5. On August 10, 2021, Claimant had a right knee MRI performed. The MRI showed a "near complete radial tear involving the medial meniscus posterior horn root junction with associated meniscal extrusion." The MRI also showed a possible posterior cruciate ligament (PCL) sprain or reactive edema, and moderate joint effusion with a moderate amount of fluid in the joint. Finally, the MRI demonstrated tricompartmental osteoarthritis worse in the patellofemoral compartment and a full-thickness cartilage defect along the lateral trochlea. (Ex. 7).

6. On September 17, 2021, Claimant underwent a right knee surgery performed by Gregg Koldenhoven, M.D. Dr. Koldenhoven performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty tricompartmental. (Ex. 5).

7. On January 11, 2022, Claimant attended a medical examination by Lawrence Lesnak, M.D., at Respondents' request. Dr. Lesnak reviewed Claimant's medical records examined Claimant, and reviewed the video of Claimant's injury. In his report, Dr. Lesnak opined that Claimant did not sustain an industrial injury, based on his observation of the video of Claimant's injury. Specifically, Dr. Lesnak stated: "the acute pop that [Claimant] reportedly developed involving his right knee while he was walking during work hours on 08/08/2021, does not appear to have any industrial causation whatsoever." Dr. Lesnak's opinion was essentially that Claimant's injury did not "arise out of" Claimant's employment. To the extent Dr. Lesnak's opinion constitutes to a legal opinion that

Claimant did not sustain a compensable injury under the Act, it is outside the scope of his expertise and unpersuasive.

8. In deposition, Dr. Lesnak testified that Claimant's right knee MRI did not show any acute pathology, that his meniscal tear was pre-existing, and that the meniscal "extrusion" or "flap" got caught between the femur and tibia when his knee flexed while walking. He testified that based on the video, Claimant had "a very exaggerated kind of bowlegged gait with his right knee, which clearly indicates chronic pathology involving the right knee. I mean it is just not in alignment and not walking correctly." Dr. Lesnak also testified that Claimant "certainly had pathology that was causing an abnormal gait."

9. Dr. Lesnak's deposition testimony regarding Claimant's "abnormal gait" indicating chronic pathology was inconsistent with his previously-issued report. Specifically, in his report Dr. Lesnak stated that "Prior to the incident, [Claimant] was ambulating normally without any signs of gait antalgia or <u>any observable signs or symptoms involving his right knee whatsoever</u>." (Ex. B, p. 7)(Emphasis added). Moreover, the video evidence of the Claimant's injury shows no more that three visible steps, and only one step in which the Claimant's gait could reasonably be seen. The ALJ finds Dr. Lesnak's opinion that the Claimant's right leg gait "clearly indicates chronic pathology involving the right knee" to lack credibility, given that the video demonstrates only one step in which Claimant's right knee appeared to bow outward.

10. The ALJ finds Dr. Lesnak's opinion that Claimant's MRI and gait were indicative of a pre-existing meniscal tear, flap or extrusion that caught in his knee joint to be speculative and unpersuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the

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

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The evidence establishes that Claimant's injury occurred "in the course" of his employment. That is, it occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The issue before the ALJ is whether Claimant's injury "arose out of" his employment.

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

As the Colorado Supreme Court explained in *City of Brighton*, "All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks,

which are neither employment related nor personal." *City of Brighton*, 318 P.3d at 502. For the reasons set forth below, the ALJ concludes that Claimant's injury was the result of a neutral risk, because it was "attributable neither to the employment itself nor with the employee [himself]." *Id*.

Claimant's injury does not constitute an "employment risk" because the neither the physical condition of the area where Claimant was injured nor the specific activity of walking while carrying cardboard caused his injury. Although the Claimant's injury was captured on video, neither the video nor the testimonial evidence established that Claimant's injury was caused by a risk directly tied to the work itself. Claimant was merely walking carrying several light pieces of cardboard. Claimant testified that he did not slip, twist, or otherwise have an explanation for the injury.

Claimant's injury also does not fall into the category of "personal risks," which include purely idiopathic or personal injuries unrelated to employment. No credible evidence was presented that Claimant's meniscal tear was pre-existing, or that a pre-existing knee condition contributed to, or caused his injury. Claimant credibly testified that he had no prior right knee injuries, symptoms, or treatment. Dr. Lesnak's testimony that Claimant's gait "clearly indicates chronic pathology involving the right knee" is not credible, and his opinion that Claimant's meniscal tear was pre-existing and got caught in his knee is speculative and unpersuasive. The ALJ concludes that the cause of Claimant's injury is unexplained. Consequently, it falls within the "neutral risk" category of injury, and should be analyzed as such under *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

"Importantly, however, injuries stemming from neutral risks, whether such risks be an employer's dry and unobstructed stairs or stray bullets, 'arise out of' employment because they would not have occurred but for employment. That is, the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) Neutral risks are analyzed under the "but-for" test. The "but for" test provides that an injury from a neutral risk 'arises out of' employment 'if it would not have occurred but for the fact that the conditions and obligations of employment placed the claimant n the position where he was injured." Id.

Here, Claimant was engaging in an employment function, carrying cardboard to a baler while walking in the rear of Employer's store where the injury occurred. But for his employment, Claimant would not have been walking when and where he was walking when the injury occurred. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee on August 8, 2021.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right knee arising out of the course of his employment with Employer on August 8, 2021.

2. Respondent is liable for reasonable and necessary medical treatment provided by Claimant's authorized treating physicians.

3. Respondent is liable for temporary partial disability benefits from August 8, 2021 to September 16, 2021.

4. Respondent is liable for temporary total disability benefits September 17, 2021 until November 19, 2021.

5. Claimant's average weekly wage is $812.82.

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

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

DATED: April 7, 2022

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

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant works as social learning program director and mental health clinician at the Colorado Mental Health Institute in Pueblo. She suffered admitted injuries on December 29, 2020 when a patient punched her in the face. Her physical injuries included a zygomatic arch fracture and a neck injury. She also developed post-traumatic stress disorder (PTSD).

2. This was the second time Claimant had been assaulted at work. On October 13, 2018, an inmate punched her in the mouth and knocked out most of her teeth, which required extensive dental reconstruction. She also received chiropractic treatment and acupuncture. After completing treatment, she had some residual mouth soreness but no ongoing pain. She was put at MMI on November 20, 2019 with no permanent impairment and no restrictions. The ATP opined she might require future dental care depending on her ongoing symptomology. Respondent filed a Final Admission of Liability (FAL) on August 25, 2020 admitting for medical benefits after MMI.

3. Claimant worked without limitation until the December 2020 assault. There is no persuasive evidence she received any additional treatment related to the 2018 injury in the interim.

4. Claimant was seen at the Parkview Medical Center emergency department on December 29, 2020. She described sharp, throbbing pain over the right side of her face. She was having difficulty opening her mouth fully because of pain. A CT scan showed a right zygomatic arch fracture. She was given pain medication and advised to eat soft food pending follow-up with an ENT specialist.

5. Employer referred Claimant to Dr. Terrance Lakin for authorized treatment. At her initial appointment, on December 30, 2020, Claimant reported severe facial pain and headaches. Physical examination showed signs and symptoms consistent with TMJ. Dr. Lakin referred her back to Dr. Thomas, who performed the dental implants for to the 2018 injury.

6. On January 11, 2021, Dr. Esperanza Salazar performed an open reduction surgery for the zygomatic arch fracture.

7. On January 28, 2021, Nurse Emily Rogers in Dr. Lakin's office noted Claimant was still having "pretty bad headaches." She also documented cervical tension and trigger points in the occipital region and trapezius, worse on the right. Ms. Rogers referred Claimant for massage therapy.

8. Claimant started having panic attacks in February 2021. She was referred to Dr. Herman Staudenmayer, a psychologist.

9. Dr. Thomas found no damage to Claimant's implants but thought she was probably having TMJ issues. He recommended Botox injections and evaluation by a dentist who specializes in treating TMJ.

10. Claimant saw Dr. Elmer Villalon for the TMJ on March 6, 2021. Claimant explained she had some residual jaw "popping" from the 2018 assault, but her jaw issues were much more significant after the 2020 incident. Dr. Villalon recommended a splint and therapy.

11. Claimant was evaluated by Dr. Michael Sparr on April 12, 2021. Dr. Sparr diagnosed a cervical strain, persistent cervical facet dysfunction, severe occipital neuralgia, and associated headaches. He opined the diagnoses were "directly related" to the December 2020 work injury. He recommended occipital nerve blocks and trigger point injections.

12. Claimant's last documented appointment with Dr. Villalon was on May 3, 2021. Claimant did not think the splint was helping much. She was using the splint a couple of hours during the day but was struggling to use it at night. Although her symptoms were similar, there was some improvement with her jaw motion. She was also complaining of some neck soreness. Dr. Villalon recommended a physical therapy evaluation.

13. Claimant received approximately two months of chiropractic treatment from Dr. Donald Dressen. The treatment provided limited benefit.

14. On May 6, 2021, Kelsey Walls PA-C in Dr. Sparr's office documented persistent cervical facet dysfunction, myofascitis with trigger points, and occipital neuralgia. She referred Claimant to a different chiropractor at Pueblo Chiropractic to provide treatment in conjunction with additional injections.

15. Claimant followed up with Ms. Walls on May 19, 2021. Ms. Walls noted,

> Unfortunately, she has not been able to transition her care to Pueblo Chiropractic so that we may resume her trigger point injections knowing that deep tissue work will be performed following. Her first round of trigger point injections were followed by chiropractic manipulation only with no massage provided afterwards. This led to only short-term benefit from the injections. In light of this, we will defer trigger point injections today. Once she has established at Pueblo Chiropractic we will have her return to the clinic to finish her last remaining 3 rounds of trigger point injections.

16. No additional records from Dr. Sparr's office and no records from Pueblo Chiropractic were submitted at hearing.

17. On June 3, 2021, Dr. Salazar released Claimant from treatment for the zygomatic arch fracture. He recommended she continue TMJ treatment with Dr. Villalon.

18. Claimant received a course of psychological treatment with Dr. Gutterman, Dr. Staudenmayer, and William Beaver. Her last appointment with Dr. Staudenmayer was on June 9, 2021. He noted her mood and affect had been more stable recently but she was still showing residual effects of the trauma. She had recently resumed work involving patient contact, which triggered anxiety. Claimant also expressed "frustration and disappointment over continued physical problems." Dr. Staudenmayer indicated he would follow up with Claimant in July "to assess her coping mechanisms" after she had worked full-time for a longer period.

19. Claimant saw Dr. Lakin on June 4, 2021. Claimant stated Dr. Villalon had "canceled last minute," but she would try to reschedule. She thought she had received some benefit from treatment with Dr. Villalon even though "she does not have great interactions" with him. Dr. Lakin opined Claimant was approaching MMI and would probably have permanent impairment. He further opined,

> I anticipate appropriate medical maintenance would be with Dr. Villalon for TMJ follow-up for 6-12 months. If she is not pleased with Dr. Villalon perhaps consider Dr. Scott or Dr. Philson. Also Dr. Dressen chiropractor 8 visits in 6 months and Dr. Gutterman in follow-up for 6-12 months if Dr. Gutterman desires. Also trigger [sic] Salazar ENT follow-up only as needed for 2 years.

20. Claimant participated in a functional capacity evaluation (FCE) on August 12, 2021. She reported continued neck pain, jaw pain, difficulty chewing, headaches, and balance issues. Claimant demonstrated the ability to perform sedentary to sedentary-light lifting activities and no bending because of neck pain and dizziness. She was able to perform upper extremity activities on a frequent basis, except for overhead reaching.

21. Dr. Centi placed Claimant at MMI on September 8, 2021 with a 14% whole person rating for her cervical spine. Dr. Centi opined Claimant required no ongoing treatment.

22. Respondent filed an FAL on October 29, 2021 admitting for the 14% rating. The FAL denied medical benefits after MMI based on Dr. Centi's report.

23. On December 21, 2021, Dr. Dressen responded to an inquiry from Claimant's counsel regarding maintenance medical needs. Dr. Dressen opined,

> Sporadic chiropractic/P.T. care for this patient would prevent recurrences. This would be supportive care in [sic] the patient's injuries per [sic] related to her W/C injury. Dental care also needs some consideration.

24. Claimant testified credibly at hearing regarding her ongoing injury-related symptoms and limitations. She credibly testified she would like the opportunity to follow-

up with authorized medical providers to see what, if any, treatment may be available to relieve the effects of her injury.

25. Claimant proved a probable need for future treatment to relieve the effects of her injury or prevent deterioration of her condition.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of her injury. Claimant had serious injuries and remains symptomatic more than a year after the accident. Dr. Lakin and Dr. Dressen's opinions regarding treatment after MMI are credible and more persuasive than the contrary opinion of Dr. Centi. Claimant is entitled to a general award of reasonably necessary medical treatment after MMI.

ORDER

It is therefore ordered that:

1. Respondent shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury and prevent deterioration of her condition.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition

to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 8, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-162-929-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that his occupational disease arose out of, and in the course of, his employment.

STIPULATIONS

If found compensable, the parties agreed that Claimant is entitled to temporary total disability (TTD) benefits beginning January 3, 2021 until terminated by law. Respondents reserved the right to later raise the defense that Claimant was responsible for his termination of employment effective the date of his resignation, October 13, 2021. The parties stipulated to a base average weekly wage (AWW) of $1,057.04, with an increase to $1,629.68 as of August 1, 2021 due to COBRA.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant was employed by Employer as a jail deputy from July 30, 2020 to October 13, 2021. Claimant's duties included performing head counts to ensure all the inmates were present, doing status walks, delivering food, and keeping peace within the jail. Claimant had nearly constant contact with others while working. His usual work day began at approximately 5:45 a.m. and ended at 6:00 p.m. (Tr. 14:12-22, 16:15-24).

2. In December 2020, Claimant was in training and worked with a Field Training Officer (FTO) each day. Claimant and the FTO would work side-by-side throughout the shift. (Tr. 36:20-37:12).

3. Claimant credibly testified that on December 30, 2020, after completing his shift, he developed a dull headache over his eyes. Claimant testified that at the time, he did not attribute it to anything other than a headache. Claimant's next shift was scheduled for January 4, 2021. (Tr. 32:20-33:3).

4. On or about Thursday, December 31, 2020, Claimant's wife started to exhibit COVID-19 (COVID) symptoms. There was no evidence presented at hearing regarding the specific symptoms Claimant's wife began to exhibit on December 31, 2020. According to Claimant, his wife progressively got worse over the next few days. She lost the ability to taste and smell, had a headache, body aches, a cough and a runny nose. She scheduled a COVID test for the morning of January 3, 2021. (Ex. I).

5. At 10:49 a.m. on January 3, 2021, Claimant emailed Employer to notify human resources and his supervisors of his wife's condition, and that she was awaiting her COVID test results. He also said "[t]he only symptom that I have had thus far is a headache." He asked if he should report to work the following day, or stay home. Claimant did not mention that he first developed a headache on December 30, 2020. (Ex. I).

6. Claimant credibly testified that he sent another e-mail, later in the day on January 3, 2021, to tell his Employer that he was now "experiencing symptoms" and was going to get a COVID test the next day, January 4, 2021. (Tr. 22:11-23:7). Neither party produced a copy of this e-mail, but Sergeant JH[redacted] credibly testified that Claimant contacted him later in the day on January 3, 2021, to inform him that he was experiencing flu-like symptoms similar to his wife. (Tr. 60:7-14).

7. Claimant took a COVID test on January 5, 2021. Claimant's COVID test came back positive. (Tr. 23:23-24:3). His wife's test, however, came back negative. Claimant's wife did not take a second COVID test. (Tr. 23:19-22).

8. Claimant contacted Sergeant JH[redacted] to inform him of his positive COVID test. Claimant told Sergeant JH[redacted] he believed he contracted the virus while at work. Sergeant JH[redacted] acknowledged that this was possible. (Tr. 62:1-12).

9. Sergeant JH[redacted] told Claimant to contact human resources and complete the necessary workers' compensation paperwork. Claimant followed the 14-day protocol that was in place and stayed home. Claimant and Sergeant JH[redacted] communicated approximately once a week. Claimant credibly testified that he informed Sergeant JH[redacted] that he had not received a response from human resources regarding the workers' compensation paperwork, so Sergeant JH[redacted] sent it to him. (Tr. 24:4-25:3).

10. The Notification of Injury was completed on or about February 8, 2021. (Ex. B).

Potential Workplace Exposure

11. Claimant testified that the COVID protocol at the jail in December 2020 was for employees to wear the standard-issued uniform, gloves and a mask while searching cells. Claimant testified that he and his fellow employees wore masks they brought from home. These masks varied from cloth masks to gaiters. Claimant further testified that he wore his N95 mask when dealing with uncooperative inmates during booking. (Tr. 14:23-15:21).

12. Deputy MG[Redacted] is a jail deputy, and a FTO. Deputy MG[redacted] testified that he wore his N95 mask, along with gloves and glasses when going into the isolation/quarantine unit at the jail. (Tr. 49:15-16).

13. The inmates were required to wear cloth masks that they had made. (Tr. 16:25). Both Claimant and Deputy MG[redacted] credibly testified that the jail personnel routinely had to admonish the inmates to correctly wear their masks because they would pull them down. (Tr. 16:6-11 and 50:18-25).

14. According to Respondents' employment records, he worked December 15, 16, 17, 20, 21, 22, 27, 28, 29 and 30, 2020. (Ex. D). Claimant believes he most likely contracted COVID on or around December 28, 2020, when he worked in the isolation/quarantine unit. (Tr. 27:15-18)

15. On December 28, 2020, Deputy MG[redacted] worked with Claimant in the 1-North housing area for the entire shift. The 1-North housing area was split into two pods, NA and NB. The NA pod had 16 rooms that held 32 inmates. The NB pod had 32 rooms, and held 64 inmates. (Tr. 40:10-17). When not in contact with the inmates, the two deputies worked together in a mini control room that was separated from the jail population by a 3-4-foot wall with glass up to the ceiling. The deputies were completely enclosed except when the door was opened. (Tr. 40:10-41:23). The deputies did not wear masks while in the mini control room or while on breaks. (Tr. 73:3-9).

16. The NB pod of 1-North housed a transitional population. The transitional population held new inmates for 14 days to see if they became symptomatic. If the inmates were not symptomatic, they would be moved into the general population pod. (Tr. 41:24-42:17).

17. The NA pod of 1-North housed an isolation/quarantine population. (Tr. 47-48). This was one of several isolation/quarantine pods within the jail. (Tr. 34:20-35:1). Isolated inmates were those that the medical staff identified as either exhibiting symptoms of, or who had tested positive for, COVID. The quarantine population were those inmates that were in close contact with someone who either exhibited symptoms of, or tested positive for, COVID. Isolated and quarantined inmates were housed in individual cells. (Tr. 62:13-63:22). Deputy MG[redacted] did not recall if any of the inmates were symptomatic or had tested positive for COVID on December 28, 2020. (Tr. 43:18-23).

18. Deputy MG[redacted] credibly testified that he and Claimant would be in the inmate areas throughout the facility including the cells and day rooms. They had regular contact with the inmates during status checks and food delivery. They also had contact with the inmates when they took them into and out of the day rooms. (Tr. 43:24-46:12).

19. Deputy MG[redacted] and Sergeant JH[redacted] both testified that when conducting cell searches in the isolation/quarantine unit, the deputies wore safety glasses, gloves, a "medical gown" and N95 masks. (Tr. 49:15-20 and 63:25-64:14). When serving meals the deputies would go door-to-door, opening each door, handing the inmate their food, and then closing the door and moving on. The inmates in the isolation/quarantine unit would be let out individually in 30-minute increments for 90 minutes per day. (Tr. 48:4049:14).

20. Deputy MG[redacted] testified that he did not remember whether he wore an N95 mask on December 28, 2020. (Tr. 57:7-10).

21. Sergeant JH[redacted] tested positive for COVID on January 11, 2022. (Tr. 64:21-25). He believes he contracted the virus during a meeting in a small office with an FTO, who knowingly did not feel well and had COVID symptoms. They were in close proximity for about 45 minutes and did not wear masks. (Tr. 70:3-21).

22. Sergeant JH[redacted] testified he was in contact with the pods where Claimant worked. He would check in on the FTO office by the quarantine unit and give occasional breaks to the jail deputies. (Tr. 65:1-8).

23. The CDC reported multiple COVID outbreaks in the [Employer facility Redacted] between December 8, 2020 and January 6, 2021. Of the individuals that contracted COVID, 17 were inmates and 18 were staff members. (Ex. 1).

Potential Household and Community Exposure

24. Claimant lives with his wife and three children. He credibly testified that his wife and children had been home since December 18, 2020, because his children were out of school for winter break. (Tr. 20:2-22).

25. Prior to December 18, 2020, Claimant's wife periodically worked outside of the house. On the days Claimant's wife was at work, the only person she was in contact with was the owner of the insurance agency where she was employed. Claimant's wife worked remotely from home as of December 18, 2020. (Tr. 20:23-21:5).

26. Claimant credibly testified that neither he nor his family participated in any activities outside the home, other than work and school. (Tr. 20:6-14).

27. Claimant's children were required to wear masks while in school and none of the children exhibited COVID symptoms, nor did they ever test positive for COVID. (Tr. 21:6-8).

28. Claimant credibly testified that the only person outside of his wife and children that came into his home was his mother-in-law. She was in his home December 24 and December 25, 2020. Claimant's mother-in-law had been in isolation prior to spending Christmas with Claimant's family. (Tr. 21:7-22 and 33:24-34:4).

29. Claimant credibly testified that the only thing he did outside of work was to pick up groceries. Claimant ordered groceries on-line. The grocery store worker would put the groceries in the trunk of his car. Claimant's contact with the grocery worker was momentary while the worker handed Claimant his receipt. (Tr. 21:9-15 and 33:15-23).

Expert Opinions

30. Marcus Oginsky, M.D., is board-certified in internal medicine and utilization management. He also practices outpatient medicine with three detention centers in the Denver Metro Area. (Ex. 2)

31. At the request of Claimant, Dr. Oginsky issued a report dated October 17, 2021. In his report, Dr. Oginsky discussed the characteristics of COVID, and the differences between community transmission, household transmission and workplace transmission. (Ex. 1).

32. Dr. Oginsky testified, via deposition, on February 9, 2022. He testified that "[i]t is usually impossible to designate that Person A gave [COVID] to Person B." (Dep. Tr. 9:15-17) Because of this it is necessary to establish the probability that the infection occurred in a certain environment. (Dep. Tr. 9:8-17). He indicated the amount of time you spend with a person in a closed environment increases the probability of contracting COVID from that exposure (Dep. Tr. 12:6-9).

33. With respect to community transmissions, Dr. Oginsky opined that while it is possible to contract COVID by chance encounters while in the community, such as the grocery store, the probability of doing so is exceedingly low. (Ex. 1 and Dep. Tr.12:22-13:21).

34. In December 2020, Claimant's time in the community was limited to picking up groceries. Dr. Oginsky opined that the probability of Claimant contracting COVID from a community transmission was low. (Dep. Tr. 13:22-14:6).

35. In contrast to a community transmission, the probability of a household transmission is high. If members of a household have COVID, the probability of others in the household contracting the infection is high. This is due to the close proximity of people, generally without masks, for longer periods of time. (Ex. 1 and Dep. Tr. 14:14-25).

36. Dr. Oginsky testified, however, that it is highly improbable that Claimant's home was a source of his infection because his wife tested negative for COVID[1], and none of Claimant's children contracted COVID. (Dep. Tr. 15:11-23).

37. Dr. Oginsky cited statistical data from the CDC reporting the attack rate in correctional environments to be about 72% for inmates, and 20-30% for jail personnel. (Dep. Tr. 19:10-24). Dr. Oginsky credibly testified that the CDC has reported extensively that the correctional environment is a high-risk environment for COVID transmission. (Dep. Tr. 62: 1-5).

[1] The date Claimant's wife began exhibiting COVID-like symptoms is irrelevant because her COVID test was negative.

38. Dr. Oginsky analyzed the probability of Claimant contracting COVID in the community, home and workplace. He noted the low probability of community and home transmission. In comparison to these environments, he opined that the highest probability of transmission of COVID to Claimant was in the workplace. (Ex. 1 and Dep. Tr. 29:5-8 and 56:6-17).

39. Robert Watson, M.D., is board certified in occupational medicine, and he holds a master's degree in public health. At the request of Respondents, Dr. Watson performed an IME to address issues related to Claimant's COVID diagnosis and causation. Dr. Watson issued his IME report on June 9, 2021. (Ex. A).

40. Dr. Watson testified, via deposition, on February 9, 2022. He credibly testified that it is effectively impossible to determine who might have transmitted the virus to Claimant. (Transcript pg. 9:9-21). Dr. Watson credibly testified that he agrees with Dr. Oginsky that it is impossible to identify where a transmission occurred. (Dep. Tr. 19:7-8).

41. Dr. Watson agreed with Dr. Oginsky that the concentration of the COVID virus was higher in the jail than in the community. (Dep. Tr. 17:20-24). He also agreed that household transmission could be as high as 60 to 80 percent. (Dep. Tr. 19:9-12).

42. Dr. Watson credibly testified that despite Claimant's wife's negative test results, it should not be assumed that she did not have COVID because she exhibited symptoms that were very much consistent with COVID. (Dep. Tr. 20:1-18). He further opined that in people at a high risk for having COVID, false negatives may be as high as 50%. (Dep. Tr. 21:20-22:4). Dr. Watson testified that it is more likely that Claimant's wife transmitted COVID to Claimant, rather than any other source (Dep. Tr. 25:17-20).

43. Both Dr. Oginsky and Dr. Watson credibly testified that it is impossible to identify who transmitted COVID to Claimant. They disagree, however, as to the environment where Claimant likely contracted COVID. While both Dr. Oginsky and Dr. Watson provided credible testimony, Dr. Oginsky was more persuasive.

44. Claimant's only community interaction in December 2020 involved a brief encounter with a grocery store worker. Based on the low attack rate in the community, and Claimant's limited activity in the community, the ALJ finds that it is not probable that Claimant contracted COVID through a community transmission.

45. In contrast, the attack rate in the home environment is high, 60-80%. There is no evidence, however, that anyone in Claimant's household, other than Claimant, contracted COVID in late December 2020. While Dr. Watson credibly testified that Claimant's wife exhibited symptoms of COVID, this testimony is not persuasive because Claimant's wife's tested negative for COVID. There is no objective evidence that Claimant's wife had COVID in late December 2020. Based on these facts, the ALJ finds that it is not probable that Claimant contracted COVID through a household transmission.

46. A correctional environment is a high-risk environment for COVID transmission, and this in fact occurred at the jail in December 2020 when there was an active COVID outbreak. Additionally, often the inmates did not properly wear the cloth masks they made, and the deputies did not wear masks while on break or while working in small quarters in the mini control room. Claimant worked consistently in the jail the last few weeks of December, and on December 28, 2020, he worked in the isolation/quarantine unit of the jail. Based on these facts, the ALJ finds that it is more probable than not that Claimant contracted COVID in late December 2020, while in the course of his employment.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish compensability, an employee must prove by a preponderance of the evidence that his injury or occupational disease arose out of the course and scope of employment with his employer. §8-41-301(1), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). The Act defines "occupational disease" as

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14), C.R.S. The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *Boulder*, 706 at 786*; Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. The Supreme Court stated "[a]n activity arises out of and in the course of employment when it is sufficiently interrelated to the conditions and circumstances under which the employee generally performs his job functions that the activity may reasonably be characterized as an incident of employment, although the activity itself is not a strict employment requirement and does not confer an express benefit on the employer." *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210 (Colo. 1996).

Claimant developed a headache, a known COVID symptom, on December 30, 2020 after his shift ended. (Findings of Fact ¶ 3). Claimant's symptoms worsened on January 3, 2020, and he tested positive for COVID on January 5, 2020. Although Claimant's wife exhibited symptoms of COVID beginning December 31, 2020, she tested negative for COVID, and no one in Claimant's household contracted COVID during this time. (Id. at ¶¶ 6-7). It is not probable that Claimant contracted COVID through a household transmission. (Id. at ¶ 45).

The only place Claimant went outside of the home and the workplace was to the grocery store. He would order groceries on-line and pick them up. His only interaction with the grocery store worker was when the worker handed him the receipt. (Id. at ¶ 29). It is not probable that Claimant contracted COVID through a community transmission. (Id. at ¶ 44).

Between December 8, 2020 and January 6, 2021, there were multiple reported outbreaks of COVID at the jail. Of the individuals infected, 17 were inmates and 18 were staff members. (Id. at ¶ 23). A correctional facility, such as the jail, is a high-risk environment for COVID transmission. (Id. at ¶ 37). The deputies at the jail did not wear their masks when working closely together in the mini-control room and when on breaks. (Id. at ¶ 15). The inmates routinely pulled down their masks and did not properly wear them. (Id. at ¶ 13). Claimant worked 12-hour shifts for ten days between December 15 and 30, 2020. On December 28, 2020, Claimant worked in the isolation/quarantine unit. (Id. at ¶ 14). It is more probable than not that Claimant contracted COVID in late December 2020 while in the course of his employment. (Id. at ¶ 46). Claimant has proved by a preponderance of the evidence that he suffered a compensable injury in the course of his employment.

ORDER

It is therefore ordered that:

1. The claim is found compensable. It is more probable than not that Claimant contracted COVID in the course of his employment, while performing his duties as a jail deputy.

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

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

DATED: April 8, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable right shoulder injury in the course and scope of his employment on April 16, 2021.

IF CLAIMANT ESTABLISHED A COMPENSABLE SHOULDER INJURY

II. Whether Claimant proved by a preponderance of the evidence that the right reverse total shoulder arthroplasty performed by authorized treating physician ("ATP") Rudy Kovachevich, M.D., on December 14, 2021 was automatically authorized; in the alternative, is the proposed arthroplasty reasonable, necessary, and related to the April 16, 2021 work injury.

III. Whether Claimant established by a preponderance of the evidence an average weekly wage ("AWW') of $581.90, based upon his gross earnings in 2020 divided by 52 weeks, which wage comports to a temporary total disability ("TTD") rate of $387.93.

IV. Whether Claimant established by a preponderance of the evidence an entitlement to TTD benefits from December 14, 2021 ongoing until terminated pursuant to statute.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 5, 2021 on the issues of compensability, medical benefits that are reasonable, necessary and related to the injury, causation of the injury, average weekly wage, and entitlement to TTD benefits. Claimant also listed a penalty of automatic authorization for the surgery under W.C.R.P. Rule 16-7 alleging Respondents' denial of the requested surgery occurred more than 10 business days after the request was submitted to Insurer.

Respondents filed a Response to the November 5, 2021 Application for Hearing on November 17, 2021 citing issues of relatedness, preexisting condition, reasonable and necessary medical benefits, and average weekly wage.

Both Claimant and Mark Steinmetz, M.D., who was accepted as an expert in occupational medicine and as a Level II accredited provider, testified in this matter.

STIPULATION

The parties stipulated that the medical providers at Colorado Occupational Medical Partners including Dr. Matthew Lugliani, PA-C Tom Chau and Dr. David Rojas and those at the Orthopedic Centers of Colorado including Sean Griggs, M.D., and Rudy Kovachevich M.D., were authorized treating providers.

The stipulation is approved and ordered by this ALJ.

FINDINGS OF FACT

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

1. Claimant is a 67-year-old parts deliver worker for Employer since 2012. He would pick up parts from Employer and deliver them to retail customers. The parts would include tires or other parts. Claimant stated that he had some minor symptoms with regard to his right shoulder prior to his date of injury.

2. Claimant was seen by his primary treating provider, Dr. John Draper of Ponderosa Family Physicians for near yearly checkups or routine general medical examinations. On April 7, 2014 Dr. Draper noted that Claimant was seen for follow up of hypothyroidism diagnosed a year before. At that time, Claimant complained of right shoulder pain for the prior two months but did not report any specific injury. Dr. Draper found no crepitance, no atrophy, no muscle asymmetry, no capsular winging, no swelling, full active range of motion, no tenderness of the acromioclavicular joint, full strength of all rotator cuff groups, found all stability tests negative and had no impingement signs. Dr. Draper found some arm weakness and referred Claimant for six visits of physical therapy.

3. Claimant's next visit to Dr. Draper was on May 18, 2015 who documented that the PT did not help his shoulder but that his right shoulder problems "now is all resolved." Over three years later, on September 27, 2018 Claimant stated that he had no issues with the shoulder upon Dr. Draper's query and declined further evaluation with regard to the shoulder. Dr. Draper stated that he found no issues on incidental shoulder exam. On October 2, 2019 Claimant again returned to his physician for a regular physical and follow up. Dr. Draper noted Claimant had persistent pain in his right shoulder but no change in symptoms and there was no examination or diagnosis. Further, Claimant denied any muscle aches, painful joints or weakness. The last physical prior to the injury was October 19, 2020. While Dr. Draper did not document any complaints of upper extremity symptoms, he ordered an x-ray. In fact, his general exam of the extremities indicates that there was no clubbing, cyanosis or edema and that Claimant denied any muscle aches, painful joints or weakness. The x-ray ordered by Dr. Draper was read by Dr. Eduardo Seda on October 23, 2020 and stated Claimant had normal soft tissue, glenohumeral joint space, and acromioclavicular joint. His impression was mild glenohumeral osteoarthritis.

4. On Friday, April 16, 2021 Claimant was loading a tire from the dock onto his truck, trying to control the lift from the right to the left at approximately chest level into the bed of the truck, when he heard a pop in his shoulder and subsequently had a sharp pain in his shoulder joint going down his deltoid and bicep. Claimant obtained a picture of his right bicep following the incident and the image showed a very large bruised area along the deltoid and biceps muscle of the right arm. Further, following the incident, the pain in the shoulder became constant, with right shoulder swelling through the weekend.

5. Claimant reported the incident to his immediate supervisor, the dispatcher, Jamie. Claimant did not request medical attention at that time. During the weekend, the

pain increased and was preventing him from lifting his arm further than chest or shoulder height.

6. Claimant had a regularly scheduled physical on the following Monday, April 19, 2021 at Ponderosa Family Physicians and advised his physician, Dr. John B. Draper, that he started having right shoulder pain three days earlier. He noted that there was swelling above the area of bruising, but there was also a defect in the biceps. Upon examination of the right upper arm he found a palpable defect in the biceps and tender to palpation at the site, though strength remained good. He specifically stated that Claimant had had consistent problems for some time, and that they had obtained an x-ray that showed no issues, but because there was swelling and bruising present, he ordered an MRI of the upper arm to rule out an abnormal mass. He noted that Claimant had had recurrent bruising. [On August 6, 2021, Dr. Draper added an addendum stating he received a call from Claimant's spouse to correct the medical record from "three episodes last year" to "incident occurred three days prior."]

7. Claimant reported his injury to another supervisor, the store manager, at Employer immediately following his appointment with Dr. Draper and advised that he was scheduled for an MRI through his private insurance on April 29, 2021.

8. Respondents filed issued an Employer's First Report of Injury (FROI) stating that Claimant had reported the work-related injury on April 16, 2021. The report indicates that Claimant "was delivering tires, lifted tire off the truck, he got bruised on his R arm." The report seems to have been completed by Insurer on May 11, 2021.

9. On April 29, 2021 Claimant underwent an MRI for the "Upper Extremity and Non Joint W/WO" at Health Images. Dr. Steven Ross found full thickness supraspinatus and infraspinatus tendon tears and moderate grade partial thickness tear subscapularis tendon with medial tendon retraction estimated at 4.5 cm, some glenohumeral joint effusion and moderate grade partial thickness tear of the subscapularis tendon. He noted that the biceps tendon and biceps muscles were intact. Dr. Ross recommend a dedicated MRI of the right shoulder for further evaluation.

10. The store manager did not do anything until after Claimant received the MRI information about the torn rotator cuff. Claimant credibly testified that after receiving an explanation of the resulting MRI he returned to Employer and indicated that treatment would need to be pursued through the workers' compensation system. Claimant was sent to Colorado Occupational Medical Partners, the authorized treating providers.

11. Claimant's first visit with the designated provider in the workers' compensation system occurred on May 13, 2021 where authorized treating provider, physician's assistant (P) Thanh Chau, took a history that Claimant was a right-hand dominant 66 year old male Driver for Employer for many years, presenting for a new patient visit for right shoulder and upper arm pain that occurred about 4 weeks prior. Claimant stated that he was lifting a heavy tire and described pushing with his right arm across his body when he felt a pop and sudden pain in his upper arm. Claimant advised that this occurred at the end of his shift on Friday. He was able to rest over the weekend and presented to his PCP on Monday, April 19. An MRI was ordered, and this was completed on April 29. Claimant clarified that he had not seen any other medical providers

since. He was hoping that his symptoms would improve. Claimant reported decreased strength in his right shoulder as well as decreased motion. He did not have any pain down into his elbow or wrist. No distal numbness or tingling. Claimant denied any previous injuries to his right shoulder. On exam of the left shoulder, Mr. Chau found Claimant was tender to touch at the anterior shoulder, deltoid and bicep head. He found decreased range of motion, and strength, and Claimant was unable to resist abduction and had pain throughout motion. PA Chau indicated that he was able to pull the MRI scan that was done on April 29, 2021 and that it reflected a full thickness tear of the supraspinatus and infraspinatus. Mr. Chau stated that the objective findings were consistent with history and work-related mechanism of injury, recommended referral to the orthopedic specialist, Dr. Griggs, and Claimant was placed on temporary work restrictions.

12. Mr. Chau consulted with Dr. Griggs on May 25, 2021 and Claimant was referred for an MRI of the right shoulder without arthrogram.

13. On May 25, 2021 Claimant was evaluated at Orthopedic Centers of Colorado by ATP Sean Griggs, M.D., from a referral by PA Chau. He took a history of present illness. He noted that Claimant was a right hand dominant 67-year-old male who presented for an evaluation of the upper extremity. Claimant complained of sudden onset of the right upper extremity injury, which occurred on April 16, 2021 at work. Claimant reported that he had was lifting a tire at work, felt a pop in his arm and had now developed weakness and difficulty with overhead reaching. Claimant described symptoms as moderate to severe and worsening. The pain was described as shooting and a burning sensation. The symptoms occurred constantly and Claimant denied any prior treatments for the shoulder or significant pain or dysfunction prior to the injury.

14. Dr. Griggs performed a musculoskeletal examination that showed limited forward elevation of the right shoulder, positive external rotation lag sign of the right shoulder compared to left, a positive abdominal compression testing on the right shoulder compared to left, and a positive Popeye sign on the right. Dr. Griggs diagnosed right shoulder injury with massive rotator cuff tear which may be acute on chronic versus completely acute. He noted that Claimant had a long head biceps rupture but also had a massive tear. He stated that he would like to obtain a shoulder MRI so that the muscle bellies could be evaluated to determine if there was any evidence of chronicity to the tear such as significant atrophy. This would help to determine his ability to repair the rotator cuff.

15. On May 27, 2021 Claimant returned to PA Chau who noted that Claimant had no significant improvement. He did see the orthopedist, Dr. Griggs on Tuesday, May 25. He agreed with Dr. Griggs regarding a referral for a dedicated right shoulder MRI scan. This was placed that same day on May 25 and were still awaiting approval.

16. Mr. Chau placed Claimant on restrictions of no lifting, reaching overhead or reaching away from the body and no use of the right arm. These restrictions were continued in subsequent status reports by Mr. Chau, Dr. Matthew Lugliani, and Dr. David Rojas through the last report available dated November 23, 2021, which included no commercial driving.

17. On June 1, 2021, Claimant had the second MRI which reflected a massive rotator cuff tear with complete disruption of the supraspinatus and infraspinatus as

well as a biceps pulley injury with dislocation of the bicep tendon out of the bicipital groove and associated partial subscapularis tearing. Dr. Brian Cox also noted degenerative disease of the acromioclavicular and glenohumeral joints.

18. On June 3, 2021 Claimant returned to Dr. Griggs, who found significant weakness with resisted external rotation on the right compared to the left, positive abdominal compression and moderate acromioclavicular joint arthritis. Dr. Griggs provided a diagnosis of acute on chronic massive rotator cuff tear of the right shoulder. He advised Claimant that there was some evidence that he had a chronic tear prior to this new injury. The new injury was to the subscapularis and the biceps now is dislocating. Claimant was given several options including total reverse arthroplasty but Claimant elected to proceed with the arthroscopic rotator cuff repair.

19. It was Dr. Griggs' opinion that the Claimant had suffered "a traumatic complete tear of the right rotator cuff" which required surgery and on June 3, 2021 Dr. Griggs submitted a request for right arthroscopic rotator cuff superior capsule reconstruction, possible bicep tenodesis ("repair right rotator cuff'), and subacromial space decompression and acromioplasty.

20. On June 10, 2021 Claimant returned to Mr. Chau who noted that reevaluation for his right shoulder showed a massive rotator cuff tear. On exam he found complaints of right arm and shoulder pain with aching, burning, stabbing and sharp pain. He found weakness and loss of range of motion. He advised Claimant to continue his current restrictions of no use of the right arm and no reaching away from the body or overhead with the right upper extremity. He documented that Dr. Griggs had recommended surgery, felt that this was an acute on chronic rotator cuff tear and that Claimant was awaiting authorization for surgery.

21. After Dr. Griggs' request for surgery was received by Respondents on June 9, 2021, Respondents had Claimant's claim peer reviewed by Mandy Flores, D.O., who noted that a formal objective physical examination report was not provided and neither was the official radiology report regarding the right shoulder, so she gave the opinion that the request for right shoulder arthroscopic rotator cuff repair was not medically necessary.

22. On June 11. 2021 Insurer advised Dr. Griggs that the requested surgery was denied.

23. On July 6, 2021 Claimant reported to ATP Chau who noted that Claimant was there for reevaluation and stated that his shoulder pain was worsening. He reported that Claimant had continued working and that Employer was providing him assistance in the shop but not when he was making the deliveries so the pain was increasing. He was having problems lifting, pulling, reaching out and reaching up. Claimant had not heard back regarding surgery authorization recommended by Dr. Griggs. The clinic had been trying to contact Dr. Griggs's office to get an update but were advised that Dr. Griggs had been out of town. Mr. Chau also reported that Claimant had been in contact with Insurer who advised Claimant that an independent medical examination (IME) was being scheduled.

24. On June 22, 2021 Hand Surgery Associates, on behalf of Dr. Griggs, submitted a second surgical request for the right shoulder surgery.

25. On July 13, 2021 Dr. Flores, M.D., issued a report that the right shoulder arthroscopic rotator cuff superior capsular reconstruction, possible biceps tenodesis was medically necessary. Dr. Flores stated that the Guidelines indicated that in cases of rotator cuff tear "options would include arthroscopic or open debridement and/or repair. In cases with extensive rotator cuff tear, preservation of the coracoacromial ligament is recommended to prevent instability." Dr. Flores specifically documented as follows:

> In this case, the injured worker was seen regarding injury to the shoulder after lifting up a tire and feeling a pop. Examination showed near symmetric elevation of the shoulders, negative external rotation lag, there was significant weakness with resisted external rotation of the right shoulder compared to the left, and neurologically the injured worker was intact. Reviewed MRI of the right shoulder on 6/01/2021: demonstrated massive rotator cuff tear with disruption of the supraspinatus and infraspinatus, disruption of the superior edge of the subscapularis, biceps the injury with dislocation of the bicep tendon out of the bicipital groove, and moderate acromioclavicular joint arthritis with glenohumeral joint disease. There was also mild supraspinatus atrophy, moderate-to severe atrophy of the infraspinatus, and mild atrophy of the subscapularis. As examination demonstrated significant weakness with resisted external rotation, as formal MRI report documented mild supraspinatus atrophy, moderate-to severe atrophy of the infraspinatus, and mild atrophy of the subscapularis.

Dr. Flores recommended that request for right shoulder arthroscopic rotator cuff superior capsular reconstruction, with possible biceps tenodesis be certified.

26. On July 13, 2021 Insurer's Utilization Management Team sent Dr. Griggs and Claimant a Notice of Approval and Modification advising that the requested surgery was certified as medically necessary and appropriate.

27. On July 14, 2021 Respondents requested a Rule 16 letter from Marc Steinmetz, M.D. Respondents' provided Dr. Steinmetz with Dr. Flores' report denying surgery but did not provide him with the second report by Dr. Flores dated July 13, 2021, certifying the surgery as reasonably necessary. Dr. Steinmetz's record review noted that he did not have the PCP records available, that he had "incomplete medical records," and that because the issue of causation was not clear at that time, the recommended surgery and ice machine were not reasonable or necessary. The notation at the bottom of the report indicate that the report was dictated on July 12. The notation at the top of the report indicated that the "Date of Exam" was July 14, 2021. This ALJ infers that date of exam really meant the date when the report was issued.

28. Dr. Steinmetz's report of July 14, 2021 was clearly more than 10 days after the June 22, 2022 request by Dr. Griggs for surgery, as well as, the July 13, 2021 notification to Dr. Griggs, certifying the surgery. It was unclear from Dr. Steinmetz testimony why he was contacted and why he was not provided with complete records.

29. On September 30, 2021 Claimant presented for a Respondent requested IME with Dr. Steinmetz who, after reviewing the records, was still of the opinion that Claimant's history was inconsistent, "changed over time," "was unreliable," and that Claimant's condition was chronic and preexisting, therefore, surgery should be denied.

30. On October 26, 2021 Division Director Paul Tauriello issued a Director's Order for Respondents to file an admission or denial in the matter within fifteen (15) days

of the order or be subject to penalties.

31. Dr. Griggs evaluated Claimant on November 17, 2021 and stated that Claimant had the surgery scheduled but it was cancelled. He noted that Claimant continued to have problems with is shoulder, though the physical therapy had helped. His musculoskeletal examination showed limited active forward elevation of the right shoulder compared to left, pain to impingement maneuvers of the right shoulder, weakness of the right shoulder compared to left and active forward elevation on the right is to about 100 degrees compared to 160 on the left. Dr. Griggs noted that based on Claimant's previous MRI findings and the time from his last evaluation it was likely that Claimant had further atrophy of the muscles and he was not sure that Claimant would be a candidate for surgical repair of the cuff any longer. Dr. Griggs stated that typically at Claimant's age and with the size of tear and the existence of atrophy of the muscle bellies another option would be a reverse prosthesis. Claimant reported having significant difficulty with the shoulder and wanted to now discuss reverse arthroplasty, so Dr. Griggs referred him to Dr. Rudy Kovachevich, an orthopedic specialist for joint replacements in his office.

32. Respondents filed a Notice of Contest on November 19, 2021.

33. Claimant was evaluated by Dr. Kovachevich on November 22, 2021. Dr. Kovachevich documented a history of injury that was consistent with Claimant's reports to other providers, that Claimant had some deformity in his anterior arm concerning for a bicep rupture, difficulty raising his arm, and Dr. Griggs evaluated him for a massive rotator cuff tear with some atrophy. Due to the nature of his injury, he was referred to Dr. Kovachevich for discussion of reverse total shoulder arthroplasty. He noted ongoing pain in the shoulder and dysfunction with movement and use as well as weakness. The symptoms continued to persist and had not really improved with conservative care. Claimant noted pain at nighttime sleeping as well. On exam Dr. Kovachevich noted Claimant had weakness of his active forward elevation, external rotation weakness and that internal rotation was limited. Dr. Kovachevich advised Claimant he had only two choices, to continue with conservative care, living with his current level of functioning or proceed with a reverse total shoulder arthroplasty. Claimant requested the surgery. Imaging studies were performed and revealed evidence of mild ligament arthritis with superior migration of the humeral head.

34. In addition, on November 23, 2021 Matthew Lugliani, M.D., at the Colorado Occupational Medical Partners, gave the opinion "I do not agree with the IME's evaluation and treatment suggestions. Patient can very well have had a preexisting condition which was accelerated through his work activity."

35. Claimant followed up with Dr. Kovachevich's office on December 6, 2021 for a preoperative evaluation. PA Madelyn Stein documented that Claimant continued to have traumatic complete tear of the rotator cuff and following assessment of right chronic shoulder pain and weakness determined Claimant was an appropriate surgical candidate for the reverse arthroplasty of the right shoulder, which she indicated was scheduled for December 14, 2021 at Swedish Orthopedic Center.

36. Claimant underwent surgery with Dr. Kovachevich on December 14, 2021 for the right reverse total shoulder arthroplasty. Claimant was instructed to keep the

shoulder immobilizer sling in place and that the dressings would be removed within 5 days.

37. Up until this point, Claimant had remained under temporary work restrictions, which the Employer accommodated. Following surgery, Claimant was unable to return to work.

38. Dr. Kovachevich examined Claimant on December 23, 2021 and noted that Claimant had some pain, as expected, but was to proceed with therapy, was already off the stronger pain medication and would be reassessed within four weeks. X-rays showed stable reverse arthroplasty in good alignment and position.

39. Dr. Kovachevich again attended Claimant on January 24, 2022 noting that, overall, Claimant was doing well, making progress regarding range of motion function with therapy, tolerated gentle passive and mild active motion of the shoulder, had been tolerating his sling and had no acute issues of note.

40. Respondents' expert Steinmetz issued an addendum report on January 27, 2022 affirming his previous opinions following further record review. Dr. Steinmetz testified consistent with his records.

41. Respondents' expert Steinmetz agreed that the surgery performed by Rudy Kovachevich, M.D., who was a referral from Dr. Griggs, was a reasonable and necessary surgery but took issue with it being related to the events of April 16, 2021, as he believed the surgery was not causally related. Dr. Steinmetz, however, gave the opinion on cross-examination that Claimant had not returned to his baseline condition, as his condition was "progressively worsening" but still maintained that the underlying need for the surgery was not related to the events of April 16, 2021.

42. Claimant continues to be off work following surgery, has not been released from care and has not been returned to modified-duty. Claimant indicated that the surgery he underwent has provided relief for pain and has given him more range of motion. He has had a reasonably good result and continued to progress as expected.

43. In 2020 Claimant earned $30,258.98, which divided by 52 weeks provides an average wage of $581.88. Respondents provided a thirteen week calculation resulting in an average wage of $528.06. However, if the wages earned by Claimant from pay period ending April 14, 2020 through pay period ending April 13, 2021, which is a period of 52 weeks, the average weekly wage is calculated at $552.04. As found, $552.04 is a fair approximation of Claimant’s earnings and is his average weekly wage in this matter.

44. As found, Claimant has shown that he was injured in the course and scope of his employment with Employer. Clearly, Claimant had occasional pain in his right shoulder, however, the fact that Claimant continued to perform work that was challenging, lifting materials, such as tires at awkward levels into vehicles, is persuasive to this ALJ. As found, Claimant had an aggravation of his preexisting degenerative condition of his right shoulder and bicep, causing massive rotator cuff tear and bicep tear following the pop while lifting the tire on the job.

45. Dr. Lugliani's and Dr. Grigg's opinions are more persuasive than the contrary opinion of Dr. Steinmetz whose opinion relies, in part, upon his view that Claimant's history was inconsistent. As found, after full reviewed of the records in

evidence, the Claimant's history is consistent. Although Claimant may have had aches and pains prior to April 16, 2021, those aches and pains in his right shoulder were intermittent, went away and there were no work restrictions prior to the events of April 16, 2021. As found, Claimant was performing his regular job where he was lifting tires and delivering them without any limitation. As further found, Claimant would lift the tires at shoulder level and depositing them into his truck and while Claimant was lifting a tire into his truck, he felt a pop and pain in his arm which was the proximate cause of his aggravation of the underlying degenerative disease and a specific incident causing the complete tear of his rotator cuff tear and bicep injury.

46. Also persuasive were the records of different providers at Colorado Occupational Medical Partner who completed Physician's Report of Workers' Compensation Injury forms (WC164), all of which indicate that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. Further, while some of the tears may have been chronic, the Orthopedic Centers of Colorado reports by Dr. Griggs opining that the need for surgery was due to an "acute on chronic massive rotator cuff tear" are also persuasive over the contrary opinion of Dr. Steinmetz.

47. As found, Claimant was initially projected to have an arthroscopic rotator cuff repair pursuant to Dr. Griggs' initial recommendations on June 22, 2021. However, by November 17, 2021 Dr. Griggs noted that based on Claimant's previous MRI findings and the time from his last evaluation it was likely that Claimant had further atrophy of the muscles and he was not sure that Claimant would be a candidate for surgical repair of the cuff any longer. As found, due to the delay in authorization and the denial of the claim, Claimant's tears continued to progress, the degenerative process was seriously accelerated by the work related injury of April 16, 2021 and the tissue retracted as opined by Dr. Griggs, necessitating a more invasive procedure as recommended by Dr. Kovachevich for a total reverse right shoulder arthroplasty. Finally as found, the procedure performed by Dr. Kovachevich was reasonably necessary and related to the April 16, 2021 work related claim.

48. As found, Claimant continued to work for employer until the date of his surgery on December 14, 2021 under Dr. Kovachevich. Claimant is temporary totally disabled as of December 14, 2021 and is entitled to temporary disability benefits. This is supported by the fact that Claimant continues to be under his provider's care and, as of the date of the hearing, continues to engage in physical therapy and continues to use the arm immobilizer pursuant to medical recommendations.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which she seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances

of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo.

App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, the medical records, Claimant's testimony, and the opinions of Dr. Lugliani, Mr. Chau, Dr. Rojas, Dr. Griggs and Dr. Kovachevich are more persuasive than the contrary opinion of Dr. Steinmetz. Claimant has shown that he was injured in the course and scope of his employment with Employer. While Claimant had occasional complaints of intermittent pain in his right shoulder before the work related injury, the fact that Claimant continued to perform his work without limitations, lifting supplies like tires at awkward levels into vehicles is persuasive to this ALJ. As found, Claimant had an aggravation of his preexisting degenerative condition of his right shoulder and bicep.

Dr. Lugliani's and Dr. Grigg's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition. In contrast, Dr. Steinmetz's opinion relied upon his view that Claimant's history was inconsistent, which was not persuasive. As found, although Claimant had intermittent aches and pains, Claimant had no limitation, and had a significant aggravation causing the complete tear of the rotator cuff and bicep tear on April 16, 2021. As found, the pop in his arm and shoulder on April 16, 2021 was the proximate cause of Claimant's disability and need for medical care, causing the aggravation of the underlying degenerative disease and a specific incident causing the complete tear of his rotator cuff tear and bicep injury. This is supported by the ATP status reports which all indicate that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. As found, while some of the tears may have been chronic, Dr. Griggs' opinion that the need for surgery was due to an "acute on chronic massive rotator cuff tear" was persuasive over the contrary opinion of Dr. Steinmetz. Claimant has shown by a preponderance of the evidence that Claimant sustained a work related on April 16, 2021 in the course and scope of his employment with Employer, aggravating his underlying degenerative right shoulder condition.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this April 16, 2021 work related injury. As found, Claimant was initially projected to have an arthroscopic rotator cuff repair pursuant to Dr. Griggs' initial recommendations on June 22, 2021. However, by November 17, 2021 Dr. Griggs noted that, based on Claimant's previous MRI findings and the time from his last evaluation, Claimant had further atrophy of the muscles and was no longer a candidate for surgical repair of the cuff. As found, due to the delay in authorization and the denial of the claim, Claimant's tears continued to progress, the degenerative process was seriously accelerated by the work related injury of April 16, 2021 and the tissue retracted, necessitating a more invasive procedure as recommended by Dr. Kovachevich for a total reverse right shoulder arthroplasty. Finally as found, the procedure performed by Dr. Kovachevich was reasonably necessary and related to the April 16, 2021 work related claim, as Claimant continued to complain of limitations and inability to continue to tolerate the symptoms caused by the work related injury. Claimant has proven by a preponderance of the evidence, that the need for the reverse total right shoulder arthroplasty was causally related to the April 16, 2021 work related injury within a reasonable degree of probability.

C. Failure to Comply with W.C.R.P. Rule 16-10

Claimant requested a determination with regard to authorization of the surgery recommended by Dr. Griggs, an authorized treating provider. Claimant reasons, first, that the surgery is automatically authorized under the Division rules as Respondents failed to deny or authorize the surgery within 10 days. Secondly, Claimant argues that the surgery is reasonably necessary and related to the work injury of April 16, 2021.

The parties agreed that Dr. Griggs and Dr. Kovachevich are authorized treating physicians. On June 22, 2020, Dr. Griggs requested prior authorization to proceed with a right arthroscopic rotator cuff superior capsular reconstruction, possible biceps tenodesis, as reasonably necessary and related to the April 16, 2021 work-related accident. Dr. Griggs provided Respondents with the proposed date of surgery programed for August 4, 2021. There is a notation on the faxed form that the document was sent to one department and potentially then faxed to the Utilization Review Department. The records or testimony do not show when Respondents received the request but that they must have received the request by July 13, 2021, as Dr. Flores approved the certification for the surgery. The question here is whether the surgery was automatically approved by Respondents' failure to respond or whether Claimant must prove by a preponderance of the evidence that the surgery was reasonably necessary and related to the injury.

W.C.R.P. Rule 16-7(B), in effect as of the request for prior authorization on June 22, 2021, states that Respondent have ten (10) business days to comply with certain provisions.[1] The pertinent W.C.R.P. are W.C.R.P. Rule 16-7 (2021), Rule 16-7-1(B) (2021) and Rule 16-7-2 (2021).

As found, Claimant was injured in the course and scope of his employment, Respondents conceded the authorized treating physician requested prior authorization

[1] As of January 1, 2021 this rule changed from 7 to 10 days of receipt of the complete request.

for the surgery. From the start of Claimant's treatment with Dr. Griggs on May 25, 2025, Dr. Griggs anticipated that the complete rotator cuff tear, which was aggravated by the work related trauma, would probably require a surgery, if conservative care measures were unsuccessful. However, as of November 19, 2021 Respondents filed a Notice of Contest in this claim and had no obligation to comply with the requirements of prior authorization rules. Further, this issue is moot, as Claimant did not proceed with the arthroscopic procedure requested by Dr. Griggs but had a total reverse arthroplasty of the right shoulder, which was found to be reasonably necessary and related to the injury as stated above.

B. Average Weekly Wage

49. An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from pay period ending April 14, 2020 through pay period ending April 13, 2021, which is a period of 52 weeks. As found Claimant's fair approximation of his average weekly wage is $552.04. Claimant has failed to show that the average weekly wage should be calculated using wages from 2020 alone, as Claimant was injured on April 16, 2021.

C. Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning

capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits from the date of his surgery on December 14, 2021 until terminated by law. Claimant sustained a work related injury on April 16, 2021 that caused a disability lasting more than three work shifts and caused him to leave work and lose wages following the surgery. Claimant was severely incapacity at the time of the hearing and continued to use an arm immobilizer, causing continued wage loss. Claimant has not been placed at maximum medical improvement by an authorized treating provider nor has he returned to modified or regular employment. Claimant has shown that it is more likely than not that Claimant is disabled and entitled to receive indemnity benefits as a cause of the work injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a compensable work related aggravation of his preexisting degenerative condition, causing injury to his right shoulder and upper extremity on April 16, 2021 within the course and scope of his employment.

2. Respondents shall pay for Claimant's reasonably necessary and related medical benefits as provided by the stipulated authorized treating providers, including the right shoulder reverse total arthroplasty performed by Dr. Rudy Kovachevich on December 14, 2021.

3. Claimant's fair approximation of his average weekly wage is $552.04.

4. Respondents shall pay for temporary total disability benefits as of December 14, 2021 at the rate of $368.03 per week until terminated by law.

5. Respondents shall pay interest at the statutory rate of eight percent on all amount not paid when due.

6. All matters not determined here are reserved for future determination.

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

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

DATED this 11th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on April 12, 2021?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of his work injury?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits?

- If Claimant has proven he sustained a compensable injury, what is Claimant's average weekly wage ("AWW")?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that Respondent was uninsured for workers' compensation benefits at the time of the injury?

- Whether Respondent has proven by a preponderance of the evidence that Claimant's actions at the time of his injury constituted horseplay and/or a substantial deviation from employment duties thereby removing the incident from being a compensable workers' compensation injury?

- Whether Respondent has proven by a preponderance of the evidence that Claimant willfully violated a safety rule and is subject to a reduction of workers' compensation benefits pursuant to Section 8-42-112(1)(b)?

FINDINGS OF FACT

1. Claimant was hired as a farmer for Employer on April 5, 2021. Claimant's job duties included performing weed mitigation at a specific location in the open area in front of an abandoned cabin within Bureau of Land Management ("BLM") land. Employer is an organic and biodynamic farm with property that borders BLM land. Employer has rights to graze cattle on the adjoining BLM land. In order to obtain and maintain the organic farm certifications, Employer cannot use herbicides on its own land, and the animals cannot be exposed to herbicides on the BLM land. In order to prevent herbicides from being used by the BLM on the BLM lands where the animals

will be, Employer had to take the on responsibility of manual weed mitigation. In order to do this, Employer retained specialists to catalog the types and locations of weeds that needed to be mitigated in the BLM areas used by Employer. Employer then created a plan to mitigate in each specific location. The first location for this project was the location in front of the abandoned cabin that Claimant was assigned to work on April 12, 2021.

2. Claimant testified at hearing that he was assigned the task of weed mitigation since he started working for the employer. Claimant was informed by his supervisor, who Claimant identified as "O[redacted]", that his job was to pull weeds for the near future. Claimant testified that he was to work with a pick axe and shovel to pull weeds on the BLM land, most often on his hands and knees. Claimant testified that prior to the date of injury, all of his work was weed mitigation.

3. Respondent admitted at hearing that as of April 12, 2021, they did not maintain workers' compensation insurance.

4. In order to get to the area where he was assigned to perform weed mitigation, Claimant was provided a side-by-side ATV (hereinafter referred to as a "Razor" as testified to at hearing}. Claimant testified that on April 12, 2021, after waiting for about an hour at the farm, he drove the Razor toward the designated area in front of the cabin to pull the weeds. Claimant testified that when he was driving on the trail to the location, he came across two hunters that were walking back towards the cabin where he was heading to work. Claimant testified he stopped the vehicle and spoke to the hunters because he was concerned that he was going to be working in the area they were hunting. Claimant testified that he informed the hunters where he was working.

5. Claimant testified he tried to call O[redacted], but he did not have cell service. Claimant testified he later encountered O[redacted] and a coworker on the trail, and informed O[redacted] about the hunters. Claimant testified that O[redacted] told him that the hunters did not have permission to be on the property. Claimant testified that O[redacted] told Claimant that if he saw the hunters, he should tell them that they did not have permission to be on the property

6. Claimant testified that he, O[redacted], and the employee who was riding with O[redacted], returned to the farm, and worked there for about an hour. Claimant testified that he was not given any instruction on whether or how to interact with the hunters. Claimant testified that he then drove back up to the cabin site with the other employee, whose name he could not recall. Claimant testified that he then received a cell phone call from O[redacted] telling him he needed to get a tarp and some rocks to cover the weeds they were picking at the cabin site. Claimant testified that he left the other employee at the cabin, and then used the Razor to go back down to the farm to retrieve a tarp and some rocks.

7. Claimant testified that on the way back to the cabin, he again saw the

hunters and he decided that he wanted to go tell the hunters that they did not have permission to be on the property. Claimant testified he was going uphill when he made a left turn on the trail that was leading up to their location, heard the rocks shift in the back and the Razor rolled over.

8. Claimant testified that after the accident, he went to get help from his co-worker, but his coworker told him that he didn't want anything to do with it and walked away. Claimant testified that the hunters came down to the accident scene to help Claimant and called O[redacted]. Claimant testified that O[redacted] eventually came to the scene and Claimant apologized to O[redacted]. Claimant was then taken to the hospital. Claimant testified he was going only 5-10 miles per hour when he was driving on the trail before he entered the corner and was navigating the left hand turn at 5 miles per hour when the Razor rolled. Claimant testified he was wearing his seat belt at the time of the accident.

9. Claimant testified at hearing that as a result of the accident, he broke his collarbone.

10. The accident in this case occurred approximately 500 feet beyond the designated weed mitigation site, off the trail while Claimant was driving in the direction away from the designated weed mitigation site.

11. LH[Redacted] testified at hearing. Mr. LH[Redacted] is Claimant's coworker who was working with Claimant at the weed mitigation site near the cabin when the accident occurred. Mr. LH[Redacted] testified that he no longer works for Employer. Mr. LH[Redacted] testified that April 12, 2021 was his first day of work for Employer. Mr. LH[Redacted] testified that he was assigned to work with Claimant on that day, picking weeds in a designated area in front of an old, run down miner's cabin about 10 minutes into the BLM land.

12. Mr. LH[Redacted] 's testimony was consistent with Claimant's regarding the earlier events of the day, including that Claimant met Mr. LH[Redacted] and O[redacted] in the morning on the trail and Claimant informed them about his discussion with the hunters. Mr. LH[Redacted] testified, however, that he did not hear O[redacted] tell Claimant to confront the hunters and tell them they were not supposed to be on the property.

13. Mr. LH[Redacted] testified that after meeting Claimant and O[redacted] on the trail, Claimant drove the Razor to the weed mitigation site and Mr. LH[Redacted] was the passenger. Mr. LH[Redacted] testified Claimant was driving pretty recklessly and smoking a hash pen while driving.

14. Mr. LH[Redacted] testified that he was to work at the weed mitigation site from 9:00 a.m. until 11:00 a.m. Mr. LH[Redacted] testified that after working for some time in front of the cabin, Claimant left the weed mitigation site, got in the Razor, and returned to the farm to get more materials, leaving Mr. LH[Redacted] at weed mitigation on his own. Mr. LH[Redacted] testified that at approximately 11:20 a.m., Claimant came back, but drove past

the cabin and deeper into the BLM land without stopping at the weed mitigation site. Mr. LH[Redacted] testified Claimant was having a good time and driving too fast as he passed the weed mitigation site and proceeded further into the BLM land. Mr. LH[Redacted] testified that his understanding was that there was no work-related reason for Claimant to be driving past the cabin and into the BLM land at that time.

15. Mr. LH[Redacted] testified that he was on his hand and knees picking weeds and talking to his mom on his phone, when a few minutes later, he heard yelling in the distance and saw Claimant coming toward him down the path. Mr. LH[Redacted] testified Claimant said at that point that an animal had jumped in front of him. Mr. LH[Redacted] testified he went with Claimant and saw the Razor flipped in an open field. Mr. LH[Redacted] testified Claimant did not state that he was trying to get to the hunters.

16. Mr. LH[Redacted] testified he and Claimant tried to flip over the Razor, but could not get it flipped onto its wheels. Mr. LH[Redacted] testified Claimant told him Claimant was going to lose his job and wanted to get the Razor back down to the cabin. Mr. LH[Redacted] testified that he then walked back to the cabin and waited for O[redacted]. Mr. LH[Redacted] testified he walked back to the crash site a couple of times to check on Claimant and saw the hunters had come to check on Claimant as well. Mr. LH[Redacted] testified O[redacted] eventually arrived at the cabin and they proceeded to where the Razor had rolled over. Mr. LH[Redacted] testified that he, Claimant and the hunters flipped the Razor back over and O[redacted] took Claimant to where the paramedics were.

17. Mr. LH[Redacted] testified that he did not abandon Claimant at the accident site and attempted to help Claimant tum the razor over, but was unable to do so. Mr. LH[Redacted] testified he took a picture of the Razor after the accident. A copy of the picture was entered into evidence at hearing. Mr. LH[Redacted] 's testimony is found to be credible and persuasive. It is noted by the ALJ that Mr. LH[Redacted] no longer works for Employer and is an independent witness in this case.

18. O[redacted] O[Redacted] testified for respondents. Mr. O[Redacted] confirmed that he received a call from Mr. LH[Redacted] informing him of the accident, and that he then proceeded to gather the people and material he needed to respond. Mr. O[Redacted] confirmed there was a conversation early in the day about the hunters, but denied ever giving Claimant directions to seek out the hunters and tell them they had to leave. Mr. O[Redacted] stated that Claimant was not doing anything that was of benefit to Employer at the time he rolled the Razor. Mr. O[Redacted] testified that he had informed Claimant about Employer's rules regarding speed limits for the off-road vehicles and about seat belts. Mr. O[Redacted] testified that he also discussed that the use of safety belts was mandatory in the off road vehicles.

19. Mr. O[Redacted] testified that he drove Claimant down from the roll-over location in his vehicle. Mr. O[Redacted] testified that Claimant told him at the time of the incident that he had not been wearing his restraints. Claimant explained to Mr. O[Redacted] on the drive that he could not wear the seat belt because he could not figure out how to

put it on. Mr. O[Redacted] took photographs and video after the incident, showing that the seat belt was not defective. Mr. O[Redacted] 's testimony is found credible.

20. Claimant was transported to Valley View Hospital after the incident where he underwent x-rays and CT scans which showed no acute fractures. The x-ray of Claimant's shoulder showed a mild widening of the AC joint with slight elevation of the distal end of the clavicle relative to the acromion. Claimant was discharged by the ER doctor who noted that they did not see any injuries to his chest, lungs, ribs, head, neck or right arm, but advised Claimant to follow up with his doctor for a possible MRI which could reveal a rotator cuff tear.

21. Claimant was examined by Dr. Copeland on April 14, 2021. Dr. Copeland noted the cervical spine and head CT did not show any acute changes. Dr. Copeland noted that the shoulder x-ray was consistent with a grade 1 AC shoulder separation, with no sign of fracture. Claimant was referred for an MRI of the shoulder which demonstrated a partial rotator cuff tear.

22. None of the physicians in this case and none of the diagnostic records indicate that Claimant broke his collarbone as a result of the injury. The testimony of Claimant that he broke his collarbone as a result of the accident is found to be not credible.

23. Claimant was examined by Dr. Lorah on April 21, 2021. Dr. Lorah reviewed the x-rays and MRI and diagnosed Claimant with a partial thickness rotator cuff tear. Notably, Dr. Lorah's records document a significant discussion with Claimant regarding the accident and Claimant's use of a seat belt. According to Dr. Lorah's medical records, Claimant reported to Dr. Lorah that he was not wearing his seat belt due to the fact that the seat belt was non-operational. Claimant reported to Dr. Lorah that he had told his boss prior to the accident about the seatbelt.

24. The ALJ finds the testimony of Claimant to be not credible. Claimant's testimony was contradicted at hearing by Mr. LH[Redacted] , Mr. O[redacted] and the medical records entered into evidence. Claimant's testimony with regard to the speed that he was traveling prior to the accident in this case was specifically contradicted by the credible testimony of Mr. LH[Redacted] who witnessed Claimant pass him immediately prior to the accident. Mr. LH[Redacted] 's testimony with regard to Claimant's actions operating the Razor are found to be consistent and credible.

25. The ALJ finds that Respondents have established that it is more likely than not that Claimant was engaged in horseplay that represents a deviation from his employment with Employer at the time of the industrial accident. The ALJ credits the testimony of Mr. LH[Redacted] with regard to Claimant's actions on the Razor prior to the accident and finds that Claimant was, more likely than not, joy riding in a reckless fashion when the injury occurred.

26. The ALJ specifically rejects Claimant's testimony that he was headed to instruct the hunters to leave the property at the time of his accident and finds that Claimant was engaged in a deviation at the time of the accident that was so significant that Claimant's injury did not arise out of and in the course and scope of his employment with Employer.

27. The ALJ notes that the horseplay in this case was significant in the fact that Mr. LH[Redacted] testified as to the nature in which Claimant was driving recklessly and his use of a hash pen while driving. The ALJ further notes that Claimant's horseplay in this case was not reasonably combined with his work activities. Claimant testified he was instructed to take the Razor and pick up rocks and a tarp, and bring them back to the weed mitigation area at the cabin. Claimant had completed this task, and then proceeded to take the Razor past the area where he was to leave the tarp and rocks, and proceeded further into the BLM land and away from his work area.

28. Claimant's testimony that he was headed into the area to confront the hunters is found to be not credible. Claimant's testimony was contradicted by the credible testimony of Mr. O[Redacted] and Mr. LH[Redacted] , both of whom contradicted Claimant's testimony that he was instructed by Mr. O[Redacted] to confront the hunters and tell them they were not allowed to be in the area. The ALJ further credits Mr. LH[Redacted] 's testimony that Claimant was driving too fast and having a good time and finds that Claimant was operating the Razor in a reckless manor. Claimant's testimony that he was driving 5-10 miles per hour on the trail prior to the turn and 5 miles per hour as he entered the turn is found to be not credible. The ALJ finds that there was no basis for Claimant to continue into the BLM land on the Razor other than to continue his joy ride on the Razor and did not confer a benefit on Employer.

29. The ALJ further finds that after passing the weed mitigation site, Claimant was proceeding on a deviation unrelated to his employment with Employer. The ALJ rejects Claimant's contention that he was headed to speak to the hunters and finds that Claimant's actions after passing the weed mitigation site was for his own enjoyment unrelated to any work activities for Employer.

30. Based on the ALJ's finding that Claimant failed to prove a compensable injury arising out of and in the course and scope of his employment with Employer, the ALJ need not consider the remaining arguments by Claimant.

31. The ALJ therefore finds that Respondents have proven by a preponderance of the evidence that Claimant's injury resulted from horseplay that was so significant that it Claimant's injury did not arise out of and in the course and scope of his employment with Employer. Based on the ALJ's finding that Claimant did not sustain a compensable injury, the ALJ does not need to address the remaining issues raised by Claimant at the commencement of the hearing.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2020. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Id.* For an injury to "arise out of" employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Id.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988).

4. Horseplay regularly occurs in the workplace and frequently results in compensation cases involving industrial injury claims. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995). In *Lori's Family Dining* the Court of Appeals set forth a four-part test to determine whether the participation in horseplay represents a deviation that takes the injury out of the arising out of employment requirement for workers' compensation cases.

5. Tile four-part test to determine if an injury arising out of horseplay is compensable under the Colorado Workers' Compensation Act includes, (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *Lori's Family Dining, supra.,* at 718.

6. As found, Claimant's act of horseplay in this case involved Claimant operating the Razor in a reckless manner, which ultimately resulted in the accident that led to Claimant's injury. As found, the ALJ credits the testimony of Mr. LH[Redacted] with regard to Claimant's operation of the Razor prior to the accident in reaching this conclusion. The ALJ finds that the extent and seriousness of the deviation is significant in that Claimant proceeded on the Razor past the area in which he was designated to work and further onto the BLM land. The ALJ finds that the deviation was not combined with the performance of a work duty as Claimant had abandoned his responsibility of dropping off the rocks and tarp in order to continue on the trail deeper into the BLM land and away from the work site. The ALJ finds that there was no credible evidence presented that the nature of the employment accepted any degree of horseplay to occur. tn fact, Claimant's testimony specifically denied that he was engaging in horseplay that would have been accepted by Employer.

7. The ALJ finds the testimony of Claimant regarding his operation of the Razor, including the purpose of his driving past the weed mitigation site, to be not credible. The ALJ credits the testimony of Mr. O[Redacted] and Mr. LH[Redacted] and finds that Claimant was not instructed to confront the hunters if he encountered them, and finds that the only basis for Claimant to continue past the weed mitigation site was to continue his joy ride on the Razor.

8. Because Claimant's injury resulted from a horseplay incident on Claimant's part that was so significant that Claimant's injury did not arise out of and in the course of his employment with Employer, Claimant's claim for compensation is dismissed.

ORDER

It is therefore ordered that:

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

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

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

DATED: April 11, 2022

Keith E. Mottram

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

PROCEDURAL MATTER

At the outset of the hearing in this matter the ALJ sustained Respondents' objection to Claimant's Exhibits 6 and 7, pages 38-43, and excluded them from evidence. Exhibits 6 and 7 are cervical spine MRI results and analysis conducted on February 4, 2022 and February 21, 2022. The Exhibits thus constitute medical records. However, Claimant did not provide the Exhibits to Respondents prior to the March 8, 2022 hearing. Subsequent to the hearing, Claimant filed a Motion in Limine seeking to reverse the ALJ's evidentiary ruling and permit consideration of Exhibits 6 and 7. Respondents' objected to the post-hearing admission of the tended Exhibits.

Section 8-43-207(1)(c), C.R.S. empowers an ALJ to "make evidentiary rulings." The preceding statute vests the ALJ with "wide discretion in the conduct of evidentiary proceedings." *Ortega v. Indus. Claim Appeals Off.*, 207 P.3d 895, 897 (Colo. App. 2009). An ALJ's evidentiary ruling will not be disturbed absent an abuse of discretion. *See Youngs v. Indus. Claim Appeals Off.*, 297 P.3d 964 (refusing to set aside ALJ's ruling that documents were inadmissible where no abuse of discretion was shown). An ALJ commits an abuse of discretion only if the evidentiary ruling "exceeds the bounds of reason." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993).

Section 8-43-210, C.R.S. requires that "[a]ll relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date." The court of appeals has recognized that exceptions to the twenty-day rule are contemplated by allowing continuances to file additional reports in appropriate circumstances. *See Ortega v. Indus. Claim Appeals Off.,* 207 P.3d 895 (Colo. App. 2009).

The record reflects that Claimant failed to exchange Exhibits 6 and 7 with Respondents more than twenty days prior to the hearing. Respondents would be prejudiced if Claimant's Motion in Limine was granted. Respondents did not have an opportunity to review and investigate Exhibits 6 and 7 prior the hearing and were thus unable to develop any rebuttal evidence. Claimant failed to provide any explanation for the failure to timely exchange the medical records prior to hearing. Moreover, Claimant did not request a continuance or otherwise demonstrate good cause to admit Exhibits 6 and 7. By failing to provide Respondents with Exhibits 6 and 7 until the date oi the hearing in this matter, exclusion of the documents is warranted pursuant to §8-43-210, C.R.S.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. If Claimant has demonstrated that her claim should be reopened, whether she has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits.

3. If Claimant has established that her claim should be reopened, whether Respondents have demonstrated by a preponderance of the evidence that Claimant abandoned her position and was responsible for her termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Claimant worked as a school bus driver for Employer. On November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant attempted to finish her work day, but went home due to increasing pain in her back.

2. Claimant received medical treatment from Authorized Treating Physician (ATP) Ethan Moses, M.D. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. Claimant requested acupuncture therapy and began experiencing relief from the treatments. On November 5, 2019 Dr. Moses permitted Claimant to perform modified duty employment. By December 13, 2019 he released Claimant to work full duty.

3. On October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant reached Maximum Medical Improvement (MMI). He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Moses assigned Claimant a 4% rating pursuant to Table 53 for a specific disorder of the cervical spine and a 9% rating for range of motion deficits. Combining the ratings yielded a 13% whole person impairment. Dr. Moses released Claimant to full duty work without restrictions.

4. Prior to Claimant's industrial accident, she experienced dizziness, difficulty sleeping, nausea and fatigue. Claimant attributed her symptoms to anxiety and did not connect them to any known physical condition. She also had a history of back and shoulder pain for over a year before the November 1, 2019 work accident.

5. On October 19, 2020 Respondents filed a Final Admission of Liability (FAL) regarding Claimant's November 1, 2019 industrial injury. The FAL acknowledged that Claimant reached MMI on October 13, 2020 with a 13% whole person impairment rating consistent with Dr. Moses's assessment. The FAL also denied medical maintenance

benefits after MMI. Claimant did not object to the FAL and the claim closed by operation of law.

6. Insurer paid Claimant a total of $22,073.28 in Permanent Partial Disability (PPD) benefits for the period October 19, 2020 through August 10, 2021. Claimant agreed at hearing that she received the preceding payments.

7. On April 14, 2021 Claimant terminated her employment with Employer. Employer prepared a Notice of Separation. The document specified that Claimant resigned through a text message to her supervisor Edie D[Redacted] on April 13, 2021. Claimant's last day worked was April 9, 2021. Claimant detailed that she resigned from her position through a text message following a series of personal conflicts with a co-worker. She explained that her co-worker repeatedly harassed her and expressed her concerns to Employer, but did not receive support.

8. Claimant's supervisor Ms. D[Redacted], who oversees Employer's operations and bus fleet, testified at the hearing in this matter. Ms. D[Redacted] remarked that Claimant would still be employed if she had not resigned her position during the Spring of 2021. She specified that Claimant made a personal decision to resign her employment. Notably, Employer reviewed video footage of Claimant's interactions with her co-worker. Ms. D[Redacted] commented that the video footage did not reveal any harassment. Instead, conversations were invited by both parties. In response to text messages from Claimant, Ms. D[Redacted] offered a transfer, but Claimant declined.

9. Claimant testified that, after her termination from employment, she began attending college full-time and presented her transcript into evidence. She further commented that she is able to perform various activities of daily living including grocery shopping, driving and cooking.

10. On December 28, 2021 Claimant underwent an independent medical examination with John R. Burris, M.D. Claimant reported that, on the date of her work injury, she was preparing her bus at the beginning of the day but slipped on a patch of ice and fell to the ground. She experienced immediate pain in her head, neck and back. During the following year, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in reported symptoms. Notably, Claimant also rejected repeated offers for treatment, MRIs, medications and physiatry referrals.

11. In conducting a physical examination, Dr. Burris noted that Claimant exhibited extreme pain behaviors and guarding. He also remarked that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020. Claimant had completed a reasonable course of conservative treatment and did not require additional care to cure or relieve the effects of her industrial injury.

12. Dr. Burris also testified at the hearing in this matter. He explained that Claimant's condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant has not suffered a worsening of condition since reaching MMI.

13. Claimant testified at the hearing in this matter. She explained that, based on medical treatment outside the Workers' Compensation system, her condition has worsened. Imaging has revealed foraminal stenosis and spurs along her neck. She desires cortisone injections to address her condition.

14. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant received treatment from ATP Dr. Moses. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. By December 13, 2019 Dr. Moses released Claimant to full duty work.

15. On October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant had reached MMI. He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. He assigned Claimant a 13% whole person impairment rating for the cervical spine and released her to full duty work without restrictions.

16. On December 28, 2021 Dr. Burris noted that during the year following her accident, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in symptoms. Notably, Claimant rejected repeated offers for treatment, MRIs, medications and physiatry referrals. In conducting a physical examination, Dr. Burris noted that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020.

17. Claimant testified that, based on medical treatment outside the Workers'; Compensation system, her condition has worsened. Imaging has revealed foraminal

stenosis and spurs along her neck. She desires cortisone injections to address her condition. However, in contrast to Claimant's testimony, Dr. Burris persuasively testified at the hearing that her condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant did not suffer a worsening of condition after she reached MMI.

18. Claimant completed a conservative course of treatment after her November 1, 2019 industrial injuries. There was no additional treatment that Claimant was willing to undergo at the time she reached MMI on October 13, 2020. At the time of MMI, Claimant continued to report subjectively pain complaints at 8/10 levels. Although Claimant testified at hearing that she continued to experience pain in her neck, her symptoms mirrored her complaints at the time she was placed at MMI. Furthermore, continued pain and some difficulty completing daily tasks after MMI would be expected as part of her condition and is reflected through the assignment of a 13% whole person permanent impairment rating. The persuasive medical records and testimony of Drs. Moses and Burris reveal that there is an attenuated causal connection between Claimant's work injury and a worsening of her symptoms after she reached MMI on October 13, 2020. Claimant has thus failed to establish that she suffered a worsening of condition that is causally related to her November 1, 2019 industrial injury. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

5. A request for continuing medical treatment must be presented at the time of MMI. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Indus. Claim Appeals Off.*, 905 P. 2d 1 (Colo. App. 1994). When a claim is closed, the claimant is precluded from receiving further benefits unless there is an order reopening the claim on the grounds of error, mistake or change of condition. *See Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), (a claim may be reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780 (Colo. App. 1991).

6. MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Off.,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

7. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her November 1, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on November 1, 2019 Claimant sustained a work injury when she slipped and fell backward while walking to a school bus. Claimant received treatment from ATP Dr. Moses. She attended physical therapy and massage therapy for pain in her cervical spine, thoracic spine, and lumbar spine, but did not receive any benefit. By December 13, 2019 Dr. Moses released Claimant to full duty work.

8. As found, on October 13, 2020 Claimant visited Dr. Moses for an evaluation. Dr. Moses diagnosed Claimant with the following: (1) strain of muscle, fascia and tendon at neck level; (2) strain of muscle, fascia and tendon of lower back; and (3) strain of ligaments of thoracic spine. Claimant reported significant difficulties with normal activities of daily living, including working, self-care and chores around the house. She also continued to report 8/10 pain levels in her neck that "impact[ed] all aspects of [her] life," Dr. Moses determined that Claimant had reached MMI. He noted that Claimant's pain levels had plateaued in response to conservative treatments and there were no other therapies she was willing to pursue. He assigned Claimant a 13% whole person impairment rating for the cervical spine and released her to full duty work without restrictions.

9. As found, on December 28, 2021 Dr. Burris noted that during the year following her accident, Claimant participated in numerous types of conservative treatment, including two sessions of physical therapy, eight sessions of massage therapy, 13 sessions of chiropractic therapy and acupuncture therapy with little overall change in symptoms. Notably, Claimant rejected repeated offers for treatment, MRIs, medications and physiatry referrals. In conducting a physical examination, Dr. Burris noted that Claimant's pain presentation was non-physiologic because it did not follow a dermatomal pattern or match the records he had reviewed. Dr. Burris assessed Claimant with non-specific neck and back pain. He agreed with Dr. Moses that Claimant reached MMI on October 13, 2020.

10. As found, Claimant testified that, based on medical treatment outside the Workers'; Compensation system, her condition has worsened. Imaging has revealed foraminal stenosis and spurs along her neck. She desires cortisone injections to address her condition. However, in contrast to Claimant's testimony, Dr. Burris persuasively testified at the hearing that her condition has not worsened since she reached MMI on October 13, 2020. Dr. Burris remarked that Claimant's pain levels have remained at 8/10. Based on his physical examination during the independent medical examination, Dr. Burris determined that there was no objective evidence of a worsening of Claimant's condition. He noted that, based on Claimant's extreme pain behaviors, he was unable to obtain reasonable range of motion measurements. Dr. Burris summarized that, based on objective measures, including normal neurologic function, Claimant did not suffer a worsening of condition after she reached MMI.

11. As found, Claimant completed a conservative course of treatment after her November 1, 2019 industrial injuries. There was no additional treatment that Claimant was willing to undergo at the time she reached MMI on October 13, 2020. At the time of MMI, Claimant continued to report subjectively pain complaints at 8/10 levels. Although Claimant testified at hearing that she continued to experience pain in her neck, her symptoms mirrored her complaints at the time she was placed at MMI. Furthermore, continued pain and some difficulty completing daily tasks after MMI would be expected as part of her condition and is reflected through the assignment of a 13% whole person permanent impairment rating. The persuasive medical records and testimony of Drs. Moses and Burris reveal that there is an attenuated causal connection between Claimant's work injury and a worsening of her symptoms after she reached MMI on October 13, 2020. Claimant has thus failed to establish that she suffered a worsening of

condition that is causally related to her November 1, 2019 industrial injury. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

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

1. Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 11, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

➢ Whether Respondents have proven by a preponderance of the evidence that Claimant did not sustain compensable injury arising out of and in the course and scope of her employment with Employer on June 27, 2019?

FINDINGS OF FACT

1. Claimant testified at hearing that she was employed with Employer on June 27, 2019 and was instructed to go to the back room and take boxes off the shelf. Claimant testified that there were two large boxes that were filled with oil. Claimant testified that when she was lifting the second box, she hurt her back. Claimant testified she informed her supervisor of the injury on the date it occurred.

2. Claimant testified that a few days later, she went to work and told her boss that she could hardly breath, but was informed by her supervisor that she should limit herself to just cashier work. Claimant testified at hearing that she called her son and had him pick her up and take her to the emergency room.

3. Claimant was examined at the St. Mary's Hospital emergency room ("ER") on June 29, 2019. Claimant reported to the ER that she had 2 days of worsening low back pain after doing a lot of heavy lifting and twisting while at work. The ER physician noted Claimant had a history of what sounded like neuropathy to the bottom of her feet. The ER records document that Claimant reported a long history of low back pain, which had become quite severe the past two (2) days.

4. Claimant reported to the ER physician that she had not seen anyone for her low back, but usually gets a massage and that helps. Claimant reported she had gotten a massage the day before, but it seemed to make her symptoms worse. The ER physician noted that Claimant's symptoms were consistent with acute on chronic low back pain and instructed to follow up with her primary care physician.

5. In a separate part of the ER records, PA Steerman notes that Claimant presented with low back pain and has had low back pain for quite a while, which she believes is secondary to her job as she does quite a bit of lifting at work. PA Steerman noted further that yesterday Claimant was see at physical therapy for foot pain when she developed increased low back pain. Claimant reported the pain was worse with movement.

6. Claimant was examined by physicians' assistant ("PA") Richards in

Norwood, Colorado on July 5, 2019. PA Richards completed a WC164 form that provided Claimant with work restrictions of no lifting greater than 15 pounds and no repetitive lifting greater than 10 pounds. PA Richards also obtained x-rays of Claimant's thoracic and lumbar spine and referred Claimant for physical therapy. The records from PA Richards do not contain an accident history, but the WC 164 indicates that Claimant's maximum medical improvement ("MMI") date is unknown at this time as it is a new case.

7. Notably, PA Richards had evaluated Claimant prior to her work injury and had seen Claimant on May 19, 2019 for her annual physical. PA Richards noted Claimant worked full time and takes care of her grandkids. PA Richards noted Claimant complained of living in pain that stems from the area of her uterus and tried to have the pain diagnosed, but was eventually told Medicaid would not pay for a hysterectomy. Claimant reported having insomnia that she related to her pelvic pain and aching pain in her legs.

8. Claimant returned to PA Richards on June 24, 2019 (3 days prior to her work injury) for evaluation of foot pain and plantar fasciitis. Claimant reported to PA Richards that she had a lot of back pain and damaged nerves in her neck, but denied any history of ankle sprains. Claimant reported some tingling in her toes, but not as bad as her hands. PA Richards referred Claimant for physical therapy.

9. Respondents filed a general admission of liability ("GAL") on July 31, 2019 admitting for medical benefits only.

10. Claimant was evaluated by Ms. Fusting, the physical therapist, on August 9, 2019. The physical therapist noted that Claimant had gone to the ER around the end of June after developing back pain that Claimant described as taking her breath away. Ms. Fusting noted that the Claimant reported that the ER doctor thought lifting at work that day caused her back to spasm. Ms. Fusting noted Claimant's signs and symptoms were consistent with low back pain with muscle strain. Ms. Fusting noted pain with palpation, and impaired strength.

11. Claimant returned to PA Richards on September 3, 2019. PA Richards noted Claimant's accident history of taking down heavy boxes and then twisting to place the boxes on a "U-boat" and being unable to continue to do this work after 2 boxes. Claimant also reported that on the next day she was lifting and placing bottles of water from the ground on to the "U-boat" and on the last one she felt a strain in her lower back. PA Richards noted Claimant denied back pain in the past, but noted that the ER records reported a history of back pain that improved with massage. PA Richards continued Claimant on a 15 pound lifting restriction and recommended Claimant continue physical therapy.

12. Claimant returned to PA Richards on October 15, 2019 and noted she continued to experience low back pain, with pain waking her from her sleep. PA

Richards noted Claimant had been back to work light duty and was improving but had been having to do a lot more bending which increased her pain again. PA Richards recommended undergo a magnetic resonance image ("MRI") of her lumbar spine.

13. Claimant was next evaluated by PA Richards on November 15, 2019. PA Richards noted Claimant's MRI was scheduled for November 25, 2019. PA Richards noted that Claimant had reported increased symptoms at her last visit secondary to excessive work requirements. Claimant reported she had been able to follow her work restrictions and continued her physical therapy and her symptoms again improved.

14. Claimant returned to PA Richards on February 7, 2020 and noted that she had not yet been able to get the MRI. PA Richards noted Claimant was complaining of lower extremity symptoms, which PA Richards thought were muscular rather than neurological. PA Richards reported that Claimant advised that her back pain continued to come and go, but would still have some bad days when her back pain is severe. Claimant noted that her back pain was mostly localized to the central lower back with some symptoms now in her legs bilaterally. PA Richards noted that Claimant appeared to have improved with physical therapy as she was no longer complaining of thoracic spine pain. PA Richards continued Claimant's work restrictions and referred Claimant to Dr. Gebhard for an orthopedic consultation.

15. Claimant eventually underwent the MRI of the lumbar spine on February 24, 2020. The MRI showed lower lumbar spine degenerative disc and facet disease at the L4-5 and L5-S1 levels.

16. Claimant returned to PA Richards on March 31, 2020. PA Richards noted the findings on the MRI and again recommended Claimant be evaluated for a spine consultation and referred Claimant to Dr. Clifford.

17. Claimant returned to PA Richards on May 1, 2020. PA Richards noted Claimant's pain continued to worsen. PA Richards noted Claimant was to be seen by Dr. Clifford in two weeks. PA Richards increased Claimant's work restrictions to no lifting pushing, pulling or carrying over 10 pounds.

18. Dr. Clifford eventually evaluated Claimant on June 22, 2020. Dr. Clifford noted Claimant's accident history of lifting boxes from overhead down to her waist when she started having increasing pain. Dr. Clifford noted Claimant had some history of back pain. Dr. Clifford noted Claimant reported currently having severe pain which was 7 to 8 out of 10 on a daily basis. Claimant also reported leg pain on the left side with cramping in the calf that is worse when she straightens her leg.

19. Dr. Clifford performed a physical examination of Claimant and reviewed Claimant's MRI scan. Dr. Clifford diagnosed Claimant with L5-S1 disc degeneration with left sided L5-S1 disc protrusion with radiculopathy in the L5-S1 nerve root distribution. Dr. Clifford recommended Claimant undergo a left L5-S1, S1-S2

transforaminal epidural steroid injection.

20. Claimant was evaluated by Dr. Linder on June 29, 2020. Dr. Linder is a physician in the same office as PA Richards. Dr. Linder noted the recommendations by Dr. Clifford and noted Claimant complained of some incontinence that was getting worse while walking. Dr. Linder continued Claimant's work restrictions to no lifting more than 10 pounds and advised Claimant to follow up after the epidural steroid injection.

21. The left L5-S1, S1-S2 transforaminal epidural steroid injections were performed on July 22, 2020 under the auspices of Dr. Clifford.

22. Claimant was examined by PA Richards on July 28, 2020. Claimant reported to PA Richards some relief in her left leg symptoms after the epidural steroid injection. Claimant reported she was now having right leg radicular symptoms. PA Richards noted Claimant may need a new MRI based on the new right leg symptoms. PA Richards continued Claimant on the 10 pound work restriction.

23. Claimant was re-examined by PA Richards on September 28, 2020. PA Richards noted that while the epidural steroid injection seemed to initially help Claimant's symptoms, her symptoms returned with return to work. PA Richards further noted Claimant was now complaining of symptoms on the right. Claimant reported to PA Richards that she believed the concrete floors at work may be contributing to the worsening symptoms. Claimant reported she was not able to tolerate more than four (4) hours of work.

24. PA Richards noted that Claimant was contacted by Dr. Clifford's office and advised that her left sided epidural steroid injection was rejected. PA Richards noted decreased range of motion on examination due to pain in all directions. PA Richards continued Claimant's work restrictions.

25. Claimant returned to PA Richards on October 26, 2020. PA Richards noted that the epidural steroid injection was declined and recommended that Claimant continue with ongoing physical therapy two times per week for another 4-6 weeks. Claimant's 10 pound work restrictions were continued.

26. Claimant was next evaluated by PA Richards on November 24, 2020. PA Richards noted that Claimant's ongoing physical therapy had not been authorized, however Claimant had reported some recent improvements with her home exercise program, and PA Richards again recommended ongoing physical therapy of once every two weeks for 3-4 months. PA Richards opined that Claimant had not reached maximum medical improvement.

27. Respondents arranged for an independent medical evaluation ("IME") with Dr. Lesnak on December 22, 2020. Dr. Lesnak reviewed Claimant's medical records, obtained a medical history and performed a physical examination of Claimant

in connection with his IME. Dr. Lesnak also reviewed video surveillance of Claimant in connection with his IME. Dr. Lesnak noted that Claimant had an accident history that included an injury at work on June 29, 2019 (sic). Dr. Lesnak further noted the accident history recorded by PA Steerman which indicated Claimant's back pain started at a physical therapy appointment for her foot.

28. Dr. Lesnak reviewed the medical records from PA Richards on July 5, 2019 and noted that the records do not provide a history of an injury at work or of any complaints of back pain. Dr. Lesnak notes that Claimant was complaining of phtotophobia and an acute headache for the past three hours. Dr. Lesnak noted that PA Richards recommended lab tests and a brain MRI on July 5, 2019. The IME report does not mention the WC164 form that recommended x-rays of the lumbar and thoracic spine.

29. Dr. Lesnak noted Claimant returned to PA Richards on September 3, 2019 and those records referenced Claimant injuring her back on June 27 while taking down heavy boxes and the twisting to place the boxes on the "U-boat". Dr. Lesnak specifically notes in his report that this accident history does not reference Claimant developing significantly worsened pain during a physical therapy session for her foot prior to the ER evaluation. Dr. Lesnak further noted that by October 15, 2019, PA Richards was recommending an MRI scan. Dr. Lesnak was critical of this request as he found no documentation of any reproducible objective findings to suggest that an MRI study was medically indicated.

30. Dr. Lesnak reviewed the medical records from Dr. Clifford and based on Claimant's report that her symptoms may have partially improved for several days following the injection, followed by her symptoms recurring, Dr. Lenak opined that Claimant had a completely nondiagnostic and nontherapeutic response to the lumbar epidural injections trials.

31. Dr. Lesnak opined that Claimant's reported history of "developing increased symptoms in 06/2019 has 'changed' over time". Dr. Lesnak reviewed the surveillance video and noted that the video depicted Claimant on September 5, 2020 performing bending and lifting activities including picking up a portable propane tank off of the ground and placing it into a metal cage outside of the Dollar Store. Dr. Lesnak noted that the video from September 6, 2020 showed Claimant performing several activities including walking activities as well as using a long-handled broom to perform repetitive sweeping activities. Dr. Lesnak noted Claimant showed no signs of discomfort or functional inability when performing these activities.

32. Dr. Lesnak noted in his report that Claimant denied a history of low back pain or treatment for her low back during his IME evaluation. Dr. Lesnak opined that it was his opinion the Claimant did not sustain any type of injury during work hours in June 2019.

33. Dr. Lesnak issued a supplemental report dated July 28, 2021 which reviewed some medical records from Claimant that predated her work injury along with additional medical records from Claimant from after her work injury. Dr. Lesnak noted Claimant's June 24, 2019 examination with PA Richards in which she reported that he had chronic low back pain and damaged nerves in her neck.

34. Dr. Lesnak testified at hearing consistent with his report. Dr. Lesnak noted Claimant had four out of five positive Waddell's signs on his physical examination. Dr. Lesnak opined that the surveillance video of July 19, 2020 that he reviewed did not show Claimant performing work outside of her restrictions, but opined it was inconsistent with Dr. Clifford's report of June 2020 where Claimant reported pain of 7-8 out of 10. Dr. Lesnak opined that Claimant was performing work outside of her work restrictions on September 5, 2020 when she was lifting the propane tank and putting it in the cage, as she was under a lifting restriction of 10 pounds at the time. Dr. Lesnak opined that even if the propane tank were empty, it would still exceed Claimant's 10 pound work restriction set forth by Dr. Linder.

35. Claimant testified at hearing that the propone tank depicted in the video was empty and was recorded lifting the propane tank while at work for Employer. Claimant testified that if she overexerts herself at work it will cause pain. Claimant testified that she did not believe lifting the empty propane tank exceeded her work restrictions.

36. The ALJ finds the opinions expressed by Dr. Lesnak to be not credible with regard to the issue of compensability. The ALJ notes that the surveillance video which Dr. Lesnak opined showed Claimant performing work outside of her restrictions took place at a time when Claimant was at work for Employer, and thus, assigned, by Employer, to perform the work outside of her restrictions. The ALJ finds that if Employer were significantly concerned about Claimant performing work outside of her restrictions, they should not have assigned her work that exceeded the restrictions from Dr. Linder and PA Richards. The ALJ further finds that the opinions expressed by Dr. Lesnak that relied on video surveillance of Claimant performing duties assigned by Employer is not credible with regard to the issue of compensability in this case.

37. The ALJ does not find that the reference in the ER records regarding Claimant's pain developing after a physical therapy appointment overcomes the other evidence in this case that Claimant sustained a compensable injury at work to allow Respondents' to withdraw the GAL in this case. The ALJ would note that Respondents were privy to the June 29, 2019 ER report prior to filing the July 31, 2019 GAL in this case. Moreover, the ER records contain multiple references to an accident history consistent with Claimant's report of injury to later physicians and consistent with her testimony at hearing.

38. The ALJ notes that Dr. Lesnak's reliance on the July 5, 2019 report from PA Richards which he indicated failed to set forth an accident history as a basis for his

opinion that Claimant did not sustain a compensable accident history at work is misguided in this case. Dr. Lesnak's report is silent with regard to the July 5, 2019 WC164 form completed by PA Richards which referred Claimant for lumbar spine and thoracic spine x-rays. However, the WC164 form identifies the third party administrator for handling the workers' compensation claim along with the workers' compensation number assigned to the claim. It is therefore reasonable to assume that Respondents were privy to the WC164 form prior to filing the GAL in this case.

39. Moreover, the medical records in this case document Claimant reporting to PA Richards just a few days prior to her work injury that she had chronic low back pain. But these records are consistent with Claimant's testimony in that Claimant at no time was seeking treatment for this condition. While Claimant mentions this portion of her medical history to PA Richards, she does not seek treatment for this condition, and the evidence establishes that Claimant was not under current medical care for her chronic low back pain. The mere fact that Claimant has a pre-existing condition does not negate the fact that she may still have a compensable injury at work. Moreover, these records document that PA Richards was informed of Claimant's prior condition before providing treatment related to her workers' compensation injury. Notably, at no point in providing care for Claimant did PA Richards opine that her current need for medical care was not related to her injury at work on June 27, 2019.

40. Likewise, the surveillance videos entered into evidence in this case showing Claimant performing her work duties while employed with Employer in September 2020 are not persuasive evidence that Claimant did not sustain a compensable injury at work on June 27, 2019. The video surveillance simply depicts Claimant performing the work duties assigned to her by Employer.

41. The ALJ finds Claimant's testimony at hearing with regard to the onset of her low back pain on June 27, 2019 that led Claimant to seek medical treatment to be credible and persuasive, and finds that Respondents have failed to prove that it is more probable than not that Claimant did not sustain a compensable injury arising out of her employment with Employer on June 27, 2019.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). However, Section 8-43-201 was modified effective August 5, 2009 to provide that a party seeking to modify an issue determined by a general or final

admission of liability shall bear the burden of proof for any such modification. Section 8-43-201(1). Because Respondents are seeking to modify claimant's benefits as admitted under the general admission of liability, Respondents bear the burden of proof in this case by a preponderance of the evidence.

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2018. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

5. As found, the ALJ finds the testimony of Claimant with regard to her work injury of June 27, 2019 to be credible and persuasive and supported by the medical records in this case. The ALJ further finds the opinions expressed by Dr. Lesnak in his IME reports and testimony to be not persuasive evidence that Claimant did not suffer an injury on June 27, 2019.

6. Therefore, Respondents' have failed to prove by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of and in the course and scope of her employment with employer.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw the general admission of liability is hereby DENIED.

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

DATED: April 13 , 2022

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-637-002

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the C2-4 facet injection recommended by John Sacha, M.D., is reasonably necessary to cure or relieve the effects of Claimant's admitted industrial injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment with Employer on May 12, 2021, when a large pallet tipped over falling onto Claimant striking him in the head.

2. On May 13, 2021, Claimant was seen at an emergency where CT scans of his head and cervical spine were taken. The cervical spine CT showed no acute fracture or subluxation, and moderate canal stenosis at C5-C6 that was attributed to degenerative changes. No records of a physical examination at the emergency room were offered into evidence. (Ex. F).

3. On May 18, 2021, Claimant saw Carol Dombro, M.D., at Concentra. Dr. Dombro was Claimant's authorized treating physician (ATP) for a follow up check for his head and neck. Claimant reported vague issues related to his head injury and that his neck discomfort was mostly resolved. Claimant also reported shoulder symptoms, but could not recall how he injured his shoulder. Dr. Dombro's examination of the cervical spine was normal. Claimant was diagnosed with a closed head injury without post-concussive symptoms, cervical strain "mostly improved;" and new left shoulder pain in the distribution of a previous workers' compensation injury. Dr. Dombro recommended that Claimant begin physical therapy that day. (Ex. F).

4. Claimant began attending physical therapy on or about May 18, 2021, and attended twenty physical therapy sessions through July 22, 2021. Claimant received physical a cervical strain, including therapeutic exercises, manual therapy, dry needling, and vestibular therapy. Claimant's cervical range of motion in both left and right rotation was documented as limited and did not significantly improve with therapy. Claimant did report that dry needling helped his neck pain, but his headaches and dizziness became worse. (Ex. F).

5. Claimant's next documented treatment was with Richard Mobus, D.C., at Concentra on June 16, 2021. At that visit, Claimant reported lower cervical pain and headaches. Claimant attended six chiropractic visits between June 16, 2021 and July 21, 2021. At his discharge from chiropractic care on July 21, 2021, Claimant reported a moderate improvement in symptoms, but continued to report cervical pain at a rating of 4/10. (Ex. F)

6. On June 23, 2021, Claimant saw John Sacha, M.D., (physical medicine and rehabilitation physician) at US Medical Group, on referral from Dr. Dombro. By virtue of this referral, Dr. Sacha is an ATP. Dr. Sacha noted that Claimant had completed three weeks of physical therapy and had begun chiropractic treatment, with "slight improvement." Claimant reported bilateral neck pain, occipital headaches, dizziness, blurred vision, nausea, and forgetfulness. On examination of Claimant's cervical spine, Dr. Sacha noted spasms, segmental dysfunction, poor posture, and pain with extension. He also noted that extension-rotation and palpation of the upper cervical segments preproduced Claimant's headaches. Based on his examination, Dr. Sacha diagnosed Claimant with post-traumatic cervical facet syndrome; whiplash associated disorder; and post-traumatic occipital neuralgia secondary to cervical facet syndrome. He recommended a cervical MRI and that that Claimant complete chiropractic and physical therapy with IMS needling. (Ex. 4).

7. Claimant returned to Dr. Dombro on June 23, 2021. Claimant reported head, neck, left shoulder and upper back pain rating 3/10. Dr. Dombro indicated that Claimant's left shoulder and neck were "much improved" with physical therapy and dry needling. Claimant continued to report daily headaches. (Ex. F).

8. On July 6, 2021, Claimant underwent a cervical MRI, which demonstrated abnormalities at C3-4. The radiologist compared Claimant's MRI to a previous cervical MRI from 2015, and noted that Claimant had degenerative disc disease and joint changes superimposed on borderline narrow spinal canal with progression at C3-4 producing moderate to marked dural sac narrowing with mild cord deformity and left paracentral chronic myelomalacia. Claimant also had degenerative changes at C4-7, without cord deformity. (Ex. E)).

9. On July 12, 2021, Dr. Sacha noted that although Claimant adamantly denied any prior cervical injuries, the presence of the 2015 MRI indicated Claimant likely had prior cervical complaints. Dr. Sacha indicated the MRI showed the same amount of degenerative disc disease and canal stenosis with some chronic myelomalacia of the cervical spinal cord. He further noted that the MRI showed "significant straightening of his cervical lordosis in the upper cervical spine, which is consistent with [Claimant's mechanism of injury." On examination, Dr. Sacha noted cervical spasms, diminished range of motion, and segmental dysfunction of the mid- and upper cervical spine. Notwithstanding that Claimant had a prior cervical MRI, Dr. Sacha opined that Claimant had sustained a whiplash injury from his employment. He diagnosed claimant with cervical facet syndrome, occipital neuralgia, head contusion, resolved, left lateral epicondylitis, nonphysiologic presentation, and left shoulder complaints. (Based on the context of the medical record, the ALJ infers that Dr. Sacha's diagnosis of "nonphysiologic presentation" was in relation to Claimant's left shoulder complaints, which were new at that time.) Dr. Sacha recommended a bilateral C2-4 facet injection and bilateral 3rd occipital nerve block. He noted that the injections would be "for diagnosis, treatment, and causality." (Ex. F).

10. Respondents submitted Dr. Sacha's request for authorization of a C2-4 facet injection to William Barreto, M.D., for an opinion on the medical necessity of the proposed

treatment. The specific question posed was "Is Bilateral C2-4 Facet Injection with anesthesia medically necessary?" Dr. Barreto reviewed and summarized Claimant's July 6, 2021 MRI report and Dr. Sacha's July 12, 2021 record. Dr. Barreto's report indicates he reviewed additional records from Mile High Sports and Rehabilitation Medicine from July 21-26, 2021, and records from July 12- 28, 2021, identified only as "Misc.", but the records are not summarized in the report. (No records from "Mile High Sports and Rehabilitation" were offered or admitted into evidence). Dr. Barreto's report does not indicate that he reviewed Claimant's physical therapy records.

11. In addressing the question posted, Dr. Barreto discussed three situations where facet injections may be medically necessary based on the Colorado Medical Treatment Guidelines. Those situations include "patients with pain 1) suspected to be facet in origin based on examination findings and 2) affecting activity; OR patients who have refused a rhizotomy and appear clinically to have facet pain; or patients who have facet findings with a thoracic component." Dr. Barreto also cited additional criteria in the "Official Disability Guidelines, Neck and Upper Back Chapter, Online Version (Update 3/31/2021)." Neither the Colorado Workers' Compensation Act nor the W.C.R.P. reference, incorporate or adopt the "Official Disability Guidelines," (ODG) and no evidence was offered explaining the authority or relevance of the ODG.

12. After citing the above-referenced authorities, Dr. Barreto's analysis consisted of the following: "In this case, the patient still has cervical paraspinal spasm, diminished range of motion and segmental dysfunction of the mid upper cervical spine. There is pain with extension rotation. However, there is no documentation of failed conservative care or any indication an active therapy program is to [be] started. As such, the requested bilateral C2-4 facet injection with anesthesia is not medically necessary and is not certified." (Ex. D, p. 6). Given that Dr. Barreto's did not review Claimant's physical therapy records which demonstrate that Claimant had undergone an active therapy program, his opinion is not persuasive.

13. On August 18, 2021, Dr. Sacha wrote a letter addressing Insurer's denial of the C2-4 facet injection, and addressed Dr. Barreto's contention that there was no documentation of failed conservative care or indication of an active therapy program. Dr. Sacha wrote: "In reviewing this patient's case, the patient has already completed multiple attempts at aggressive therapy that included prolonged physical therapy including both active and passive therapeutic modalities, chiropractic, home exercise and medications. So, the patient has clearly already done the conservative care for this case, and what is interesting, is that the patient not only meets the criteria including absence of radicular pain and spinal stenosis, straightening of his cervical lordosis, has had the conservative care that has been failed, but also has declined doing the radiofrequency and wanting to do the facet injections first. As such, he meets all the medical criteria." (Ex. 4). The ALJ notes that no records were submitted indicating Claimant was offered or declined a radiofrequency procedure.

14. Claimant returned to Dr. Sacha on September 16, 2021, October 7, 2021, October 25, 2021, and November 24, 2021. At Claimant's examination on November 24, 2021, Dr. Sacha noted that Claimant's neck pain and headaches were "essentially unchanged."

On examination, he found cervical paraspinal spasms, segmental dysfunction, and pain with extension and extension rotation. Dr. Sacha's diagnosis was cervical facet syndrome, occipital neuralgia, and lateral epicondylitis. (Ex. F).

15. On September 22, 2021, Claimant saw Stephen Dahaney, M.D., at Concentra, who assumed the role of ATP. Dr. Danahey indicated that Claimant's neck was "fine now but through out the day it will start to hurt him." He diagnosed Claimant with a cervical sprain, closed head injury, elbow sprain, and left shoulder strain. He indicated that Claimant was not at maximum medical improvement at that time. (Ex. F).

16. Claimant returned to Dr. Danahey on January 27, 2022. At that time, Claimant noted posterior cervical discomfort and increased headaches with neck motion. Dr. Danahey indicated that Claimant was not at MMI because of ongoing evaluation. Dr. Danahey offered no opinion regarding Dr. Sacha's recommended injection. (Ex. F).

17. At hearing, Claimant testified that he continues to have dull pain in his neck that becomes "stabbing" with motion, and that his neck pain increases his headaches. He testified that he had no headaches prior to May 12, 2021. Claimant testified that he understands the risks of undergoing a facet injection and that he wishes to proceed with the injection. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*,

183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the C2-4 facet injection recommended by Dr. Sacha is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. Dr. Sacha indicated that the purpose of the proposed injection is "diagnosis, treatment, and causality." From this, the ALJ infers that the intention of the C2-4 facet injection is, at least in part, to treat Claimant's diagnosis of facet joint syndrome, which Dr. Sacha diagnosed as traumatic. Dr. Barreto's opinion on medical necessity is not persuasive. The only expressed basis for his determination that the recommended procedure was not medically necessary was the mistaken notion that Claimant had not failed conservative care or undergone an active therapy program. The evidence established that Claimant underwent physical therapy, including manual therapy, exercises, and dry needling with only minimal improvement in his symptoms.

Respondents' contention that Claimant does not meet the criteria for facet injections under the Medical Treatment Guidelines is not compelling. In January 2022, the Division of Workers' Compensation adopted the latest version of Rule 17, Exhibit 8, related to

cervical spine injuries. (Although the original recommendation was made prior to the adoption of the current version, the ALJ finds the January 2022 rule to be the operative guideline, given that any injections would be performed after their adoption). Notwithstanding, W.C.R.P. Rule 17, Ex. 8, paragraph 8.a.ii, provides that one of the following sets of criteria must be met before proceeding with a facet joint injection

1) at least 3 months of pain, unresponsive to 6 weeks of conservative therapies, including manual therapy; and confounding psychosocial risk factors have been screened for and clinically addressed; and physical examination findings are consistent with facet origin pain (e.g., pain on extension with lateral bending and referral patterns are consistent with the expected pathologic level) that is affecting activity; OR
2) the patient has refused a rhizotomy despite facet origin pain on clinical exam; OR
3) the patient has facet findings with a thoracic component.

Here, the Claimant's medical records establish that he has experienced at least three months of pain which was unresponsive to physical therapy, including manual therapy for more than six weeks. (Claimant underwent physical therapy from at least May 18, 2021 through July 21, 2021, without significant improvement in pain levels) and Claimant continues to complain of neck pain and headaches. Dr. Sacha's diagnosis of post-traumatic cervical facet syndrome demonstrates that Claimant's symptoms are consistent with facet origin pain. Although no evidence was admitted regarding screening for confounding psychosocial risk factors, logically, such a screening should be performed at or near the time of the recommended procedure. Thus, the failure to perform a screening for confounding psychosocial risk factors when the procedure was initially recommended in 2021, does not preclude that screening being performed prior to a future procedure. Thus, the ALJ finds that Claimant substantially meets the MTG requirements for a facet joint injection. The ALJ finds and concludes that performance of the recommended C2-4 facet joint injection is reasonably necessary to cure or relieve the effects of Claimant's May 12, 2021 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of a C2-4 facet joint injection, recommended by Dr. Sacha is GRANTED.

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

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

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

DATED: April 13, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-335-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable, work-related injury.

2. If Claimant sustained a compensable, work-related injury, was he terminated for cause and responsible for his own wage loss, if any.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant worked for Employer from August 16, 2018 to February 19, 2020. His responsibilities including moving materials through the galvanizing system in an orderly and efficient manner. (Ex. G and Ex. H).

2. Claimant testified that he sustained a work-related injury to his bilateral hands due to chemical exposure while working for Employer.

3. Claimant testified he went to the emergency room for his hand pain prior to January 23, 2020, and that the providers should have known this was a work injury. Claimant did not present any evidence of the visit or treatment.

4. On January 23, 2020, Claimant went to the AFC Urgent care where he was treated by Kevin Ralls, FNP. Claimant's chief complaint was "hand pain." Claimant's medical record reads "b/l hands visibly dirty. Dry cracked skin noted over b/l hands and fingers. Fissures noted b/l distal fingers 1-5 and over b/l palmar PIPs and DIPs 1-5, no pus drainage or streaking." Claimant reported having pain in his bilateral hands and under his nails for three weeks. (Ex. A).

5. According to the medical records, Claimant told Mr. Ralls he worked with metal beams and used his hands while working. Claimant denied any injuries or metal fragments in his hands. Mr. Ralls diagnosed Claimant with dermatitis, and prescribed Keflex and Lotrisone cream. He advised Claimant to seek further treatment at the emergency room or from a primary care provider if his condition worsened. (Ex. A).

6. Claimant testified that he told Mr. Ralls about the chemical exposure. The ALJ does not find this testimony persuasive because there is nothing in the medical record referencing a work-related injury or chemical exposure.

7. Mr. Ralls wrote Claimant a note stating that Claimant was unable to return to work until January 28, 2020, unless Claimant chose to return sooner. (Ex. A). Claimant's

employment records note that Claimant called out sick on January 22, 2020, and had a doctor's note excusing him from work until January 28, 2020. (Ex. F).

8. Claimant returned to work on January 27, 2020, but left early before completing his shift. (Ex. F). Claimant testified he left work early because of the pain in his hands. Claimant further testified that he took a video of his hands and sent the video to his direct supervisor. At no time in the video does Claimant say that his hands were subject to chemical exposure, nor does he reference a work-related injury. (Ex. 6).

9. Claimant called in sick on January 28, 2020, and returned to work on January 29, 2020. (Ex. F).

10. Claimant testified that he did not seek further medical treatment for his hands after his initial evaluation with Mr. Ralls.

11. BM[Redacted[is the plant manager for Employer. Mr. BM[Redacted] credibly testified that Claimant never reported he was out due to a work-related condition.

12. Mr. BM[Redacted] credibly testified that Claimant's job did not require the use of chemicals. He testified that some employees handle chemicals, but those employees are provided protective equipment, including gloves, to prevent chemical exposure.

13. On February 10, 2020, Employer terminated Claimant for his repeated violation of Employer's attendance policy. Claimant's termination followed multiple warnings, write-ups, and a suspension. Claimant's violations of Employer's attendance policy are well documented in his personnel file. (Ex. G).

14. On July 26, 2019, Claimant received a verbal warning because of tardiness. (Ex. G).

15. Claimant's first written warning for attendance issues, specifically tardiness, occurred on August 19, 2019. Employer provided Claimant a copy of the attendance policy concurrently with the write-up. Claimant checked a box indicating that he agreed with the recitation of facts and signed the document. (Ex. G).

16. Claimant's second written warning for attendance issues, specifically tardiness, occurred on October 9, 2019. (Ex. G).

17. Claimant third written warning for attendance issues, specifically frequent tardiness, occurred on November 15, 2019. Employer moved Claimant to second shift to help improve his tardiness. The written warning noted that further violations of the attendance policy would result in suspension or termination. Claimant checked a box indicating that he agreed with the recitation of facts and signed the document. (Ex. G).

18. Claimant's fourth written warning for attendance issues occurred on December 12, 2019. The written warning noted Claimant left work on two occasions to run personal errands without clocking out. Employer suspended Claimant, and the warning indicated

that the consequences for any further violations of the attendance policy would result in termination. (Ex. G).

19. Between December 12, 2019 and February 10, 2020, when he was terminated, Claimant continued to violate Employer's attendance policy with his repeated tardiness.

20. Claimant did not file a Workers' Claim for Compensation until August 22, 2021. He listed the date of his injury as February 1, 2020, and stated that he had a cumulative fungal and bacterial infection occurring at each of his fingertips. There is no reference to the alleged chemical exposure. (Ex. B).

21. LB[Redacted] completed Employer's First Report of Injury on September 29, 2021. Under "tell us how the injury occurred," Ms. LB[Redacted] stated, "[u]nknown, did not report to management, disgruntled employee." (Ex. C).

22. The ALJ finds that Employer terminated Claimant for cause on February 10, 2020.

23. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that he sustained an injury to his hands in the course of his employment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ.

Cordova v. Indus. Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

The claimant is required to prove by a preponderance of the evidence that he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Merely feeling pain at work in and of itself is not "compensable." *See Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (I.C.A.O. April 11, 2007).

On January 23, 2020, Claimant went to urgent care because of pain in his fingers and nail beds. (Findings of Fact ¶ 4). Claimant's medical records make no mention of chemical exposure at work, or any type of work injury. To the contrary the records say that Claimant "denies any injuries." (*Id.* at ¶ 5). Mr. BM[Redacted] , the plant manager, credibly testified that Claimant's job did not require the use of chemicals. (*Id.* at ¶ 12). Claimant failed to present sufficient evidence to prove that he suffered an injury to his bilateral hands during the course of his employment. (*Id.* at ¶ 23).

ORDER

It is therefore ordered that:

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

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

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

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

DATED: April 13, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-183-992-001

ISSUES

I. Whether Respondent has proven by a preponderance of the evidence that Claimant is responsible for his termination from employment, and thus precluded from receiving Temporary Total Disability ("TTD") benefits.

STIPULATIONS

A. Claimant's average weekly wage ("AWW") is $980.67.

B. TTD Benefits are payable but for the termination of cause.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a trailer mechanic. His employment began on or about March 29, 2019. Although Employer carries mail across state lines for the United States Postal Service ("USPS"), Claimant performed his job duties exclusively in Colorado.

2. On March 29 ,2019, Claimant was provided a copy of the Employer's Drug, Alcohol and Controlled Substance Policy (Drug Policy). On that same day, Claimant affirmed that he fully understood the terms of the Drug Policy and agreed to abide by it. **R. Ex. E., 99-102.**

3. On September 29, 2021, Claimant was sent to perform work on a tractor-trailer that was stalled in the middle of the road. He sustained multiple injuries, including left hip and spinal fractures, when the driver of the semi-truck began to drive while Claimant was underneath the attached trailer. He was crushed by a wheel axel.

4. Emergency services were called. Northglenn Ambulance arrived on the scene at 4:20 p.m. Claimant was transported to the Emergency Department at UC Health ("UCHER"). **Cl. Ex. 4**.

5. Claimant arrived at the UCHER at 4:40 p.m. **R. Ex. D: 14**. Claimant was administered fentanyl intravenously at 4:45 p.m. (i.e., 1645 on a 24-hour clock), and 6 mg of morphine intravenously at 6:25 p.m. (i.e., 1825 on a 24-hour clock). **Cl. Ex. 5: 55**.

6. Claimant's urine was collected for a toxicology screen at 7:30 p.m. (i.e., 1930 on a 24-hour clock). It was positive for opiates and cannabinoids - marijuana. **Cl. Ex. 6: 65**.

7. Claimant underwent left hip surgery on September 30, 2021. **Cl. Ex. 8**.

8. Claimant was discharged from UCHER on October 2, 2021. **R. Ex. D: 15**.

9. Right after the accident, Claimant was disabled and unable to perform his regular job duties.

10. Respondent filed a General Admission of Liability on October 21, 2021. Respondent admitted for medical benefits only and indicated "Claimant is responsible for termination of employment." **Cl. Ex. 1**.

11. BG[Redacted] is the General Manager of Employer. Mr. BG[Redacted] testified that Employer has a contract with the United States Federal Government ("USFG") to haul mail for the USPS. Mr. BG[Redacted] testified, as part of that contract, Employer must maintain an anti-drug policy for its drivers that complies with the Drug-Free Workplace Act of 1988. Mr. BG[Redacted] testified that only drivers have to take a pre-employment drug test per federal mandate.

12. Mr. BG[Redacted] testified that a copy of the Drug-Free Workplace Act of 1988 is not given to employees. Mr. BG[Redacted] testified that a list of prohibited substances is not detailed in Employer's Drug Policy. Mr. BG[Redacted] testified a list of prohibited substances is not given to employees. Mr. BG[Redacted] testified that a list of what constitutes a "controlled substance" is not given to employees. Mr. BG[Redacted] testified that what constitutes a controlled substance varies from state to state depending on what substances are legal in each state.

13. Mr. BG[Redacted] testified Employer's Drug Policy does allow for the use of legally obtainable drugs by employees, and what a legal drug is varies from state to state. Mr. BG[Redacted] testified there is nothing given to Colorado employees indicating cannabis or marijuana use is prohibited by Employer despite it being legal in Colorado. Mr. BG[Redacted] testified that alcohol is a legally obtainable drug, and an employee can test positive for alcohol while at work and retain his or her employment.

14. Mr. BG[Redacted] testified that he terminated Claimant's employment because Claimant's urinalysis from the UCHER was positive for opioids and cannabis - marijuana.

15. EC[Redacted] works for Employer as the Safety and Compliance Manager, but previously she was the Human Resources Manager for nine years. Ms. EC[Redacted] testified she handles the onboarding process for new employees, including providing the Employee Handbook and Drug Policy. Ms. EC[Redacted] testified she does not inform employees that marijuana use is prohibited by Employer unless the employee asks. She testified Employer does not provide employees a list of controlled substances or a list of prohibited substances.

16. Ms. EC[Redacted] testified Employer's Drug Policy does not make it clear to employees which legally obtainable drugs are permissible to use and which are not. Ms. EC[Redacted] testified that Employer's Drug Policy is ambiguous in regard to off-the-clock cannabis - marijuana - use to Colorado employees.

17. Claimant used marijuana before and after obtaining employment with Employer, and he was not subject to a drug test before beginning his employment. Claimant was provided a copy of the Employee Handbook, inclusive of the "Drug, Alcohol, and Controlled Substances Policy" ("Drug Policy") by Employer during the onboarding process. Employer did not orally or specifically inform Claimant that marijuana use was included in Employer's "Zero Tolerance" policy. Moreover, Claimant was not provided a list of prohibited substances.

18. Claimant was not provided a copy of the federal "Drug-Free Workplace Act of 1988" that is referenced in Employer's Drug Policy. Claimant understood the policy to mean he could be randomly drug tested at any time.

19. Claimant credibly testified that when the injury occurred, he was not under the influence of marijuana or opioids, nor feeling any effect of marijuana use that occurred before the injury. Claimant also credibly testified that he is not a recreational user of opioids.

20. The opioids detected in Claimant's urine was due to Claimant being administered opioids in the hospital.

21. Employer's Drug policy prohibits "the use, purchase, transfer, or possession of a controlled substance by any employee in a company vehicle or while performing company business[.]" It states, "The presence of an amount of any controlled substance that results in a positive test of any employee, while in a company vehicle or while performing company business is prohibited." Further, that "Being under the influence of a controlled substance while in a company vehicle or while performing company business is prohibited." **Cl. Ex. 3: 23**.

22. Marijuana possession, sale, and distribution is regulated by both state and federal law. In Colorado, marijuana is regulated as a controlled substance. *See* Colo. Rev. Stat. § 18-18-102. But as of 2012, Amendment 64 made it legal under state law for adults (people 21 years old or older) to possess and cultivate certain amounts of marijuana for personal use.

23. In regard to "Legal Drugs," the Drug Policy states that "The use or being under the influence of any legally obtainable drug by any employee while in a company vehicle or while performing company business, is prohibited, as such use or influence may affect the safety of others." **Cl. Ex. 3: 23**.

24. Claimant did not use, and was not under the influence of, marijuana while performing his job duties at the time of the accident.

25. Employer's Drug Policy is modeled after federal laws and regulations and not Colorado state laws and regulations. The Drug Policy specifically states that:

> This program is designed to comply with the regulations of the DrugFree Workplace Act of 1988 (Public Law 100-690) and applicable Federal Regulations including the Federal Motor Carriers Drug and Alcohol Clearinghouse. **R. Ex. E. 99**.

26. Employer's Drug Policy is ambiguous about whether it is permissible for employees to use marijuana in Colorado, which is legal to use and possess in Colorado, after hours. As testified to by Mr. BG[Redacted] , Employer's Drug Policy is only designed to comply with federal statute for drivers.

27. Moreover, the Drug Policy is ambiguous as to whether non-drivers, such as Claimant, are subject to the same substance use policies as drivers.

28. Employer's Drug Policy creates an ambiguity for Colorado employees as to whether off-the-clock marijuana use is permitted because it does not specify as to whether

marijuana is considered a prohibited controlled substance or a permissible legally obtainable drug for Colorado employees.

29. Employer did not clearly and unambiguously inform Claimant that off-the-clock marijuana use was prohibited.

30. Employer did not clearly and unambiguously inform Claimant that off-the-clock marijuana use was a terminatable offense.

31. Employer's "zero tolerance" policy does not clearly and unambiguously prohibit off-the-clock usage of legally obtainable drugs in Colorado such as marijuana.

32. Claimant was not under the influence of opioids or marijuana while working for Employer, or at the time of injury.

33. Claimant is not responsible for his termination because non-driver employees such as Claimant would not reasonably expect off-the-clock marijuana use, which is legal in Colorado, to result in the loss of employment.

34. Claimant is entitled to TTD benefits from the date of injury until terminated by law.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v.*

ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondent has proven by a preponderance of the evidence that Claimant is responsible for his termination from employment, and thus precluded from receiving Temporary Total Disability ("TTD") benefits.

As found, Claimant's work accident caused his disability and prevented Claimant from performing his regular job duties. Thus, he would be entitled to temporary total disability benefits. However, Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, Respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish a claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

Unless it is ambiguous a contract must be enforced as written. *Cary v. Chevron*, U.S.A., 867 P.2d 117 (Colo. App. 1993). A term in ambiguous if "fairly susceptible" to more than one interpretation. *Dorman v. Petrol Aspen Inc*., 914 P.2d 909 (Colo. 1996). Further, in determining whether the policy is ambiguous, the language must be examined "and construed in harmony with plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fiberglas Fabricators*, *Inc. v. Klyberg*, 799 P.2d 371, 374 (Colo. 1990).

As found, Claimant is not responsible for his termination because he did not act volitionally or exercise some control of his termination because, in light of the totality of the circumstances, he would not reasonably expect off-the-clock marijuana or cannabis use to result in the loss of employment. In other words, Employer allowed Claimant to believe off-the-clock marijuana or cannabis use was permissible and subjectively decided to apply the terms of its Drug Policy in a way that allowed Employer to terminate Claimant despite the apparent ambiguities in the Drug Policy, and Claimant has no control over that.

To begin, Mr. BG[Redacted] testified Claimant was terminated, partially, for having opioids in his system. As evidenced by the medical records, the opioids in Claimant's system were placed there by his providers at the UCHER. Claimant testified he does not recreationally use opioids and was not under the influence of opioids prior to his work injury. There is a lack of credible and persuasive evidence to contradict Claimant's testimony.

Next, Employer's Drug Policy is ambiguous is multiple ways. First, it is ambiguous as to off-the-clock cannabis use by non-driver employees of Employer in Colorado. Mr. BG[Redacted] testified Employer's Drug Policy is intended to comply with federal law "for drivers." Claimant is not a driver; he is a mechanic. Claimant does not work across state lines. Thus, it is ambiguous as to whether the intent of compliance with federal law is intended for mechanics like Claimant.

Second, Employer's Drug Policy allows employees to use legal drugs that are legally obtainable. Cannabis – marijuana - is a legal drug that is legally obtainable in Colorado where Claimant works. Employer's Drug Policy implies employees can use marijuana so long as the employee does not use or is under the influence of marijuana while in a company vehicle or while performing company business. Claimant credibly testified he did not use, nor was he under the influence of, marijuana at work.

Third, Employer's Drug Policy does not define what a "controlled substance" is, nor does it define what a legal or legally obtainable drug is. The Drug Policy does not specify whether Employer categorizes marijuana as an impermissible controlled substance or a permissible legally obtainable drug. Simply stated, the Drug Policy does not indicate that off-the-clock marijuana use is prohibited despite it being legal in Colorado, leaving employees to figure it out for themselves.

Fourth, Ms. EC[Redacted] testified that Employer does not inform its Colorado employees that off-the-clock marijuana use is prohibited unless the Claimant asks. Thus, Employer does not inform employees off-the-clock marijuana use will result in termination unless the Claimant asks. Expecting a new employee to ask his or her new employer what legal and legally obtainable drugs he can use is an unreasonable expectation, and

strongly suggests a “don’t-ask-don’t-tell” policy on behalf of Employer in regard to its Colorado employees and the use of marijuana.

Fifth, Employer’s “zero tolerance” policy does not specify that testing positive for a legally obtainable drug, the use of which occurred off-the-clock, will result in termination. Furthermore, Mr. BG[Redacted] testified that an employee can test positive for alcohol, a legally obtainable drug under Employer’s Drug Policy but not be terminated. Thus, per Mr. BG[Redacted] ’s testimony the “zero tolerance” policy is a not a “zero tolerance” policy creating more ambiguities within the Drug Policy.

Sixth, although the Drug Policy states that employees will be tested before they start their employment with Employer, Claimant did not undergo preemployment testing. Again, this is additional evidence which creates ambiguity as to whether the Drug Policy was applied against mechanics such as Claimant.

Thus, the ALJ finds and concludes that Claimant is not responsible for his termination because non-driver employees such as Claimant would not reasonably expect that off-the-clock marijuana use will result in the loss of employment. The Drug Policy is subject to multiple reasonable interpretations, including whether marijuana is a prohibited controlled substance or a permissible legally obtainable drug. As a result, Respondents failed to establish by a preponderance of the evidence that Claimant is at-fault for his termination and wage loss. Claimant is therefore entitled to TTD benefits from the date of injury until terminated by law.

ORDER

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

1. Claimant is entitled to temporary total disability benefits as of the date of his injury.
2. Claimant shall be paid temporary total disability benefits based on an average weekly wage of $980.67.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: April 14, 2022.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-096-070-003

ISSUE

1. Whether Claimant has overcome the Division Independent Medical Examination (DIME) physician's opinion regarding Claimant's impairment rating by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant was working for Employer as the Supervisor of Housekeeping when she sustained an injury in the course of her employment on January 4, 2019. On that day, Claimant fell down a stairwell. Claimant sustained numerous facial fractures, including a left-sided tripod fracture, left maxillary sinus fractures, a left lateral orbital wall fracture, a left zygomatic arch fracture, and non-displaced fractures of the anterior and posterior wall of the left maxillary sinus. In addition to her facial injuries, Claimant sustained a right middle finger strain and a fractured tooth. (Ex. B).

2. Following the work injury, Claimant had nasal congestion and difficulty breathing through her nose, with the left side worse than the right. On August 29, 2019, Peter McGuire, M.D., an ENT specialist, performed a septoplasty, concha bullosa excision, left, and septoplasty with submucous turbinate resection on Respondent. (Ex. R).

3. In January 2020, Claimant transferred care to ENT, Christopher Mawn, M.D. because of her continued difficulty breathing. On July 21, 2020, Dr. Mawn operated on Claimant to repair a nasal valve collapse. On December 3, 2020, Dr. Mawn noted in his records that Claimant was "[o]verall doing well with improved nasal breathing. She had some congestion on the right side, but was overall happy with the results." (Ex. AA).

4. On January 7, 2021, Jason Crawford, M.D, Claimant's authorized treating physician (ATP) evaluated her. Dr. Crawford documented that Claimant self-rated her breathing at 80% of her baseline. Claimant described continued "left eye pressure", but Dr. Crawford noted that two separate eye specialists treated her and did not identify any anatomic defect. Claimant's physical examination revealed "no significant nasal congestion." (Ex. BB).

5. On April 1, 2021, Dr. Crawford placed Claimant at maximum medical improvement (MMI). Her physical examination revealed "no sinus tenderness. No significant nares obstruction." Dr. Crawford concluded Claimant did not sustain a permanent impairment. (Ex. DD).

6. Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Crawford's opinions. Claimant objected and proceeded to a DIME, performed by Brian Beatty, D.O.

7. Dr. Beatty described the scope of his examination as follows: "[t]o consider maximal [sp.] medical improvement, permanent impairment and apportionment. To evaluate the right hand, face, nose, and throat." (Ex A).

8. Dr. Beatty noted Claimant's subjective complaints as:

> She also developed left upper teeth sensitivity and went to a dentist and was told she had a fractured tooth and this had occurred in May/April 2019. She still has some pain in the left jaw/temporal region when she chews and she still has difficulty with right middle when she tries to grafts. She has seen an ophthalmologist due to some difficulty with her left eye but she is unable to wear contact lenses and notes that her eye is dry. He left shin feels fine. She still has some stuffiness in her left sinus and stiffness in her right middle finger. She is still working full duties.

Dr. Beatty's physical examination revealed temporomandibular joint tenderness on the left, but full range of motion of the jaw with no deviation, clicking, or popping, and normal nasal passages. Dr. Beatty acknowledged Claimant's "persistent stuffiness" on the left nostril, and recommended a repeat CT scan. Dr. Beatty assigned Claimant a 7% impairment for the right middle finger due to the loss of range of motion, which equaled 1% whole person impairment. He did not assign any additional permanent impairment. (Ex. A).

9. Respondent filed an FAL consistent with the DIME opinion. (Ex. EE). Claimant objected and requested a hearing to overcome the DIME physician's opinion that she did not sustain a permanent impairment related to her facial injuries.

10. Respondent retained Carlos Cebrian, M.D., to perform an Independent Medical Examination (IME). Dr. Cebrian reviewed the medical records, examined Claimant, and prepared an IME report. (Ex. B).

11. In his IME report, Dr. Cebrian explained that the AMA Guides, 3rd Ed, *Revised* (AMA guides) presented three areas of potential impairment for Claimant's facial injuries, two in Chapter 9 (Ear, Nose, Throat and Related Structures) and one in Chapter 4 (Nervous System).

12. Dr. Cebrian credibly testified that according to the AMA Guides, Claimant did not qualify for an Air Passage Defect impairment rating (Chapter 9, Table 5, p. 181) because Claimant did not have complete obstruction of the nose. This was supported by Claimant's testimony.

13. Dr. Cebrian credibly testified that according to the AMA guides, Claimant did not qualify for a rating under nerve disorders (Chapter 4, Table 2, p.111) as Claimant's injury did not rise to the level of permanent impairment. Claimant did not provide any evidence to challenge this opinion.

14. Dr. Cebrian credibly testified that Claimant ***could*** receive a rating for Face Structural Integrity under Section 9.2 of the AMA Guides (p.179). Dr. Cebrian would place Claimant in Class I, which is "when the facial abnormality is limited to a disorder of the cutaneous structures, such as visible scars and abnormal pigmentation." Individuals in this class can be assigned an impairment rating of 0-5%. Dr. Cebrian testified that he would assign a 5% impairment rating. He explained in his IME report that the rating was due to the "loss of structural integrity of the face. This is evidenced by her left eye being open, more than the right, and a fullness of the left cheek. This category would also include any visible scarring on the face." (Ex. 1, pp 24-25).

15. Claimant underwent surgery in February 2022, at her own expense, to correct the facial deformities Dr. Cebrian referenced in his IME report.

16. Dr. Cebrian testified at hearing in support of his IME report. He explained that while he offered an impairment for Facial Structural Integrity, it was not incorrect for Dr. Beatty not to do so as the Class I impairment provided a range of impairment from 0% to 5%. The Level II Accreditation Curriculum provides guidance for such ratings, "[t]he impairment percentages are meant to reflect interference with social and vocational activities." https://codwc.app.box.com/v/L2ACurriculum p.353. He acknowledged the Curriculum statement and conceded in his testimony that he was likely "generous" with the 5% rating. Further, Dr. Cebrian explained it was not inconsistent for the DIME not to assign a rating for a permanent impairment as the AMA Guides provide ranges beginning with 0%.

17. Claimant credibly testified regarding her treatment, including the surgeries referenced above and her current symptoms. Claimant described sensitivity in her teeth on the left side and in the four areas on the left side of her face, as delineated in Exhibit 2. Claimant testified that she avoids cold drinks, chews carefully, and experiences symptoms when blowing her nose. Claimant testified she described these symptoms to Drs. Crawford, Beatty, and Cebrian. Accordingly, each doctor had the same information with which to determine permanent impairment.

18. Dr. Cebrian credibly testified that Dr. Beatty's assignment of no impairment rating for Claimant's facial injuries was not in error.

19. The ALJ finds that Claimant did not overcome Dr. Beatty's opinion on impairment by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

DIME Physician's Impairment Findings

The party seeking to overcome the DIME physician's finding regarding permanent impairment bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

The DIME physician, Dr. Beatty, specifically noted in his report that he was considering injuries to Claimant's face, but he did not assign Claimant an impairment rating for her facial injuries. (Findings of Fact ¶¶ 7-8). Dr. Crawford, the ATP, agreed that no impairment rating was appropriate for Claimant's facial injuries. (*Id.* at ¶ 5). Respondents' IME physician, Dr. Cebrian, credibly testified that Dr. Beatty did not err by not assigning Claimant an impairment rating for her facial injuries. With respect to facial

structure impairment, Dr. Cebrian credibly testified that because the AMA Guides provide for a 0% impairment for a Class I impairment, Dr. Beatty did not err by not assigning an impairment rating. (*Id.* at ¶¶ 16 and 18). Claimant presented no evidence to the Contrary. Dr. Beatty's opinion regarding Claimant's impairment rating must be overcome by clear and convincing evidence, and Claimant failed to do this.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits is denied and dismissed.

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

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

DATED: April 18, 2022

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant's admitted injury is not on the schedule of disability pursuant to Sec. 8-42-107(2), C.R.S.

II. If Claimant has a whole person impairment, whether Respondents have overcome the DIME physician's impairment by clear and convincing evidence.

III. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to maintenance medical benefits after maximum medical improvement.

PROCEDURAL HISTORY

Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME) on September 16, 2021 on the issue of Claimant's right shoulder impairment.

Respondents filed an Application for Hearing on December 16, 2021 on issues that included overcoming the DIME physician's opinion, compensable components of the Claimant's impairment and permanent partial disability benefits.

Claimant filed a Response to Respondents' December 16, 2021 Application for Hearing on December 17, 2021 on issues that included permanent partial disability benefits, and medical benefits that are authorized and reasonably necessary.

FINDINGS OF FACT

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

1. Claimant was 66 year old at the time of the hearing in this matter. He worked for Employer as a driver delivering construction materials, as of July 24, 2016. Employer was in the business of supplying materials such as pipes, water heaters and other equipment. Claimant would frequently have to load and unload large pieces of equipment, including lifting them off the delivery truck. Some of the water heaters would weigh up to 120 lbs. and he would frequently handle eleven to twelve per day. His truck had a tail gate door that weighed approximately 30 to 40 lbs. which he had to open and close multiple times throughout the day. He would lift the truck door in an upward motion. He frequently worked from approximately 4:30 a.m. to 5 p.m. and sometimes Saturdays.

2. For the five years from the date of his hire to the date of his admitted work related injury, he was able to perform all the essential functions of his job, and was working full time without limitations. He had no problems lifting the back gate of the truck,

lifting the water heaters in and out of the truck, getting up in the back of the truck and securing the equipment by tying them down.

3. On January 11, 2021 Claimant was sent to Colorado Springs with several deliveries. On the fourth or fifth delivery, Claimant was lifting the back door of the truck, it got stuck and when forcing the door up, Claimant felt a pop in his shoulder. Claimant is 5' 6" tall and he had to lift the tail door above his shoulder level. He felt a stabbing, knifing sensation in his right shoulder. Claimant indicated that the pain was between the tip of his shoulder anteriorly and up towards the base of his neck. Claimant immediately started sweating from the level of pain and felt agitation due to the pain.

4. Claimant finished his route as he was able and returned to report the injury to the Employer's warehouse manager, who sent him to see a physician at Concentra Medical Centers.

5. Claimant stated that he continued to have pain and problems with the right shoulder from the date of injury and ongoing. He required medications to help him handle his pain and his loss of function, which he did not have prior to the date of injury. He stated he continued to need some physical therapy and medications to handle his ongoing right shoulder problems.

6. He continued to have difficulty raising his arm in front of him. He continued to have difficulty with activities of daily living, especially if they involved lifting his right arm, such as washing his hair or putting on a hat. He even reported he had problems using the bathroom. Prior to the January 11, 2021 work related injury he was able to perform these activities without problems.

7. Claimant stated that he did not have an interpreter for all his medical appointments, and while he communicated the best he could with his providers, he could not be sure that he was making himself understood. He stated that his providers would frequently use words he did not understand. Claimant disputed that he ever used the word "pinch," but instead reported he felt a stabbing or knifing pain in his right shoulder.

8. Claimant was first seen on January 11, 2021 by Dr. Christian Updike of Concentra Medical Centers at Denver Aurora North. He presented for a right shoulder and arm injury which occurred on January 11, 2021 while he was pulling a door and felt a "pinch" in his arm. On exam, Dr. Updike found joint pain and muscle pain, tingling and numbness. Dr. Updike diagnosed a biceps rupture and sent him to his primary care provider as his hypertension was uncontrolled. He was provided with a sling and an MRI was ordered, but Dr. Updike indicated that anti-inflammatories and physical therapy were contraindicated until his blood pressure was under control. He provided restrictions of no use of the right arm and no driving company vehicles.

9. Claimant returned to see Dr. Updike[1] the following day stating that his right shoulder pain was getting worse and was constant. Dr. Updike found joint pain, muscle pain, neck pain, joint swelling, joint stiffness and night pain. He was mildly tender at top of shoulder, wearing a sling, very tender with ROM at the biceps. He assessed a right biceps tendon rupture, and referred Claimant to an orthopedic specialist as well as prescribed pain medications. He also noted that Claimant had a history of left biceps

[1] Visit transcriptions are authored by Dr. Updike but the Physician's Reports are authored by Dr. Amanda B. Cava.

rupture. On January 14, 2021 Dr. Updike ordered interpreter services for Claimant's appointments. As found, with regard to the sensation Claimant felt at the time of his admitted injury, Claimant's testimony is more persuasive as Dr. Updike did not indicate having an interpreter at the first evaluation and specifically noted ordering an interpreter on January 14, 2021.

10. On January 19, 2021 Claimant was evaluated by Dr. Cary Motz at the Concentra clinic. Dr. Motz took a history from Claimant that he was "a 65-year-old gentleman who injured his right shoulder on 01/11/2021 when he pulled up on the lift gate on his delivery truck and it stuck. He felt a pop in his right shoulder." Dr. Motz documented that Claimant had significant discomfort since the injury. He developed some deformity in the biceps. He had been treated with Percocet, muscle rub cream and lidocaine patches. He continued to have moderate discomfort and was using a sling. Claimant denied any prior problem with his right shoulder but Claimant stated he did have a Popeye deformity on the left due to a prior injury. On exam, Dr. Motz noted Popeye deformities in both biceps, but the left one was asymptomatic. Claimant had significant tenderness about the right shoulder and biceps tendon. He had limited range of motion, his rotator cuff strength was difficult to examine due to pain and there may have been some swelling about the right shoulder. He diagnosed probable long-head biceps tendon tear, probable rotator cuff tears and asymptomatic left chronic biceps tendon tear. Dr. Motz stated that Claimant may have a rotator cuff tear that lead to a biceps tendon tear on the right. He stated he needed the MRI to be performed to assess the shoulder further.

11. On January 21, 2021 Dr. Updike referred Claimant to Dr. Zimmerman for a physiatrist evaluation for purposes of pain management, including narcotic use.

12. The MRI was completed on January 28, 2021 and read by Adam Williams, M.D. There was a full-thickness, full-width tear of the supraspinatus and infraspinatus tendons with medial retraction of the torn tendon stump to the level of the glenoid. Subscapularis and teres minor tendons were intact. There was stage IV atrophy of the supraspinatus and infraspinatus. Subscapularis and teres minor muscles themselves were normal bulk and signal. The posterior labrum findings were suggestive of an old, healed labral tear. There was large effusion at the subacromial-subdeltoid bursa. The long head biceps tendon was completely torn and distally retracted. There was moderate acromioclavicular osteoarthrosis, and noted that fluid within the subacromial-subdeltoid bursa may represent bursitis, fluid extravasation from the glenohumeral joint, or a combination of both.

13. On February 1, 2021 Dr. Amanda Cava evaluated Claimant with regard to his right anterior shoulder and right lateral shoulder pain. She stated Claimant was having constant pain that was sharp and severe, was affecting his sleep and movement and causing joint and muscle pain as well as joint stiffness. On exam she noted Claimant was tender to touch in the anterior lateral right shoulder, had limited range of motion in all planes with pain. She provided medications, prescribed therapy and noted that objective findings were consistent with work related mechanism of injury.

14. On February 2, 2021 Respondents filed a General Admission of Liability for medical benefits and temporary disability benefits at the average weekly wage of $861.01 with a TTD rate of $574.01 beginning on January 15, 2021 though it states that the waiting period was paid.

15. Claimant was evaluated by Dr. Fredric Zimmerman at Concentra Advanced Specialists in Denver on February 2, 2021. Dr. Zimmerman documented a history consistent with Claimant's testimony of sudden "stabbing pain" in the right shoulder as well as weakness. He documented that Claimant had an interpreter for this appointment. On exam, he noted Claimant had limited range of motion and significant shoulder pain. Lift-off, Neer test and cross-arm test were all positive for impingement and irritability. Claimant had loss of biceps strength on the right compared to the left. After discussion of Claimant's options, including surgery and injection, Dr. Zimmerman noted that surgery was reasonable. He referred Claimant to Dr. Michael Hewitt for surgical consultation.

16. Claimant was evaluated by Dr. Motz on February 2, 2021. Following review of the MRI, he determined that the rotator cuff was not repairable and Claimant would require a reverse total shoulder arthroplasty to surgically address the shoulder but that "would need to be performed outside of the work comp claim as this is clearly a chronic massive tear that was headed for joint replacement more than likely down the road." He offered Claimant a steroid injection which might decrease the inflammation and reduce the pain in order to gain better function. He noted that Claimant's massive rotator cuff tear was chronic and not work related. He released Claimant from care.

17. Dr. Updike responded to Insurer's inquiry regarding the claim on February 19, 2021. Dr. Updike stated that Claimant's preexisting chronic rotator cuff tears were not work related or aggravated by the injury and the total shoulder arthroplasty would not be required through the workers' compensation system. He opined the biceps tendon rupture was related to the January 11, 2021 workplace accident. He recommended a steroid shot and physical and massage therapy for the work related aggravation and stated he would be at maximum medical improvement (MMI) within twelve weeks.

18. Pursuant to Dr. Zimmerman's referral, Claimant was evaluated by Dr. Michael Hewitt for an orthopedic surgeon consult on March 8, 2021. He reviewed the injury and history with Claimant. On shoulder exam, there was mild muscular atrophy, no acromioclavicular deformity, and biceps deformity consistent with probable biceps tendon rupture. Active range of motion was significantly decreased and caused pain even with mild shoulder shrug. Dr. Hewitt reviewed the MRI findings and discussed the treatment options with Claimant and, specifically advising him that he would, in all likelihood, need surgery.

19. Claimant was seen on March 22, 2021 by Dr. Nathan Faulkner for a third surgical opinion regarding his right shoulder. Dr. Faulkner took a history that Claimant stated he had had a prior fall on his right elbow while at work but did not report the injury and his shoulder improved. He recounted the incident of January 11, 2021 consistent with Claimant's testimony, including the immediate onset of sharp pain. Dr. Faulkner stated that the atrophy shown on MRI supported that the massive rotator cuff tear was not acute. He agreed with Dr. Updike's treatment plan for conservative care following the work injury as there were no prior records of injury.

20. Dr. Updike opined on April 30, 2021 that Claimant had a profound chronic rotator cuff tear that was destined to needing a total shoulder replacement before the January 11, 2021 event took place, with that event possibly being the final tear of any remaining shoulder muscle. He noted that, because of the events of January 11, 2021

Claimant would not likely ever be placed back to work at full duty and an impairment rating was appropriate but surgery was not appropriate under workers' compensation system.

21. On July 27, 2021 Dr. Zimmerman completed an impairment rating evaluation, noting the use of an interpreter. He stated Claimant was ineligible for narcotic medication prescriptions as he was non-compliant with his narcotic pain management contract. Dr. Zimmerman placed Claimant at MMI and provided an impairment rating in accordance with the *AMA Guides to the Evaluation of Permanent impairment*, Third Edition (*Revised*) with a 22% upper extremity impairment that converted to a 13% whole person impairment. Dr. Zimmerman indicated that there was no indication for apportionment with no previous right shoulder workman's compensation claims and did not recommend any further maintenance care.

22. Claimant was attended by Janelle Tittelfitz, PA-C on July 28, 2021. She noted that if Claimant required narcotic medication refills, that he would have to reach out to Dr. Zimmerman but that since he was using Lidoderm patches and Diclofenac gel, they would refill those with his pharmacy. She contacted his physical therapy who noted that he should continue for one more week of PT as he continued to await notice of authorization for surgery. Ms. Tittelfitz stated that she suspected that Claimant had an acute right shoulder biceps rupture but a chronic rotator cuff tear. Claimant stated that PT had helped a lot and requested further therapy. Ms. Tittelfitz advised Claimant that the stage IV atrophy indicated an old rotator cuff tear and that Insurer was unlikely to authorize the total shoulder replacement. She also reviewed discharge evaluation procedures with Claimant advising that he was at MMI per Dr. Zimmerman's report and impairment with no further maintenance care. The Physician Report of Injury (M-164) was issued by Dr. Cava on July 28, 2021 also stated no to maintenance care after MMI.

23. Dr. Robert Watson issued a DIME report on November 17, 2021. He took a history, reviewed the medical records submitted, and performed both a physical examination and range of motion testing. He indicated that he evaluated Claimant with an interpreter present. Dr. Watson noted that Claimant was complaining of pain in the anterior right shoulder and towards the body of the biceps on the right. Claimant complained of aching and inability to lift his arm above his head or shoulder level. On exam of the upper extremity, Dr. Watson found on palpation of the shoulder girdle some mild tenderness extending from the mid right shoulder girdle posterior, down to the area of the acromion; palpation of the shoulder showed tenderness over the bicipital groove; an obvious "Popeye" deformity consistent with the long head of the biceps tendon rupture on the right; full motion of the elbow, wrist and hand; and loss of range of motion of the upper extremity. A negative drop arm test, with restricted motion, positive Speed's Impingement test and negative Finkelstein's test in the wrist and hand. Dr. Watson found Claimant to be at maximum medical improvement on July 21, 2021, agreeing with Dr. Zimmerman that Claimant required no maintenance care. He noted that only the biceps tendon rupture was work related but that the massive rotator cuff pathology was degenerative, based on the MRI findings, and not work related.

24. Dr. Watson provided an impairment rating using the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*). Range of motion for the shoulder was added, for a total of 19% for a regional impairment of the upper extremity of the right shoulder and converted it to a whole person impairment,

using Table 3 (p. 16), which equaled 11%. Claimant was given permanent work restrictions at light physical demand, no overhead reaching of the right upper extremity, and no ladders. Lastly, he noted that no maintenance medical care was needed for the work related injury.

25. Dr. Watson testified by deposition on March 9, 2022. Dr. Watson was accepted as an expert, who was Board certified by the American Board of Preventative Medicine and Occupational Medicine and Level II accredited.

Dr. Watson stated that the biceps tendon rises on the head of the humerus, comes down through the bicipital groove of the humerus, and then attaches on the proximal radius and forearm, with the biceps tendon running underneath the supraspinatus and infraspinatus and subscapularis tendons. He explained the anatomy of the shoulder girdle, specifically noting that there were three primary muscle groups and four main tendons that comprise the rotator cuff in addition to the biceps tendon and the deltoid muscles, all of which are necessary to have full range of motion. Dr. Watson stated that while physiologically, the biceps tendon rupture primarily accounted for the loss of flexion that he was required to perform the impairment rating under the *AMA Guides* and the Division guidelines for determining an impairment rating. He specifically stated with regard to loss of range of motion that "[T]hey do not necessarily allow me to separate these out for the purpose of impairment rating unless I have preexisting range of motion measurements. So from an administrative standpoint, this is the whole, and I don't get to separate them out unless I have some way to apportion it."

26. It is inferred from reports issued by Dr. Motz, Dr. Faulkner, Dr. Updike and Dr. Watson that, because Claimant already had a preexisting rotator cuff tear, the biceps tendon on the right was assisting Claimant in utilizing his arm to continue performing work activities and once ruptured, Claimant had little remaining substantial tendon structures that would assist him with significant arm movement.

27. As found, Claimant's rotator cuff pathology is primarily preexisting the January 11, 2021 workplace injury.

28. As found, Claimant's biceps rupture is work related, including the loss of range of motion.

29. As found the appropriate impairment to be assigned is for loss of range of motion in accordance with the *AMA Guides* and the impairment rating protocols established by Division.

30. As found, Claimant's functional impairment involves not just the arm, as the arm has little function without the tendons, tissue and muscle surrounding the glenohumeral joint (ball of the humerus). The biceps tendon is attached proximally from the humerus head and is part of what induces the function.

CONCLUSIONS OF LAW

A. Generally

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

(2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Impairment Benefits

Claimant asserts in this matter that he has an injury to the whole person, and that his admitted injury is not on the schedule of impairments. Respondents not only assert that the schedule applies in this case, but that Claimant must prove by clear and convincing evidence that the causation analysis of Dr. Watson must be overcome by clear and convincing evidence because his true opinion is that the biceps tendon is part of the arm alone, not involving functional limitations of the shoulder girdle, and that only flexion of the arm is involved, which is exclusively on the schedule.

a. Schedule vs. Whole Person

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* Section 8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under Section 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). The ALJ must determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868- 996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (Dec. 28, 2006).

Base on case law, this ALJ concludes that medical impairment benefits must be determined in statutory order. The first question must be whether Claimant has an impairment on the schedule of impairments first. This burden is by preponderance of the evidence, not a clear and convincing standard, because the DIME process does not apply to scheduled injuries, if this is a scheduled injury.

In the case of a shoulder injury, where the long head of the bicep tendon of the right shoulder was ruptured, the question is whether the injury has affected structures and function beyond the arm at the shoulder. *Brown v. City of Aurora*, W .C. 4-452-408 (Oct. 9, 2002). The portion of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*) (*Guides*) related to the upper extremity is not a model of clarity but it is clear that an upper extremity and an arm at the shoulder are not equivalent. The upper extremity is composed of multiple sections that include the hand, forearm, arm, and shoulder complex or girdle. In turn, the joints that are between each section are the writs or radiocarpal joint, the elbow, and the glenohumeral joint. See AMA *Guides*, Ch. 3, Sec. 3.0. Proximal to the glenohumeral joint are the acromioclavicular joint, the clavicle and the scapula and all the muscle tissue that is proximal to the joint including the supraspinatus, infraspinatus, trapezius muscles that are involved in producing movement of the upper extremity. The *Guides* are further confusing because Figure 2 of Sec. 3.1b

at p. 15 (impairments of upper extremity from amputation at various levels) shows an anatomical sketch where a 100% loss of the *upper extremity* rating is assigned when there is an amputation of the arm at the mid-point of the humerus bone. The same figure also converts the 100% upper extremity impairment to 60% of the whole person, even if the entire *shoulder girdle* remains intact. The *Guides* do not rate impairments of the "*shoulder*." The *Guides* rate impairments of the *upper extremity*. However, the schedule of impairments is for "*loss of an arm at the shoulder*." Section 8-42-107(2), C.R.S. Inherent in this rating provision are the body part impairment, in this case the arm, that is being measured "*at the shoulder,*" which is the location.

As is noted by the Industrial Claim Appeals Office panel in *Newton v. Broadcom, Inc.,* the General Assembly chose not to list the scheduled body part as the "loss of the arm and the shoulder," or "loss of the arm and all bodily tissue directly attached thereto," or "loss of the shoulder joint," or "loss of the shoulder girdle," or "loss of the upper extremity." *Newton v. Broadcom, Inc.*, I.C.A.O., W.C. No. 5-095-589-002 (July 8, 2021). As this ALJ is precluded from reading nonexistent provisions into the Act, *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App. 2016), it cannot be assumed that "arm at the shoulder" is anything that extend into the shoulder joint or functionally affects body parts or structures or function that are at the shoulder itself or proximal from the shoulder joint. In this case, Claimant worked for employer loading and unloading heavy construction supplies on his own for five years, for example heavy water heaters that would weight up to 120 lbs. It is also clear that Claimant had chronic rotator cuff tears as shown by the MRI of January 28, 2021. The Claimant credibly testified that he was able to perform all his job functions prior to the January 11, 2021 admitted work related injury but now is severely limited in his abilities, as noted by the DIME physician by limiting him to light physical demands and no overhead reaching of the right upper extremity. Since Claimant already had significant pathology prior to the work injury, this ALJ infers and concludes that Claimant's remaining upper extremity structures, including the long head biceps tendon, were compensating for the preexisting conditions and that the rupture of the long head biceps tendon was what caused him to lose significant remaining function of the upper extremity, the proverbial straw the broke the camel's back.

The arm, without other bodily tissue, is immotile. Said another way, the arm, without other bodily tissue, has no spontaneous power to move. Thus, without other bodily tissue, the arm itself has no range of motion and no functional ability. For range of motion to exist in the arm, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate. See *Newton, supra.* The long head biceps tendon attaches above the head of the humerus bone, right below the coracoid process. Here, the humerus bone is not the injured body part. The bone itself did not lose function or substance. Any corresponding loss of range of motion is not attributable to the humerus bone. Here, like in *Newton*, there is no indication that the loss of range of motion is due to an impingement or loss of bony material. Rather, any loss of range of motion is attributable to the loss of function of the muscles, tendons, or cartilage, or all three, which operate together to permit spontaneous movement of the arm. *Newton, supra*

Findings regarding pain, physical limitations, problems with range of motion, protective carriage of the limb, and difficulty with activities of daily living are not factors that determine the "situs of functional impairments." Rather, they are manifestations of

functional impairments. Loss of range of motion is an effect of an impairment but not the underlying impairment itself. This ALJ is not persuaded by Respondents' suggestion that unless there is pain in the neck, no conversion is proper. There is no dispute that pursuant to the *Guides*, the loss of range of motion in this case as assigned by Dr. Watson is 22% of the upper extremity, which converts to 11% whole person impairment. The "arm" sustained no anatomical disruption to account for this loss of motion. Hence, the loss of motion arises from an anatomical disruption of the tissues of the biceps tendon that attaches right above and proximal to the glenohumeral joint, at the supraglenoid tubercle, which is considered a region of the scapula, attaching to the coracoid process. See *Gray's Anatomy*. The tendon that was ruptured was substantially in reliance of tissue attachments in the torso. Therefore the anatomical disruption or functional impairment is not only of the arm or of the glenohumeral joint, but rather of the shoulder complex proximal to the torso from the glenohumeral joint.

As found, there is loss of function that is proximal[2] to the shoulder joint structures that activate the use of the arm when measuring loss of range of motion. Specifically, the DIME physician, Dr. Watson, concluded that Claimant had loss of range of motion caused by the work related injury and the impairment caused by the loss of range of motion cannot be separated in a workers' compensation rating without preexisting records showing impairment, which were not tendered to the DIME physician nor the court. As found, this ALJ cannot but conclude that Claimant has lost function that is beyond the glenohumeral joint because the impairment of the bicep is measured through the loss of motion of the upper extremity.

As specifically found here, Claimant's work related injury of January 11, 2021 caused a disruption in the functioning of his upper extremity, not just his arm, and the biceps tendon may have been the last critical tissue structure that was keeping Claimant's upper extremity functioning before it ruptured. As found, Dr. Watson was clear in his testimony that Division prohibited any parceling out or apportionment of range of motion without medical records of a preexisting injury documenting prior loss of range of motion. Based on the totality of the persuasive evidence, Claimant is entitled to a determination that his loss of function encompasses all of his lost range of motion as required by the AMA *Guides*, the Division and the Level II accreditation requirements that a biceps tendon be rated based on loss of range of motion of the upper extremity, which affect portions of the body beyond the glenohumeral joint and proximal tissue function. Claimant has shown by a preponderance of the evidence that Claimant has an 11% whole person impairment rating, a rating not on the schedule.

b. Overcoming the DIME physician's opinion

Respondents also asserted that they need not overcome the DIME physician's opinion by clear and convincing evidence because Dr. Watson testified that the biceps tendon rupture primarily affected flexion, so the burden of proof is really just preponderance of the evidence. This ALJ disagrees. Respondents must prove that the

[2] Proximal to a joint is closer to the center of the body, trunk or torso. If it is proximal to the shoulder joint, it is towards the neck or the spine. If a symptom or condition is distal to the joint it moves away from the center of the body from the joint. If it distal to the shoulder joint, it is toward the hand.

DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021). The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, *supra*.

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*.

A party seeking to overcome the DIME physician's opinion need only prove that any one particular aspect of the impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

In this case, even if Claimant's objective physiologic functional impairment is only to flexion, the flexion is a function of the upper extremity, not of the arm alone. Flexion is not performed by the humerus. It is performed by multiple tissue, tendons and muscles as stated above. As found, Claimant's impairment is not on the schedule and is a whole person impairment. Dr. Watson's true opinion with regard to the assigning of impairment is that he, as a Level II physician, must comply with the AMA *Guides* and the Division impairment protocols, which require a physician to rate the upper extremity loss of range of motion when there is a biceps tendon rupture. As found, Dr. Watson fulfilled his mandate by providing such an impairment rating and the DIME physician correctly applied the *AMA Guides* and other rating protocols. Therefore, as further found in this case, Respondents' burden must be a clear and convincing standard. The totality of the persuasive evidence shows that Dr. Watson complied with the requirements of the AMA *Guides* and the impairment rating protocols in assigning the 11%whole person impairment rating for Claimant's loss of function related to the biceps rupture. There was no other persuasive evidence that Claimant has anything other than the 11% whole

person impairment. Respondents have failed to overcome the DIME physician, Dr. Watson's, impairment rating by clear and convincing evidence.

Lastly, if Claimant's arguments are that Claimant's massive rotator cuff injuries were related to this claim of January 11, 2021, whether fully related or aggravated by the incident, this ALJ concludes that they were not, as supported by Dr. Watson's opinion as well as multiple other provider's opinions, that the rotator cuff pathology was chronic and preexisting. Claimant has failed to show by any standard of proof that Claimant's rotator cuff injury is related to the January 11, 2021 workplace injury.

C. Maintenance Medical Benefits after Maximum Medical Improvement

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Drs. Watson, Zimmerman and Updike all agree that Claimant does not require maintenance medical benefits. There is a lack of persuasive evidence that any medical provider made recommendations for maintenance care in this matter. Claimant has failed to show by a preponderance of the evidence that he requires maintenance benefits after having achieved maximum medical improvement.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay permanent partial disability benefits based on the Dr. Watson's impairment rating of 11% whole person impairment. Respondents may take credit for any benefits paid from the date of MMI to the present.

2. Claimant's claim for maintenance medical benefits under *Grover* is *denied* and *dismissed.*

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

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

DATED this 19th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-845-972-002

ISSUES

The issues for determination were:

- Did Claimant prove that hydrotherapy/aqua therapy (as prescribed by ATPs-Dr. Leahy and Dr. Polovitz) was reasonable, necessary and related as maintenance treatment, including the mileage going to and from hydrotherapy treatments?

- Is Claimant is entitled to reimbursement for payment of $677.75 for ophthalmological services rendered by ATP Dr. Politzer?

PROCEDURAL HISTORY

The undersigned ALJ issued a Summary Order on December 16, 2020. Respondents requested a full Order on December 31, 2020. This Order follows.

FINDINGS OF FACT

1. On January 17, 2011, Claimant suffered an admitted industrial injury while working for Employer. He was a restrained driver in his vehicle and was stopped at an intersection when he was rear-ended by another vehicle.[1]

2. Claimant received medical treatment for his injuries. Richard Leahy, D.O. from Elizabeth Family Health had previously treated Claimant before the MVA. Dr. Leahy was an ATP who provided treatment to Claimant starting in April 2011.[2]

3. Claimant was also injured on May 30, 2012 when his head was struck by an umbrella while undergoing rehabilitation for his work injuries. This was a compensable injury.

4. On May 17, 2011, Dr. Leahy wrote a prescription for hydrotherapy for Claimant that was to take place in Parker. The diagnosis was C6-C7 radiculopathy and cervical, lumbar spondylosis, DDD.

5. On August 8, 2012, Dr. Leahy wrote a prescription for hydrotherapy for Claimant. This was for a diagnosis of "DDD C-L spine".

6. A medical benefits issue arose in 2012 and ALJ Felter issued Findings of Fact, Conclusions of Law and Order on April 4, 2013 in which he ordered Respondents to pay for bilateral carpal tunnel surgery as recommend by A.T. Alijani, M.D.

[1] The MVA was described in Dr. Paz' IME report. [Exhibit 8, p. 76.; Exhibit B, p.6].

[2] Exhibit 12, p. 142.

7. Dr. Leahy authored a letter, dated April 18, 2016 in which he stated Claimant would need ongoing physical therapy or chiropractic treatment, along with pool therapy and medications for the injury sustained on January 17, 2011.

8. On September 28, 2016, parties entered into a settlement agreement for a full and final settlement of the case. The settlement agreement had a Medicare Set-Aside ("MSA") provision, which specified Respondents had the option of funding the MSA or leaving medical benefits open.[3]

9. The proposed MSA did not have a reference to or an amount allocated for future costs related to eye or vision issues.[4]

10. On April 18, 2018, Claimant was evaluated by Katherine Polovitz, M.D. He reported fatigue, slurred speech episodes and loss of time episodes. In the review of systems, Dr. Polovitz noted it was negative for blurred vision and eye pain. On examination, Claimant's neck had decreased range of motion ("ROM") with left rotation and right rotation. His neurologic exam was negative. Dr. Polovitz diagnoses were: post-concussion syndrome; post-concussional syndrome; seizures; unspecified convulsions; other fatigue.

11. Dr. Polovitz noted Claimant had done a version of cognitive therapy, as well as EMDR. Claimant's MRI and EEG were essentially normal around the time of that therapy and he had not had any recent episodes of loss of awareness. Dr. Polovitz recommended he continue with a very good sleep hygiene and routine exercise. Dr. Polovitz did not make specific treatment recommendations at that time (including for eye problems) and did not offer an opinion on causation.

12. There was no evidence in the record that Claimant reported eye symptoms or required treatment for vision issues from 2011-2019.

13. On August 5, 2019, Dr. Leahy wrote a letter recommending hydrotherapy for chronic pain s/p MVA.

14. Claimant submitted attendance records from Lifetime Fitness Gym for the period January 6, 2016 through September 18, 2019 (193 weeks). These records showed Claimant visited this facility 244 times during this period, which equated to 1.26 visits per week during this time.

15. In a letter, dated October 3, 2019, Dr. Leahy stated Claimant had been utilizing Lifetime Fitness Center since 2012 in order to obtain hydrotherapy. Dr. Leahy said Claimant required a pool-type setting in order to complete his treatment in a therapeutic venue. Dr. Leahy said a hot tub, although beneficial, was not adequate as a means of receiving essential treatment. He concluded Claimant required a pool in order

[3] Exhibit 10, p. 122.

[4] Exhibit 11, p. 140.

to maintain his quality-of-life following the trauma and subsequent health-related issues that were directly related to the 2011 MVA and 2012 injuries.

16. Dr. Leahy drafted a letter, dated November 4, 2019, in which he addressed aquatic or hydrotherapy. He noted Claimant suffered multiple traumatic injuries involving his lumbar, cervical, bilateral upper extremities, and head following the MVA of 2011. Claimant sustained further cervical and head injuries as a result of the 2012 pool accident. Dr. Leahy said the aquatic therapy was initiated in 2011 after invasive treatment and found to be extremely beneficial as his primary non-invasive therapeutic invention, utilized for pain control, core strength, cognitive maintenance and improvement. Dr. Leahy stated aquatic therapy utilizing a pool offered the necessary treatment for Claimant by utilizing the principles of hydrostatic pressure, buoyancy and viscosity of water. These principles used in a therapeutic venue were the standard of care utilized in similar multi-trauma cases to those suffered by Claimant. Dr. Leahy stated the support of the water was complete and surrounded the body from all sides. Reduced weight and hydrostatic pressure allowed Claimant to upload his spine, increase blood flow to injured areas promoting healing, reduction of joint stress, stretching out of muscle groups which were guarding given the neural and increase range of motion, as well as cardio therapy. Dr. Leahy said aquatic therapy had and would continue to be a necessity for Claimant's continued success. Dr. Leahy stated a hot tub would only be considered adjunct therapy.

17. Dr. Leahy's recommendations for hydrotherapy did not specify the duration or frequency of treatments. There was no evidence in the record Dr. Leahy oversaw Claimant's hydrotherapy at Lifetime Fitness. The ALJ found this opinion did not provide for oversight by an ATP or how the treatment would maintain MMI or prevent deterioration.

18. There was no confirmation in the record that Respondents paid for any part of Claimant's membership at Lifetime and reimbursement (from 2016-19) that was requested as part of Claimant's Application for Hearing.[5]

19. On or about November 8, 2019, Respondents denied the request for payment of Dr. Politzer's services and for glasses prescribed by Dr. Politzer (date of service February 26, 2019). No report was submitted from Dr. Politzer which provided an opinion as to why the need for glasses was related to Claimant's injuries. The denial was made pursuant to W.C.R.P. 16-11(A)(B) and (C).[6]

20. On November 20, 2019, Respondents denied the request for payment of mileage for hydrotherapy at Lifetime Fitness and Lifetime dues for the period of November 2016 through October 2019. A second denial for the mileage and Lifetime dues was sent on or about December 23, 2019.

[5] Exhibit 1, p.3.

[6] Exhibit C, pp. 38-39.

21. On March 3, 2020, Claimant was evaluated by F. Mark Paz, M.D., at the request of Respondents. At that time, he complained of numbness/tingling in the upper and lower extremities bilaterally; intermittent versus constant. Claimant also reported headaches. Dr. Paz reviewed the history of Claimant's treatment, including surgeries for CTS and for the lumbar spine. On examination, Claimant had good ROM in the thoracic spine (on flexion, right and left rotation), with no trigger points or fasiculations. Claimant's lumbar spine had no paraspinal muscle spasm or tenderness. Lumbar spine active range of motion on extension was less than 10°, right and left lateral flexion less than 10°, with no percussion tenderness in the midline of the lumbar spine, L1- S1. The straight leg raise tests for the right and left lower extremity were approximately 60°. No neurologic abnormalities were identified.

22. Dr. Paz' assessment was: neck pain; chronic low back pain; cervical degenerative disc disease, history of; cervical spondylosis, history of; traumatic brain injury, history of; sleep dysfunction; post-traumatic stress disorder, history of; deconditioning, history of; lumbar degenerative joint disease, history of; lumbar degenerative disc disease, history of lower extremity parasthesias; diabetic peripheral neuropathy; bilateral carpal tunnel syndrome; status post-decompressive surgery, right upper extremity; obesity; hypoxia by pulse oximetry, without tachycardia; elevated blood pressure; cognitive dysfunction, by history; diabetes mellitus type two; gout; hearing loss; Meniere's disease; left hand extensor tendon repair, history of; opioid dependence.

23. Dr. Paz opined the hydrotherapy treatment was not reasonable, necessary, nor causally related to the January 17, 2011 and/or May 30, 2012 incident. Hydrotherapy was defined as warm water pool treatments. Dr. Paz noted that the records of Dr. Leahy, who recommended the hydrotherapy, did not show he reviewed Claimant's treatment. As found, this treatment was essentially self-directed, along with Claimant's exercise program and not supervised by a medical professional. In addition, the ALJ found Dr. Leahy, though he recommended the treatment, did not specify that Claimant required it to maintain MMI or to prevent deterioration of his condition. Dr. Paz reviewed the DOWC MTG, specifically chronic pain disorder (Rule 17, Exhibit 9), cervical spine injury (Rule 17, Exhibit 8) and low back pain (Rule 17, Exhibit 1) as these applied to the case. Dr. Paz noted the term "hydrotherapy" was not identified by the DOWC MTG. Dr. Paz opined the definition of hydrotherapy, outside of DOWC MTG was not consistent with defined treatments of pool therapy or aquatic therapy. In addition, no treatment records were signed by a therapist as opposed to active therapy associated with hydrotherapy. Dr. Paz stated there was no evidence that this treatment was supervised. Dr. Paz distinguished hydrotherapy from pool therapy that was referenced in the DOWC MTG. Dr. Paz' analysis was persuasive to the ALJ.

24. Dr. Paz also stated that the eye care plan was not reasonable, necessary, nor causally related to the January 17, 2011 and/or May 30, 2012 incident. Dr. Paz noted that Claimant did not report subjective symptoms of vision abnormality during the IME, nor during the other IMES (performed by Drs. Goldman and McCranie). The ALJ credited Dr. Paz' opinions on relatedness, specifically whether the need for eye evaluations and treatment were related to the January 17, 2011 and May 30, 2012 injuries.

25. Claimant returned to Dr. Polovitz on April 15, 2020 (telehealth visit). He had not returned to his pre-injury baseline, but was keeping himself busy at home. He reported back pain, myalgias and neck pain. The evaluation was negative for blurred vision, eye drainage and pain. He had not had any recent episodes of loss of awareness and his sleep had improved. Dr. Polovitz‘ diagnoses were the same as the previous evaluation. She continued the prescription for modafinil and recommended that he continue to do aqua therapy. Dr. Polovitz said this was “absolutely” recommended for Claimant’s ongoing care and quality of life, including improving his sleep.

26. Claimant testified that the hydrotherapy helped the condition of his back, as it provided pain relief. He estimated that he went to Lifetime Fitness three times per week. In addition to the hydrotherapy, Claimant participated in a self-directed exercise and stretching program. Claimant was a credible witness when testifying that the hydrotherapy helped his physical condition.

27. There was no evidence in the record that Claimant’s hydrotherapy treatment was overseen by a health care professional.

28. Claimant failed to meet his burden of proof to show that care and treatment for an eye condition was reasonable necessary and related to his work injuries. Claimant failed to meet his burden of proof to show that the hydrotherapy treatment were reasonable and necessary.

29. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical Benefits

Claimant had the burden of proving his entitlement to medical benefits by a preponderance of the evidence. The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

Claimant alleged that the evidence established he required hydrotherapy to maintain MMI and prevent deterioration of his condition. Claimant argued that his testimony, the medical records from the ATP's, along with the plausible inferences drawn therefrom, supported the conclusion that both hydrotherapy and evaluation by Dr. Politzer was reasonable, necessary and related. Respondents argued there was no evidence to support the conclusion that the hydrotherapy treatments were supervised by a physician. Respondents also asserted that there was no evidence to show that Claimant's eye issues were related to the work injuries. The ALJ concluded Claimant failed to meet this burden with regard to treatment of his eye condition and hydrotherapy.

As a starting point, Claimant suffered two injuries which arose out of and were in the course of his employment. (Findings of Fact 1, 3). He required both conservative treatment, as well surgical treatment for those injuries. (Findings of Fact 6, 21). As determined in Findings of Fact 9-12, there was no reference to eye symptoms or vision problems from 2016-19 in the treatment records, including when the case was settled with MSA provisions. The records from Claimant's treating physicians admitted at hearing failed to prove that his need for this treatment was caused by or related to the injuries suffered. The ALJ concluded Claimant did not meet his burden of proof to show that his need for eye care (including eyeglasses) was causally related to the industrial injuries and their sequalae. (Finding of Fact 28).

Next, the ALJ reviewed the request for reimbursement of Claimant's hydrotherapy at Lifetime Fitness (including member fees and mileage). Claimant failed to meet his burden of proof with regard to this request for medical benefits. As a starting point, the ALJ credited Claimant's testimony regarding the salubrious effect of this treatment. (Finding of Fact 26). However, the ALJ was not persuaded this constituted a medical treatment that would fit within *Grover* medical benefits. As determined in Findings of Fact 4-5, 7,15-16, Dr. Leahy made multiple recommendations for hydrotherapy. While Dr. Leahy described the mechanism and benefits of hydrotherapy, there was not a specific statement by Claimant's ATP-s (including Dr. Leahy) as to why this treatment was required to maintain MMI or prevent deterioration. (Finding of Fact 17). In addition, while this treatment was recommended by the Drs. Leahy and Polovitz, the parameters of this treatment [frequency, duration etc.] were not elucidated. *Id*. Both Dr. Leahy and Polovitz stated the hydrotherapy was required to maintain Claimant's quality of life, as opposed to a specific statement about MMI. The ALJ also found this treatment was not supervised by a medical professional. (Finding of Fact 27). Based upon this evidence, the ALJ

concluded the medical evidence did not support an Order requiring Respondent to pay for Lifetime Fitness and the hydrotherapy as a medical benefit.

In this regard, the ALJ also credited the expert testimony of Dr. Paz, who noted this treatment was not defined in the DOWC Medical Treatment Guidelines. As found, Dr. Paz distinguished between treatment that was supervised by a therapist and the treatment Claimant was doing, which was essentially self-supervised. (Finding of Fact 23). Claimant's request for medical benefits will therefore be denied, as there was not sufficient evidence to establish that this treatment was required to maintain MMI or prevent deterioration of his condition.

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, the Judge enters the following Order:

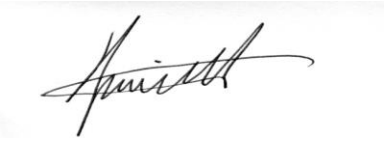
1. Claimant's claim for medical benefits is denied and dismissed.

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

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

DATED: April 20, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-087-009-005

ISSUES

I. Whether Claimant is at MMI.

II. The extent of Claimant's permanent impairment.

FINDINGS OF FACT

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

1. On July 10, 2018, Claimant suffered an injury to his neck, low back, and groin when he was rear ended while driving his work vehicle. **RHE D, p. 15**. On February 1, 2022, Claimant testified that he was "in stop-and-go traffic, and a car that wasn't paying attention, whose lane had slowed down, switched lanes and rear-ended" him. **HearTr, p. 17**. Claimant sought care at the "closest Concentra he could find on google." **HearTr, p. 17**.
2. Claimant presented to Concentra right after the accident and was seen by Dr. Jay Reinsma. At this visit, Claimant complained of neck, back, and bilateral shoulder pain. Dr. Reinsma's assessment of Claimant included whiplash, low back strain, as well as pain in his left testicle. Due to Claimant's neck pain – whiplash injury – he also ordered cervical spine x-rays. The x-ray findings were "unremarkable." He also prescribed physical therapy and assigned work restrictions. **CHE 8, pp. 43-47.**
3. On July 13, 2018, Claimant returned to Dr. Reinsma. At this visit, he completed a pain diagram. Claimant noted that he had pain in his neck, shoulders, and back. **CHE 8, p. 56**.
4. On July 18, 2018, Claimant returned to Dr. Reinsma. At this visit, Claimant still complained of pain in his neck, shoulders and back. At this visit, however, Claimant also stated that he was having testicular pain. Claimant stated that he had a metal cup between his legs at the time of the accident and when he was thrown forward during the accident, the cup hit the steering wheel and caused the cup to strike his left testicle. **CHE 8, p. 57**.
5. Claimant kept treating with Dr. Reinsma for his back, neck, and shoulder pain. Dr. Reinsma kept prescribing physical therapy and chiropractic treatment.
6. On August 22, 2018, Claimant returned to Dr. Reinsma. Claimant still had ongoing neck pain and low pain and was not getting better. Therefore, Dr. Reinsma ordered an MRI and referred Claimant to a specialist – Dr. Aschberger. **CHE 8, pp. 75-78**, **87**.

7. Claimant underwent a cervical MRI on August 29, 2018. The MRI showed the following:

> A very mild disc bulge at C4-5 and very small disc protrusions at C5-6 and C6-7 without central canal stenosis or spinal cord compression.
>
> A small to moderate uncovertebral osteophytes from C3 through C7 contributing to mild to moderate foraminal narrowing.
>
> **CHE 8, p. 80**.

8. On September 18, 2018, Claimant was seen by Dr. John Aschberger – a physiatrist – for neck and back pain. In the report, it notes that Claimant has been undergoing chiropractic, acupuncture, and massage therapy. It also reports that Claimant did have a prior back strain. During the visit, Claimant asked about imaging of his thoracic and lumbar spine. But, based on Dr. Aschberger's assessment, he did not think it was warranted. Dr. Aschberger, did, however, recommended dry needling, and ongoing physical therapy in the form of stretching and massage therapy. Lastly, he noted his findings were mild overall. **CHE 8, pp. 87-90**.

9. On October 9, 2018, Claimant returned to Dr. Aschberger. At this visit, Claimant stated that his back pain was getting better and that he had some persistent tightness in his neck and upper trapezius. Claimant also complained of ongoing testicular pain. Dr. Aschberger noted that review of Claimant's physical therapy records revealed Claimant was improving his range of motion. Due to his testicular pain, Claimant was referred to his urologist, Dr. Horne. At this appointment, Dr. Aschberger assessed Claimant with a cervical strain and possible lumbar strain. **CHE 8, pp. 91-92**.

10. On December 13, 2018, Claimant was seen by Dr. Lacie Esser with continued neck and back pain. At this visit Claimant complained about his treatment. Claimant felt that he should be prescribed additional passive treatment, such as massage, hot/cold therapy, and partner stretches. He was also upset that it was taking too long to see additional specialists. Lastly, he complained about pain in his right ring finger. As a result, Dr. Esser referred Claimant to Dr. Sachar for evaluation of his right ring finger complaints. **CHE 8, pp. 111-115**.

11. On January 28, 2019, Claimant was seen by Dr. Sachar for his right ring finger. After obtaining an MRI, he diagnosed Claimant with a right finger PIP joint ganglion. He did not recommend any treatment at that time since it was not very symptomatic. **CHE 9, p. 123**.

12. On April 26, 2019, Claimant underwent an MRI of his lower back. The impression was:

1. Patchy appearance of the bone marrow suggesting osteopenia. Finding should be correlated with radiographs.
2. Multilevel degenerative disc disease as described. No disc herniation or spinal canal stenosis.
3. Bilateral pars defect at L5.

13. On June 6, 2019, Claimant was seen by Dr. Aschberger. At this appointment, Dr. Aschberger treated Claimant's lumbar strain by providing lidocaine injections at the L2, L4, and L5 area. **CHE 9, pp. 138-139**.

14. On June 7, 2019, Claimant was seen by Dr. Robert Kawasaki for lumbar epidural steroid injections. Claimant underwent an injection for lumbar radiculopathy. **CHE 9, pp. 142-143**.

15. On July 11, 2019, Claimant returned to Dr. Aschberger. At this visit, Dr. Aschberger evaluated Claimant. He noted Claimant's trapezial and cervical musculature was tight. He also evaluated his back. At this visit, he abruptly concluded that Claimant had reached MMI and provided an impairment rating. In determining Claimant's impairment, he concluded that Claimant did not suffer any permanent impairment to his cervical spine. He did not rate Claimant's cervical spine because he concluded that Claimant's symptoms and findings were myofascial and did not warrant a rating under the AMA Guides. He did, however, provide Claimant a 14% impairment for his lumbar spine and a 5% impairment for his testicle/scrotal injury. This combined to a 18% impairment. **RHE F, p. 59**.

16. On July 31, 2019, Claimant underwent a comprehensive evaluation by Dr. Usama Ghazi. After a comprehensive review of Claimant's medical records and a physical examination, Dr. Ghazi's assessment was:

    1. Whiplash injury with cervical facet syndrome with cervicogenic headaches.
    2. Occipital neuralgia. (This is the most severe pain complaint and is likely from occipital contusion against the headrest.)
    3. Thoracolumbar through lumbosacral facet pain.
    4. Moderate sacroiliac pain bilaterally without coccydynia.
    5. Neuritis/groin/testicular pain secondary to left testicular contusion.

    Based on his assessment and diagnoses, Dr. Ghazi recommended, and performed, bilateral greater occipital nerve blocks for Claimant's cervical pain and headaches. The injections were diagnostic – and therapeutic - and provided immediate pain relief of Claimant's occipital nerve pain. He also recommended cervical and lumbar facet injections. **CHE 9, pp. 156-163**.

17. On August 14, 2019, Dr. Kathy McCranie performed a Rule 16 evaluation to assist in determining whether medial branch blocks recommended by Dr. Ghazi were reasonably necessary and causally related to the work accident. Dr. McCranie concluded that the medial branch blocks were reasonably necessary and causally related to the work injury. She also thought that such treatment could be provided as maintenance treatment. **CHE 9, pp. 164-171**.

18. On September 6, 2019, Claimant underwent lumbar medial branch blocks. According to Dr. Aschberger, they were diagnostic since Claimant's pain significantly decreased after the injections. **CHE 9, pp. 171-172**.

19. On October 25, 2019, Claimant returned to Dr. Aschberger. Based on his response to the medial branch blocks, Dr. Aschberger stated that they would discuss proceeding with a facet rhizotomy at his next visit. **CHE 9, pp. 175-176**.

20. On November 22, 2019, Claimant started treating with Dr. Shimon Blau. At this appointment, Dr. Shimon performed trigger point injections – for Claimant's back pain.

21. On January 9, 2020, Claimant attend his first DIME appointment with Dr. Mitchell. **RHE D.** Claimant reported neck pain with occasional headaches, without radiation into the upper extremities. Claimant did not report any lower extremity numbness or tingling. Claimant, other than Ibuprofen, was taking Cyclobenzaprine for sleep. Upon physical examination, tenderness was found in the suboccipital regions and occipital nerve. Negative cervical facet loading was found, along with a negative Spurling's test. **RHE D, p. 19.** Normal upper and lower extremities findings were also noted.

22. Dr. Mitchell determined that Claimant was not at MMI. She recommended that Claimant undergo repeat injection to the greater occipital neuralgia, consideration of a C1-C2 nerve block. RHE D, p. 20. Dr. Mitchell did not find evidence of cervical facetogenic pain, however she stated that facet joint injections could be considered. She also recommended that Claimant could consider medial branch blocks and radiofrequency neurotomy for the low back given Claimant's subjective complaints. Dr. Mitchell also recommended biofeedback. She also provided Claimant a provisional impairment rating of 39% for his low back, cervical spine, and occipital neuralgia that was causing Claimant's headaches.

23. On January 10, 2020, Claimant returned to Dr. Shimon Blau and stated that the injections helped significantly for the pain in his right lower back, but not so much on the left. Dr. Blau repeated the injections – and assessed Claimant with low back pain and neck pain. **CHE 9, pp. 124-125**.

24. On February 27, 2020, Dr. Aschberger reevaluated Claimant. Dr. Aschberger reviewed Dr. Mitchell's DIME report and discussed care with Claimant. Dr. Aschberger referred Claimant to Dr. Zimmerman for medial branch blocks from T11 through L2. Per Dr. Mitchell's recommendations, biofeedback was also

recommended by Dr. Aschberger. The following quotes from this evaluation are relevant:

a. "I had gone over that with [Claimant]. We have performed an L1-L2 medial branch block, and on follow-up with myself, he reported some partial symptomatic benefit only, not really meeting the criteria for a diagnostic response to medial branch block." **RHE F, p. 65**.

b. "[Dr. Mitchell] talked about additional trigger point injections. [Claimant], of course, has been through a number of different processes for that." **RHE F, p. 65**.

c. "[Claimant] is discussing multilevel trials of injections, additional massage, and additional physical therapy. As Dr. Mitchell noted, [Claimant] has had 63 sessions of manual therapy of doubtful benefit, although she mentioned 10 sessions of manual therapy for maintenance over a 12-month period." **RHE F, pp. 65-66**.

25. On March 11, 2020, Claimant initiated biofeedback treatment with Jessica Graves, MA, LPC, BCB. **CHE 10, pp. 190-194**.

26. On April 22, 2020, Dr. Aschberger responded to a medical questionnaire from Respondents' counsel. **RHE F, p. 70**. Pertaining to impairment and following review of Claimant's job description, Dr. Aschberger's response to the third question about the provisional impairment rating, provided by Dr. Mitchell, stated, "[Claimant's] functional ability is not compatible with a 39% WP impairment."

27. On May 6, 2020, Claimant underwent medial branch blocks with Dr. Zimmerman. **RHE F, pp. 74-75** (note: referenced by Dr. Aschberger).

28. On July 28, 2020, Claimant underwent a bilateral L5-S1 radiofrequency neurotomy with Dr. Zimmerman. **RHE G, pp. 97-98**.

29. On September 10, 2020, Claimant returned to Dr. Aschberger for reevaluation. **RHE F, pp. 83-84**. Claimant reported good relief for about a week following the bilateral L5-S1 radiofrequency neurotomy but recurrent increasing symptoms. It was also noted that Claimant underwent a T11 through L2 radiofrequency neurotomy on August 12, 2020, also without significant relief of his symptoms. Dr. Aschberger recommended myofascial release. As for the cervical spine, Dr. Aschberger suggested consideration for facet blocks, "although given his lack of response thus far, I am not optimistic that this will provide much benefit." ***Id.*** **at 84**. The physical examination noted just limited thoracic and lumbar extension, with tightness and tenderness. There were not any notations of cervical motion restrictions, but yet it is not clear that he measured Claimant's cervical spine for any decrease in motion.

30. On November 19, 2020, Claimant had a follow-up visit with Dr. Aschberger, reporting no significant tenderness on palpation at the upper cervical levels, but

reporting headache. **RHE F, pp. 85-87**. Claimant also reported tightness at the neck but no issues with the low back. No range of motion restrictions are documented other than pain with cervical extension. Dr. Aschberger noted the DIME's recommendation for medial branch blocks for the cervical spine, but again concluded that such treatment would not help diagnostically.

31. On January 28, 2021, Dr. Aschberger again placed Claimant at MMI. Dr. Aschberger wrote in a progress report, Claimant "has his cervical facet injections. Report from Dr. Kawasaki does not show any dramatic reduction of symptoms." **RHE F, p. 88**. Dr. Aschberger noted that Claimant, "did have an episode of some tightness and pain at the base of the left neck and trapezius. He sought chiropractic intervention with 1 session and that settled down pretty well." **RHE F**, **p. 88**. Physical examination revealed only restrictions with cervical extension, without aggravation with palpation at the upper facets. No lumbar spine restrictions were documented by Dr. Aschberger. Dr. Aschberger again concluded that lateral branch blocks would not offer any additional information.

32. On May 12, 2021, Claimant returned to Dr. Mitchell for a follow-up DIME. **RHE E**, **pp. 26-34**. Dr. Mitchell concluded that Claimant was not at MMI due to chronic cervical pain. Claimant reported neck and low back pain without radicular symptoms.

33. Dr. Mitchell recommended cervical medial branch blocks followed by rhizotomies if appropriate. Dr. Mitchell disagreed with Dr. Barker's recommendations for epidural steroid injections at T12- L1 because prior diagnostic studies did not show evidence of spondylolisthesis. Dr. Mitchell further concluded that Claimant had developed spondylolisthesis; this condition was unrelated to the industrial injury.

34. Dr. Mitchell assigned an impairment rating of 30% whole person. This number relies on the assignment of a 17% whole person rating for the cervical spine, a 14% whole person impairment rating for the lumbar strain, and a 1% whole person impairment rating for the varicocele.

35. On November 19, 2021, Dr. Mitchell attended an evidentiary deposition. Dr. Mitchell testified as "[f]or the neck . . . he had very extended conservative therapy; physical therapy, massage, chiropractic. He had 23 cervical facet joint injections." **DepTr, p. 7**.

36. Dr. Mitchell testified as "for the lumbar spine, again a very extended course of conservative therapy; an epidural steroid injection at L1-2, medial branch blocks, and then eventually, radiofrequency rhizotomies at four levels in the lower thoracic and through the lumbar spine." **DepTr, p. 8**.

37. Dr. Mitchell does not believe that the cervical medial branch blocks, followed by rhizotomies, will provide any actual gain in functional improvement. **DepTr, p. 24**.

38. Dr. Mitchell, on record in deposition, officially amended her MMI finding after being walked through the statute and Level II Curriculum by Respondents' counsel, excerpted below:

> Counsel: . . . there is the indication of how the statute defines MMI, as well as the component of future medical care and how it interjects with MMI. So particularly, I just have the highlighted section there to get to the point here for you to read. Can you read that for me?
>
> Dr. Mitchell: Out loud?
>
> Counsel: Not out loud. I'm going to ask a follow-up question.
>
> Dr. Mitchell: Yes, I see the section.
>
> Counsel: Okay. Now, your testimony earlier is that it's not medically probable that Mr. [Claimant Redacted] is going to get any functional or therapeutical relief from the medial branch blocks; that's correct?
>
> Dr. Mitchell: Yes.
>
> Counsel: Okay. And so you would agree with me that, at least under this Desk Aid, the Division is instructing us and physicians that if future care, maintenance care, will not significantly improve the condition or the possibility of improvement or deterioration, the passage of time shall not affect the finding of MMI. In reading this instruction and guidance from the Division, do you believe that, given the fact that you don't expect the medial branch block to physically or therapeutically provide any improvement in Mr. [Claimant Redacted] , that you could confidently change your opinion and say that he is at maximum medical improvement?
>
> Dr. Mitchell: Well, it talks about the possibility of improvement or deterioration, not the probability. Possibility. And that's where I'm saying it's possible that there might be improvement in this case.
>
> Counsel: But your medical opinions, whether it's a patient coming in, whether you're conducting a Division IME, is always based on a reasonable degree of medical probability, though, correct?
>
> Dr. Mitchell: That is true.
>
> Counsel: And under the Level II curriculum and instruction guidelines that I'm sure not only that you originally learned

years and years ago, but the repetitive -- not repetitive, I'm sorry – repeat validations they continue to treat, that it is under a degree of reasonable medical probability, not possibility, as to asserting your and giving your opinions?

Dr. Mitchell: All right. You have a point.

Counsel: So that's a yes?

Dr. Mitchell: I guess.

Counsel: So is it medically probable, Doctor, that Mr. [Claimant Redacted] is at maximum medical improvement?

Dr. Mitchell: Oh, boy.

Counsel: I feel like I just took you through a formal logic class, undergrad.

Dr. Mitchell: Okay. I would say it's probable, then.

Counsel: Medically probable to a degree of reasonable probability that he's at maximum medical improvement?

Dr. Mitchell: Yes.

Counsel: And that would be at date of your follow-up examination in May of 2021?

Dr. Mitchell: Yes.

Dep Tr, pp. 46-48.

39. Claimant is working as a RAV technician, dealing with roadside emergencies and shop services, working 40 hours per week without any permanent work restrictions issued from his physicians. **Hear Tr, p. 29**. Claimant has, however, had to make self-modifications to perform his job. **Hear Tr, p. 32**.

40. The ALJ finds that Dr. Mitchell's ultimate opinion is that Claimant reached MMI on May 12, 2021 – the date of the follow up DIME – and has a 30% whole person impairment rating due to his industrial accident.

41. The ALJ finds that the treatment recommended by Dr. Mitchell, the DIME physician, does not have a reasonable prospect for defining Claimant's condition, suggesting further treatment, or curing him from the effects of his injury. As a result, Claimant's work-related conditions are stable and no further treatment is reasonably expected to improve his conditions.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant is at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *affd, Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005) (ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video)

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, during her deposition, Dr. Mitchell changed her opinion on MMI and concluded that Claimant reached MMI as of the date of her evaluation – May 12, 2021. As a result, Claimant has the burden of proving by clear and convincing evidence that he is not at MMI.

Dr. Mitchell did indicate that it was her opinion that Claimant needed cervical medial branch blocks - followed by radiofrequency rhizotomies if appropriate – before being placed at MMI. However, based on her deposition, it was found that such treatment did not have a reasonable prospect for defining Claimant's condition or suggesting further treatment. As result, the suggestion for such treatment is not inconsistent with a finding of MMI since it is not reasonably expected for such treatment to further define his condition, suggest future treatment, or cure his work-related condition. As a result, Claimant's work-related condition is stable, and no further treatment is reasonably expected to improve his condition.

Claimant, however, contends that Dr. Mitchell's opinion is that Claimant is not at MMI. The ALJ has, however, rejected such contention. As found, the ALJ concluded that Dr. Mitchell ultimately concluded in her deposition that Claimant is at MMI.

Based on the resolution of such conflict in the evidence, the ALJ finds and concludes that Claimant has failed to overcome Dr. Mitchell's opinion regarding MMI by clear and convincing evidence. Thus, Claimant is at MMI as of May 12, 2021.

II. The extent of Claimant's permanent impairment rating.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim*

Appeals Office, supra. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Since Claimant has been found to be at MMI as of May 12, 2021, and Dr. Mitchell provided Claimant an impairment rating, it is Respondents' burden to overcome her opinion regarding Claimant's impairment by clear and convincing evidence.

As found, Dr. Mitchell assessed Claimant's impairment and concluded that Claimant suffered a 30% whole person impairment rating. In determining Claimant's impairment, she concluded that Claimant suffered permanent impairment to his cervical spine, lumbar spine, and testicle in the form of a varicocele.

Respondents contend that the impairment rating provided by Dr. Mitchell is incorrect. In support of their opinion, they provided the opinions of Dr. Aschberger – who did not rate Claimant's cervical spine. Dr. Aschberger did not rate Claimant's cervical spine because he concluded that Claimant's symptoms and findings were myofascial. However, while Dr. Aschberger did not rate Claimant's cervical spine, he failed to provide a detailed opinion – which rises to the level of clear and convincing evidence – that the cervical spine rating should not be included. Merely stating that Claimant's cervical spine findings are myofascial and that Claimant's functional ability is not compatible with a 39% whole person impairment – the initial provisional rating provided by Dr. Mitchell - is insufficient. In the end, there is merely a difference of opinion regarding Claimant's impairment rating.

Moreover, in reviewing the record as a whole, the ALJ finds that the rating provided by Dr. Mitchell is supported by her testimony, the underlying medical records, and Claimant's testimony. Thus, the ALJ finds and concludes that Respondents failed to establish that Dr. Mitchel erred in determining Claimant's impairment rating.

As a result, the ALJ finds and concludes that Respondents failed to overcome Dr. Mitchell's opinion that Claimant has a 30% whole person impairment rating by even a preponderance of the evidence, let alone clear and convincing evidence.

ORDER

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

1. Claimant reached MMI on May 12, 2021.

2. Claimant suffered a 30% whole person impairment rating.

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

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

DATED: April 22, 2022.

/s/ Glen Goldman

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

ISSUES

- Did Respondents prove they properly terminated Claimant's TTD benefits on August 20, 2021?

- Did Claimant prove entitlement to reinstatement of TTD benefits on or after August 21, 2021?

FINDINGS OF FACT

1. Claimant works at Employer's distribution center as a warehouse worker. The job is physically demanding, with heavy lifting and prolonged standing and walking.

2. Claimant suffered an admitted injury to his right knee on September 28, 2020 while pushing a pallet of merchandise. A heavy box fell from the pallet and landed on his knee.

3. Claimant was initially diagnosed with a knee contusion. His symptoms failed to improve as expected and he was referred to Dr. Derek Purcell, an orthopedic surgeon. Dr. Purcell diagnosed subchondral edema and a tibial plateau stress fracture.

4. On February 26, 2021, Dr. Purcell performed a tibial plateau fracture fixation and chondroplasty.

5. Claimant continued to follow up with both Dr. Lakin (his ATP) and Dr. Purcell after surgery but did improve significantly. Dr. Purcell ordered a repeat MRI, which was completed on June 14, 2021. Claimant had developed increased edema in the posterior aspect of the lateral tibial plateau posterior to the previous lesion. There was also an area of articular cartilage loss on the weightbearing surface of the lateral tibial plateau. Dr. Purcell recommended a second surgery.

6. Dr. Centi took over Dr. Lakin's practice in June 2021. On June 24, 2021, Dr. Centi updated Claimant's work restrictions to no lifting, pushing, or pulling greater than 10 pounds, sitting 75% of the time and no standing or walking more than 15 minutes per hour.

7. On July 1, 2021, Employer offered modified duty within Claimant's restrictions. The primary duties were packing facemasks for other employees to use, and other general administrative tasks as needed. All assigned tasks could be performed in a seated position. Claimant was scheduled to work 12-hour shifts (as before the injury) from 6:00 a.m. to 6:00 p.m. Saturday-Monday.

8. Claimant returned to work on Monday July 5, 2021 but reported late. Claimant was scheduled to work his regular Saturday-Monday shifts starting Saturday

July 11, 2021. Between July 11, 2021 and the surgery on July 26, 2021, Claimant missed six scheduled shifts.

9. Dr. Purcell performed a proximal tibia lateral plateau open reduction and internal fixation procedure on July 26, 2021. Insurer commenced TTD on the surgery date.

10. On August 9, 2021, Dr. Centi amended Claimant's restrictions to include sitting 95% of the time and no standing or walking more than five minutes per hour.

11. Claimant returned to modified duty on August 21, 2021, performing the same tasks as before the surgery. Dr. Centi approved the modified work, all of which was to be performed in a "seated" position. Employer completed a Supplemental Return to Work form on August 25, 2021 documenting that Claimant had returned to work at full wages. Insurer filed a revised General Admission on August 27, 2021 terminating TTD on August 20, 2021.

12. Respondents proved Claimant's TTD benefits were properly terminated on August 20, 2021 because Claimant returned to work.

13. Claimant was scheduled to work modified duty from August 21 through September 17, 2021. However, he called off most of the shifts. Many of the absences are coded "Absent ill self," the code used when the employee calls off for self-reported medical issues. During this period, Claimant missed all or part of 14 scheduled shifts.

14. On September 17, 2021, Dr. Centi liberalized Claimant's work restrictions because he was doing a bit better. Claimant was late to work on September 18, 2021. On September 19, 2021, Employer mailed Claimant a letter again notifying him that work was available within his new restrictions. Claimant did not work on September 19 or 20, 2021. He reported to work on Saturday, September 25, 2021 and worked most of his scheduled shift. September 25, 2021 was the last day Claimant worked.

15. [Redated, hereinafter Ms. R], an HR representative for Employer, testified that Claimant was initially offered a modified position on June 18, 2021 and returned to work. However, he started missing time almost immediately. Multiple letters were sent to Claimant between June and September of 2021 advising him of work available within the restrictions assigned by Dr. Centi. Claimant continued to miss time from work, which caused staffing problems for the facility. Ms. R completed three corrective action forms in July 2021 addressing Claimant's pattern of tardiness and missed work. The next progressive disciplinary action for ongoing violations normally would have been termination. However, Claimant was not terminated, per Employer's policies, because "he is a team member on workmen's comp." Claimant was still an employee of Employer as of the hearing.

16. Ms. R's testimony was credible and persuasive.

17. At hearing, Claimant did not deny missing work between June and October 9, 2021. However, he stated he missed work because pain from the injury hindered his ability to tolerate working, even in a sedentary capacity.

18. Employer has a policy of offering only 12 weeks of modified duty. If the employee cannot return to regular work at the end of the 12-week period, they are put on unpaid administrative leave. Claimant exhausted his 12 weeks of modified duty as of October 9, 2021,[1] at which point he was put on unpaid leave and advised to stop reporting for work.

19. Claimant failed to prove he suffered a wage loss between August 21, 2021 and October 9, 2021 proximately caused by his injury. Employer had suitable work available during that period that he was capable of performing. Claimant's testimony he could not tolerate his assigned modified duty is not credible. The work offered by Employer was minimally demanding and well within his work restrictions. Dr. Purcell repeatedly advised Claimant to increase his weight bearing activities to further his rehabilitation, and Dr. Centi continually indicated Claimant was able to work modified duty from a medical standpoint. Claimant's allegations about his work capacity are unsubstantiated by any medical reports or other persuasive documentation.

20. Claimant has not worked or been released to regular duty since October 10, 2021.

21. Claimant proved he suffered an injury-related wage loss commencing October 10, 2021, when Employer stopped offering modified duty and placed him on unpaid leave.

CONCLUSIONS OF LAW

A. Termination of ongoing TTD effective August 21, 2021

Insurer admitted liability for TTD benefits commencing July 26, 2021, the date of Claimant's second surgery. Once commenced, TTD benefits must continue until one of the terminating events listed in § 8-42-105(3)(a)-(d). Termination of TTD is an affirmative defense that the respondents must prove by a preponderance of the evidence. Section 8-43-201(1); *Strombitski v. Man Made Pizza*, W.C. No. 4-403-661 (December 1, 2003).

One enumerated terminating event is a return to regular or modified employment. Section 8-42-105(3)(b). As found, Respondents proved Claimant's TTD benefits were properly terminated on August 20, 2021 based on his return to work.

B. Reinstatement of TTD between August 21, 2021 and October 9, 2021

[1] Mr. R testified Claimant's eligibility for modified duty "expired as of October 9, 2021." It is unclear whether he was put on administrative leave on October 9 or October 10. However, we can be confident he was on leave by October 10, 2021.

Because Claimant's TTD benefits were properly terminated on August 20, 2021, Claimant has the burden to re-establish eligibility for TTD at any time thereafter. A claimant is entitled to TTD benefits if the injury causes a disability and the disability causes the claimant to leave work. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

As found, Claimant failed to prove he suffered an injury-related wage loss from August 21, 2021 through October 9, 2021. Employer repeatedly offered Claimant suitable work within his restrictions during that period. Claimant consistently "began" the modified duty but then quickly stopped reporting to work. Claimant's testimony he could not tolerate his assigned modified duty is not credible. There is no persuasive reason Claimant could not have performed the sedentary, self-paced, non-production-level duties available to him. Claimant simply made a unilateral decision to stay home. Claimant provided no credible evidence of any specific aspects of his modified duty that caused him difficulty, and his nonspecific allegation that he was in too much pain to work at all is not persuasive. Claimant failed to prove any wage loss from August 21, 2021 through October 9, 2021 was proximately caused by the work injury.

C. TTD commencing October 10, 2021

As found, Claimant proved TTD benefits should be reinstated effective October 10, 2021. TTD benefits are intended to compensate for a wage loss proximately caused by an industrial injury. *Montoya v. Industrial Claim Appeals Office*, 488 P.3d 314 (Colo. App. 2018). The causal nexus between Claimant's injury and his wage loss was reestablished on October 10, 2021 when Employer terminated his eligibility for modified duty. On that date, Claimant was affirmatively advised to stop reporting to work and was put on unpaid administrative leave. At that point, Claimant lost the ability to mitigate his wage loss, because of factors that were entirely outside of his control. Claimant would have been off work as of October 10, 2021 regardless of his ability or willingness to perform modified duty.

Moreno v. Aspen Living, W.C. 4-676-020 (November 15, 2006), cited by Respondents, does not preclude the reinstatement of TTD benefits here. The claimant in *Moreno* had been found "responsible for termination of employment," which provides an independent statutory bar to an award of TTD benefits. In this case, Employer did not terminate Claimant despite the attendance issues. Accordingly, the "termination statutes" are inapplicable and Claimant eligibility for TTD is determined by reference to traditional principles of proximate causation.

ORDER

It is therefore ordered that:

1. Claimant's request for TTD benefits from August 21, 2021 through October 9, 2021 is denied and dismissed.

2. Insurer shall pay Claimant TTD benefits commencing October 10, 2021 and continuing until terminated according to law.

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

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

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

DATED: April 22, 2022

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips lacked statutory authority to compel him to attend the January 6, 2022 Division Independent Medical Examination (DIME) with Brian Mathwich, M.D. and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME.

2. Whether Respondents have proven by a preponderance of the evidence that they may suspend the payment of Temporary Total Disability (TTD) benefits to Claimant for the period from November 23, 2021 until he attends the DIME with Dr. Mathwich.

3. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022.

4. Whether Claimant has demonstrated by a preponderance of the evidence that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury while working for Employer on December 9, 2018. On January 18, 2019 Insurer filed a General Admission of Liability (GAL).

2. Claimant underwent numerous surgeries and was eventually diagnosed with Chronic Regional Pain Syndrome (CRPS). On April 9, 2021 Authorized Treating Physician (ATP) Roberta Anderson-Oeser, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). Dr. Anderson-Oeser assigned a 42% whole person permanent impairment rating.

3. On May 12, 2021 Respondents challenged Dr. Anderson-Oeser's impairment determination and sought a Division Independent Medical Examination (DIME). The Division of Workers' Compensation (DOWC) issued a DIME physician panel on June 16, 2021.

4. Both Claimant and Respondents struck a member of the DIME panel. Brian Mathwich, M.D. was the remaining physician and on June 25, 2021 was selected to perform the DIME.

5. On July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit in the DOWC noting concerns about a potential conflict of interest. He specifically stated:

> I was informed [Claimant] has been seen in my practice by Dr. Anderson-Oeser and Dr. Cotgageorge. I was not aware as I have never seen [Claimant] nor discussed him with Dr. Oeser or Dr. Cotgageorge. Please let me know if you feel this is a conflict.

6. The parties discussed the possible conflict issue on July 26, 2021. They agreed that they had no concerns about Dr. Mathwich serving as the DIME physician. On July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich. The letter specified the following:

> Additionally, you indicated that you are not opposed to Dr. Mathwich conducting the DIME even given the potential conflict raised by Dr. Mathwich. As you know, Dr. Mathwich was part of Dr. Anderson-Oeser's practice prior to her departure. Both parties have agreed that the DIME can proceed with Dr. Mathwich.

7. The DIME was held in abeyance twice for the parties to pursue a possible settlement. Notably, the second order issued on September 27, 2021 by PALJ Royce Mueller granted the parties' request to hold the DIME process in abeyance "for 60 days from the date of this Order. If settlement does not occur with[in] 60 days, Respondents will reschedule the Division IME or seek further relief."

8. Ultimately, when the case did not settle at a settlement conference on November 5, 2021, Respondents scheduled the DIME for November 23, 2021. The date was three days prior to the end of the final 60-day abeyance period. Claimant did not object to the setting of the DIME and inquired whether Respondents would be providing transportation.

9. On November 12, 2021 Claimant attended a regularly scheduled maintenance appointment with Dr. Anderson-Oeser. Claimant mentioned an upcoming DIME with Dr. Mathwich. Based on the information, Dr. Anderson-Oeser revealed that she had left a prior medical practice with Dr. Mathwich. Because most of her patients followed her to her new office, Dr. Mathwich suffered a substantial loss of money and his practice closed.

10. On the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest. Moreover, the DIME appointment was set during the 60-day abeyance period noted by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021, Respondents were required to pay a $1400.00 rescheduling fee.

11. Respondents subsequently rescheduled the DIME for January 6, 2022. They also scheduled a prehearing conference seeking an Order to Compel Claimant's attendance at the rescheduled DIME and pay the costs for failing to attend the November 23, 2021 appointment.

12. On December 9, 2021 PALJ Susan D. Phillips conducted a prehearing conference. The issues considered at the conference included the following: (1) Claimant's motion for a new three-physician DIME panel pursuant to W.C.R.P. 11-3(E); (2) Respondents' motion to compel Claimant's attendance at a rescheduled DIME; and (3) Respondents' motion to compel Claimant to reimburse the DIME rescheduling fee.

13. On December 10, 2021 PALJ Phillips issued a prehearing order. Noting Claimant's failure to comply with W.C.R.P. Rule 11-4(4), she concluded there was no good cause for striking Dr. Mathwich as the DIME. Accordingly, Claimant's motion for a new three-physician DIME panel was rendered moot. PALJ Phillips also compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." Finally, she determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

14. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 prehearing order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

15. Claimant did not attend the rescheduled DIME on January 6, 2022. Silvia Malagon testified at the hearing that she is an administrative assistant employed by Mathwich & Associates. She was involved with scheduling Claimant's DIME appointments. Ms. Malagon remarked that Claimant did not appear for the January 6, 2022 DIME appointment. She specified that Claimant notified her that he would not be attending the DIME on the advice of counsel.

16. On January 14, 2022 Respondents filed a Response to the Application for Hearing. Respondents endorsed penalties against Claimant for violation of PALJ Phillips' December 10, 2021 order, reimbursement of the $1,400 DIME rescheduling fee, waiver, estoppel, laches and attorney fees.

17. Senior resolution manager at third-party administrator [Redacted] RA[Redacted] testified at the hearing. He remarked that Respondents have paid Claimant

Temporary Total Disability (TTD) benefits in the amount of $987.84 per week. Mr. RA[Redacted] detailed that from November 23, 2021 to March 30, 2022 Respondents paid total TTD benefits in the amount of $13,829.76.

18. Dr. Anderson-Oeser testified at the hearing in this matter. She explained that, at a regularly scheduled maintenance appointment with Claimant on November 12, 2021, he mentioned an upcoming DIME with Dr. Mathwich. She informed Claimant that she knew Dr. Mathwich personally because he was her employer at her prior practice of Ascent Medical. She left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by, Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the new practice and began Mathwich & Associates.

19. On the day Dr. Anderson-Oeser resigned, Ascent Medical was offered for sale. Dr. Anderson-Oeser was thus concerned about potential bias in the upcoming DIME with Dr. Mathwich. She acknowledged that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Dr. Anderson-Oeser specified that, after leaving Ascent Medical, she encountered many problems in obtaining patient medical records from the practice even though patients had signed releases. She noted that she does not currently have any mutual economic interest with Dr. Mathwich.

20. Claimant has failed to demonstrate that it is more probably true than not that PALJ Phillips lacked statutory authority to compel him to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. Initially, in her December 10, 2021 pre-hearing order PALJ Phillips compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." PALJ Phillips also determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

21. In *Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004) the respondents applied for a DIME. The claimant notified the respondents that he would not attend the DIME. The respondents rescheduled the DIME and obtained an order from a PALJ compelling attendance at the DIME. The claimant refused to attend the DIME and filed an Application for Hearing. Ultimately, the court of appeals upheld the assessment of a penalty against the claimant for violation of the PALJ's Order. *See Kennedy*, 100 P.3d at 950. The Court noted, "we agree with the Panel that a party may not elect, without fear of consequences, to ignore a ruling of the PALJ in the hope of obtaining a more favorable ruling before the ALJ." *Id.* Based on the reasoning of the court of appeals in *Kennedy* a PALJ has the authority to compel a claimant to attend a DIME. Thus, PALJ

Phillips had the ability to require Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

22. Despite the court of appeals' opinion in *Kennedy*, Claimant contends that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021 limit a PALJ's authority to nine distinct areas. Construed strictly, the amendments specifically delineate the authority of a PALJ. Claimant thus asserts the statutory amendments preclude a PALJ from compelling a claimant to attend a DIME.

23. Notably, the amendments to §8-43-207.5, C.R.S. do not define the limits of a PALJs authority, but identify distinct areas that constitute "procedural matters." Specifically, §8-43-207.5(2)(b), C.R.S. provides that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The plain language of the statute then details nine types of issues that constitute "procedural matters." However, the statute does not provide that "procedural matters" are limited to the nine enumerated areas, but instead states that "procedural matters include the enumerated powers. Furthermore, the nine listed areas contemplate a variety of situations that include broad categories such as resolving evidentiary and discovery disputes as well as imposing sanctions. Although the amendments clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from requiring a claimant to attend a DIME. Accordingly, based on the analysis in *Kennedy* and a review of amended §8-43-207.5(2), C.R.S PALJ's are not prohibited from compelling a claimant require to attend a DIME. Therefore, PALJ Phillips had the authority to order Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

24. PALJ Phillips also had the authority to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. PALJ Phillips remarked that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. As discussed in the preceding section, although the statutory amendments to §8-43-207.5(2), C.R.S. clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from imposing a rescheduling fee for a missed DIME appointment.

25. Moreover, W.C.R.P Rule 11-5(C) provides that a DIME "may only be rescheduled or terminated by the requesting party or by order. The party responsible for the rescheduling shall submit the rescheduling fee . . . to the DIME physician within ten (10) days after the defaulting event." Respondents were the requesting party for the DIME. However, Claimant canceled the DIME in contravention of Rule 11-5(C). Notably, on the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest and that the DIME was set during the 60-day abeyance period specified by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021,

Respondents were required to pay a $1400.00 rescheduling fee. Therefore, pursuant to Rule 11-5(C) PALJ Phillips properly required Claimant to pay the $1,400 fee.

26. Respondents have failed to prove that it is more probably true than that they may suspend the payment of TTD benefits to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich. Initially, Mr. RA[Redacted] testified at the hearing that Respondents paid Claimant TTD benefits at the rate of $987.84 per week for the period from November 23, 2021 to March 30, 2022 in the total amount of $13,829.76. Respondents assert that under §8-43-404(3), C.R.S. Claimant's right to receive weekly indemnity benefits that accrue and become payable during a period of refusal to attend a scheduled DIME shall be barred. Respondents are thus entitled to be reimbursed for indemnity benefits paid to Claimant during the period November 23, 2021 until he attends the DIME with Dr. Mathwich.

27. Despite Respondents' contention, the case law and express language of §8-43-404(3), C.R.S. reflect that the statute does not apply to the suspension of indemnity benefits for refusing to attend a DIME. Instead, §8-43-404(3), C.R.S. applies to a claimant's refusal to attend or obstruct vocational evaluations, independent medical examinations and evaluations by ATPs. In contrast, the DIME process involves the selection of an independent physician from a three-judge panel after an ATP has placed a claimant at MMI. The DIME physician then makes an independent determination regarding whether a claimant has reached MMI and assigns a permanent impairment rating. The specific language of §8-43-404(3), C.R.S. and the case law simply do not contemplate the suspension of TTD benefits when a case proceeds to the DIME process. Accordingly, Respondents' request to suspend the payment of TTD benefits for the period from November 23, 2021 until Claimant attends the DIME with Dr. Mathwich is denied and dismissed.

28. Respondents have failed to establish that it is more probably true than not that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. Initially, in PALJ Phillips' December 10, 2021 prehearing order she noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." However, Claimant did not attend the rescheduled DIME on January 6, 2022. Ms. Malagon testified that Claimant did not appear for the January 6, 2022 DIME appointment. She specified that Claimant contacted her to state that he would not be attending the DIME on the advice of counsel. Because PALJ Phillips compelled Claimant to attend the January 6, 2022 DIME but he did not attend, his conduct violated a lawful order.

29. Although Claimant violated PALJ Phillips' December 10, 2021 pre-hearing order by failing to attend the January 6, 2022 DIME, his action was not objectively unreasonable because it was based on a rational argument in law or fact. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 Prehearing Order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and

dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

30. The record reveals that Claimant did not simply ignore PALJ Phillips' prehearing order, but sought a hearing before an ALJ to challenge her ability to issue the order. Specifically, Claimant asserted that PALJs lack statutory authority to compel DIME attendance and to pay the cost of rescheduling a missed DIME. Although acknowledging the court of appeals' opinion in *Kennedy*, Claimant contended that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021, limit the authority of PALJ's to nine distinct areas. Claimant thus provided a rational explanation for his conduct. Although the preceding section of the present order rejected Claimant's contention, it was nevertheless predicated on a rational argument in law based on a strict construction of the amendments to §8-43-207.5, C.R.S. that does not permit PALJs to compel claimants to attend DIMEs or pay DIME rescheduling fees. Accordingly, Respondents are not entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022.

31. Claimant has failed to prove that it is more probably true than not that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest. Initially, both Claimant and Respondents struck a member of the DIME panel. Neither party requested summary disclosures under W.C.R.P. Rule 11-3. Because Dr. Mathwich was the only remaining physician, he was selected to perform the DIME on June 25, 2021. However, on July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit at the DOWC noting concerns about a potential conflict of interest. The parties discussed the potential conflict issue on July 26, 2021. Neither party expressed any concerns about Dr. Mathwich serving as the DIME physician. In fact, on July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich.

32. At the time Dr. Mathwich mentioned a potential conflict, Claimant had a responsibility to research and review any concerns. Although Claimant had ample opportunities even after Dr. Mathwich mentioned his issues, he did not raise any concerns. In fact, Claimant affirmatively agreed to Dr. Mathwich as the DIME. Based on Claimant's failure to comply with Rule 11-4, and his agreement to Dr. Mathwich as the DIME physician, Claimant waived the right to object to Dr. Mathwich as the DIME doctor.

33. Nevertheless, Claimant contends that, based on Dr. Anderson-Oeser's testimony there is a conflict of interest with Dr. Mathwich performing the DIME. Dr. Anderson-Oeser detailed that she was concerned about potential bias in the upcoming DIME with Dr. Mathwich. She reasoned that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Despite Claimant's contention, the record reveals that PALJ Phillips did not err in her December 10, 2021 order denying Claimant's motion for a new three-physician DIME panel and not removing Dr. Mathwich as the DIME physician.

34. Initially, the record reflects that PALJ Phillips had the authority and did not err in denying Claimant's motion for a new three-physician DIME panel. Specifically, Claimant did not request summary disclosures concerning any business, financial, employment, or advisory relation with the insurer within five business days of issuance of the three-physician list by the DOWC pursuant to Rule 11-4. Furthermore, although Drs. Mathwich and Anderson-Oeser were colleagues in the past, a conflict is only presumed "when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME." Because Drs. Mathwich and Anderson-Oeser do not currently practice together, no conflict is presumed. In fact, Dr. Anderson-Oeser specified that she does not currently have any mutual economic interest with Dr. Mathwich.

35. Under Rule 11-3(E)(2) "having practiced together in the past [is] not the types of relationships that will be considered a conflict." Dr. Anderson-Oeser remarked that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. However, in the absence of an actual conflict based on a current financial relationship, concerns about a potential conflict are speculative. Notably, Dr. Anderson-Oeser left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the practice and began Mathwich & Associates. The significant temporal delay since an actual business relationship between Drs. Mathwich and Anderson-Oeser's and the numerous manifestations of Dr. Mathwich's practice suggest that any concerns about a current conflict of interest are speculative. Accordingly, the record does not warrant disqualification of Dr. Mathwich as the DIME physician.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

PALJ's Authority

4. Section 8-43-207.5(2), C.R.S. grants a PALJ authority to issue "interlocutory orders." A PALJ may also order a party to participate in a prehearing conference and make evidentiary rulings. An order of a PALJ is "an order of the director and binding on the parties," and "such an order shall be interlocutory." §8-43-207.5(3); *see Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004); *Martinez v. Vertical Electric Inc.*, WC 5-049-469 (ICAO, Oct. 20, 2017) (orders relating to prehearing conferences are generally interlocutory because a prehearing conference is followed by a full hearing before the director or an ALJ). ALJ's have the authority to review the pre-hearing orders of PALJ's. *See Dee Enterprises v. Indus. Claim Appeals Off.*, 89 P.3d 430, 441 (Colo. App. 2003); *Villegas v. Denver Water*, WC 4-889-298-005 (ICAO Apr. 14, 2021). Orders related to DIME requests are interlocutory. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020); *see Bath v. Adams County,* W. C. No. 4-584-461 (September 20, 2005).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that PALJ Phillips lacked statutory authority to compel him to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. Initially, in her December 10, 2021 pre-hearing order PALJ Phillips compelled Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022. She noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." PALJ Phillips also determined that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. Because Respondents made payment in order to reschedule the DIME, PALJ Phillips found good cause to compel Claimant to reimburse Respondents for the $1,400 rescheduling fee.

Authority to Compel Attendance at the January 6, 2022 DIME

6. As found, in *Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004) the respondents applied for a DIME. The claimant notified the respondents that he would not attend the DIME. The respondents rescheduled the DIME and obtained an order from a PALJ compelling attendance at the DIME. The claimant refused to attend the DIME and filed an Application for Hearing. Ultimately, the court of appeals upheld the assessment of a penalty against the claimant for violation of the PALJ's Order. *See*

Kennedy, 100 P.3d at 950. The Court noted, "we agree with the Panel that a party may not elect, without fear of consequences, to ignore a ruling of the PALJ in the hope of obtaining a more favorable ruling before the ALJ." *Id.* Based on the reasoning of the court of appeals in *Kennedy* a PALJ has the authority to compel a claimant to attend a DIME. Thus, PALJ Phillips had the ability to require Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

7. As found, despite the court of appeals' opinion in *Kennedy*, Claimant contends that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021 limit a PALJ's authority to nine distinct areas. Construed strictly, the amendments specifically delineate the authority of a PALJ. Claimant thus asserts the statutory amendments preclude a PALJ from compelling a claimant to attend a DIME.

8. The amendment to §8-43-207.5(1), C.R.S. provides, in relevant part, that

> any party to a claim may request a prehearing conference before a prehearing administrative law judge in the division for the speedy resolution of or simplification of any issues and to determine the general readiness of remaining issues for formal adjudication on the record. The issues addressed in the prehearing conference may include any issues properly within the authority of a prehearing administrative law judge pursuant to subsection (2) of this section.

Section 8-43-207.5(2)(b), C.R.S. effective September 7, 2021, specifies that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The statute then specifies that procedural matters include:

(I) Issuing subpoenas…
(II) Resolving prehearing evidentiary disputes
(III) Determining if depositions must be taken
(IV) Ruling on the imposition of sanctions for discovery disputes…
(V) Granting or denying requests for extensions of time…
(VI) Resolving disputes regarding discovery…
(VII) Appointing guardians ad litem and conservators…
(VIII) Determining the ripeness of legal issues for formal adjudication
(IX) Determining the competency of any party to a claim to enter into settlement agreements.

9. As found, notably, the amendments to §8-43-207.5, C.R.S. do not define the limits of a PALJs authority, but identify distinct areas that constitute "procedural matters." Specifically, §8-43-207.5(2)(b), C.R.S. provides that PALJs "have authority to approve any stipulations of the parties and issue interlocutory orders regarding procedural matters." The plain language of the statute then details nine types of issues that constitute "procedural matters." However, the statute does not provide that "procedural matters" are limited to the nine enumerated areas, but instead states that "procedural matters include the enumerated powers. Furthermore, the nine listed

areas contemplate a variety of situations that include broad categories such as resolving evidentiary and discovery disputes as well as imposing sanctions. Although the amendments clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from requiring a claimant to attend a DIME. Accordingly, based on the analysis in *Kennedy* and a review of amended §8-43-207.5(2), C.R.S PALJ's are not prohibited from compelling a claimant require to attend a DIME. Therefore, PALJ Phillips had the authority to order Claimant to attend the DIME appointment with Dr. Mathwich on January 6, 2022.

Authority to Require Claimant to Pay November 23, 2021 Rescheduling Fee

10. As found, PALJ Phillips also had the authority to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME. PALJ Phillips remarked that Claimant terminated the November 23, 2021 DIME without permission and was therefore responsible for the rescheduling fee. As discussed in the preceding section, although the statutory amendments to §8-43-207.5(2), C.R.S. clarify the authority of PALJ's, they do not substantively change the power of PALJ's as delineated in the case law. The amendments thus do not prohibit a PALJ from imposing a rescheduling fee for a missed DIME appointment.

11. As found, moreover, W.C.R.P Rule 11-5(C) provides that a DIME "may only be rescheduled or terminated by the requesting party or by order. The party responsible for the rescheduling shall submit the rescheduling fee . . . to the DIME physician within ten (10) days after the defaulting event." Respondents were the requesting party for the DIME. However, Claimant canceled the DIME in contravention of Rule 11-5(C). Notably, on the day prior to the scheduled DIME, Claimant's counsel announced that Claimant would not be attending the DIME based on the information from Dr. Anderson-Oeser regarding Dr. Mathwick's potential conflict of interest and that the DIME was set during the 60-day abeyance period specified by PALJ Mueller in his September 27, 2021 order. When Claimant failed to attend the DIME appointment on November 23, 2021, Respondents were required to pay a $1400.00 rescheduling fee. Therefore, pursuant to Rule 11-5(C) PALJ Phillips properly required Claimant to pay the $1,400 fee.

Suspension of TTD Benefits

12. Section 8-43-404(3), C.R.S. provides, in pertinent part, that an insurer may suspend compensation when a claimant refuses to submit to a medical examination:

> So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division

> appointed pursuant to section 8-43-208 (1) or in any way obstructs the same, all rights to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred.

13. Demand appointments include examinations by an ATP or a request for an independent medical examination as contemplated by §8-43-404(1)(b) and (2), C.R.S. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020); *see Johnston v. Hunter Douglas*, W.C. No. 4-879-066-01 (ICAO, Apr. 29, 2014) ("provisions for a demand appointment and the consequences for refusing to attend or obstructing a demand appointment in §8-43-404(3), C.R.S., appear to apply to requests for an examination by an authorized treating physician or to a request for an Independent Medical Examination"); *Twiggs v. Hoffman Structures*, W.C. No. 4-430-471 (ICAO, Dec.11, 2001) (no language in §8-43-404, C.R.S. indicates the statute is inapplicable to requests for the claimant to undergo an examination by an authorized treating physician). The provisions of §8-43-404(3), C.R.S. thus apply equally to second opinions by non-treating physicians and a claimant's refusal to attend a rescheduled appointment with an ATP after being ordered by a PALJ. *In Re Fitzsimmons*, W.C. No. 4-995-913-001 (ICAO, Dec. 16, 2020).

14. Section 8-43-404, C.R.S. is an all-encompassing statute that addresses many aspects of medical providers in the Workers' Compensation system. *Johnston v. Hunter Douglas*, W.C. No. 4-879-066-01 (ICAO, Apr. 29, 2014). Some sections apply only to independent medical examinations, while others apply only to the selection of the ATP. *Id.*; *see* §8-43-404(l)(a)-(b), C.R.S. & §8-43-404(5), C.R.S. In contrast, §8-42-107.2 governs the DIME process. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998).

15. As found, Respondents have failed to prove by a preponderance of the evidence that they may suspend the payment of TTD benefits to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich. Initially, Mr. RA[Redacted] testified at the hearing that Respondents paid Claimant TTD benefits at the rate of $987.84 per week for the period from November 23, 2021 to March 30, 2022 in the total amount of $13,829.76. Respondents assert that under §8-43-404(3), C.R.S. Claimant's right to receive weekly indemnity benefits that accrue and become payable during a period of refusal to attend a scheduled DIME shall be barred. Respondents are thus entitled to be reimbursed for indemnity benefits paid to Claimant during the period November 23, 2021 until he attends the DIME with Dr. Mathwich.

16. As found, despite Respondents' contention, the case law and express language of §8-43-404(3), C.R.S. reflect that the statute does not apply to the suspension of indemnity benefits for refusing to attend a DIME. Instead, §8-43-404(3), C.R.S. applies to a claimant's refusal to attend or obstruct vocational evaluations, independent medical examinations and evaluations by ATPs. In contrast, the DIME process involves the

selection of an independent physician from a three-judge panel after an ATP has placed a claimant at MMI. The DIME physician then makes an independent determination regarding whether a claimant has reached MMI and assigns a permanent impairment rating. The specific language of §8-43-404(3), C.R.S. and the case law simply do not contemplate the suspension of TTD benefits when a case proceeds to the DIME process. Accordingly, Respondents' request to suspend the payment of TTD benefits for the period from November 23, 2021 until Claimant attends the DIME with Dr. Mathwich is denied and dismissed.

Penalties

17. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

18. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

19. As found, Respondents have failed to establish by a preponderance of the evidence that they are entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. Initially, in PALJ Phillips' December 10, 2021 prehearing order she noted that, "[i]n light of Claimant's professed objection to Dr. Mathwich, it is concluded that Respondents have shown good cause to compel Claimant's attendance at the rescheduled DIME." However, Claimant did not attend the rescheduled DIME on January 6, 2022. Ms. Malagon testified that Claimant did not

appear for the January 6, 2022 DIME appointment. She specified that Claimant contacted her to state that he would not be attending the DIME on the advice of counsel. Because PALJ Phillips compelled Claimant to attend the January 6, 2022 DIME but he did not attend, his conduct violated a lawful order.

20. As found, although Claimant violated PALJ Phillips' December 10, 2021 pre-hearing order by failing to attend the January 6, 2022 DIME, his action was not objectively unreasonable because it was based on a rational argument in law or fact. On December 16, 2021 Claimant filed an Application for Hearing. He sought review and dismissal of PALJ Phillips' interlocutory orders in her December 10, 2021 Prehearing Order. The Application for Hearing specifically endorsed the issues of "Claimant seeks review and dismissal of all interlocutory orders from PALJ Susan Phillips in a Prehearing Order dated December 10, 2021. The PALJ either exceeded the boundaries of her jurisdiction pursuant to §8-43-207.5(1) or was in error regarding both the facts and law of her decisions and orders."

21. As found, the record reveals that Claimant did not simply ignore PALJ Phillips' prehearing order, but sought a hearing before an ALJ to challenge her ability to issue the order. Specifically, Claimant asserted that PALJs lack statutory authority to compel DIME attendance and to pay the cost of rescheduling a missed DIME. Although acknowledging the court of appeals' opinion in *Kennedy*, Claimant contended that the statutory amendments to §8-43-207.5, C.R.S. effective September 7, 2021, limit the authority of PALJ's to nine distinct areas. Claimant thus provided a rational explanation for his conduct. Although the preceding section of the present order rejected Claimant's contention, it was nevertheless predicated on a rational argument in law based on a strict construction of the amendments to §8-43-207.5, C.R.S. that does not permit PALJs to compel claimants to attend DIMEs or pay DIME rescheduling fees. Accordingly, Respondents are not entitled to recover penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022. *Compare Human Resource Co v. Indus. Claim Appeals Off.*, 948 P.2d 1194 (Colo. App. 1999) (failure to offer a reasonable factual or legal explanation for conduct permits the inference that the opposing party carried its burden to prove that the violation was objectively unreasonable).

Conflict of Interest

22. W.C.R.P. Rule 11-3 defines the phrase "conflict of interest" pertaining to a DIME physician. Rule 11-3(E) specifically provides that the DIME doctor shall:

> (E) Not evaluate the claimant if an actual conflict of interest exists. A conflict of interest includes, but is not limited to, instances where the physician or someone in the physician's office has treated the claimant or performed an Independent Medical Examination (IME) on the claimant. A conflict is presumed to exist when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME.

> (1) Direct or substantial financial interest is defined as a business ownership interest, a creditor interest in an insolvent business, employment relationship, prospective employment for which negotiations have begun, ownership interest in real or personal property, debtor interest, or being an officer or director in a business.
>
> (2) Being members of the same professional association, society, or medical group, sharing office space, or having practiced together in the past are not the types of relationships that will be considered a conflict;

23. W.C.R.P. Rule 11-4 permits parties to request disclosures within five business days of the issuance of a three-doctor panel from the Division in determining whether to strike a DIME physician. Rule 11-4(4) provides, in relevant part:

> (4) Within five (5) business days of issuance of the three-physician list by the Division, a party may request summary disclosure concerning any business, financial, employment, or advisory relation with the insurer or self-insured employer. Such request shall be submitted by electronic mail to the DIME Unit and copied to the other parties. The parties may use the information provided on the summary disclosure forms to assist in the decision to strike a physician.

24. As found, Claimant has failed to prove by a preponderance of the evidence that Dr. Mathwich should be removed as the DIME physician based on a conflict of interest. Initially, both Claimant and Respondents struck a member of the DIME panel. Neither party requested summary disclosures under W.C.R.P. Rule 11-3. Because Dr. Mathwich was the only remaining physician, he was selected to perform the DIME on June 25, 2021. However, on July 21, 2021 Dr. Mathwich sent an email to the parties and the DIME Unit at the DOWC noting concerns about a potential conflict of interest. The parties discussed the potential conflict issue on July 26, 2021. Neither party expressed any concerns about Dr. Mathwich serving as the DIME physician. In fact, on July 26, 2021 Respondents wrote a letter to Claimant's counsel confirming the waiver of any potential conflict of interest involving Dr. Mathwich.

25. As found, at the time Dr. Mathwich mentioned a potential conflict, Claimant had a responsibility to research and review any concerns. Although Claimant had ample opportunities even after Dr. Mathwich mentioned his issues, he did not raise any concerns. In fact, Claimant affirmatively agreed to Dr. Mathwich as the DIME. Based on Claimant's failure to comply with Rule 11-4, and his agreement to Dr. Mathwich as the DIME physician, Claimant waived the right to object to Dr. Mathwich as the DIME doctor. *See Woolsey v. Pikes Peak Rock Shop, Inc., and Republic Indemnity Company*, WC 4-401-197 (ICAO, Mar. 13, 2004) (where the claimant objected to the DIME physician because he had previously been a treating physician, the ICAO reasoned that the

claimant had waived the right to remove the DIME physician because he previously agreed to him as the DIME physician).

26. As found, nevertheless, Claimant contends that, based on Dr. Anderson-Oeser's testimony there is a conflict of interest with Dr. Mathwich performing the DIME. Dr. Anderson-Oeser detailed that she was concerned about potential bias in the upcoming DIME with Dr. Mathwich. She reasoned that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. Despite Claimant's contention, the record reveals that PALJ Phillips did not err in her December 10, 2021 order denying Claimant's motion for a new three-physician DIME panel and not removing Dr. Mathwich as the DIME physician.

27. As found, initially, the record reflects that PALJ Phillips had the authority and did not err in denying Claimant's motion for a new three-physician DIME panel. Specifically, Claimant did not request summary disclosures concerning any business, financial, employment, or advisory relation with the insurer within five business days of issuance of the three-physician list by the DOWC pursuant to Rule 11-4. Furthermore, although Drs. Mathwich and Anderson-Oeser were colleagues in the past, a conflict is only presumed "when the DIME physician and a physician who previously treated or evaluated the claimant in the course of an IME have a relationship involving a direct or substantial financial interest during the pendency of the DIME." Because Drs. Mathwich and Anderson-Oeser do not currently practice together, no conflict is presumed. In fact, Dr. Anderson-Oeser specified that she does not currently have any mutual economic interest with Dr. Mathwich.

28. As found, under Rule 11-3(E)(2) "having practiced together in the past [is] not the types of relationships that will be considered a conflict." Dr. Anderson-Oeser remarked that the circumstances surrounding her departure from Ascent Medical could impact Dr. Mathwich's ability to be impartial in performing the DIME. However, in the absence of an actual conflict based on a current financial relationship, concerns about a potential conflict are speculative. Notably, Dr. Anderson-Oeser left Ascent Medical at the end of 2020 and joined her current practice of Premier Spine & Pain Institute. Ascent Medical subsequently changed its name, or was bought out by Physical Medicine of the Rockies. Dr. Anderson-Oeser was not aware that Dr. Mathwich had left the practice and began Mathwich & Associates. The significant temporal delay since an actual business relationship between Drs. Mathwich and Anderson-Oeser's and the numerous manifestations of Dr. Mathwich's practice suggest that any concerns about a current conflict of interest are speculative. Accordingly, the record does not warrant disqualification of Dr. Mathwich as the DIME physician. *See generally City of Manassa v. Ruff*, 235 P.3d 1051, 1055 (Colo. 2010) (noting that the phrase 'conflict of interest' "has been described as a term of art, reflecting a host of different policy determinations, depending on the context in which it operates,...").

ORDER

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

1. PALJ Phillips had the authority to compel Claimant to attend the January 6, 2022 DIME with Dr. Mathwich and to reimburse Respondents for the cost of rescheduling the November 23, 2021 DIME.

2. Respondents' request to suspend TTD payments to Claimant for the period November 23, 2021 until he attends the DIME with Dr. Mathwich is denied and dismissed.

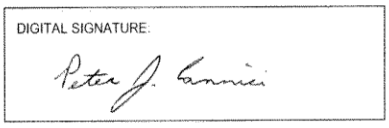
3. Respondents' claim for penalties from Claimant for his refusal to attend the DIME with Dr. Mathwich on January 6, 2022 is denied and dismissed.

4. Claimant's request to remove Dr. Mathwich as the DIME physician based on a conflict of interest is denied and dismissed.

5. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 22, 2022.



Peter J. Cannici
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-145-039-001

ISSUES

1. Whether Respondents established by clear and convincing evidence that the DIME physician, John Hughes, M.D., incorrectly determined that Claimant is not at maximum medical improvement.

FINDINGS OF FACT

1. Claimant is a 55-year-old man who sustained an admitted work injury to his right ankle on July 28, 2020, while working for Employer. Claimant's injury occurred when his right foot slipped or twisted, and he "inverted" his right ankle.

2. Claimant is a Spanish speaker and understands limited English. Except where noted otherwise below, a Spanish interpreter was used for Claimant's medical visits.

3. Approximately five hours after his injury on July 28, 2020, Claimant was seen at Midtown Occupational Health Services by Ashley Pospisil, NP (nurse practitioner for supervising physician Lawrence Cedillo, D.O.). Claimant's complaints were limited to his right ankle, where he reported twisting his right ankle in the mud and inverting it, causing pain and swelling. Claimant was diagnosed with a mildly displaced oblique fracture in the distal fibula, and referred to Thomas Mann, M.D., for an orthopedic evaluation. No complaints of right knee issues were addressed in the report. (Ex. L).

4. Also on July 28, 2020, Claimant saw Dr. Mann at Cornerstone Orthopaedics & Sports Medicine. Dr. Mann examined Claimant and diagnosed him with a closed fracture of the right ankle (right oblique Weber B fracture with mild displacement) and mild joint incongruity of the right ankle. No complaints of right knee issues were addressed in Dr. Mann's report. (Ex. 3). Dr. Mann performed surgery on Claimant's right ankle on July 31, 2020. (Ex. 3).

5. On July 29, 2020, Employer filed an First Report of Injury, indicating the claimant sustained an ankle fracture on July 28, 2020. (Ex. A).

6. On August 3, 2020, Claimant saw Ms. Pospisil in follow up. At that time, Claimant was in a knee-to-toe splint, non-weightbearing on his right ankle, and using crutches. Ms. Pospisil provided Claimant with a prescription for a temporary wheelchair, for approximately six weeks during which Claimant was anticipated to be non-weightbearing. Claimant was also advised to elevate his right leg whenever resting. No complaints of right knee issues were addressed in the report. The August 3, 2020 record does not indicate whether an interpreter was present. (Ex. L).

7. Claimant returned to Ms. Pospisil on August 14, 2020. Claimant reported he was using the prescribed wheelchair, although it presented difficulties navigating his work site.

Due to the difficulties, Ms. Pospisil prescribed a scooter in lieu of a wheelchair. No complaints of right knee issues were addressed at this visit. (Ex. L).

8. On August 17, 2020, Claimant presented to Dr. Mann for a post-surgical evaluation. Claimant reported occasionally using prescribed pain medication, keeping his leg elevated, and being non-weightbearing. No knee issues were addressed at this visit. Dr. Mann placed Claimant in a walking boot with instructions to begin partial (50%) weightbearing while in the boot. The medical record does not indicate an interpreter was used. (Ex. M).

9. On August 31, 2020, Claimant returned to Ms. Pospisil. Claimant reported using a scooter while ambulating which was helpful. Claimant was advised to continue to use the boot and scooter for ambulation, and to elevate his right leg whenever seated. No knee issues were addressed. (Ex. L).

10. Claimant began physical therapy for his ankle on September 10, 2020 at Midtown Occupational Health Services. At the time, Claimant remained at 50% weightbearing, and used a scooter for ambulation otherwise. The therapy performed included only seated exercises. Claimant's right knee was not addressed at physical therapy. The medical record does not indicate an interpreter was used. (Ex. O).

11. On September 14, 2020, Claimant attended his second session of physical therapy and saw Ms. Pospisil after that appointment on the same day. Records from both providers indicate Claimant saw Dr. Mann that day, however, no record from Dr. Mann was included in the records provided. Nonetheless, the physical therapy records indicate Claimant provided a new physical therapy script which included physical therapy for "R knee MCL sprain as well." Ms. Pospisil's record from that day does not mention Claimant's right knee. (Ex. O & L).

12. Claimant returned to Ms. Pospisil on September 28, 2020, the records from this date do not mention Claimant's right knee. (Ex. L).

13. On October 15, 2020, Dr. Mann examined Claimant's right knee. Claimant reported worsening pain and "crunching" of the right knee. He noted that the knee was normal to inspection with normal alignment and no effusion. The knee was normal on testing, with the exception of "significant medial joint line tenderness" and "a "palpable click around the patella." Dr. Mann diagnosed Claimant with osteoarthritis of right knee, discussed a potential cortisone injection, and ordered physical therapy for Claimant's right knee. (Ex. 3).

14. Claimant returned to Dr. Mann on November 16, 2020. Claimant's knee was not addressed, but Dr. Mann noted that "If indicated by occ med, [Claimant] may follow up for a separate visit concerning evaluation of the right knee." (Ex. M).

15. Claimant saw Ms. Pospisil on November 23, 2020, for indicated complaints of right ankle and right knee sprain. Examination of Claimant's right knee showed mild edema, 4/5 strength, and mild tenderness to palpation in the lateral joint line. Ms. Pospisil's diagnosis under the heading "Work Related" was "Mildly displaced right oblique fracture

distal fibula, right knee sprain." She recommended 4 weeks of physical therapy for both the right ankle and knee. (Ex. L).

16. On December 16, 2020, Claimant saw Ms. Pospisil and reported concerns about right knee instability, swelling and 6-7/10 pain. Examination of the right knee was the same as November 23, 2020. Ms. Pospisil ordered an MRI of the right knee to rule out a meniscal tear, and directed Claimant to continue in a right knee sleeve for instability. (Ex. L).

17. On December 23, 2020, Claimant underwent a right knee MRI, which was interpreted as showing "a very small knee joint effusion," "a complex tear of the body and posterior horn of the medial meniscus," "severe osteoarthritis and near complete loss of articular cartilage from the patellar femoral compartment" and "mild to moderate osteoarthritis and moderate chondromalacia of the medial femoral tibial compartment." (Ex. O). Based on the MRI findings, Claimant was referred to Michael Hewitt, M.D.

18. Claimant saw Dr. Hewitt on January 13, 2021. Based on his examination and review of the MRI, Dr. Hewitt diagnosed Claimant with a right knee medial meniscus tear with mild medial compartment arthritis. Dr. Hewitt proposed treatment options including observation, activity modification, NSAIDs, brace, therapy, cortisone injection, and arthroscopy. He noted that arthroscopy was unlikely to address Claimant's arthritis. Dr. Hewitt recommended a partial medial meniscectomy, indicating he believe surgical treatment was medically reasonable. Claimant indicated he would like to proceed with the procedure. (Ex. N).

19. On January 25, 2021, Claimant saw Sadie Sanchez, M.D., at Midtown Occupational Health Services. Claimant reported to Dr. Sanchez that he had mentioned his knee pain when he was initially examined in July 2020. Dr. Sanchez reviewed Claimant's medical records and indicated that she "cannot saw with 51% or greater certainty that his knee condition is work related." Dr. Sanchez noted that Claimant did not report knee pain at his initial intake or early follow-ups, and that because the MRI was not performed until approximately five months after the incident, the findings are not able to be "dated" appropriately. Dr. Sanchez stated "one cannot say for certain that his medical meniscal tear is directly related to his [mechanism of injury] on the [date of injury]. Or if perhaps it was present prior and the altered gait from use of the walking boot/rehab has aggravated an underlying condition." (Ex. 5). Claimant continued to follow up with Dr. Sanchez through June 1, 2021.

20. On April 23, 2021, Claimant underwent an independent medical examination (IME) at Respondents' request with Mark Failinger, M.D. Dr. Failinger examined Claimant and reviewed relevant medical records. Dr. Failinger diagnosed Claimant with a right ankle distal fibular fracture, and "right knee exacerbation of pre-existing degenerative joint disease and possible acceleration of a pre-existing meniscus tear." (Ex. K).

21. With respect to causation, Dr. Failinger opined that, had the July 28, 2020 injury cause significant or major pathology, symptoms would have appeared before his first documented knee complaints on September 14, 2020. However, he also noted that the

Claimant's mechanism of injury could have caused an exacerbation or acceleration of a pre-existing meniscal tear or acceleration of pre-existing arthritis. He also indicated it was possible Claimant's symptoms would not have occurred until after Claimant advanced to partial weightbearing on August 18, 2020. Specifically, he noted that although there was no documentation of knee complaints at that time, "[t]here are times when ipsilateral (same-sided) injury occurs, and symptoms do not appear until the patient is weightbearing." Dr. Failinger opined that it was more likely that Claimant sustained an exacerbation of pre-existing issues rather than new pathology. However, at the time of his IME report, Dr. Failinger had not reviewed the Claimant's MRI report or films. He noted that he would need to see the MRI report and films to determine whether Claimant's knee pathology could be reasonably treated by the arthroscopy recommended by Dr. Hewitt. (Ex. K).

22. On May 17, 2021, Insurer denied authorization for Dr. Hewitt's recommended surgery based on Dr. Failinger's IME report. (Ex. 5).

23. On May 28, 2021, Dr. Sanchez saw Claimant and indicated that because Insurer had denied authorization for surgery on Claimant's right knee, she was unable to provide further treatment for the knee. (Ex. 5).

24. On June 1, 2021, Dr. Sanchez placed Claimant at maximum medical improvement (MMI) and provided Claimant with an impairment rating for his right ankle only. Dr. Sanchez did not provide any impairment rating for Claimant's right knee. (Ex. 5).

25. On June 29, 2021, Respondents filed a Final Admission of Liability, admitting for a 6% lower extremity impairment, as assigned by Dr. Sanchez. (Ex. C). Claimant subsequently requested a Division Independent Medical Examination (DIME).

26. On October 28, 2021, John Hughes, M.D., performed a DIME, and issued a report on the same date. Dr. Hughes examined Claimant and reviewed medical records. As relevant to the present issues, Dr. Hughes opined that Claimant sustained a right knee sprain/strain with development of a meniscus tear, meriting arthroscopic surgical treatment proposed by Dr. Hewitt. He opined that Claimant sustained a right medial meniscus tear and that it did not become clinically evident until he started weightbearing. He noted that the surgery recommended by Dr. Hewitt offered a reasonable treatment option, and that Claimant was therefore not at MMI. (Ex. 1)

27. Dr. Hughes testified by deposition in lieu of live testimony. Dr. Hughes testified that he reviewed the December 23, 2020 MRI report and accepted the radiologist's interpretation of the MRI as showing effusion in the Claimant's knee, which he opined was consistent with an active process in his knee. He testified that it "is biologically plausible" that the Claimant's mechanism of injury could have resulted in trauma to the knee. And that he believes Claimant's work injury "accelerated an occult knee process as a result of weight-bearing when he began weight-bearing again." Dr. Hughes further testified that the arthroscopy proposed by Dr. Hewitt was appropriate treatment for Claimant's knee.

28. On November 27, 2021, Dr. Failinger issued an addendum to his original IME report. After reviewing Claimant's MRI, Dr. Failinger opined that Claimant had significant preexisting degenerative medial meniscal tearing and medial compartment degenerative changes prior to July 28, 2020 injury. He indicated that it was not probable that Claimant's injury resulted in further tearing of the meniscus or any accelerated pre-existing condition, based on the delay in reporting knee symptoms and the results of the MRI. (Ex. K).

29. Dr. Failinger was admitted as an expert in orthopedic surgery and testified at hearing. Dr. Failinger testified that MRIs are only reliable to detect a relationship between effusion and a meniscus tear in the first month after an injury, and that an MRI taken five months after the injury would not be reliable to establish any relationship between a meniscus tear and effusion. He further opined that any effusion shown in Claimant's knee would likely be related to his severe arthritis. Dr. Failinger testified that Claimant would not have an altered gait on the ipsilateral leg (right side) that would aggravate or accelerate symptoms in the right knee. This testimony appears to conflict with Dr. Failinger's initial written opinion, and is unpersuasive.

30. He also testified that had Claimant reported knee pain contemporaneous with the July 28, 2020 injury, it would change his opinion regarding causality. From this, the ALJ infers that Dr. Failinger's opinion that Claimant did not sustain a knee injury is not based on the MRI results, but on the delay in reporting of symptoms. Dr. Failinger also opined that he did not believe that Claimant's current knee symptoms were the result of a meniscus injury, but rather that they were the result of his severe, pre-existing degenerative arthritis in the knee. He further opined that the surgery recommended by Dr. Hewitt was not likely to resolve Claimant's symptoms, and that Claimant needed a knee replacement.

31. Claimant testified at hearing that he reported knee symptoms to each of his providers prior to September 14, 2020, and that each of those providers failed to document those complaints. Claimant saw three different providers nine times between July 28, 2020 and September 10, 2020. It is highly improbable that each of these providers would have failed to document complaints of knee pain at every visit. Claimant's testimony that he complained of knee pain prior at every visit prior to September 14, 2020 is not credible. Claimant credibly testified that he had no prior knee injuries and did not sustain any additional injury to is right knee after July 28, 2020.

CONCLUSIONS OF LAW

Generally

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

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

OVERCOMING DIME - MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is

inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office,* 794 *P.2d 1090 (Colo. App. 1990); Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *In Re Villela,* W.C. No. 4-400-281 (ICAP, Feb. 1, 2001).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* W.C. No. 4-712-812 (ICAO Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents have failed to establish by clear and convincing evidence that Dr. Hughes opinion that Claimant is not at MMI from his July 28, 2020 injury is incorrect. The basis of Dr. Hughes' non-MMI finding is his opinion that Claimant sustained a work-related right knee injury July 28, 2020, in addition to his ankle injury, and that the knee requires further treatment. Dr. Hughes also opined that the arthroscopy recommended by Dr. Hewitt is a reasonable, related treatment option.

With respect to causation of Claimant's right knee condition, Respondents have not established through evidence that is "unmistakable and free from serious or substantial doubt" that Dr. Hughes' opinion that Claimant sustained an injury that accelerated an occult knee process when he began weightbearing is "highly probabl[y]" incorrect. The Claimant's December 23, 2020 MRI shows Claimant had pre-existing severe osteoarthritis and cartilage loss in his right knee. The MRI also showed a complex tear of the body and posterior horn of the medial meniscus. Claimant had not previously received treatment for his right knee and no credible evidence was presented that Claimant's right knee was symptomatic prior to his injury.

While Dr. Failinger opined that Claimant did not likely sustain a new meniscal tear as a result of the July 28, 2020 incident, he did concede that it was possible to exacerbate or accelerate a pre-existing tear or Claimant's pre-existing osteoarthritis. Dr. Failinger also agreed that the reported mechanism could cause a knee injury, in addition to Claimant's ankle injury. Primarily, Dr. Failinger does not believe it is medically probable that Claimant

sustained an exacerbation or acceleration, based on the timing of Claimant's reported symptoms.

Although Claimant did not report right knee symptoms until September 14, 2020, this does not clearly and convincingly establish that his right knee symptoms were not causally-related to the July 28, 2020 incident. Claimant could not bear weight on his right leg until approximately three weeks following surgery, or August 18, 2020, when he began partial weightbearing. Dr. Hughes, Dr. Sanchez, and Dr. Failinger agree that Claimant's knee symptoms may not have manifested until after Claimant resumed weightbearing. Although Dr. Failinger believes Claimant's knee symptoms should have manifested prior to September 14, 2020, his opinion on this does not constitute evidence that is "unmistakable and free from serious or substantial doubt." Moreover, no credible evidence was presented to indicate that Claimant sustained any unrelated injury after July 28, 2020, that would explain the symptoms.

Considering the evidence in its entirety, the ALJ finds that Respondents have not established by clear and convincing evidence that Dr. Hughes' opinion that Claimant sustained an injury to his knee that accelerated his preexisting conditions is incorrect.

With respect to MMI, Dr. Hughes indicated that the arthroscopy recommended by Dr. Hewitt was a reasonable treatment option. In his January 13, 2021 report, Dr. Hewitt indicated he felt arthroscopic surgery was medically reasonable, given Claimant had only minimal improvement in his knee condition. He also recommended other treatment options, such as therapy and a cortisone injection, which Claimant has not received. Although Dr. Sanchez placed Claimant at MMI on June 1, 2021, her assessment of MMI was limited to Claimant's ankle because, in her view, she was unable to provide treatment or restrictions for Claimant's knee due to Insurer's denial of the request for surgery. Dr. Failinger disagrees that the proposed surgery will properly address the cause of Claimant's symptoms, which he attributes to osteoarthritis. Dr. Failinger's opinion that the proposed surgery will not be effective is a difference of medical opinion with Dr. Hughes and Dr. Hewitt, and does not constitute unmistakable evidence that the MMI opinion is highly probably incorrect. Although the ALJ makes no conclusions regarding the propriety of the proposed surgery, Claimant continues to experience right knee symptoms, and treatment options exist which he has not received, and which may reasonably improve his condition or function. Respondents have failed to establish by clear and convincing evidence that Claimant is not at MMI.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant is not at MMI due to his right knee injury is incorrect.

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

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

DATED: April 22, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-088-992-004

ISSUES

The issues set for determination included:

- Did Claimant overcome the opinion of the Division of Workers' Compensation IME ("DIME") physician (Wallace Larson, M.D.) by clear and convincing evidence that he was not at MMI as of January 23, 2018?

- Is Claimant entitled to medical treatment to diagnose and treat his cervicothoracic spine and right shoulder?

- Did Claimant overcame the opinion of the DIME physician by clear and convincing evidence that he sustained a permanent medical impairment as a result of his January 16, 2018 injury?

PROCEDURAL HISTORY

The undersigned ALJ issued a Summary Order on October 28, 2021. Respondents requested a full Order on November 4, 2021. This Order follows.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as an industrial laborer, starting on September 26, 2016.

2. There was no evidence in the record that Claimant suffered injuries to his lumbar spine or cervicothoracic spine prior to May 2017.

3. On May 24, 2017, Claimant suffered a compensable work injury while picking up trim pieces. Claimant testified that he injured his low back that day. He required medical treatment for that injury.

4. An Employer's First Report of Injury was completed on or about May 26, 2017. This confirmed Claimant injured his low back on May 24, 2017 when he picked up pieces of trim.

5. Claimant's treating physicians for May 24, 2017 injury included Michael Striplin, M.D. at Colorado Occupational Medicine Physicians and Nicholas Olsen, D.O. at Rehabilitation Associate of Colorado. Both physicians were ATP-s. Claimant started treating in June 2017 and Dr. Olsen diagnoses on June 14, 2017 were: lumbar spine

sprain/strain with subjective complains of right lower extremity numbness and a clinical examination consistent with somatic dysfunction in the thoracic, lumbar and sacral regions.[1]

6. On July 11, 2017, a General Admission of Liability ("GAL") for medical benefits and TTD was filed on behalf of Respondents for the May 24, 2017 injury.

7. Claimant underwent a lumbar MRI on August 14, 2017 in which the radiologist noted the presence of a large central and right paracentral, right proximal foraminal disc extrusion at L1-L2, associated with moderate facet degeneration and hypertrophy along with moderate to severe spinal canal narrowing. There was also moderately severe right proximal foraminal narrowing. At L3-L4, there was a large left foraminal, left far lateral disc protrusion, with mild facet arthrosis and mild foraminal narrowing. At L4-L5, there was a moderate facet degeneration and hypertrophy, with a mild posterior disc bulge. There was a posterior disc bulge with mild facet arthrosis at L5-S1.[2]

8. Claimant received epidural steroid injections that were administered by Dr. Olsen on August 29, 2017 (right transforaminal ESI L1-L2 and L2-L3), on September 26, 2017 (right transforaminal ESI L1-L2 and L2-L3), and on November 21, 2017 (left transforaminal ESI L3-L4 and right TFESI at L2-L3).[3]

9. Claimant was evaluated Bryan Castro, M.D. on November 6, 2017. Dr. Castro noted the back pain may be a result of the acute herniations at L1-L2 and L3-L4. The ALJ noted that this opinion supported the conclusion that the May 24, 2017 injury caused the disc herniations at L1-L2 and L3-L4. Surgery was not recommended at that time. Dr. Castro recommended continued physical therapy ("PT") for Claimant.[4]

10. Claimant had continuing low back as a result of the initial work injury.

11. Dr. Olsen placed Claimant at MMI on November 30, 2017.[5]

12. On January 16, 2018, Claimant suffered a second compensable work injury when he slipped on ice while carrying construction cables. Claimant testified he fell when his feet went out from under him and he hurt his upper back.[6]

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[1] This report was not admitted into evidence, but was referenced in Dr. Castrejohn's June 26, 2018 DIME report. Exhibit L, p. 38. It should be noted that Dr. Castrejohn did not reference the January 16, 2018 injury.

[2] *Id.*

[3] Exhibit L, pp. 38-39.

[4] *Id*. at p. 39.

[5] *Id.*

[6] Hearing Transcript ("Hrg. Tr."), p. 22:17-20.

13. Claimant testified he kept working but the pain was much worse the next day. Specifically, he felt pain in both his upper and lower back, the areas between the shoulder blades, in his right shoulder and neck and right hand.[7] Claimant said he did not have pain in those areas after the first injury. The ALJ found Claimant to be a credible witness and credited this testimony.

14. Claimant was evaluated by Dr. Striplin on January 16, 2018. Claimant complaints were not identified in any detail, but no acute distress was noted. The examination of Claimant's back showed diffuse tenderness, with no spasm or visible injury. Dr. Striplin's assessment was: back contusion. Claimant was noted to be still under care for the May 24, 2017 injury. The WCM 164 (which referred to the January 16, 2018 date of injury) noted that Dr. Striplin concluded the objective findings were consistent with history and/or work-related mechanisms of injury/illness. Dr. Striplin recommended Aleve and heat. Claimant was placed on modified duty with a 10 pound lifting, pushing and pulling restriction, as well as no overhead reaching.

15. Dr. Olsen evaluated Claimant on January 18, 2018 (in connection with the May 2017 injury), at which time he reported increased pain in his right side. Claimant reported his pain level was 9/10 following the fall whereas during the last visit, his pain level was 3/10 following an ESI. (This was related to the prior injury). Dr. Olsen observed there were discrepancies in the pain complaints reported by Claimant and his pain diary, which did not include a report of pain in his shoulders and upper back. Dr. Stiplin had indicated that this would be a new injury and Dr. Olsen contacted Dr. Striplin to discuss the case. The ALJ noted that this was evidence Claimant had new/ different pain complaints attributable to the second injury. On examination, Claimant', lumbar range of motion ("ROM") was limited. Dr. Olsen's report did not contain specific findings with regard to an examination of the thoracic spine or upper extremities.

16. Dr. Olsen's assessment was: lumbar sprain/strain, with subjective complaints of right lower extremity numbness; mild multilevel degenerative changes on 6/14/17 per plain films; MRI of the lumbar spine completed on 8/14/17 demonstrated a large right paracentral disc extrusion at L1-2, with moderate to severe spinal cord narrowing, large left bilateral disc protrusion; status post diagnostic right L1-2, L2-3 transforaminal epidural steroid injection completed on 8/29/17; status post diagnostic right L2-3 transforaminal epidural steroid injection completed on 9/26/17; post diagnostic right L2-3 left completed on 8/29/17, left L3-4 transforaminal epidural steroid injection completed on 11/21/17; status post and aggravation of lower back pain with recent slip-and-fall; new claim potentially pending regarding right upper quarter complaints.

17. Dr. Olsen expressed a concern about Claimant being a surgical candidate because he had a two level disc protrusion. Claimant was to continue his home exercise program.

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[7] Hrg. Tr., p. 23:9-11.

18. An Employer's First Report of Injury was prepared on or about January 18, 2018, which said Claimant was injured on January 16, 2018 carrying cables.

19. Claimant received a physical therapy PT treatment on January 22, 2018 for the May 24, 2017 injury, but there was no reference to the second injury. This treatment note stated Claimant was treating for two herniated discs which were caused for the first work injury. There was no record of treatment for the mid-upper back in this period of time.

20. Claimant was evaluated by Dr. Striplin on January 23, 2018 in connection with the January 16, 2018 injury. At that time, he complained of diffuse tenderness on the right and left side of the upper thoracic spine down to the lower lumbar areas. On examination, Dr. Striplin said no palpable spasm was found. Right and left shoulder motion was described as normal and Dr. Striplin opined the lumbar ROM was also normal, although there was no indication that he performed actual ROM testing with dual inclinometers. No ROM measurements were documented in Dr. Striplin's report.

21. Dr. Striplin noted Claimant was to have a repeat lumbar MRI, as well as an evaluation with Dr. Castro and would follow up with Dr. Olsen under the prior claim. Dr. Striplin concluded Claimant was at MMI and sustained no permanent impairment from his back contusion. Claimant's 10 lb. lifting restriction from the prior injury was continued.

22. On January 24, 2018, Claimant underwent a lumbar MRI and the films were read by Craig Stewart, M.D. Dr. Stewart's impression was that the lumbar spine had a similar appearance compared with the MRI done on August 14, 2017. Congenital narrowing of the lumbar spinal canal was noted and there was moderate to severe multi-factorial spinal stenosis at L1-L2, not significantly changed. There was a similar appearance of the left foraminal/lateral disc protrusion at L3-L4, contributing to mild to moderate left foraminal narrowing and contacting the exiting left L3 nerve root. Dr. Stewart also noted persistent moderate bilateral L4-L5 and moderate to severe bilateral L5-S1 foraminal narrowing.

23. Claimant was reevaluated by Dr. Striplin on January 25, 2018, at which time he reported low back pain, as well as radiating pain to the upper back. The treatment notes reflected this evaluation was in connection with the May 24, 2017 date of injury.[8] Claimant's lumbar ROM was found to be limited. No specific treatment recommendations were made at that time and Claimant was scheduled for an MRI.

24. Claimant was evaluated by Dr. Olsen on January 31, 2018, after the MRI. Dr. Olsen described the studies as quite similar and he had no new recommendations based on new pathology. The focus of this evaluation was on Claimant's low back.

[8] There was a discrepancy as to this date of injury between Dr. Striplin's records and Dr. Olsen's records (which noted a May 24, 2014 D.O.I. that appeared to be a typographical error). Dr. Olsen's January 31, 2018 WC M-164 reflected a May 24, 2017 date of injury. The E-1 reflected a May 24, 2017 date of injury.

On examination, limitations in ROM, including lumbar extension in forward flexion were noted. Claimant was scheduled for a follow-up with Dr. Castro regarding surgery. Claimant was encouraged to continue his home exercise program. The ALJ found Dr. Olsen evaluated Claimant's low back and did not address other complaints referable to the January 16, 2018 injury.

25. Claimant was evaluated Dr. Castro on February 14, 2018. Dr. Castro reviewed the MRI findings and noted the neural foraminal stenosis at L5-S1 appeared to be improved. There was a mild central disc at L1-L2, without central canal encroachment. The ALJ noted the symptoms of radiculopathy were new and occurred after the second injury. Dr. Castro's assessment was: lumbar radiculopathy, with back pain as the predominant complaint. Dr. Castro did not think surgical intervention was the best option and said he would refer Claimant for other pain management techniques.

26. On February 21, 2018, Claimant returned to Dr. Olsen in connection with the May 24, 2017 injury.[9] Dr. Olsen noted Claimant had completed three epidural injections and he would not recommend more than four ESI-s in a year because of adrenal suppression. Dr. Olsen's assessment was the same as the January 18, and 31, 2018 report with the addition of the MMI date of February 21, 2018.

27. Dr. Olsen assigned a 9% whole person impairment, which included a 7% category II-C impairment (Table 53), plus an additional 2% for loss of ROM. Dr. Olsen noted that Claimant had questions regarding right upper extremity complaints. Dr. Olsen advised Claimant that this case closure was for the lumbar complaints only. The ALJ inferred that Dr. Olsen was of the opinion that at a minimum Claimant should be evaluated to see whether further treatment was required for the January 16, 2018 injury.

28. On February 27, 2018, Claimant returned to Dr. Stiplin, who noted no surgery was recommended and Dr. Olsen had issued an impairment rating. Dr. Striplin found Claimant could heel to toe walk, had 2+ reflexes in the right patellar and Achilles areas and had grossly normal light touch in both lower extremities. Dr. Striplin stated Claimant was at MMI effective February 21, 2018 and said he agreed with Dr. Olsen 9% whole person rating.

29. The ALJ found there was an interplay between the two injuries and Claimant did not receive specific treatment for the new symptoms which resulted from the January 16, 2018 injury.

30. On June 26, 2018, Claimant underwent a DIME for the May 24, 2017 injury, which was performed by Miguel Castrejon, M.D. At that time, Claimant reported intermittent to constant dull to sharp and stabbing pain that he localized to the mid back, specifically from the area of the thoracolumbar junction to approximately L5. He also reported occasional to intermittent dull sensation with them to send both legs, right

[9] Exhibits 2 and K.

greater than left. Claimant said there was a benefit after his last injection and his pain level range from 6–8/10.

31. Examination of the thoracic spine did not produce midline tenderness and full ROM was present. Tenderness was found at the thoracolumbar and lumbar paraspinal musculature. Dr. Castrejon's impression was: chronic lumbar muscular ligamentous strain/sprain; large central, right paracentral L12 foraminal disc extrusion with moderate facet degeneration and moderately severe spinal stenosis per MRI; large left foraminal/left far lateral protrusion L3-4, per MRI; multilevel facet arthropathy contributing to lower limb radiculitis: normal thoracic spine examination; chronic pain.

32. Dr. Castrejon confirmed Claimant was at MMI. He assigned 14% whole person impairment, which included a 4% Table 60 impairment and 6% for loss of range of motion. This evaluation did not address whether Claimant needed treatment for his upper back or sustained any permanent impairment for the second injury.

33. On August 31, 2018, a Final Admission of Liability ("FAL") was filed on behalf of Respondents for the May 24, 2017 injury. It listed the date of MMI as January 23, 2018. The FAL admitted for the 14% whole person impairment and denied medical benefits after MMI.

34. Claimant was evaluated by George Bovadilla, D.C. on September 19, 2018. Claimant was complaining of moderately severe aching upper back and moderately severe constant ache and low back at that time. Dr. Bovadilla said there was a subluxation of T4, 12 leather evolves with segmental fixation. Dr. Bovadilla recommended a treatment schedule of three visits per week.

35. Claimant returned to Dr. Olsen, on September 27, 2018. He advised Dr. Olsen of the chiropractic evaluation and recommendation for treatment. Dr. Olsen was not in favor of the chiropractic treatment, given the MRI findings. On examination, Claimant's lumbar extension showed 25° of mobility and 50° of forward flexion was noted. Right and left lateral bending were full, but increased pain with lateral bending to the right was found. Claimant was given the option of an epidural steroid injection, as well as continuing his exercise program.

36. On October 3, 2018, a Worker's Claim for Compensation was filed for the January 16, 2018 date of injury. The Worker's Claim stated Claimant injured his upper back and both hands.[10]

37. On October 17, 2018, an FAL was filed on behalf of Respondents in connection with the January 16, 2018 injury. It listed the date of MMI as January 23, 2018 and admitted for a 0% whole person impairment.

[10] Exhibit P.

38. Claimant filed an Application for DIME on December 12, 2018 for the January 16, 2018 date of injury.

39. On January 15, 2019, Claimant was evaluated by Dr. Olsen. The evaluation referenced the May 24, 2017 date of injury. At that time, he had pain in his low and middle back, as well as a referral pattern into the right upper extremity.

40. Dr. Olsen's assessment was: lumbar sprain/strain, with subjective complaints of right lower extremity numbness; mild multilevel degenerative changes on 6/14/17 per plain films; MRI of the lumbar spine completed on 8/14/17 demonstrated a large right paracentral disc extrusion at L1-2, with moderate-to-severe spinal cord narrowing, large left bilateral disc protrusion; status post diagnostic right L1-2, L2-3 transforaminal epidural steroid injection completed on 8/29/17; status post diagnostic right L2-3 transforaminal epidural steroid injection completed on 9/26/17; status post diagnostic right L2-3 left completed on 8/29/17, left L3-4 transforaminal epidural steroid injection completed on 11/21/17; status post and aggravation of lower back pain with recent slip-and-fall; new claim potentially pending regarding right upper quarter complaints; MMI on 2/2118; status post completion of a DIME increasing impairment for 9% to 14%.; FAL for 5/24/17 claim on 8/30/18/history of second work-related injury on1/16/18-Dr. Striplin placed him at MMI on 1/23/18 for this claim. The foregoing diagnoses was evidence of evidence that Claimant had increased symptoms as a result of the second injury.

41. At the time of the January 15, 2019 evaluation, Dr. Olsen explained to Claimant that a DIME examination had been scheduled for the second injury and if the DIME Dr. had treatment recommendations and he was referred to Dr. Striplin and then to Dr. Olsen, he would offer an opinion on the second injury. The ALJ concluded that Dr. Olsen was of the belief he was not to provide an opinion on the second injury and potential treatment until after the DIME.

42. Claimant returned to Dr. Olsen, on May 9, 2019 and the report referenced the May 24, 2017 date of injury. Dr. Olsen, reviewed Dr. Castejon's DIME report and noted Claimant was recommended for medical maintenance. Claimant advised that he was not interested in repeating the ESI. Claimant's pain diagram reflected pain and the low back, as well as down both legs. On examination, Claimant's lumbar extension demonstrated 20° mobility, facet loading was positive on the right and left. He had 50° forward flexion with increased pain at termination of forward flexion. No radiculopathy was noted. Dr. Olsen,'s assessment was the same as the January 15, 2019 evaluation. Dr. Olsen opined that Claimant's symptoms were more consistent with a facet hyper mediated component. He offered claimant the possibility of a bilateral L4-5 and L5-S1 facet injection. The ALJ found that Dr. Olson was recommending additional treatment for Claimant.

43. Claimant underwent bilateral L4-5 and L5-S1 facet injection on May 21, 2019. Claimant returned to Dr. Olsen on June 5, 2019, which time he reported in 80% reduction of his symptoms. Dr. Olsen noted Claimant may or may not be a candidate

for radio frequency neurotomy and that the work-up would include serial medial branch blocks in order to determine if he was a candidate. In the follow–up evaluation on June 19, 2019, Dr. Olsen discussed scheduling Claimant for serial medial branch blocks for confirmation and possible radio frequency neurotomy. Claimant wished to go forward with that treatment.

44. Claimant underwent bilateral L3, L4 medial branch and L5 dorsal primary ramus blockade. The diagnosis was lumbar spondylosis, bilateral L4-5, L5–S1.

45. Claimant returned to Dr. Olsen on June 27, 2019. After the medial branch block, Claimant had an immediate reduction in symptoms, but once he got home his pain was 2 out of 10. The pain was the went back to 3/10. Dr. Olsen said Claimant had a non-diagnostic response to medial branch block and it was not clear that he had a facetogenic pain generator. Dr. Olsen did not recommend proceeding with a confirmatory medial branch block and said Claimant was not a candidate for radio frequency neurotomy. Dr. Olsen‘s assessment was the same as the previous evaluation. He talked to Claimant about an exercise program, including a water program.

46. In the follow-evaluation on July 25, 2019. Dr. Olsen noted Claimant had set up an aquatic program, but Insurer had not paid for it. Dr. Olsen encouraged Claimant to participate in the pool program 3 to 5 days per week. No other treatment recommendations were made.

47. The ALJ noted in all of Claimant’s pain diagrams for the evaluations done by Dr. Olsen in 2019, Claimant indicated that he was having pain going down both of his legs. In addition, Dr. Olsen referenced the May, 2017 date of injury in all of the follow-up reports. Although he referenced Dr. Castrejon‘s DIME report, it was unclear whether Dr. Olsen considered the DIME report from Dr. Larson.

48. Claimant returned to Dr. Castro on August 14, 2019. Claimant reported ongoing low back pain and also that he had pain in the lower extremities, which was getting better. Dr. Castro referenced the May 23, 2017 work injury. Dr. Castro‘s assessment/plan was lumbar radiculopathy; back pain ongoing and a new MRI was going to be ordered.

49. Claimant underwent an MRI on August 23, 2019 and the films were read by Frank Crnkovich, M.D. Dr. Crnkovich impression was: disc protrusion and foraminal compromise including at the L2-L3 level, where the cul-de-sac measured 1.13 cm. At L3-L4, the thecal sac was narrowed to 1.04 cm., with ligamentum flavum hypertrophy and facet arthropathy was present. The lateral disc protrusion at L3-L4 level on the left was greater than right and there was contact to the exiting L3 nerve roots, left greater than right. At L4-L5 level, a broad-based disc protrusion was present, with left greater than right central component; no contusion, fracture or infiltrative process of the marrow present. The most prominent interval changewas the visualization of the urinary

bladder with distention of the bladder up to the L5 level. No obstruction or hydronephrosis of either kidneys noted.

50. Claimant testified he didn't really receive treatment for the second injury, including when he saw Dr. Olsen in January 2019. The focus was on his lower back when he had the second MRI and evaluation with Dr. Castro. He did not receive treatment for his upper back and the numbness in his hands. Claimant said he continues to experience symptoms related to the 2018 injury. The ALJ credited this testimony.

51. Claimant was evaluated by Caroline Gellrick, M.D. on February 22, 2019 to evaluate the injuries related to the January 16, 2018 slip and fall. Claimant reported symptoms in the mid back, thoracic, and some cervical pain with radiation into the right upper extremity. On physical examination, Dr. Gellrick noted that Claimant carried the right shoulder higher than the left. Claimant had tenderness to the mid and upper thoracic spine, lower back and right side of cervical paraspinal muscles. Claimant had tight trigger points of the right trapezius, which were painful. Dr. Gellrick diagnosed a cervical strain, thoracic and right shoulder contusions and aggravation of pre-existing low back condition.

52. Dr. Gellrick stated Claimant was not at MMI and required additional medical care (including diagnostic testing) to evaluate his second injury. Dr. Gellrick opined that Claimant required an MRI of the cervicothoracic area, in addition to subsequent MRI's of the low back (which were done under the first claim). She also indicated that an MRI arthrogram of the right shoulder may be necessary to determine if partial tears were present. The ALJ credited Dr. Gellrick's opinions that further diagnostic testing was required.

53. On March 5, 2019, Wallace Larson, M.D. performed the DIME with respect to the January 16, 2018 injury. Claimant reported that he had pain in his back in the area between the scapula, as well as the thoracic spine area. He also experienced numbness in both hands, which came and went. On examination, Claimant had bilaterally negative Tinel's and Phelan's signs. Mild tenderness to palpation of the thoracic spine and bilateral trapezius areas was noted by Dr. Larson. No tenderness to palpation was noted in the cervical spine, however, Dr. Larson found there was a mild restriction of cervical spine ROM. The ALJ noted Dr. Larson did not perform formal measurements with regard to the cervical or thoracic spine. No ROM testing worksheets were included in Dr. Larson's report.

54. Dr. Larson concluded Claimant did not have any identifiable impairment relative to the January 16, 2018 date of injury. Specifically, Claimant was at MMI as of January 23, 2018 without ratable impairment. Dr. Larson stated Claimant did not require additional treatment or maintenance treatment. In coming to these conclusions, Dr. Larson noted that he did not evaluate Claimant or review medical records relative to the May 2017 injury. The ALJ found Dr. Larson's DIME report did not address Dr. Olsen's treatment recommendations for Claimant for the January 16, 2018 injury or the

relationship between the two injuries. The ALJ also found Dr. Larson did not address Claimant's increased low back, mid back and upper extremity complaints which were present after the January 2018 injury. There was no analysis of Claimant's need for treatment in 2019 for radiculopathy, which was present after the second injury.

55. The ALJ found Dr. Larson's failure to perform formal measurements was an error. In addition, Dr. Larson's failure to address Claimant's additional pain complaints after the second injury was an error.

56. On March 25, 2019, an FAL was filed on behalf of Respondents, based upon Dr. Larson's DIME. The FAL denied liability for *Grove*r medical benefits.

57. On October 14, 2019, Albert Hattem, M.D. conducted an independent record review of this claim at the request of Respondents. Dr. Hattem reviewed Claimant's medical records, and found that Claimant was appropriately placed at MMI on January 23, 2018, by Dr. Striplin, without permanent impairment. Dr. Hattem agreed with Dr. Larson's DIME opinion rather than Dr. Gellrick's IME. He cited the comparison of Claimant's post fall lumbar MRI to his prior MRI, which showed Claimant's lumbar condition was unchanged. Dr. Hattem said there were inconsistencies in Claimant's presentation to his providers; particularly on January 18, 2018 and this indicated Claimant was not a credible historian. Dr. Hattem said the records reflected an absence of complaints and symptoms related to Claimant's fall over approximately 8 months' worth of appointments. To Dr. Hattem, this indicated Claimant's complaints to Dr. Gellrick, were unlikely to be related to a January 16, 2018 injury. The ALJ noted Claimant had mid and upper back complaints when he was evaluated by Dr. Olsen on January 18, 2018 and the latter opined that these needed to be treated under a different claim number, which undercut Dr. Hattem's opinion that Claimant had no complaints to these areas of his body. Dr. Hattem's opinions were less persuasive to the ALJ

58. Dr. Hattem testified as an expert at hearing. He is board-certified in Occupational Medicine and Level II accredited pursuant to the W.C.R.P. Dr. Hattem reiterated his conclusions from his report, including that Claimant reached MMI for the second work injury on January 23, 2018. Dr. Hattem opined that the medical records did not support an impairment rating for the January 16, 2018. Dr. Hattem disagreed with Dr. Gellrick's conclusion that Claimant required additional treatment, including for low back pain.

59. Claimant was evaluated by Bruce Evans, M.D. at the Emergency Department of Saint Joseph Hospital on February 7, 2020. He reported increased low back pain, which radiated down both legs with right being greater than left. On examination, Claimant was tender to palpation of the right paraspinal lumbar region with positive right straight leg test. Dr. Evans' clinical impression was: acute right–sided low back pain with right sided sciatica; type two diabetes mellitus without complication. Claimant was prescribed medications and advised to follow up with his PCP. This evaluation was evidence that Claimant's increased low back pain potentially required additional treatment.

60. Claimant met his burden of proof and overcame Dr. Larson's conclusion on MMI by clear and convincing evidence.

61. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

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

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

Overcoming the DIME

A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. 2020. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt". *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

Thus, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect. Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. Such evidence must be unmistakable and free from serious or substantial doubt". *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002) [citations

omitted]. Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, *supra,* 914 P.2d at 414.

As a starting point, Claimant was initially injured at work on May 24, 2017 in which he hurt his low back. (Finding of Fact 3). At least two medical treatment providers attributed two disc herniations to this injury. (Findings of Fact 9 and 19). Claimant received conservative treatment for this low back injury. As determined in Findings of Fact 7-10, the treatment included epidural steroid injections, as well as an MRI and a surgical consult, which was performed by Dr. Castro. The ALJ found Claimant had continuing low back pain as a result of the initial work injury. (Finding of Fact 10).

Claimant was injured at work on January 16, 2018. (Finding of Fact 12). As found, Claimant reported different symptoms he felt as a result of the second injury. These symptoms included pain in the mid and upper back, as well as upper extremities. (Finding of Fact 15). Claimants low back pain also increased. *Id.* Claimant's ATP's were the same for the second injury as the first and at the time, he was still under both doctors' care for the May 24, 2017 injury. (Findings of Fact 14-16). In particular, Dr. Striplin evaluated Claimant on January 16, 2018, however, Dr. Stiplin did not document Claimant's symptoms in any detail. (Finding of Fact 14).

Claimant was then seen by Dr. Olsen two days later and the ALJ noted Claimant had new and different pain complaints that were attributable to the second injury, which were reflected in Dr. Olsen's evaluation. Claimant continued to receive treatment for his first injury, including PT. In this time frame, one ATP (Dr. Striplin) then concluded Claimant was at MMI (for the January 16, 2018 injury) as of January 23, 2018. (Findings of Fact 20-21). The other ATP, Dr. Olsen evaluated Claimant on January 31, 2018 and had no additional treatment recommendations for the new symptoms. At this time, Dr. Olsen noted Claimant's treatment for the new symptoms would have to be under a different claim. (Finding of Fact 27). The ALJ inferred that Dr. Olsen was of the opinion that Claimant should be evaluated to see whether further treatment was needed for the second injury. *Id.*

Concurrently, Claimant continued to treat for the May 24, 2017 injury with both Drs. Olsen and Striplin. As determined in Findings of Fact 24-28, Claimant's evaluations and treatment for the May 24, 2017 injury continued through February 21, 2018 when Dr. Olsen concluded he was at MMI. There was overlap between the evaluations and treatment for these two injuries and the ALJ concluded Claimant did not receive specific treatment for the new symptoms which resulted from the January 16, 2018 injury. (Finding of Fact 29).

The evidence in the record reflected Claimant underwent a DOWC-sponsored evaluation in connection with the first injury and no further treatment was provided in connection with the January 16, 2018 injury. Claimant testified that he continued to have symptoms and, as found, Claimant was evaluated by chiropractor in September 2018, after which time he returned to Dr. Olson. (Findings of Fact 34-35). In October

2018, a Workers claim for Compensation was filed in connection with the second injury and Respondents then filed an FAL based upon the January 23, 2018 MMI date from Dr. Striplin. As reflected in Findings of Fact 35, 39-49, Claimant then received additional treatment provided by Dr. Olsen, which included specifically addressing radiating pain in his legs, increased low back pain and pain in the thoracolumbar junction. He also underwent an MRI and a surgical evaluation performed by Dr. Castro. *Id.*

It was against this backdrop that Claimant underwent a DIME for the second injury on March 5, 2019. (Finding of Fact 60). As found, Dr. Larson who performed the DIME adopted the finding that Claimant reached MMI within one week of the date of injury. Claimant contested this finding and Respondents argued that Claimant did not meet his burden of proof.

The ALJ determined Claimant met his burden of proof and overcame Dr. Larson's opinion on MMI by clear and convincing evidence. (Finding of Fact 60). This conclusion was based upon the evidence in the record. First, there is a dearth of information/analysis in Dr. Larson's report. (Findings of Fact 54). As found, Dr. Larson conclusorily agreed with the determination that Claimant reached MMI within one week of the injury, but did not address the recommendations by Dr. Olsen regarding Claimant's need for treatment in connection with the second injury. *Id.* Dr. Larson also did not address the potential interplay between the first and second injuries in his DIME report. While his focus was on the second injury, the ALJ found the DIME report prepared by Dr. failed to address Claimant's increased low back pain following the second injury, which were documented in the records admitted at hearing. (Finding of Fact 54). In this regard, Dr. Larson also did not address the continued symptoms Claimant reported through 2019. *Id.*

Second, Dr. Larson did not document performing ROM measurements for the cervical or thoracic spine. (Finding of Fact 53). There was no evidence in the record that these measurements were performed and the ALJ found this was an error. (Finding of Fact 55).

Third and finally, Claimant's testimony, as well as Dr. Gellrick's opinions led the ALJ to conclude Claimant required treatment for the 2018 injury. (Findings of Fact 50, 52). The ALJ concluded that the records admitted at hearing led to the conclusion Claimant was not at MMI and required additional treatment.

The ALJ considered Respondents' argument that Claimant failed to meet his burden to overcome Dr. Larson's opinions. They argued that Dr. Larson's opinions were supported by the great weight of the evidence and were consistent with the opinions of Dr. Striplin and Dr. Hattem. Respondents also contended Dr. Gellrick's opinion that Claimant's January 16, 2018 slip and fall aggravated his preexisting lumbar condition and caused lasting injuries to his thoracic spine, cervical spine, and right shoulder was not persuasive, as she failed to conduct a sufficient causal analysis. The ALJ found Dr. Gellrick's opinion persuasive and also concluded that these arguments

did not obviate the errors found with Dr. Larson's report and his lack of analysis of Claimant's need for treatment following the second injury.

ORDER

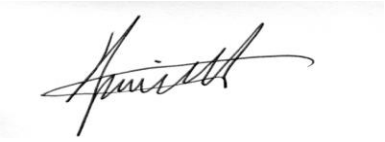
1. Respondents shall provide medical benefits to Claimant, as he is not at MMI.

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

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

DATED: March 31, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable injury on October 5, 2020?
- If the claim is compensable, did Claimant prove a right total hip arthroplasty performed on November 15, 2021 by Dr. Michael Schuck was causally related to the work accident?
- The parties stipulated that Dr. Schuck is authorized, if the claim is compensable.
- The parties stipulated to an average weekly wage of $1,423.60.
- The parties stipulated that Claimant is entitled to TTD starting November 15, 2021 if the hip surgery is found work-related.
- The parties stipulated that Claimant received short-term disability benefits under an Employer-paid disability policy. The parties agreed that any TTD benefits awarded are subject to applicable offsets, but did not know whether Insurer or the short-term disability carrier would receive the offset. Counsel expressed confidence they can resolve that issue by mutual agreement, depending on the outcome of the hearing. Any issues related to the specific mechanics of the offset will be reserved for future determination, if necessary.

FINDINGS OF FACT

1. Claimant works for Employer as a broadband technician, repairing data and telephone lines. The job is physically demanding, requiring heavy lifting, awkward postures, and climbing ladders.

2. On October 5, 2020, Claimant was working on a "cross box" to troubleshoot a telephone line problem.[1] Claimant lost his footing while walking around the cross box and fell to the ground. There is conflicting evidence whether Claimant fell on his right side or his left side.

3. Claimant reported the injury to his supervisor and then to an injury hotline at "Unicall." The call was recorded, but portions are inaudible, including approximately 90 seconds while Claimant was discussing the accident and resulting symptoms. Claimant stated, "I tripped and fell on my left side and rolled to my right side." Claimant reported pain in his left lower back and his right hip. He stated the hip was "of more concern right now." Claimant denied any visible bruising or abrasions on his right hip.

[1] A "cross box" is an outdoor enclosure that contains interconnection points for phone and data lines to multiple residences or businesses

4. Claimant's pain was worse the next morning when he awoke so he requested treatment. Employer referred him to Concentra. Claimant saw Dr. Anthony Stanulonis at Concentra on October 6, 2021. Claimant explained, "He fell into a cross box and hurt his back. States the left side of his back hurts a lot and his right hip has been popping since the fall." On further questioning, Claimant described discomfort and popping sensation in the lateral right hip and right groin discomfort when transitioning between sitting and standing. On examination, Claimant's low back was tender to palpation around L3-5 and the left SI joint. Examination of Claimant's right hip showed tenderness in the anterior hip joint, greater trochanter, and bursa. Hip ROM was painful and limited in all directions. Dr. Stanulonis diagnosed a lumbar strain and a right hip contusion. He prescribed a muscle relaxer, NSAIDs, and Lidocaine patches, and ordered a CT scan of the right hip.

5. The hip CT was performed later that afternoon, and showed significant osteoarthritic changes. There was no clearly defined fracture or significant joint effusion.

6. On October 19, 2020, Claimant's back pain was 80% improved, but his right hips was still painful and "cracking." Dr. Stanulonis ordered an MR arthrogram to look for a labral tear.

7. Claimant's low back pain had resolved by November 6, 2020, but he still had hip pain and popping, particularly when exiting his truck.

8. A right hip MRA was performed on November 17, 2020. It showed significant degenerative osteoarthritis and articular cartilage loss. The radiologist noted labral hypertrophy but no labral tear.

9. Claimant returned to Concentra on November 30, 2020. Dr. Stanulonis was noted the MRI showed degenerative changes and impingement syndrome. He referred Claimant to Dr. Michael Schuck, an orthopedic surgeon, for consideration of a steroid injection versus a total hip replacement.

10. Insurer filed a Notice of Contest on December 10, 2020.

11. Claimant saw his PCP on March 20, 2021 for persistent and worsening hip symptoms. He explained he fell on his right hip in October 2020. He initially had pain in his left lower back but subsequently started having hip pain and popping. The report notes, "You have never had right hip pain before the injury." The provider concluded, "The hip symptoms seem to be directly attributable to your fall." Claimant was an orthopedist or physical medicine specialist.

12. Insurer authorized a one-time evaluation with Dr. Stanulonis on June 22, 2021. Claimant described the same symptoms in his hip, but they were slowly getting worse. The hip was particularly bothersome when exiting his vehicle, ascending or descending stairs, or kneeling. Dr. Stanulonis again referred Claimant to Dr. Schuck.

13. Claimant saw Dr. Douglas Adams, an orthopedic surgeon, on July 28, 2021. Claimant described his mechanism of injury as "fell at work on right side." Dr. Adams

opined the physical exam and imaging findings were consistent with femoral acetabular impingement with osteoarthritis and a degenerative labral tear. He recommended an intra-articular injection for diagnostic and potentially therapeutic purposes.

14. Claimant returned to his PCP on August 26, 2021. The report notes, "he [was] injured on the job on 10/5/2020 s/p fall on the job and reported to workman's comp and it was denied [in] December due to pre-existing condition, which [he] denies ever having a previous injury." Claimant reported, "His symptoms have been present and worsening since Oct 2020 after an injury at work . . . at this point, the pain is severe enough that he wants to use his commercial insurance to have this taken care of once and for all." Claimant was referred to Dr. Schuck.

15. Claimant saw Dr. Schuck on September 14, 2021. He explained that his hip problems started "after a fall at work on 10/5/2020. He did land on his right hip while wearing a tool belt. He did notice an onset of pain after that time." The symptoms had progressed and were severely impairing his ability to work and perform routine activities. Based on his exam findings and review of the imaging studies, Dr. Schuck opined Claimants symptoms were caused by a combination of significant degenerative changes, a labral tear, and soft tissue/muscular pain. He thought the labral tear was "at least somewhat degenerative in nature." He explained that a labral repair or debridement would only address part of the problem and Claimant would still have significant symptoms from his underlying osteoarthritis. He estimated arthroscopic surgery would probably provide only six months of relief, at which point Claimant would likely experienced a recurrence of pain in functional impairment. As a result, he concluded that "the only true fix" would be a total hip arthroplasty.

16. Claimant had a pre-operative appointment with Dr. Schuck on November 2, 2021. Dr. Schuck documented, "his symptoms began after a work-related injury in October 2020. At that time, he sustained a fall while wearing a heavy tool belt. He has had persistent right groin pain and hip pain ever since. He states that he had no trouble with the hip prior to this work-related injury."

17. Dr. Schuck performed a right total hip arthroplasty on November 15, 2021.

18. Dr. Timothy O'Brien performed an IME for Respondents and testified at hearing. Claimant told Dr. O'Brien that he tripped and fell to the right, landing on the tool belt he was wearing. Dr. O'Brien noted, "the facts in this case are concordant." He concluded Claimant suffered a minor lumbosacral strain/sprain and a right hip contusion from the fall on October 5, 2020, but opined the injuries were "self-limited and self-healing" without the need for treatment. Dr. O'Brien noted the imaging studies showed pre-existing osteoarthritis but no evidence of a fracture or other acute injury. Dr. O'Brien testified that a significant, direct blow to the right hip from the ground and tool belt would have caused some bruising, swelling, or other visible trauma. The lack of bruising confirmed the injury was minor. He opined the degenerative findings seen on imaging take years to become evident. Dr. O'Brien conceded that Claimant had no prior medical history related to the right hip, but opined there was "virtually 0%" chance Claimant's right hip was functioning normally before the injury. Dr. O'Brien testified that the work accident did not aggravate

or accelerate the underlying pre-existing degenerative changes. He agreed that the only appropriate treatment option was a total hip arthroplasty, because an arthroscopic procedure would not be effective. However, he did not consider the hip replacement related to the work injury in any way. Dr. O'Brien further testified that if Claimant had in fact fallen on his left hip, that would negate any type of right hip injury.

19. Dr. Jack Rook performed an IME for Claimant and testified at hearing. Claimant told Dr. Rook, "He tripped and fell to his right. He stated he was wearing a tool belt with a tool pouch overlying his right hip. He landed on his right side with his hip directly impacting the tool belt as he struck the ground." Dr. Rook opined the work accident substantially aggravated Claimant's underlying pre-existing osteoarthritis, and ultimately necessitated the hip replacement. To support his conclusion, Dr. Rook noted the injury caused a direct trauma to Claimant's right hip, Claimant reported a new onset of hip pain and popping within hours of the work accident, the hip was asymptomatic before the accident, and Claimant had worked a physically demanding job for years with no limitation or indication of hip problems. Dr. Rook agreed that if Claimant actually fell on his left hip instead of the right hip, his conclusions regarding causation would change.

20. In his testimony, Claimant described the accident consistent with his previous reports to Dr. Rook, Dr. O'Brien, and Dr. Schuck. He explained he fell on his right side and landed on the tool pouch he typically wears on his right hip. Claimant confirmed he had experienced no popping, clicking, pain, or other problems with his right hip before the work accident. He agreed the low back injury resolved after a couple of weeks, but the right hip remained symptomatic and became progressively worse. Claimant testified he simply "misspoke" when he referenced falling on his left side during the call with Unicall, "because I fell on my right side, not my left side."

21. Claimant's testimony was credible and persuasive, including the testimony that he "misspoke" during the telephone interview when he stated he fell on his left side.

22. The ALJ finds Claimant probably fell on his right side, rather than his left side. This is supported by his statements to multiple providers describing a fall on his right side. Moreover, Claimant specifically mentioned right hip pain during the interview with Unicall. The reliability of the recorded statement is undermined by the 90-second gap just at the point when Claimant was describing the accident and his symptoms. In any event, the reference to falling on his left side is an outlier and was probably a mistake.

23. Claimant proved he suffered a compensable injury on October 5, 2020. Claimant developed low back and right hip symptoms proximately caused by the accident. He reasonably requested medical treatment, and Employer obliged. Dr. Stanulonis documented findings consistent, at a minimum, with soft tissue injuries. He appropriately requested imaging and prescribed medication. These facts are sufficient to establish a compensable injury.

24. Dr. Rook's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. O'Brien.

25. Claimant proved the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary and causally related to the compensable work injury. All experts agree an arthroplasty was the appropriate procedure to address Claimant's ongoing hip problems. Although Claimant had severe, pre-existing, degenerative osteoarthritis before the injury, it was asymptomatic and caused no functional limitations. The work accident aggravated, accelerated, or combined with the pre-existing condition to cause the need for the hip replacement.

26. The stipulated average weekly wage corresponds to a TTD rate of $949.07 ($1,423.60 x 2/3 = $947.07).

27. The parties stipulated Claimant is entitled to TTD benefits commencing November 15, 2020, subject to applicable offsets for short-term disability benefits.

CONCLUSIONS OF LAW

A. Compensability

To receive medical or indemnity benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury on October 5, 2020. Claimant's fall proximately caused low back and right hip symptoms. He reasonably

requested medical treatment, and Employer obliged. Dr. Stanulonis documented findings consistent, at a minimum, with soft tissue injuries. He appropriately requested imaging and prescribed medication. These facts are sufficient to establish a compensable injury.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment, the claimant is entitled to medical benefits as long as the pain is proximately caused by the employment-related activities and not the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Abeyta v. Wal-Mart Stores, Inc*., W.C. No. 4-669-654 (January 28, 2008). However, the mere fact a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

All the medical experts agree the right total hip arthroplasty performed by Dr. Schuck was reasonably necessary. The dispute relates to causation. As found, Claimant proved the need for surgery was proximately caused by the work accident. Claimant's testimony regarding the accident, and the onset and progression of hip symptoms is credible. Dr. Rook's causation analysis is credible and more persuasive than the contrary opinions offered by Dr. O'Brien. Claimant arrived at work on October 5, 2020 with a severely degenerated but asymptomatic hip. He then fell directly on his right hip and developed pain and popping within a few hours. Regardless of whether the work accident could be characterized as "minor," it was the proverbial "final straw" that pushed Claimant's hip over the edge. The right hip has been continuously and progressively symptomatic since the injury. Although Claimant had severe, pre-existing degenerative changes before the

accident, he was not a candidate for a hip replacement because he was asymptomatic. No one performs arthroplasties on asymptomatic and non-disabling hips regardless of how damaged they might be. The mere fact that Claimant probably would have developed hip symptoms at some point in the future does not negate the fact it became symptomatic on October 5, 2020 as a direct and proximate consequence of his industrial accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for accidental injuries on October 5, 2020 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the right total hip arthroplasty performed by Dr. Schuck on November 15, 2021.

3. Claimant's average weekly wage is $1,423.60, with a corresponding TTD rate of $949.07 per week.

4. Insurer shall pay Claimant TTD benefits, commencing November 15, 2021 and continuing until terminated according to law, subject to any allowable short-term disability offset.

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

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

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

DATED: April 22, 2022

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II

Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the DIME physician's opinion with regard to permanent medical impairment was incorrect.

II. Whether Claimant proved by a preponderance of the evidence that Claimant is entitled to maintenance medical benefits.

III. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 3, 2021, endorsing as issues for hearing "Overcome the Division IME on the issue of permanent impairment pursuant to W.C.R.P. Rule 5-5(F) and Sec. 8-42-107(8), C.R.S., as well as reasonably necessary and related medical benefits.

Claimant, while still represented by counsel, filed a Response to the September 3, 2021 Application for Hearing on September 15, 2021 listing issues including maintenance medical benefits after maximum medical improvement, temporary total disability benefits as of October 27, 2020 through March 31, 2021, permanent partial disability benefits.

A Hearing was set for February 16, 2022 before the Office of Administrative Hearings. Claimant failed to appear. Respondents were represented by counsel. The official court interpreter was Pablo Silveira of E-Multilingual Interpreting Services. Counsel for Respondents indicated that Respondents were unable to reach Claimant by mail, phone or email. The hearing was conducted via Google Meet at 1:30 p.m. and time was permitted to allow Claimant to appear. This ALJ also, through Spanish/English interpreter Pablo Silveira, attempted to contact Claimant four times by telephone at the number provided to the OAC. This is the phone number provided by Claimant's former attorney in her motion to withdraw as counsel. During the final contact, a person answered the phone and identified herself as "Ms. Maria de Jesus Perez" and stated that she had 'just obtained the phone number from T-Mobile for her son's cell phone. This suggests to the Court that this telephone number at one time belonged to Claimant but no longer belongs to Claimant. Ms. Perez indicated that they had received multiple prior calls at this number asking for Claimant.

As of the date of this Order, the undersigned has received no communication from Claimant explaining his absence at the first hearing. The records support the determination that Claimant had proper notice of the hearing date and time. Former counsel for the Claimant filed a motion to withdraw as Claimant's attorney on October 19, 2021, which was granted on November 29, 2021. Both the motion and the order granting

Claimant attorney's motion to withdraw were sent to Claimant at his address of record filed with the Division of Workers' Compensation and the Office of Administrative Courts. On November 3, 2021, a Hearing Confirmation containing the date and time of day for the scheduled hearing was sent to Claimant at his Marion Street address of record and was also emailed to Claimant at his email on file with the OAC. On February 4, 2022, Respondents filed a Case Information Sheet (CIS) and provided a copy of Respondents' Hearing Submissions to Claimant. The CIS contained the date and time this hearing was scheduled and Respondents' hearing submissions indicated that the hearing was scheduled for February 16, 2022 at 1:30 p.m. via Google Hangouts. Respondents indicated that none of the mailings to Claimant's address on record or any of the emails sent to Claimant at his email of record were returned to Respondents or bounced back to Respondents as undeliverable. This ALJ finds that Claimant had proper notice of hearing.

At the February 16, 2022 hearing, Respondents notified the Court that Respondents were prepared to proceed with their case-in-chief. Respondents requested to put on their case or present an offer of proof. In the alternative, Respondents requested that Claimant's claim be dismissed with prejudice, as Claimant failed to respond to discovery and failed to attend Respondents' Independent Medical Evaluation (IME). The undersigned considered these requests, and instead determined that a new hearing would be set and notice of the hearing would be sent to Claimant by certified mail.

Respondents set the new hearing for March 28, 2021 at 8:30 a.m. in this matter. A Notice of Hearing was sent to Claimant at his email address. This ALJ confirmed that neither this NOH nor the one for the prior hearing was returned as undeliverable to the OAC and are presumed to have reached their intended recipient. Respondents sent by certified mail a copy of the Notice of Hearing advising Claimant of the new date and time of the hearing, and was delivered on March 15, 2022 at 5:45 p.m., utilizing USPS Tracking Plus, Tracking Number 70072560000025614605. The NOH stated that “Claimant's failure to attend the hearing may result in the claim being dismissed” and that the parties’ had the right to be represented by an attorney or other person of their choice at the hearing. It also advised that “Attorneys and non-represented parties must keep the Office of Administrative Courts informed of any change of address pending final disposition of this case.”

FINDINGS OF FACT

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

1. Claimant was injured in the course and scope of his employment on August 31, 2020 while lifting a five gallon tub filled with water and flowers, when he felt a pull in his lower back.

2. Claimant was initially seen at Midtown Occupational Health Services on September 1, 2020 by Dr. Lawrence Cedillo and Matthew Edwards, PA-C. Upon exam, Claimant had a fairly normal exam with the exception of decreased extension, rotation and lateral bending, tender to palpation in the paralumbar and sacroiliac and mildly positive Faber test of the back bilaterally. Mr. Edwards diagnosed work related lumbar strain with sciatica, stated that they would proceed with conservative care and assess progress. He stated that the objective findings were consistent with history and work

related mechanism of injury, prescribed physical therapy, massage therapy and medication, a lumbar support, and provided restrictions for modified duty.

3. Claimant returned to see Mr. Edwards on September 8, 2020 stating that he had had some improvement but was still having significant pain and discomfort as well as difficulty sleeping and had not yet started PT. He added prescription medication and noted continued on prior plan for conservative care.

4. On September 11, 2020 Claimant was evaluated by Dr. David Orgel, also from Midtown Occupational Health, who noted unremitting axial back pain, right leg symptoms that did not radiate below the knee, minor tenderness in his axial lumbar spine with moderately limited range of motion with pain in all planes, negative straight leg raise test bilaterally, mildly decreased sensation to light touch at the right Achilles. He stated that Claimant's objective findings were consistent with a work-related mechanism of injury, ordered an x-ray of the lumbar spine and continued therapy.

5. Claimant continued to see Mr. Edwards, Dr. Cedillo and Dr. Orgel over the next few months, reporting some progress with therapy but, that he continued to have symptoms in his low back and into his buttocks. Claimant continued to have a fairly normal exam with the exception of decreased extension, rotation and lateral bending, tender to palpation in the paralumbar and sacroiliac and mildly positive Faber test of the back bilaterally. On September 15, 2020 they added chiropractic care to his treatment.

6. Alexa Sheppard, D.C. evaluated Claimant on September 24, 2020. She found that palpation and myofascial exam of the lumbosacral musculature identifies hypertonicity with mild subjective tenderness and spasm at lumbar paraspinals. His myofascial evaluation of the thoracolumbosacral muscles identified tender trigger points of the lumbar paraspinals, quadriceps lumborum, gluteus medius, gluteus maximus, piriformis that correspond with referral pain patterns and spasms. Intersegmental examination revealed articular fixation and somatic dysfunction at L4-S1. Provocative loading maneuvers incorporating extension and rotation with P-A facet load revealed intersegmental restriction and elicited discomfort from the lumbar facets at L4-S1. The lumbar tests were negative for straight leg raise, positive Yeoman's bilaterally, and positive Kemp's bilaterally. She assessed that findings were consistent with mechanical back pain, with a combination of myogenic and lumbar facet dysfunction. She stated that clinical findings suggested uncomplicated low back pain without any obvious signs of discogenic etiology, instability, or nerve root impingement. She recommended ongoing chiropractic care for up to eight weeks. Claimant continued with approximately ten additional visits during the following weeks.

7. Respondents filed a General Admission of Liability on October 20, 2020 for medical benefits only.

8. Kristine M. Couch, OTR, conducted a Functional Capacity Evaluation (FCE) on November 2, 2020 and a second one on March 29, 2021. Testing was found to be valid and consistent in 22 of 22 tests, for maximum validity criteria and voluntary effort. She noted that Claimant's demonstrated maximum safe weight lifting ability of 20 lbs. from floor to waist on an occasional basis with increased low back pain and a 10 lbs. occasional dynamic safe lifting on an occasional basis.

9. On November 3, 2020 Mr. Edwards stated that he had concerns with Claimant's efforts during the functional capacity evaluation as his abilities were placed in the light duty category. He ordered an MRI of the lumbar spine to rule out significant pathology with regard to the workplace injury and referred Claimant to a physiatrist for evaluation of pain management.

10. On November 19, 2020 Dr. Sheppard stated that Claimant was progressing slower than was expected but that he did obtain temporary relief from the chiropractic care. She further stated that she suspected more pathology was involved in the lumbar spine that was causing nerve compression.

11. The MRI of the lumbar spine was completed on November 23, 2020, and read by Clinton Anderson, M.D., which showed L4-L5 moderate broad-based disc bulge with superimposed central and left paracentral disc protrusion extending caudal to the disc level. This results in moderate effacement of the anterior aspect of the thecal sac; mild compression of the bilateral L5 nerve roots as they exit the thecal sac more marked in the left than the right; mild bilateral L4-5 neural foraminal narrowing without evidence for L4 nerve root compression; mild bilateral L4-L5 facet joint arthropathy; and mild bilateral facet joint arthropathy at the L5-S1 level.

12. Claimant was evaluated by Dr. Levi Miller of Colorado Rehabilitation and Occupational Medicine on December 1, 2020. Subjectively Claimant complained of low back pain, bandlike, that radiated to his right buttock intermittently, however frequently down his left leg to his posterior lateral calf. He denied numbness or tingling in his feet. "Most physical activity" aggravated his symptoms including bending, lifting. He denied focal weakness such as foot slap or difficulty climbing stairs. Neurologic exam was normal except for a positive neural tension sign on the left. From the musculoskeletal exam he noted a lumbar forward flexion at approximately 70 degrees that causes low back pain; extension approximately 5 degrees; poor tolerance of facet loading both to the left and the right; tenderness over the bilateral L5 lumbar paraspinals most prominently, lesser so above and below this level; no tenderness over the SI joints or the greater trochanter. He also noted that Patrick's maneuver bilaterally caused low back pain, but not buttock pain. He assessed sprain of the ligaments of the lumbar spine, radiculopathy, intervertebral disc displacement, and myalgia, with left greater than right leg pain. Dr. Miller recommended L4-S1 transforaminal epidural steroid injection for the lumbosacral radiculopathy and bilateral L4-5 injection to target the disc herniation. He also referred Claimant for psychological evaluation for pain management with Timothy Shea, PsyD.

13. On December 2, 2020 Mr. Edwards stated that Claimant was to proceed with ESI injections, pending authorization and referred Claimant for a psychological evaluation with Dr. Shea.

14. Dr. Miller noted on December 14, 2020 that following the TF ESI that Claimant had a pre-procedure pain score of 8/10 and post procedure pain level was 3/10. Only the L5-S1 level was performed. Dr. Miller later noted that the injection only provided three days of pain relief. Dr. Miller performed a second ESI on February 8, 2021 with a left L4-L5 TF ESI, left L5-S1 TF steroid injection with temporary complete relief of low back symptoms but not leg symptoms, though better than it was prior to the injection.

15. Claimant completed a psychological evaluation with Dr. Timothy Shea on December 22, 2020. He noted that Claimant had participated in multiple conservative care treatments with limited temporary success, including physical therapy, chiropractic care, massage, ESI injections, OTC medications. He noted that Claimant's success has been limited by levels of untreated psychological stressors. In regard to his prior level of activity, Claimant reported being more physically active before his accident, but is currently limited to some light walking. He reported Claimant would perform housework, walking in the park, shovel, which are all difficult for him now. Dr. Shea suspected Claimant would also have difficulty driving long distances. Claimant reported experiencing down mood and increased anxiety following his workplace injury as well as symptoms of depression and concerns with his finances. He had increased emotionality, irritability and decreased energy as well as disrupted sleep. Claimant expressed frustration with regard to his ongoing symptoms and his injury because his life had completely changed. Dr. Shea recommended follow-up psychological assessment given Claimant's reported concerns about increased pain and higher than expected reports of pain experience. Dr. Shea diagnosed adjustment disorder with depressed mood and anxiety, as well as insomnia due to other medical conditions (neuropathic pain, anxiety.)

16. Claimant completed testing on multiple platforms, including a Minnesota Multaphasic Personality Inventory-2 Restructured Form (MMPI-2RF), Tampa Scale for Kinesiophobia, Pain Outcomes Questionnaire, Short Form McGill Pain Questionnaire, Pain Catastrophizing Scale, Pain Quality Assessment Scale, Pain Stages of Change Questionnaire, Beck Depression Inventory-2 and Beck Anxiety Inventory. The MMPI was invalid but all other measures were valid. There was a clear disconnect in his behaviors, reports of pain and his emotions. From the testing results, Dr. Shea noted that Claimant was likely to report experiencing significant physical limitations due to reported moderate to severe pain, despite incongruent physical findings to support the level and ongoing complaints. Dr. Shea reported that Claimant was not malingering but instead was much more likely to be experiencing a large disconnect between his pain, mood, and the interaction and the impact that it has on his overall reported pain experience. He noted that depression and chronic stressors can manifest through physical complaints. He further stated that Claimant's exacerbation of his pain does not negate the pain was likely present at some point but that there is evidence that there were multiple non-organic factors further exacerbating his pain experience above what would be expected. Dr. Shea stated that being able to address his stressors and related factors was to provide Claimant with the opportunity to experience improvements in his ability to manage his pain and ultimately increases his self-efficacy in regard to pain management. Following the testing Dr. Shea recommended cognitive behavioral therapy and was to start cognitive behavioral therapy with therapist Susie Love, M.A. He also made recommendations for scheduling activities, encouraging engagement in physical activities and provide education about pain management.

17. Mr. Edwards referred Claimant to Dr. B. Andrew Castro for a surgical evaluation on January 7, 2021 due to lack of progress, though he expressed doubts Claimant was a good surgical candidate. On January 28, 2021 Mr. Edward indicated Claimant's diagnosis was work related lumbar strain with L4-5 disc protrusion. He stated

that he reviewed Dr. Shea's notes, which indicated that Claimant had significant inorganic components to his pain response.

18. Clamant underwent a final TF ESI at the L4-5 and L5-S1 levels on February 8, 2021. He had low back pain of 4/10 and left calf pain as 8/10 severity. Dr. Miller documented that after 30 minutes from the procedure Claimant had complete relief of the lack pain but still had left leg pain of 6/10 with a 60% improvement.

19. Mr. Edwards noted on February 11, 2021 that Claimant

> … failed conservative treatment and initial round ESI. He was referred to Dr. Castro for surgical evaluation. No surgical indication at this time but Dr. Castro did recommend repeat ESI which patient had been on 2/8/2021. Patient reports he is feeling better than before the injection. He still reporting having some mild numbness and tingling in his legs and some back pain but he is better than he was.

20. Claimant was placed at maximum medical improvement on March 31, 2021 by Dr. Orgel. He noted that the MRI suggested some degenerative changes with a disc bulge that could be causing an L5 radiculopathy but Claimant was not a surgical candidate. Injections (ESI) were not helpful and neither was conservative care, other than for temporary relief. Claimant continued to complain of axial back pain with radiating buttocks pain and pain into the left calf. He noted that the FCE was valid, with a 10 lbs. lifting limitation. He completed an impairment evaluation for a 17% whole person impairment, including 11% whole person impairment for loss of range of motion (which was valid) and a 7% for specific disorder. Dr. Orgel did not recommend maintenance care as treatment in the prior six months was not effective.

21. Respondents arranged for an independent medical evaluation with F. Mark Paz, M.D. of Occupational Medicine of the Rockies, which was conducted on May 18, 2021. Dr. Paz reviewed medical records, took a history from Claimant and performed a physical exam. The exam was substantially normal except for end range of motion, which caused increased low back pain, and found decreased range of motion, which was invalid for flexion, and that Claimant was favoring his left lower extremity. He provided multiple diagnosis including chronic low back pain, left lower extremity paresthesias, lumbar degenerative disc disease, lumbar herniated nucleus pulposus at the L4-5 level, and adjustment disorder. He specifically conducted a causation analysis and determined that the herniated disc or left paracentral disc protrusion at the L4-5 level was proximally related to the August 31, 2020 incident at work. He agreed with Dr. Orgel that Claimant reached MMI on March 31, 2021.[1] He noted that Claimant perceived himself as being severely disabled. Dr. Paz, opined that Claimant should return for a lumbar flexion "reassessment," and that he had a significant amount of non-physiologic findings on the clinical examination. He provided permanent work restrictions, which were in excess of the FCE findings based on his medical judgement, and stated that Claimant did not require maintenance medical benefits.

22. On July 14, 2021 Dr. Brian Reiss, the Division of Workers' Compensation Independent Medical Examination (DIME) physician, issued a report following record review, history and examination of Claimant. Claimant complained of lower back pain

[1] This ALJ concludes that the March 31, 2020 date listed in the report is in error.

following an incident moving up buckets of flowers, which was continuing on the date of the exam, but did not convey any symptoms of the lower extremities. On exam, Dr. Reiss did not notice any pain behaviors or apparent distress, noted some irritation of the left calf with bending as well as lower back pain, some decreased sensation in the left lateral heel and irritation with straight leg raising on the left. Dr. Reiss diagnosed probable herniated disc at the L4-5 on the left, residual deconditioning and back pain. He stated that Claimant was not a surgical candidate and expected the herniation to resolve on its own. Dr. Reiss opined that, from the available information, he did not believe any work restrictions were necessary. He provided a 14% whole person impairment rating in accordance with the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), consisting of 7% for specific disorder under Table 53IIC and 8% for loss of range of motion. He stated that no apportionment was appropriate. Further he stated:

> More likely than not the work injury resulted in a herniated disc with some nerve irritation and back pain. The nerve irritation is essentially resolved with minor residual unlikely to be improved with any surgical intervention. The continued lower back pain should be managed with a home exercise program directed at core strengthening, aerobic conditioning and stretching.

23. On September 2, 2021 Division issued the DIME Process Concluded letter regarding this matter, stating that they had received the DIME report, advising Respondents that they had 20 days to either file an admission consistent with the report or an application for hearing.

24. On November 19, 2021 Dr. Scott Primack issued a record review report. Following review of the medical records he opined as follows:

> Given the discordance between what Mr. Favela Nevarez was telling different physicians regarding how he was doing after the injection, the MMPI-2RF, and the nonphysiologic findings documented by Dr. Paz, I do not believe that there is any residual impairment. Although Dr. Orgel was able to render a 17% impairment of whole person and Dr. Reiss was able to render a 14% of whole person, the substantial medical record documentation does not indicate a specific diagnosis and therefore should not have a permanent impairment. The DIME did not take into account the profound medical data which indicates that there is not any specific injury but more so psychological overlay. This would make the DIME erroneous and not valid. The extreme psychological issues, although not work-related, would also correlate with the extensive areas of fear avoidance noted by Dr. Shea. This fear avoidance and non-work related issues would cloud the physical examination. Therefore, in my opinion, the preponderance of the medical data would suggest that there is no permanent residual impairment.

25. Surveillance of Claimant performing multiple activities in his yard on July 14, 2021 were observed. Claimant is recorded walking, sitting, bending at the waist, carrying various items and driving. He was also observed driving his vehicle to Dr. Reiss' office for the DIME, as well as returning to his place of residence. As found, none of the activities observed were inconsistent with a herniated disc or the determinations that while Claimant has a herniated disc, he was able to return to regular employment according to Dr. Reiss, who is persuasive.

26. As found, Dr. Paz completed range of motion testing and found Claimant's flexion to be invalid, recommending a follow-up evaluation. However, he did provide a diagnosis with regard to the lumbar spine injury that was causally related to the August 31, 2020 workplace event. Dr. Paz indicated on Figure 84 that Claimant was assessed a 7% whole person impairment for specific disorder pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition, (*Revised)*. He further analyzed that only the flexion was invalid and would be "pending." As found, when looking at the range of motion for the remaining testing, according to Dr. Paz's measurements, Claimant would qualify for a whole person impairment for the extension, and lateral flexion measurements, even without the lumbar flexion measurements.

27. As found, both Dr. Orgel and Dr. Reiss, the DIME physician, determined that they were able to complete range of motion testing. As found and concluded, Respondents have failed to overcome the DIME physician's opinion with regard to the Claimant's permanent impairment. Dr. Paz and Dr. Primack simply provide opinions that would qualify for a preponderance of the evidence but not by clear and convincing evidence. Dr. Reiss' opinion with regard to causation is found to be accurate based on the totality of the evidence and therefor the impairment determination of the 14% whole person impairment related to the herniated disc at the L4-5 level is appropriate. Respondents failed to show that either Dr. Paz or Dr. Primack's opinions are anything more than simply different opinions. While this ALJ recognizes that Claimant may have had symptoms in excess of what is normally seen for patients with a lumbar spine injury, which may have interfered with medical care progress and reporting of symptoms, the evidence does not support a finding that Dr. Reiss was incorrect.

28. Of note, while Dr. Reiss' report is brief and concise, addressing only the pertinent issues he was asked to address, it is specifically found that Dr. Reiss accomplished the mandate of the Division in conducting the DIME, including addressing the questions in this case. Dr. Reiss specifically notes he reviewed 412 pages of medical records, including from prior to the injury, and failed to find any records of preexisting conditions or problems. This ALJ reviewed 416 page of documents submitted by Respondents for consideration and concurs with Dr. Reiss that there are no significant records of preexisting conditions. As found, Dr. Reiss complied with the requirements of the AMA *Guides*, the impairment rating tips and the Level II accreditation requirements. While it is helpful to have physicians summarize the medical records, it is not a requirement of the DIME to do so, if time is limited, as did Dr. Primack, who did not list all the records he likely reviewed.

29. Lastly, it is found that Dr. Reiss assessed causality by reviewing the complete records and determining that Claimant's disc injury was clearly defined and caused or aggravated by the work related incident. The records included that Claimant had ESIs that decreased Claimant's pain significantly immediately after the injections, though provided no lasting effect. This is indicative that the disc was likely a pain generator but is not a god candidate for surgery if it provided no lasting effect. Medical science is not black and white, it encompasses a multitude of shades of gray. Dr. Reiss clearly reviewed Dr. Shea's records and considered the medical opinion as he quotes multiple reports, including Dr. Shea's diagnosis of adjustment disorder with depressed mood and anxiety. Dr. Reiss, following examination of the Claimant reached a

conclusion, which as a DIME physician, he is entitled to do. As found, his final determination was that Claimant had a work related specific disorder and provided an impairment accordingly. Respondents failed to show that Dr. Reiss was incorrect.

30. As found, Claimant has failed to show he is entitled to maintenance medical benefits after maximum medical improvement. Drs. Orgel, Reiss, Paz and Mr. Edwards all agree, and are persuasive, that the care that was provided to Claimant was less than effective and that Claimant does not require medical benefits after maximum medical improvement in this matter.

31. As found, Claimant failed to show that there was a wage loss or that he is entitled to temporary disability benefits. Claimant failed to appear at the hearing either in person or through a representative, and failed to submit any evidence or testimony for consideration to support a claim for lost wages. Further, as found, the record does not support that there was a wage loss in this matter.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight,

credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME by Clear and Convincing Evidence

Respondents seek to overcome Dr. Reiss' determination of impairment in this matter. Respondents must prove that the DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the AMA *Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the AMA *Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the AMA *Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the AMA *Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a

question of fact for the ALJ to determine, including whether the physician correctly applied the AMA *Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the AMA *Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA *Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the AMA *Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *Lopez vs. Redi Services.,* I.C.A.O., W.C. Nos. 5-118-981 & 5-135-641 (October, 27, 2021).

Respondents need only prove that any one particular impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AM*A Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the

contents of the AMA *Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

The Impairment Rating Tips promulgated by the Division, under General Principles states in pertinent part:

> Impairment ratings are given when a specific diagnosis and objective pathology is identified. *(Reference: C.R.S. §8-42-107(8)(c))* In cases with multiple symptoms, the clinician must determine whether separate diagnoses are established which warrant an impairment rating *OR* the impairment rating provided for a specific diagnosis incorporates the accompanying symptoms of the patient.

Here, Respondents seek to overcome the DIME physician's opinion. Respondents argue that Dr. Primack was correct in his assessment that Claimant's injury did not result in a herniated disc and therefore there is no specific diagnosis that would allow for application of the AMA *Guides*' specific disorder table, Table 53. They specifically cite to nonphysiologic findings, discordant histories given to different medical providers with regard to ESI results, and psychological overlay as documented by the MMPI-2R.

As found, Dr. Brian Reiss complied with the requirements of the law by assessing causation of the injury, identifying a specific diagnosis, and correctly applying the AMA *Guides.* Dr. Reiss based his opinion on the review of the medical records, his examination of Claimant, the fact that by the time of the DIME Claimant was without an apparent pain behaviors. He was able to perform the examination and comply with Dr. Reiss' cues. Dr. Reiss found that Claimant was able to perform the range of motion testing without complaint other than some left calf irritation and a little decreased sensation of the left lateral heel and some slight irritation of the left calf with straight leg raising test. Dr. Reiss opined that it was more likely than not the work injury resulted in a herniated disc with some nerve irritation and back pain. His ultimately conclusion was that the work related injury of August 31, 2020 resulted in a herniated disc that caused residual impairment. This is supported by objective findings, including the MRI findings and examination. As further found, Dr. Reiss correctly applied the *Guides* and the impairment rating tips in providing the 7% whole person impairment rating for the specific disorder under Table 53IIC. A simple grammatical error is not sufficient to breach this burden of proof. Both Dr. Orgel and Dr. Paz agreed that 7% whole person impairment was the correct impairment to assign for the specific disorder caused by the work related herniated disc which resulted from the August 31, 2020 workplace injury. Dr. Paz provided a diagnosis with regard to the lumbar spine injury that was causally related to the August 31, 2020 workplace event. Dr. Paz indicated on Figure 84 that Claimant was assessed a 7% whole person impairment for specific disorder pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition, (*Revised)*. This is the same impairment assigned by Dr. Reiss and Dr. Orgel, an authorized treating provider, for specific disorder. Dr. Reiss also complied with the requirements of the Division tips which state that "[I]f a spinal impairment rating is provided, both Figure 84 and the appropriate spinal range of motion worksheet are required."

The disagreement among the providers that made a full assessment of the Claimant's impairment is with regard the loss of range of motion. Dr. Paz completed

range of motion testing and found Claimant's flexion to be invalid, recommending a follow-up evaluation. He stated that only the flexion was invalid and would be "pending," further testing. The record is devoid of evidence as to why no further follow up was conducted, but even if it had been performed and was different than the ROM findings of the DIME physician, it would have only constituted a difference of opinion. When looking at Dr. Paz's range of motion findings for the remaining testing, under the *Guides*, Claimant would have qualified for a loss of range of motion whole person impairment for the extension, and lateral flexion measurements. Despite this potential rating, it is not sufficient to overcome the valid measurements and impairment rating issued by the DIME physician in this matter.

The Impairment Rating Tips also state under Spinal Ratings, Sec. 2 as follows:

> Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity.

It is clear that Dr. Primack, the only physician to state that the nonphysiologic findings, the history of response to treatment and the MMPI, justified an impairment of zero. While it is apparent that Claimant had some symptoms that did not correspond to or exceeded the physiologic findings in this matter during his treatment in this case, he is the lone opinion to state that there was no diagnosis at all, which he identifies in his short report, not even non-work related diagnosis. Dr. Paz and Dr. Reiss specifically found that there was a correlation with the workplace injury and the herniated disc. Also, this ALJ is more persuaded by Dr. Shae's analysis that "Claimant was not malingering" and that there was a "large disconnect between his pain, mood, and the interaction and the impact that it has on his overall reported pain experience," and as found, so was Dr. Reiss. Dr. Shae also reinforced that "Claimant's exacerbation of his pain does not negate the pain was likely present." The standard of proof of clear and convincing evidence is high and difficult to achieve. Here, Dr. Primack was the lone physician to state that discrepancies in the record were of significance and his opinion does not rise to the standard of clear and convincing, but is simply a difference of opinion. Based on the totality of the evidence, Respondents have failed to show that the DIME physician, Dr. Reiss, was incorrect in his assessment of impairment in accordance with the AMA *Guides*, the Impairment Rating Tips and the Level II accreditation curriculum.

C. Medical Benefits after MMI

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. In order to receive such benefits, the claimant must present substantial evidence that future medical treatment is or will be

reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Claimant sought maintenance care after reaching maximum medical improvement. However, the persuasive evidence provided by Dr. Orgel, Dr. Reiss and Dr. Paz is that Claimant no longer requires maintenance care in this matter. They specifically addressed the fact that the care Claimant received before reaching MMI on March 31, 2021 was either not effective or was only temporary, not lasting or curative. Therefore, as found from the totality of the evidence, Claimant is not entitled to ongoing medical care to relieve the effects of the injury. Claimant has failed to show that he is entitled to maintenance medical care.

D. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v.*

Stanberg, supra. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

In this matter, Claimant failed to show for the hearing and provide evidence to prove by a preponderance of the evidence that he was entitled to temporary disability benefits. Dr. Reiss in fact stated that, despite his findings of a herniated disc related to the work injury, that he expected the herniation to resolve and in fact had likely resolved with the exception of minor symptoms in his left calf and low back. Dr. Reiss was also persuasive with regard to making a determination that Claimant could return to work without restrictions. As found, Claimant is not entitled to temporary disability benefits.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents have failed to show by clear and convincing evidence that Dr. Brian Reiss, the DIME physician, was incorrect in his assessment of impairment. Respondents shall pay permanent partial disability benefits based on the 14% whole person impairment as provided by Dr. Reiss.

2. Claimant's claim for maintenance medical benefits after MMI are denied and dismissed.

3. Claimant's claim for temporary disability benefits are denied and dismissed.

4. All matters not determined here are reserved for future determination.

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

DATED this 25th day of April, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-148-906-006

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the November 18, 2021, request by authorized treating provider ("ATP") Michael Lersten, M.D., for a platelet-rich plasma injection ("PRP") into Claimant's left hip bursa is reasonable and necessary, as well as causally related to Claimant's admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant suffered an admitted industrial injury on July 16, 2020, while working as a package handler for Employer. Claimant has worked for Employer, primarily as a driver, and for the last seven years as an article 22 package handler.
2. In Claimant's position as a package handler, he had to handle packages weighing up to 70 pounds and, if the packages exceeded 70 pounds, he had a helper to handle packages up to 150 pounds.
3. On July 16, 2020, Claimant was standing on a conveyor belt walkway, he pulled a tall box off the belt which weighed more than anticipated and, as he turned, felt a pop in his low back and has had persistent pain in his left hip since that time.
4. Claimant demonstrated to the Court that the pain following his injury is above his left buttock cheek, around the belt area, going around the belt area into the seam of his leg on the front and has been constant since his injury.
5. The medical records reflect that Claimant has undergone multiple physical therapy treatments and has had steroid injections, but none of the medical modalities applied have provided long-term relief.
6. On May 6, 2021, Claimant was evaluated at Panorama Orthopedics and Spine by authorized treating provider ("ATP") Michael Lersten, M.D., who at the time noted:

> Nathan Wright is a 60 year old male with a history of L>R pelvic girdle pain that is multifactorial including anterolateral and posterior pain. He is status post a left greater trochanteric bursa injection, which provided significant ongoing pain relief. He is now status post a left ischial bursa diagnostic anesthetic injection that was negative. We then performed a left sided superior cluneal nerve block that provided functionally significant and approximately 60% pain relief. Unfortunately, his insurance company is denying the definitive steroid injection for presumed left superior cluneal nerve

> neuropathy. He was also denied additional physical therapy and an MRI. The patient states that physical therapy can exacerbate his symptoms at times. Leaning forward and to the left makes his pain worse. Dry needling on his left side made his pain worse, too. He states that due to his left sided pan, his right side starts to have pain as well at times. On one occasion, he felt radiating pain all the way to his left foot while twisting.

See Claimant's Exhibit Tab 6, BS 61.

7. On November 18, 2021, ATP Lersten requested preauthorization for a left hip PRP injection.

8. On November 23, 2021, ATP Lersten's request was denied by a record review authored by David H. Elfenbein, M.D., who relied upon medical treatment guidelines related to the hip, indicating that the therapy should be denied, as the "CO guidelines don't specifically apply." See Claimant's Exhibit Tab 1, Bate Stamp ("BS") 5.

9. Dr. Elfenbein, a Level II Accredited orthopedist, performed a Rule 16 Review of the requested PRP injection. (RHE D) Dr. Elfenbein reached out to the office of Dr. Lersten via telephone on November 24, 2021, at 11:33AM and again on November 29, 2021 at 11:21AM to discuss the medical reasoning behind the request. *Id.* However, Dr. Elfenbein did not receive any call back from Dr. Lersten regarding the requested injection. *Id.*

10. Dr. Elfenbein subsequently determined that the requested left hip PRP injection was not medically necessary. (RHE D) Dr. Elfenbein concluded that there was no evidence of tendon damage and no documentation that the next step of management would be an invasive procedure as required by the Colorado Medical Treatment Guidelines. *Id.*

11. Further, to complete his assessment without a response from Dr. Lersten, Dr. Elfenbein referred to Exhibit 4 of the Colorado Medical Treatment Guidelines, which is the medical treatment guideline for the shoulder, to assess the reasonableness of the recommended PRP injection. (RHE D; MTG Exhibit 4) As the Medical Treatment Guidelines do not provide appropriate guidance on PRP injections to the hip, Dr. Elfenbein determined that the shoulder would operate most similarly to the hip in his review. *Id.*

12. Exhibit 4, Section F(4)(b) of the Medical Treatment Guidelines address PRP injections to the shoulder. (MTG Exhibit 4) As cited by Dr. Elfenbein in his Rule 16 Review, the Medical Treatment Guidelines state that "a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy." (RHE D; MTG Exhibit 4) Further, "there is also a lack of standardization of platelet preparation methods, which precludes clear conclusions about the effect of platelet-rich therapies for musculoskeletal soft tissue injuries. The preponderance of the evidence suggests that PRP is not likely to have long term benefits effects." *Id.*

13. Additionally, Exhibit 6 Section F(6)(d), which addresses PRP injections to the lower extremity (though not specifically the hip) further notes that "[s]teroid injections prior to the use of PRP are believed to lower the chance of healing." (MTG Exhibit 6)

14. It was Dr. Elfenbein's opinion, however, that if "PRP is found to be indicated in the select patients, the first injection may be repeated once after 4 weeks when significant functional benefit is reported but the patient has not returned to full function or full-duty work." See Claimant's Exhibit Tab 1, BS 2.

15. Claimant was sent out for a second opinion with ATP Barry Ogin, M.D., at Colorado Rehabilitation Occupational Medicine, who took a history and reached the following conclusions:

> Mr. Wright is a pleasant 61-year-old male presents as a consultation from Dr. Matus, with a chief complaint of left-sided low back and hip pain. He hurt himself on 07/16/20 when he was working at UPS and was lifting a bag off of a conveyor belt that was heavier than he expected. He denies any pre-existing history of back or hip issues. Did physical therapy, for the better part of a year, without benefit. He has been working with Dr. Lerston at Panorama. An injection along his left greater trochanter performed in January was helpful. He had a couple of other injections along his lateral hip and buttock which failed to give much relief. He also saw Dr. Faulkner, who I believe performed a left greater trochanteric injection. This was not helpful. Concern was raised that his pain may be emanating predominately from his spine. He did see Dr. Castro for a surgical opinion, and was told that there is nothing surgical regarding his back.
>
> More recently, he has initiated another course of physical therapy at Select PT, where he has been attending one time per week for six visits. This has proven a bit more helpful, particularly dry needling.
>
> Currently describes aching pain across his left buttock into his lateral hip. He has some pain in his groin, but not as severe. He get some stabbing pain along his left lower back. He denies any significant radicular pain, but gets occasional pins and needles along his posterior upper thigh. Pain is aggravated by standing and walking. Sitting is not bad. He has difficulty sitting more than 1 hour. Difficulty with twisting bending or lifting. Some relief with stretching. On a scale 0-10, worse pain 9/10, least pain 3/10 and current pain 6/10.
>
> * * *
>
> However, his clinical examination is most reflective of localized soft tissue pathology over his greater trochanter. He

> reportedly has had several injections along the bursa, with short term relief only. He reports that Dr. Lerston has suggested PRP to the hip bursa. Given his failure to improve with time, therapies, and steroid injections, this would be a reasonable pursuit. We would be more than happy to set this up, though he seems in capable hands with Dr. Lerston.
>
> If he pursues a PRP injection, an additional 4 weeks of PT may be reasonable for further strengthening and conditioning and materials handling training.

See Respondent's Exhibit Tab Q, BS 383 and 385.

16. On December 17, 2021, after ATP Lersten's request for PRP was denied and after the second opinion with Dr. Ogin occurred, Claimant returned to ATP Brenden Matus, M.D., at Workwell who noted:

> Discussion: Nathan has seen Dr. Ogin for second opinion. He agrees for the greater trochanteric bursitis that PRP is reasonable next option as he had good diagnostic and partial lasting therapeutic benefit to repeat steroid injections. He also agrees lower back injections have had partial benefit, would recommend trial repeat versus facet injection trial. He will continue with Dr. Lerston for now. He has restarted PT, noting some good benefit in pain but still quite functionally limited. We will continue PT and begin to gradually advance some functional lifting. Goal would be advancing to work conditioning over next 12 weeks or so; that would be pending significant gains in the meantime. Recheck 2-3 weeks.

See Claimant's Exhibit Tab 5, BS 31.

17. On January 7, 2022 Claimant returned to ATP Matus who noted:

> Nathan is seen for left lower back and left lateral hip pains. He has been participating in PT, some mild progress with pain at rest and tolerance to light activity but still quite functionally limited for lift/push/pull activities. He reports his PRP injection was denied and now has a pending court date in March. I recommend he recheck with Dr. Lerston to see if any further options are available. He has made limited functional gains to date, has not been able to resume work.

See Claimant's Exhibit Tab 5, BS 32.

18. On January 28, 2022 Claimant returned to ATP Matus who noted:

> Nathan continues with fairly elevated lower back and hip pains. He has restarted PT, reviewed notes and he is showing some slow but objective gains and therapy has recommended continued visits on a weekly basis. He is set

> to see Dr. Lerston on 2/10 for recheck. His hip PRP was denied, he is pending court date for appeal in March. Recheck in a few weeks for progress.

See Claimant's Exhibit Tab 5, BS 33

19. On February 18, 2022 Claimant returned to ATP Matus who noted:

> Nathan continues with PT, reviewed recent notes and he is showing some progress; albeit slowly. Recommend weekly PT for another 6-8 weeks; place referral today. He has seen Dr. Lerston in recheck. PRP still recommended; but no additional injections at this time. PRP is currently denied pending court date. Continue restrictions. Recheck in a few weeks.

See Claimant Exhibit Tab 5, BS 34.

20. Claimant testified that some of the injections he underwent with ATP Lersten provided relief anywhere from 2 to 5 months, but nothing has been permanent in terms of relief for the symptoms stemming from his admitted workplace injury.

21. Claimant credibly testified that he understands the risks associations with PRP injections and desires to proceed with the procedure so that he can return to work.

22. Claimant credibly testified he is not happy with the lack of progress and the slow recovery he is making under physical therapy, as related to his left hip. Claimant indicates he desires to pursue the PRP treatment.

23. The ALJ finds ATP Lersten and ATP Ogin's opinion and rationale for the PRP injections to be credible and persuasive because their opinions are consistent with Claimant's underlying medical records and statements made to his providers regarding his pain and disability, as well as Claimant's completion of conservative care medical treatment – which did not help.

24. Claimant credibly testified he understands the risks of a PRP injection and wishes to pursue it.

25. The opinions of David H. Elfenbein, M.D., have been considered, as well as the medical treatment guidelines, but such opinion is inconsistent with the underlying records, Claimant's testimony, and the opinions of his ATPs. Before the work injury, the Claimant could perform his regular duties and was not suffering from chronic pain. At this point in time, he cannot. In the end, Dr. Elfenbein's opinion does not appear to offer reasonable medical treatment to improve Claimant's condition. It also appears that Dr. Elfenbein's opinion ignores Claimant's pain complaints and current disability. On the other hand, Dr. Lersten and Dr. Ogin, in their medical judgement, have determined that the PRP injection, which was recommended by Dr. Lersten, offers Claimant the best option to cure and relieve him of the effects of his work injury. Medical records submitted at hearing reveal Claimant has had multiple physical therapy visits, corticosteroid injections and other conservative treatments consisting of physical therapy, anti-inflammatories, pain medications and rest without improvement of his symptoms.

26. Claimant remains under the care of ATP Matus, who has not yet release Claimant at MMI and who noted on December 17, 2021:

> Discussion: Nathan has seen Dr. Ogin for second opinion. He agrees for the greater trochanteric bursitis that PRP is reasonable next option as he had good diagnostic and partial lasting therapeutic benefit to repeat steroid injections. He also agrees lower back injections have had partial benefit, would recommend trial repeat versus facet injection trial. He will continue with Dr. Lerston for now. He has restarted PT, noting some good benefit in pain but still quite functionally limited. We will continue PT and begin to gradually advance some functional lifting. Goal would be advancing to work conditioning over next 12 weeks or so; that would be pending significant gains in the meantime. Recheck 2-3 weeks.

See Claimant's Exhibit Tab 5, BS 31.

27. Based on ATP Matus' reports Claimant has not returned to baseline and continues to have chronic and disabling pain that has not been relieved by any of the treatments provided to-date. The ALJ finds his conclusions to be credible and persuasive since they are supported by Claimant's testimony and the opinions of the ATPs.

28. Claimant's testimony and his statement to his medical providers mostly track with the underlying medical records. As a result, the ALJ finds Claimant's statements to medical providers and testimony be consistent and persuasive.

29. The ALJ finds the opinions of Claimant's ATPs to be credible and persuasive because the ALJ finds their opinions are supported by the underlying medical records and Claimant's statements to them as well as his testimony about his pain and disability since the work accident.

30. The ALJ finds that before the work accident, Claimant's left hip was not disabled and did not require any active medical treatment. But the ALJ further finds that after the accident, Claimant's left hip required medical treatment and that the condition is disabling. As a result, the ALJ finds that Claimant's work injury caused the need for medical treatment – including the PRP injections which were recommended.

31. The ALJ further finds that the PRP injection is reasonably necessary to treat Claimant's left hip pain which was caused by his work accident. Thus, the need for the PRP injection is also related to his work accident.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that the November 18, 2021, request by authorized treating provider ("ATP") Michael Lersten, M.D., for a platelet-rich plasma injection ("PRP") into Claimant's left hip bursa is reasonable and necessary, as well as causally related to Claimant's admitted industrial injury.

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa*

Tanklines, Inc., W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company, W.* C. No. 4-445-060 (February 22, 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines ("MTG") because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians and medical providers, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra.* The ALJ Also considered the MTG.

Respondents contend that the left hip PRP injection recommended by ATP Lersten and concurred in by ATP Ogin is not necessary or related because the MTG indicate it is contraindicated. This is in fact not the case as the ALJ has found that the symptoms have been present since Claimant's injury.

The Administrative Law Judge ("ALJ") next considered the broader question of whether the MTG applied to the requested PRP injection. The MTG are contained in W.C. Rule of Procedure 17-2(A), 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the MTG adopted by the Division of Workers' Compensation (Division). The Division's MTG were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office,* 74 P.3d 459 (Colo. App. 2003) the Court noted that the MTG are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The MTG are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the MTG in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual,* W.C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward,* W.C. No. 3-757-021 (October 30, 1998) (MGT are a reasonable source for identifying the diagnostic criteria). However, an ALJ is not required to award or deny medical benefits based on the MGT. In fact, there is generally a lack of authority as to whether the MGT require an ALJ to award or deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the MGT. *Madrid v.Trtnet Group, Inc.,* W.C.4-851-315 (April 1, 2014).

W.C.R.P. 17-5(C) provides in relevant part:

> The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9.

Claimant's ATPs maintain the PRP injection is a reasonable treatment to pursue at this time in light of the fact that conservative care has failed. There is credible and persuasive evidence that Claimant had no symptoms in his left hip which required medical treatment or caused any disability prior to his admitted industrial injury. Claimant testified that since the admitted industrial injury the pain in his hip has not resolved.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). In this case, the evidence leads the ALJ to conclude that while Claimant may have had underlying asymptomatic conditions, it was the admitted industrial injury that caused his symptoms and the need for medical treatment.

The ALJ finds and concludes that the PRP injection recommended is reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes Claimant has satisfied his burden by a preponderance of the evidence that the PRP injection is reasonable, necessary, and related to his work accident.

ORDER

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

1. Respondents shall pay the cost, pursuant to the medical fee schedule, of the PRP injection to Claimant's left hip recommended by ATP Lersten and concurred in by ATP Ogin.

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

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

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

DATED: April 26, 2022.

/s/ Glen Goldman

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

ISSUES

1. Whether the respondents have overcome the opinion of the Division sponsored independent medical examination (DIME) physician on the issue of maximum medical improvement (MMI), by clear and convincing evidence.

2. The issue of permanent partial disability (PPD) benefits was also endorsed for hearing, if the DIME opinion was overcome. At the hearing, the parties agreed to hold the issue of PPD in abeyance pending the ALJ's initial decision.

FINDINGS OF FACT

1. On October 14, 2019, the claimant suffered an injury to his right shoulder while working for the employer. On October 25, 2019, the respondents filed a General Admission of Liability (GAL) regarding the October 14, 2019 work injury.

2. During this claim, the claimant has treated with providers a Roaring Fork Family practice.

3. On January 20, 2020, a magnetic resonance image (MRI) of the claimant's right shoulder showed, *inter alia*, a moderately sided acromial spur, mild infraspinatus tendinosis, a bursal tear of the mid distal fibers, an articular tear of the distal anterior fibers, moderate acromioclavicular joint osteoarthritis, and mild atrophy of the teres minor muscle.

4. On June 1, 2020, the claimant was seen by Dr. Ferdinand Liotta for a surgical consultation. Dr. Liotta noted that the claimant was a candidate for shoulder surgery. Thereafter, surgery was scheduled for July 7, 2020.

5. The claimant has Type 2 diabetes. On July 3, 2020, the claimant was seen by Ivy Chalmers, PA-C for a pre-operative appointment. On that date, it was noted that the claimant's hemoglobin A1c level was at 12.8. As a result, the recommended rotator cuff repair surgery was not performed. Dr. Liotta communicated to PA Chalmers that he will not perform the surgery until the claimant's A1c level is less than 8.

6. The claimant's primary care physician is Dr. Christopher Tonozzi. The medical records entered into evidence demonstrate that Dr. Tonozzi attempted to work with the claimant to lower his A1c levels. On July 20, 2020, the claimant's A1c level was 13.9. On December 8, 2020, it was 10.8. On January 19, 2021, the A1c level was 10.9. On March 31, 2021, it was at 9.3. On July 27, 2021, the claimant's A1c level was at 12.5.

7. These same medical records demonstrate that the claimant was not compliant with Dr. Tonozzi's instructions regarding insulin use. For example, on March 31, 2021, Dr. Tonozzi instructed the claimant to increase his insulin to 80 units in the morning and 50 units in the evening. However, on July 27, 2021, the claimant informed Dr. Tonozzi that he had not increased his insulin, and continued at 60 units in the morning, and 45 units in the evening. The claimant also reported that he "had heard lots of insulin might do damage, so he actually decreased. Hoped tea he was taking would help." As noted above, the claimant's A1c level was 12.5 on that date.

8. On April 4, 2021, the claimant was seen by Dr. Andrew Gisleson. On that date, Dr. Gisleson noted that the claimant's diabetes was poorly controlled and he could not undergo surgery. Dr. Gisleson recommended that the claimant be placed at maximum medical improvement (MMI).

9. On June 14, 2021, Dr. David Lorah determined that the claimant reached MMI as of April 6, 2021. Dr. Lorah noted that although the claimant is a potential surgical candidate, he cannot undergo surgery until he is able to lower his hemoglobin A1c levels. Specifically, Dr. Lorah noted that the claimant's A1c would need to be less than 7 prior to undergoing surgery. Dr. Lorah rated the claimant's permanent impairment for his right upper extremity as nine percent (which converts to five percent whole person).

10. On September 10, 2021, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Lorah's June 14, 2021 report.

11. Following the FAL, the claimant requested a Division sponsored independent medical examination (DIME). On November 16, 2021, the claimant attended a DIME with Dr. Frank Polanco. In connection with the DIME, Dr. Polanco reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Polanco identified the claimant's diagnoses as a right shoulder strain, tendinosis with biceps tearing, and "subacute on chronic" quadrilateral space syndrome. Dr. Polanco opined that the claimant was not at MMI and needed additional treatment including physical therapy and surgery.

12. During his deposition testimony, Dr. Polanco stated that the claimant has adhesive capsulitis (also called "frozen shoulder"). Dr. Polanco recommends the claimant undergo manipulation under anesthesia. It is Dr. Polanco's opinion that this procedure would improve the claimant's function.

13. On January 26, 2022, the claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Primack opined that the claimant was at MMI. Dr. Primack noted that the claimant has adhesive capsulitis, secondary to diabetes. In addition, Dr. Primack opined that the treatment recommendation by Dr. Polanco would not address the claimant's condition. Dr. Primack assessed permanent

impairment of 11 percent for the claimant's right upper extremity (which converts to whole person impairment of seven percent).

14. Dr. Primack's deposition testimony was consistent with his report. Dr. Primack explained that due to the claimant's diabetes, he has developed a diabetic shoulder. Specifically, the tendons and soft tissue in the claimant's shoulder have thickened and created adhesions. Therefore, manipulation under anesthesia (as recommended by Dr. Polanco) would not work to improve the claimant's shoulder function. In fact, that procedure would likely worsen the rotator cuff tear.

15. The claimant testified that he would like to undergo the treatment recommended by Dr. Polanco. The claimant also testified that he has tried to reduce his blood sugar levels.

16. The ALJ credits the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack over the contrary opinions of Dr. Polanco. The ALJ finds Dr. Gisleson's determination that the claimant reached MMI on April 6, 2021 is correct. Dr. Polanco's statement that the claimant was not at MMI is incorrect. The claimant has a torn rotator cuff and could benefit from surgery. However, due to his uncontrollable diabetes, the claimant cannot undergo surgery at this time. Therefore, the ALJ finds that it is highly probable and free from substantial doubt that the claimant is at MMI unless and until he can reduce his A1c level.

CONCLUSIONS OF LAW

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

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

5. As found, the respondents have overcome the DIME physician's opinion by clear and convincing evidence. As found, Dr. Polanco's statement that the claimant was not at MMI is incorrect. The claimant reached MMI on April 6, 2021. As found, the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents have overcome the DIME physician's opinions by clear and convincing evidence.

2. The claimant reached maximum medical improvement (MMI) on April 6, 2021.

3. The issue of permanent partial disability (PPD) benefits is reserved for determination by the ALJ. Within twenty (20) days after this Findings of Fact, Conclusions of Law and Order becomes final, the parties shall notify the ALJ of a date mutually convenient for the parties to submit position statements on the issue of PPD benefits.

Dated this 27th day of April 2022.

Cassandra M. Sidanycz
Administrative Law Judge

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[Redacted],** Claimant, v. **[Redacted]** Employer, and **[Redacted],** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-168-949-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on March 22, 2022. The proceeding was digitally recorded in Courtroom 1 of the Office of Administrative Courts in Colorado Springs, Colorado between 1:00 and 1:34 p.m.

Claimant was present and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq. Testimony was taken from Claimant. In lieu of presenting his live hearing testimony, Respondents elected to take the pre-hearing deposition of Dr. Marc Steinmetz. A transcript of the March 8, 2022, deposition of Dr. Steinmetz was lodged with the OAC prior to the hearing and was admitted into evidence by the ALJ along with the following exhibits: Claimant's Hearing Exhibits 1-8 and Respondents' Hearing Exhibits A-E.

Following the presentation of evidence, the ALJ held the record open through April 5, 2022 to allow counsel time to submit written position statements in lieu of closing argument. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this Summary Order [Redacted] will be referred to as "Claimant". [Redacted] will be referred to as "Employer" and AIU Insurance will be referred to as "Insurer". The term "Respondents" refers to Employer and Insurer collectively. All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2020); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3

ISSUES

The issues addressed by this decision involve a determination of Claimant's average weekly wage (AWW) and his entitlement to a period of temporary total disability (TTD) benefits extending from July 3, 2021 to November 15, 2021.

PROCEDURAL MATTERS

At the outset of hearing, Respondents agreed that Claimant's AWW of $486.88, as reflected on the Final Admission of Liability (FAL) was incorrect. Respondents agreed that Claimant's AWW should be increased to $597.22 based upon wage records reflecting Claimant's earnings from September 5, 2020 through April 3, 2021. Respondents also agreed that temporary total disability (TTD) benefits were due and payable from July 3, 2021 through July 21, 2021, subject to an offset due to Claimant's receipt of short-term disability benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Steinmetz, the ALJ enters the following findings of fact:

1. Claimant suffered a compensable injury to his left wrist on April 2, 2021, while helping a co-worker who was having a seizure.

2. Claimant was referred to Concentra Medical Centers for treatment. Dr. Douglas Bradley oversaw Claimant's care. Claimant was also treated by Nurse Practitioners (NP) Antonio Ramos and Brandon Madrid.

3. Claimant was assigned work restrictions on April 5, 2021 of no lifting, pushing, pulling or carrying greater than two (2) pounds. He was then released to return to modified duty work.

4. Claimant worked in a modified duty capacity from April 2, 2021 through July 2, 2021, at which time Employer placed him on leave due to their policy of offering only 12 weeks of modified duty. Claimant was restricted when Employer placed him on leave. Consequently, Claimant was paid $4,219.75 in short term disability on November 18, 2021 for his Employer's imposed leave of absence extending from July 3, 2021 through November 15, 2021.

5. Dr. Timothy Hart performed an orthopedic evaluation on May 20, 2021. Following his examination, Dr. Hart did not believe that surgery was warranted.

6. Claimant's work restrictions were liberalized to permit lifting, pushing, pulling and carrying up to ten pounds on June 2, 2021. Nonetheless, he remained restricted through July 13, 2021.

7. On July 13, 2021, Claimant reported tingling and grinding in the left wrist. Consequently, Claimant returned to Dr. Hart for further evaluation.

8. On July 22, 2021, Dr. Hart noted that therapy had been helpful in "resolving a significant portion of pain in other parts of the wrist, but the first dorsal compartment pain [remained]". Dr. Hart explained that Claimant's ongoing symptoms were consistent with de Quervain's tenosynovitis, which may respond to a cortisone injection. Claimant consented to the injection and Dr. Hart proceeded to inject the wrist based upon his assessment of left wrist de Quervain's tenosynovitis.

9. Respondents sought an opinion from Dr. Marc Steinmetz regarding the relatedness of Claimant's de Quervain's tenosynovitis to his April 2, 2021 industrial injury. Dr. Steinmetz conducted a records review on July 26, 2021. Following his records review, Dr. Steinmetz opined that Claimant's ongoing symptoms were "more likely related to a preexisting left wrist fracture and not the 04/02/2021 incident".

10. On July 27, 2021, Dr. Bradley lowered Claimant's lifting, pushing, pulling and carrying capacity from 10 pounds to 1 pound.

11. On August 12, 2021, Dr. Hart recommended surgery to address Claimant's persistent left wrist symptoms. Dr. Hart requested pre-authorization to perform a first dorsal release surgery on August 16, 2021.

12. Respondents denied the surgery and requested an independent medical examination (IME) with Dr. Steinmetz. Dr. Steinmetz completed the examination on September 9, 2021. Following his IME, Dr. Steinmetz opined that Claimant's ongoing left wrist symptoms were related to de Quervain's radial wrist tendinitis, which is a cumulative trauma disorder "completely" inconsistent with the pronated flexion and grasping mechanism of injury described by Claimant as occurring April 2, 2021. Dr. Steinmetz concluded that Claimant was suffering from left radial wrist and thumb de Quervain's syndrome that was unrelated to the 04/02/2021 incident. He also opined that Claimant reached maximum medical improvement (MMI) for April 2, 2021 injury on July 22, 2021.

13. Claimant returned to Dr. Bradley on September 22, 2021. Dr. Bradley opined that Claimant was "not at MMI, but [was] anticipated to be at MMI on 11/15/2021".

14. Dr. Richard Trifilo assumed Claimant's care on October 19, 2021. On this date, Dr. Trifilo noted that Claimant was "approximately 25% of the way toward meeting the physical requirements of his job". Dr. Trifilo indicated that Claimant had "restrictions for [the] left hand", indicating specifically that Claimant could lift, push, pull and carry 0 pounds. Finally, Dr. Trifilo noted that Claimant was not at MMI, but was anticipated to be so on December 30, 2021.

15. On November 16, 2021, Respondents sent a copy of Dr. Steinmetz' September 9, 2021 IME report to Dr. Trifilo along with a request regarding his opinions concerning MMI, impairment, restrictions and Claimant's ongoing treatment needs. Dr. Trifilo opined that Claimant had reached MMI without impairment or need for maintenance care. He fixed the date of MMI as of November 16, 2021 and returned Claimant to full duty work without restriction.

16. Respondents filed a medical only FAL consistent with the opinions of Dr. Trifilo on November 29, 2021. Claimant objected to the November 29, 2021 FAL. He requested a Division Independent Medical Examination (DIME). He filed a separate Application for Hearing endorsing, among other things, "Average Weekly Wage" and "Temporary Total Benefits from July 3, 2021 to Continuing".

17. Wage records submitted into evidence document that Claimant earned a total of $17,916.74 between September 5, 2020 and April 3, 2021, which Respondents contend supports an AWW of $597.22. Claimant asserts that because he got several raises between his date of hire and the date of injury, Respondents' method of calculation, i.e. including wages back to his date of hire, is an unfair reflection of his AWW. Claimant argues that the most accurate method of calculating his AWW is to look at the wage on the date he was injured and use a 40-hour workweek since he was hired to work 40 hours per week.

18. The ALJ agrees with Claimant that calculating his AWW by using pre-injury wages at substantially lower hourly rates going back to his date of hire results in an inherently low AWW that does not accurately reflect his wage loss and diminished earning capacity. Based upon the evidence presented, the ALJ agrees that Claimant's AWW should be calculated based upon his earnings at the time he was injured. The records reflect that Claimant's hourly rate at the time of injury was $19.57 per hour, which, when multiplied by 40 hours per week yields an AWW of $782.80.

19. While the ALJ agrees that Claimant's AWW should be computed based upon the wages he was earning at the time of his injury, he is not convinced that the calculation should be grounded on a 40-hour workweek. Here, the wage records support a finding that in the 30 weeks between September 5, 2020 and Claimant's April 2, 2021 date of injury, he only worked a 40-hour pay period eight (8) times. Consequently, the Claimant's suggestion that his contract for hire supports a reasonable expectation of working 40 hours/week is unpersuasive.

20. Based upon the evidence presented, the most fair method by which to calculate the average number of hours Claimant worked per week is to average his time over the entire period extending from September 5, 2020 to the last full pay period ending March 27, 2021. The wage records reflect that for this period, Claimant worked a total of 897.25 hours or 30.78 hours per week. (897.25 hours ÷ 204 days × 7 days/week = 30.78 hours). Multiplying Claimant's average number of hours worked per week by his hourly rate of $19.57 yields an AWW of $602.36, which the ALJ finds most

closely approximates his wage loss and diminished earning capacity at the time of his April 2, 2021 work related injury.

CONCLUSIONS OF LAW

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

Average Week Wage

A. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of an injured workers wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993); *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

B. Sections 8-42-102(3) and (5)(b), C.R.S. (2020), gives the ALJ discretion to determine an AWW that will fairly reflect the loss of earning capacity. It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993). The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. As found, Respondents methodology in calculating Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's true wage loss and diminished earning capacity. Based upon the findings articulated above, the ALJ concludes that Claimant's AWW should be based upon his earnings at the time of his injury rather than including significant periods where he was earning less wages shortly after being hired, as Respondents have done here. Indeed, even **post-injury** raises can form the basis for an increase in a claimant's AWW for periods of disability occurring after the initial period of disability where "manifest injustice" would result if the claimant's benefits are calculated based on lower earnings at the time of the injury. *Campbell v. IBM Corp., supra; see also Lozano v. Grand River Hospital District*, W.C. No. 4-734-912 (ICAO, February 4, 2009); *Marr v. Current, Inc.*, W.C. No. 4-407-504 (ICAO, September 20, 2000). While the question presented does not involve a post-injury wage increase, Respondents are effectively using Claimant's lower wages for periods preceding his industrial injury to artificially lower his AWW, which the ALJ concludes will result in "manifest injustice" should Claimant experience a subsequent period of disability. As found, the ALJ determines that Claimant's average weekly wage is $602.36 as this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his April 2, 2021 compensable work related injury.

Claimant's Entitlement to Temporary Total Disability

C. To receive temporary disability benefits, Claimant must prove that his injury caused a disability, that he left work as a result of the injury and that his temporary disability is total and lasts more than three regular working days. Sections 8-

42-103(1)(a) and (b), 8-42-105(1), C.R.S. 2020; *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). The term "disability" connotes two distinct elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant's inability "to resume his or her prior work." *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Disability may be evidenced by the complete inability to work, or by restrictions, which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy and Co.*, 964 P.2d 595 (Colo. App. 1998); *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo.App. 1991); *See also, McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo.App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with § 8-42-105(3)(a)-(d), C.R.S. 2020.

D. In this case, the evidence supports a conclusion that Claimant was under restrictions and working modified duty when Employer elected to place him on leave on July 3, 2021. Indeed, at the time he was placed on leave, Claimant was working modified duty with a ten (10) pound lift, push, pull and carry restriction as evidenced by the June 2, 2021 report of NP Madrid. Unfortunately, persistent symptoms resulted in a change in Claimant's restrictions on July 27, 2021, when Dr. Bradley amended Claimant's lifting, pushing, pulling and carrying capacity from 10 pounds to 1 pound. By September 22, 2021, Dr. Bradley precluded Claimant from any lifting, pushing, pulling or carrying with the left hand. The zero lift, push, pull and carry restriction remained in place until November 16, 2021 when Dr. Trifilo placed Claimant at MMI and returned him to full duty work.

E. The ALJ credits Claimant's testimony that his wrist injury precluded him from performing the full range of duties required in his position and beyond that, that he received help from his co-workers and supervisors to complete some duties while working modified duty. Claimant's testimony combined with the content of his medical records persuades the ALJ that Claimant's wrist injury resulted in medical incapacity as evidenced by a loss/restriction in bodily function, which restriction reduced his wage earning capacity as demonstrated by his inability to return to full duty employment based on the imposition work-related restrictions. Consequently, the ALJ concludes that Claimant has established that he is "disabled" within the meaning of section 8-42-105, C.R.S. Moreover, the evidence presented supports a conclusion that Claimant has suffered a wage loss as a direct result of his disabling wrist injury. Indeed, Claimant was placed on leave on July 3, 2021, after Employer could no longer accommodate the modified duty schedule he required as a direct result of his work injury. While the evidence supports that Claimant received short-term disability for the time he was on leave, he earned no wages and his short-term disability did not amount to wage replacement. Consequently, the ALJ concludes that Claimant has established an actual wage loss directly related to his industrial injury. Because Claimant has established that his injury caused a disability, that he left work as a result of the injury and that his temporary disability was total and lasted more than three regular working days, he is entitled to TTD. Sections 8-42-103(1)(a) and (b), 8-42-105(1), C.R.S. 2020; *Culver v.*

Ace Electric, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

F. Once the claimant has established a disability and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d).

G. C.R.S. § 8-42-105(3) provides in pertinent part: Temporary total disability benefits shall continue until the first occurrence of any one of the following:

(a) The employee reaches maximum medical improvement;

(b) The employee returns to regular or modified employment;

(c) The attending physician gives the employee a written release to return to regular employment; or

(d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

H. As noted, Respondents agree that temporary total disability benefits are due and payable from July 3, 2021 through July 21, 2021 subject to a short-term disability offset. However, Respondents urge the ALJ to terminate Claimant's entitlement to TTD on July 22, 2021 based upon the opinions of Dr. Steinmetz that Claimant reached MMI for his work related injury on July 22, 2021. Indeed, Respondents argue that because Dr. Steinmetz credibly testified that the cause of Claimant's ongoing symptoms and disability after July 22, 2021 were related to his non-industrial de Quervain's syndrome rather than the April 3, 2021 wrist sprain, Claimant is not entitled to TTD beyond July 22, 2021. The ALJ is not persuaded.

I. Although the ALJ may not disregard the attending physician's report releasing a claimant to regular employment, if there is a conflict in the record regarding the claimant's release to work, "the ALJ must resolve the conflict." *Imperial Headware, Inc*. *v. Industrial Claim Appeals Office*, 15 P.3d 295, 296, (Colo. App. 2000). It is also well established that if the record contains conflicting opinions from multiple attending physicians concerning the claimant's ability to perform regular employment, the ALJ may resolve the conflict as a matter of fact. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Diary*, 911 P.2d 661 (CoIo.App. 1995).

J. Where there are no conflicting opinions from physicians regarding a Claimant's release to work, the ALJ is not at liberty to disregard the attending physician's opinion that a claimant is released to return to employment. *Burns Robinson Dairy, Inc*., 911 P.2d at 662. However, if there is a conflict in the record regarding a

Claimant's release to return to regular employment, the ALJ must resolve the conflict. *Imperial Headware*, 15 P.3d at 296.

K. In this case there is no conflict among the authorized treating physicians regarding the date of MMI and Claimant's full duty work release. It is clearly November 16, 2021 per the report of Dr. Trifilo. Dr. Steinmetz is not an authorized treating physician, but is instead a retained expert hired by the Respondents to opine as to causation and Claimant's need for additional treatment, i.e. surgery directed to the left wrist. Pursuant to C.R.S. § 8-42-107(8)(b)(I), "[a]n authorized treating physician shall make the determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5). Accordingly, the ALJ agrees with Claimant that Dr. Steinmetz's MMI opinion cannot be used to terminate Claimant's entitlement to ongoing TTD.

L. When Respondents filed the Final Admission of Liability, they had an opportunity to disagree with the date of MMI by filing for a DOWC IME but chose, instead, to agree with the date of MMI of Dr. Trifilo. Since Claimant was under restrictions from the authorized treating doctors up to the date of MMI he is entitled to be paid temporary disability if, as here, the Employer was unable to accommodate his restrictions. Here, the Employer offered no testimony to contradict Claimant's statements that this is what occurred when he was no longer afforded light duty beginning July 3, 2021. Claimant's testimony and the supporting exhibits persuade the ALJ that he is entitled to TTD extending from July 3, 2021, when Employer elected to place him on leave, through November 15, 2021, since he was placed at MMI and released to full duty work by Dr. Trifilo on November 16, 2021.

M. Because Claimant's period of disability lasted longer than two weeks from the day he left work as a consequence of his left wrist injury, Claimant is entitled to recover disability benefits from the day he left work in this case, i.e. July 3, 2021. Section 8-42-103(1)(b), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $602.36.

2. Respondent shall pay Claimant TTD benefits from July 3, 2021 through November 15, 2021, at the appropriate TTD rate associated with Claimant's average weekly wage of $602.36. Respondents are entitled to offset Claimant's TTD benefits based upon payment of short-term disability benefits to Claimant for his leave of absence from July 3, 2021 through November 15, 2021. The parties shall determine the amount of the offset. If the parties are unable to reach an agreement regarding the amount of the offset, either may apply for a hearing to determine the same.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

DATED: April 28, 2022

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

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

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing Error! Reference source not found. by U.S. Mail, or by e-mail addressed as follows:

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Date: April 28, 2022

/s/ Laverne Romero
Court Clerk

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained a work related injury or occupational disease in the course and scope of her employment on October 5, 2020.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to received medical benefits that are authorized, reasonably necessary and related to the injury, if Claimant is found to have sustained a work related injury.

III. Whether Claimant has proven entitlement to reimbursement of out of pocket expenses related to obtaining medical care, if the claim is found compensable and medical benefits are determined to be reasonably necessary and related to the claim.

STIPULATIONS

The parties stipulated that all other issues listed by the parties in their pleadings but not addressed by this order, shall be held in abeyance pending the determination of the above issues, with the exception of penalties for failure to comply, which was withdrawn by Claimant.

If the claim is found compensable, Respondents stipulated that they had not issued a Rule 8 letter and Claimant had selected as her authorized treating provider (ATP) her personal treating physicians (PCP), including but not limited to Dr. Jennifer Hepp and Dr. John Papilion, her orthopedic surgeon.

FINDINGS OF FACT

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

a. Claimant's testimony

1. Claimant was 55 years old at the time of the hearing, right handed and approximately 5'1" tall. Claimant worked as a merchandiser, or field support representative, for Employer hired on January 15, 2014. Her job included distributing product to approximately 150 kiosks, machines that rent movies, in her assigned territory, and would do approximately 30 kiosks per day, but the quantity varied depending on the location and other duties she was required to complete during any particular week. She would work Monday through Friday but the hours varied depending on the quantity of kiosks that she would service on a given day.

2. Claimant would obtain the merchandise from the warehouse once or twice per week, meeting the trucks and locating the appropriate pallets of products. She would

break down and build boxes, sort the stock, break it down by day and retrieve the boxes to load into her car. She would also deliver to the warehouse the merchandise that was taken out of the kiosks. The day boxes were 12”x12”x6” in size, and would weight from approximately two to twenty pounds. Claimant would take the full boxes out of her car and organize them on a table in her garage across from her residence. She would handle a lot of day boxes every day, at least 150 per week.

3. The job also included logging into the machines, pulling out movies from the kiosk machines, cleaning them, doing minor maintenance, and loading the kiosk with the new merchandise. If there were any stickers, she would put the stickers on the kiosks.

4. The merchandise she would retrieve from the machines she packed in large shipping boxes that were 24”x15”x15” rectangles and would weight up to approximately forty pounds when full. She would keep these full ones in her garage until the next time she went to the warehouse, where she would deliver them for shipping. When she retrieved the new merchandise from the warehouse, she would keep them in her garage on a table which was organized by everyday boxes (new products) and shipping boxes (old products). She would handle approximately two to five full shipping boxes per day. By the end of the week Claimant would have anywhere from five to twenty five shipping boxes loaded. She loaded the shipping boxes herself, meaning no one helped her to load them up into her vehicle, and she delivered them generally on Friday. In general, in this position, Claimant would use her personal vehicle to maintain an assigned merchandising route and was authorized to store merchandize in her garage.

5. She considered the work she performed to be repetitive in nature and the work performed at each kiosk was similar. She agreed with the descriptions of the jobs generally to be similar as those assessed by the Job Demand Analysis issued for a different employee on February 25, 2019, but it did not contain all details of her job. She disagreed that the job she performed was not repetitive in nature.

6. On October 6, 2020 she began her day at approximately 6 a.m., clocking in using a phone app. She had to move some shipping boxes out of the way to get to her everyday boxes for the day. She had already moved one shipping box aside when she lifted a full shipping box to stack it upon the first one. She had the box at above shoulder height during the lift, lifting from the bottom of the box, when she felt a pop in her right shoulder and immediate onset of pain in her shoulder. She recalled that the pain was a sharp stabbing pain. Claimant rubbed at the shoulder and waited several minutes before she could continue sorting her merchandise.

7. Claimant called her supervisor to inform her of the incident, telling her that she hurt her right shoulder by picking up a box and that she was in pain. Claimant informed her supervisor that she had taken some Aleve to relieve some of the symptoms by then. Her supervisor informed her that workers’ compensation would not take any steps to help her with regard to the shoulder problem because they would just look at it as a repetitive motion issue. Her supervisor did not offer her any medical care or to complete a report of the injury. The conversation lasted approximately 20 minutes. She then took approximately 30 everyday boxes to her car, continuing to work that day.

8. Claimant continued working full duty after her date of injury on October 6, 2020. She continued to worsen and was having difficulty moving her shoulder because it was so inflamed. She had to use her left upper extremity to compensate.

9. Claimant stated she completed the online form on Employer's website with regard to the injury on the same day of the injury, October 6, 2020, but did not receive a call back or any information from Employer or their workers' compensation insurer.

10. Claimant conceded that she had had prior problems with the right shoulder, specifically achiness. She did not recall for what period of time, but had discussed it with her primary care physician (PCP) at Advanced Integrative Medicine, was examined but was not offered any medical treatment, including diagnostic testing or referrals to specialists or physical therapy. Claimant would take over the counter medications and the symptoms would subside.

11. She explained that two days after the accident she had an appointment with her PCP but was instead seen by a nurse practitioner. The appointment was originally scheduled to treat a personal problem. Claimant stated that she advised the nurse that she had injured her shoulder by lifting a box, was asked to mobilize her arm, told to use ice on it, but was advised that the nurse did not handle work related injuries.

12. She later returned to her PCP and was seen by Dr. Jennifer Hepp. Claimant relayed that she had been moving a box when she heard a pop and had pain, which continued throbbing throughout the day, continuing to get worse as the days went by from performing repetitive activities as she continued to work. She stated she was having problems moving her shoulder and showed Dr. Hepp that it was inflamed. She advised that it was different and much worse than what she had been experiencing previously.

13. Claimant testified that Dr. Hepp first sent her for x-rays, then an MRI and eventually referred her to Dr. John Papilion, an orthopedic specialist. Claimant testified that Dr. Papilion encouraged her to seek workers' compensation benefits for her right shoulder injury and treatment.

14. She stated that when she saw Dr. Papilion, he recommended surgery right away, since injections and physical therapy were unlikely to help. Claimant recalled telling Dr. Papilion that she was hurt lifting a box at work and Dr. Papilion recommended she apply for workers' compensation benefits as she was likely to be out of work for some time.

15. Claimant continued to work until the Thursday she was seen by Dr. Papilion. Then she proceeded with the surgery and post-operative care, including physical therapy but had to discontinue it when she found out her parents had COVID-19 and she went to them in New Mexico, where, eventually her mother was sent home but her father eventually passed away in the hospital at the end of December, 2021. She was unable to return to physical therapy because she could no longer afford it. However, she reported that her right shoulder was much better following the surgery.

b. Medical Records Prior to Alleged Injury

16. Claimant was evaluated by Dr. Jennifer Hepp on October 16, 2015 regarding right shoulder, elbow, forearm and hand pain as well as joint pain. On physical exam there was no musculoskeletal tenderness, though Claimant was tender to palpation

of the bilateral epicondyles and flexor muscles of the right forearm. She stated that Claimant required supportive care for epicondylitis, including ice, rest and topical agents.

17. On August 9, 2017 Dr. Hepp again noted Claimant had increased joint pain, stiffness and fatigue and commented that Claimant was concerned due to a family history of rheumatoid arthritis (RA). Dr. Hepp ordered some lab work at that time. In a follow-up on October 19, 2019 Dr. Hepp remarked that Claimant had complaints of right shoulder, upper extremity pain. Dr. Hepp noted Claimant was having shoulder pain for some time and was using OTC medication as the pain moved down the arm. She observed that the musculoskeletal pain was likely related to overuse strain caused by her repetitious actions at work and did not note a serious injury. The lab work came back negative for RA.

18. On August 28, 2020 Claimant was seen at Denver Integrated Spine Center by Michael Schnider, D.C., where she complained of multiple issues of the cervical, thoracic and lumbar spine as well as continuous aching and throbbing discomfort in the right trapezius with a VAS scale pain of 5/10 approximately 90% of the time. She was provided with manual therapy including manual traction, trigger point therapy and myofascial release to her upper right quadrant including right trapezius, levator scapula, and rhomboid muscles. She was assessed with cervical, thoracic and lumbar joint dysfunction with associated myospasms. Claimant continued with at least one more session of chiropractic care on September 3, 2020 when her shoulder discomfort decreased to a 3/10 only 40% of the time.

c. Medical Records After Alleged Injury

19. Claimant was seen by Heath Rooney, a nurse practitioner at her PCP's office, on October 8, 2020 for a possible urinary tract infection (UTI). The nurse did not document any report of the work related injury in the medical records. She documented an exam consistent with the UTI and ordered lab tests.

20. Dr. Hepp evaluated Claimant on November 16, 2020 regarding the ongoing right shoulder pain. She reported that Claimant advised her PCP that she had been trying to reduce the repetitive motion she was performing and had her chiropractor treat it, which provided some relief. Now the pain had increased and worsened. Claimant had significant pain on testing, with a positive drop arm test on the right and loss of range of motion. Dr. Hepp questioned the integrity of the rotator cuff for either moderate tear or complete tear. She diagnosed right shoulder pain and right rotator cuff syndrome, and ordered an MRI of the right shoulder.

21. The x-rays were completed at Health Image Cherry Creek and read by Erik Handly, M.D. on December 3, 2020. They showed an apparent moderate calcific tendinitis over the rotator cuff, most likely the supraspinatus tendon.

22. An MRI was performed on January 8, 2021 and read by Dr. Handly. The technician took a history that the MRI was being performed due to the "lifting injury" and "limited range of motion" of the right shoulder. Dr. Handly identified a full-thickness tear of the supraspinatus tendon with medial retraction of 1.4 cm, moderate subacromial and subdeltoid bursal fluid and no rotator cuff muscular atrophy or edema. He also noted mild acromioclavicular arthropathy with mild to moderate active edema, superior labral fraying and degeneration, without discrete tear, and mild glenohumeral chondromalacia.

23. Claimant was first evaluated by Dr. John Papilion of Orthopedic Centers of Colorado, LLC, on January 21, 2021. Claimant reported symptoms of the right shoulder with a gradual onset with now symptoms interfering with sleep, activities and worsening. The pain was deep, throbbing and frequent, exacerbated by motion of the shoulder. She provided a history of a right shoulder injury in October 2020 doing repetitive lifting of boxes in her home office for Employer and developed onset of right shoulder pain with progressive weakness and loss of motion. Claimant advised she reported it to her Employer "but did not make a work comp claim." Dr. Papilion noted specifically that the MRI showed a full thickness tear of the supraspinatus tendon with retraction and "no significant muscular atrophy", which indicated that this was "an acute tear." On exam he noted mild right supraspinatus tenderness, and positive Hawkins-Kennedy and impingement tests. He assessed that Claimant had a traumatic complete tear of the right rotator cuff, specifically stating that it was not degenerative in nature. Dr. Papilion noted that there were no other hobbies or recreational activities other than work to account for the traumatic injury and rotator cuff tear. He recommended surgery and scheduled it for February 1, 2021.

24. Dr. Hepp attended Claimant on February 8, 2021 to complete short term disability forms, reported Dr. Papilion's opinions with regard to her need for surgery and that she was not able to perform her job. On March 18, 2021, Claimant returned to Dr. Hepp, where she reported to Dr. Hepp that she had hurt her shoulder in October 2020. Dr. Hepp reviewed shoulder exercises and stretches, as well as provided education and precautions.

25. Dr. Papilion proceeded with the surgery on May 28, 2021 at DTC Surgery Center for the full thickness rotator cuff tear, supraspinatus tendon tear of the right shoulder, the chronic biceps tendon rupture and chronic impingement of the right shoulder. The procedure included debridement of the superior labrum and rotator cuff, decompression and releases of the coracoacromial ligament and repair of the cuff. During the surgery, Dr. Papilion noted that Claimant had a chronically disrupted and retracted biceps tendon, the superior labrum had a small stump that was debrided to a stable rim excising the stump. The undersurface revealed a full-thickness tear of the supraspinatus tendon without retraction. There was marked thickening and inflammation of the bursa and the edges of the cuff were smoothed to a stable rim. Dr. Papilion performed a subacromial decompression where the coracoacromial ligament was released from the AC joint and the acromion hook was smoothed and then he proceeded to repair the rotator cuff, including placement of the suture anchors into the greater tuberosity.

26. On July 6, 2021 Dr. Papilion saw Claimant in follow up with good recovery and minimal pain but was still using a sling. Claimant reported engaging in physical therapy with increases in range of motion. She was instructed to wean off of the sling, continue with PT but was limited to no use of the right upper extremity. Claimant was again seen on August 24, 2021. Dr. Papilion specifically noted that "It remains my opinion that this was a work-related injury posttraumatic as well as repetitive. She had no antecedent problems with the shoulder and no other recreational or vocational activities to account for her symptoms." Dr. Papilion noted on September 30, 2021 that Claimant was "doing well 4 months post arthroscopy rotator cuff repair right shoulder. She still has

some residual weakness but I believe her repair is intact." He ordered more aggressive therapy for strengthening with a work conditioning program. He changed her work restrictions to 10 pound lift limit overhead. By November 2, 2021 Claimant only had mild discomfort after PT and some difficulty with overhead lifting.

27. Dr. Allison M. Fall of Colorado Pain and Rehabilitation examined Claimant on August 18, 2021 upon Respondents' request. Claimant provided a history that was consistent with her testimony, including the reports of achiness in the right shoulder prior to the work injury, which she thought was arthritis. Claimant reported a specific incident to Dr. Fall occurring on October 6, 2020. Dr. Fall opined that the medical records support a repetitive motion and gradual onset of the rotator cuff pathology and not a specific incident. She reviewed the job demands analysis for a field support representative (merchandiser) and concluded that the work Claimant performed did not fall within the risk factor assessment for a repetitive motion shoulder injury under the causation analysis of the Cumulative Trauma Conditions Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 5, effective March 2, 2017. Dr. Fall specifically stated that she was unable to opine within a reasonable degree of medical probability that Claimant sustain an acute traumatic injury on October 6, 2020. However, if found that Claimant did have an acute injury, then Claimant was not at maximum medical improvement and required further care.

28. John Hughes, M.D. of Hughes Medical Consulting evaluated Claimant on January 20, 2022 upon Claimant's request. He noted a similar history as provided to Dr. Fall and through testimony, that Claimant was lifting a box which weight approximately 40 lbs. when she felt her right shoulder "popped." She advised that she did not go in for immediate treatment but that her symptoms got progressively worse after the date of the injury, over time as she continued working. He noted that Claimant continued to have some symptoms of pain in the right shoulder of 3/10 and weakness that limited her ability to lift. Dr. Hughes noted that Claimant did not engage in activities or sports other than riding a motorcycle, which she had not done since her injury. He diagnosed a calcific tendinitis, which is documented prior to her injury and not work related, and is a known complication of diabetes. This condition can cause weakening of the affected tendons making an individual vulnerable to sustaining frank rotator cuff rupture, as Claimant suffered on October 6, 2020 while lifting a box at work. He opined that the shoulder injury sustained on October 6, 2020 developed into a full-thickness rotator cuff tear and was related to the work injury. He also stated that the post arthroscopic repair, decompression and debridement performed on May 28, 2021 by Dr. Papilion was a reasonably necessary treatment caused by the work related October 6, 2020 workplace injury.

29. Dr. Hughes agreed "with Dr. Papilion that the lack of atrophy seen on the MRI and at the time of surgery is consistent with an acute rotator cuff rupture." He further noted that "[A]lso, consistent with acuity is the reactive bursitis seen on the MRI of January 8, 2021." His ultimate opinion is that Claimant "sustained an acute work-related rupture of the right supraspinatus tendon as a result of her lifting activities of October 6, 2020." He opined that the treatment under Dr. Papilion, including the additional physical therapy was reasonably necessary and related to the October 6, 2020 work place injury.

30. On February 27, 2022 Dr. Fall issued an addendum report with further medical records review, including Dr. Hughes' IME report. She noted she did not disagree

with Dr. Hughes' opinion that the MRI findings were consistent with an acute rotator cuff rupture. She noted that other providers opined that Claimant's injury was from repetitive motion, in conflict with the history Claimant provided Dr. Hughes and Dr. Fall identifying a specific incident. However, she stated that nothing in the new records she reviewed changed her opinion.

31. On March 2, 2022 Dr. Papilion stated the following within a reasonable degree of medical probability:

> It is my medical opinion that she did sustain a work-related injury to her right shoulder. She was doing repetitive lifting of heavy boxes. Although she had a pre-existing history of calcific tendinitis this was not symptomatic. She was fully functional. After this incident she had significant weakness and loss of motion. An MRI confirmed a full-thickness tear in the rotator cuff. There was no muscular atrophy. This is consistent with an acute tear.
>
> She has performed this type of work for over 7 years. This repetitive heavy lifting is likely a source of her pre-existing shoulder complaints. She was fully functional until this incident on 10/6/2020. It is therefore my opinion that she did sustain an acute exacerbation in this lifting incident to her underlying rotator cuff pathology from repetitive lifting.
>
> Mechanism of injury in rotator cuff tears include repetitive lifting with rotator cuff fiber failure over a period of time. A traumatic injury would be direct impact from a fall or very commonly lifting incident. This is direct force on the rotator cuff tendon that ultimately fails. The tendon is full-thickness and has some retraction. In an acute tear there is no muscular atrophy of the rotator cuff muscles and no fatty infiltration. This is all consistent with an acute tear.
>
> It is precisely this mechanism that, in my opinion occurred with [Claimant].
>
> I agree with Dr. Hughes's report. He is correct in his conclusion that while this patient had underlying shoulder problems that she had no antecedent trauma nor any vocational or recreational activities that would account for rotator cuff tear. In addition she did repetitive lifting for over 7 years and had an acute event which ultimately was diagnosed with a full thickness rotator cuff tear. He concurs with my opinion that the MRI revealed an acute rotator cuff tear consistent with a traumatic event. He also agreed that surgical indication was reasonable and medically necessary. He also agreed that she was not at MMI and required additional physical therapy to reach MMI. This was opined by Dr. Hughes in his IME and Dr. Fall in her IME. I wholeheartedly concur.

d. Dr. Allison Fall Testimony

32. Dr. Fall testified at hearing and was accepted as an expert in physical medicine and rehabilitation, noting that she had examined Claimant previously, taken a history and reviewed medical records, which she documented in her two written IME reports. Dr. Fall explained primary and secondary risk factors for cumulative trauma conditions based on the determinations of a panel of physicians and experts that reviewed research and studies regarding the effect of repetitive work on the body. She stated that based on the Claimant's description and the demands analysis that Claimant did not have any risk factors. Dr. Fall testified consistent with her reports, stating that the medical records did not support a determination of a specific event occurring on October 6, 2020.

However, she stated that Claimant required the surgery performed by Dr. Papilion. She established that the Medical Treatment Guidelines were guidelines for physicians to assess causation and risk but that not every injured worker fit within the guidelines and had to be assessed on a case by case basis. Dr. Fall specifically acknowledged that an acute on chronic condition is where there is a chronic condition and later something acute also happens on top of the chronic condition. .

e. Other evidence

33. Respondent Insurer issued an Employer's First Report of Injury on October 9, 2020. It stated that Insurer received the report on that same day. The report specifically notes that Employer was notified on October 9, 2020 that Claimant advised she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. It does not specify the mechanism or any object that injured Claimant. It specifies that Claimant was treated at a clinic.

34. Respondents submitted a document that appears to represent a payment log for unemployment insurance payments and entitlement after reported earnings were deducted. The log identified that Claimant's entitlement began as of August 23, 2020 but that benefits started as of the week ending September 19, 2020 with some weeks with no payments. The issues of TTD and offsets were reserved by the parties and this ALJ need not go into the details of the evidence.

35. A Job Demands Analysis and Risk Factor Analysis of the Field Support Representative job was conducted by Howard Fallik of Genex on February 25, 2019. Another Claimant was listed on the document and Respondents agreed that the Claimant was not the subject of the evaluation. However, Claimant stated that the descriptions of the job were similar to the job she performed. Essential functions included collecting the supplies needed for the cleaning and stocking of the kiosks, which were carried from the warehouse to the employees personal vehicle, use of personal vehicle to transport to each kiosk location, cleaning the kiosks surfaces, collecting the merchandise from the kiosks, replacing signs and displays, loading the merchandise, securing the kiosks, receiving pallet delivery and moving boxes and maintaining positive relationships with customers. The job required lifting boxes of approximately 3 to 38 lbs., and other supplies, push a merchandising cart, reaching to perform the job, and the physical demands of job, including lifting force, positional tasks, upper extremity tasks, and total body tasks. Mr. Fallik opined that the job did not include the risk factors for a cumulative trauma as the primary and secondary factors were not present for force, repetition, awkward postures, computer work, and handheld vibratory tools. He noted that the secondary risk factor of cold environments was present. He specifically analyzed the repetitive nature of wrist motions, which are not relevant here.

36. The Division issued a letter to Claimant on April 22, 2021 advising that Respondents had denied the workers' compensation claim and could apply for a hearing.

f. Decisive Findings

37. As found, Dr. Papilion and Dr. Hughes are more credible and persuasive than Dr. Fall in her analysis of the Claimant's history and medical records.

38. As found, Claimant clearly had calcific tendinitis, which is documented prior to her injury and not work related, as it is a known complication of diabetes per Dr. Hughes opinion.

39. Also as found, Claimant sustained an acute rotator cuff tear, specifically the full-thickness 11-14 mm tear of the supraspinatus tendon with minimal medial retraction, moderate subacromial and subdeltoid bursal fluid and no rotator cuff muscular atrophy or edema. Dr. Papilion is persuasive that the critical signs here is that Claimant had no muscle atrophy and no fatty infiltration, all of which indicated an acute tear. Claimant is credible and persuasive in her testimony that, while she did have some tenderness previously to her injury, that on October 6, 2020 she felt a pop in her shoulder and an acute, specific, sharp, stabbing pain. As found, this particular event of lifting the approximately 40 lb. box to above shoulder level from the table to be placed on top of a second box, proximately caused the acute rotator cuff tear. Claimant continued to work and the repetitive motion continued to incite the pain, but the acute specific injury was already present. Dr. Hughes and Dr. Papilion persuasively noted that Claimant did not engage in activities or sports other than riding a motorcycle, which she had not done since her injury. Dr. Papilion persuasively noted that Claimant worked full duty without limitations until the work related injury despite her intermittent prior shoulder pain due to the preexisting calcification. As found, Dr. Papilion is credible and persuasive in his opinion that Claimant's weakness, pain and loss of motion are related and caused by the specific injury of October 6, 2020 when she sustained the acute rotator cuff tear.

40. As found, Claimant received reasonably necessary care from Dr. Hepp and Dr. Papilion, including the May 28, 2021 rotator cuff surgery, the arthroscopic repair, decompression and debridement, and the subsequent physical therapy and follow up care.

41. As further found, Claimant continues to require medical care that is reasonably necessary and related to the claim. Dr. Papilion, Dr. Hughes and Dr. Fall are found credible and persuasive in this matter with regard to Claimant's ongoing need for care, including continued physical therapy in order for Claimant to achieve maximum medical improvement.

42. Lastly, as found, Claimant is entitled to reimbursement of any payments made to the authorized treating providers, Dr. Hepp, Dr. Papillion, and the related care Claimant received for the rotator cuff injury including but not limited to Health Images Cherry Creek, DTC Surgery Center/Colorado Perioperative Medicine, Orthopedic Centers of Colorado, and Advanced Integrative Medicine as well as the physical therapy provider, which was not identified.

CONCLUSIONS OF LAW

A. Generally

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

(2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by Sec. 8-40-201(14), C.R.S. which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. The mere fact an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). The question of whether a claimant has proven that a particular disease was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether there is a sufficient causal relationship between the claimant's employment and the injury or disease is also one of fact, which the ALJ must determine based on the totality of the circumstances. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The Division has adopted *Medical Treatment Guidelines* (MTG) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. W.C.R.P. 17, 7 Code Colo. Regs. 1101-3. The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See Sec. 8-42-101(3.5)(a)(II), C.R.S. Exhibit 5 of Rule 17 specifically addresses Cumulative Trauma Conditions (CTD MTG), and was most recently updated in December 2016 (effective March 2, 2017). Shoulder Injury Medical Treatment Guidelines adopted December 8, 2014 and effective February 1, 2015. Pursuant to Sec. 8-42-101(3)(b) and W.C.R.P. 17-2(A), medical providers must use the MTG when furnishing medical treatment. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. The ALJ may consider the MTG as an evidentiary tool but is not bound by the MTG when making determination of causation or when determining if requested medical treatment is reasonably necessary or injury related. Sec.8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). However, the compensable nature of the claimant's industrial injury or disease is not controlled by the application of the Guidelines. In determining the compensability of a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Indus. Commission v. Riley*, 165 Colo. 586, 591, 441 P.2d 3, 5 (1968*); Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). Rather, the determination of the compensable nature of an alleged occupational disease remains controlled by the

Workers' Compensation Act and by relevant case law. The claimant sustains an occupational disease when the injury is the incident of the work, or a result of exposure occasioned by the nature of the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment. While it is appropriate to consider the Guidelines on the question of diagnosis and cause of the claimant's condition, even assuming there might have been some deviation from the Guidelines, it does not compel the fact finder to disregard the opinion of that medical expert on the issue of the causal connection between a work-related injury and a particular medical condition. See *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (May 5, 2006).

Here, Dr. Papilion and Dr. Hughes' opinions are persuasive and much more credible over the contrary opinions of Dr. Fall with regard to the causation analysis in this matter. Claimant is further credible and persuasive as to the mechanism of her injury. Dr. Papilion and Dr. Hughes are found specifically credible with regard to the fact that Claimant sustained an acute injury, when Claimant lifted the box and felt a pop in her right shoulder, causing the acute right rotator cuff tear. The lifting of the box was a specific act and incident that caused the rotator cuff tear and is the proximal cause of the October 6, 2020 injury within the course and scope of her employment with Employer. As found, Claimant was performing one of the essential functions of her job, retrieving the day boxes from her garage, where her Employer authorized their storage, for Claimant to complete the tasks of her job as a merchandiser. In the course of retrieving the day boxes, she had to move the larger storage or shipping boxes out of the way. Claimant has shown by a preponderance of the evidence that there is a direct causal relationship between her employment duties for Employer and the injury. Claimant has shown that there is a direct nexus and causal relationship between a Claimant's employment and the injury. Claimant did not sustain an occupational disease in this matter. Claimant proved by a preponderance of the evidence that she sustained a compensable specific injury on October 6, 2020 within the course and scope of her employment.

Respondents argue that this claim involves an occupational disease claim. This is not persuasive. The MTGs for Cumulative Trauma Conditions do not address shoulder pathology or rotator cuff tears. In fact Exhibit 5 makes mention of the shoulder only with regard to the examination of the upper extremity,[1] education[2] for therapeutic procedures and the exercises of the upper extremity involving nerve gliding.[3] In this ALJ's assessment of the CTC and Shoulder Injury Medical Treatment Guidelines, it is most appropriate to assess causality for Claimant's shoulder injury under the Shoulder MTG, which specifically address causation issues. Sec. 2, MTG, Rule 17, Exh. 4, specifically states in pertinent part as follows:

> **RELATIONSHIP TO WORK AND OTHER ACTIVITY:** This includes a statement of the probability that the illness or injury is medically work-related. If further information is necessary to determine work relatedness, the physician should clearly state what additional diagnostic studies or job information is required.

[1] CTC, Exhibit 5, Sec. D(1)(d), p. 10.
[2] CTC, Exhibit 5, Sec. H(3), p. 127
[3] CTC, Exhibit 5, Sec. H(13)(c), p. 162

Principles of Causation of Occupational Shoulder Diagnoses

Causation is a medical/legal analysis in the workers compensation system. The information in the Medical Treatment Guidelines pertaining to causation addresses only the evidence related to the medical analysis of causation. Actual cases may vary from the evidence presented based on specific circumstances of the claim. Work-related conditions may occur from the following:

- a specific incident or injury,
- aggravation of a previous symptomatic condition, **or**
- a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

All of these conditions must be determined based on the specifics of the work related injury or exposure.
...
Cumulative work-related causation for shoulder disorders is difficult to quantify given 1) the variable techniques used to measure work exposures and the paucity of studies which have measured exposures, 2) the lack of verified clinical exams and 3) the lack of prospective studies.
…
There is some evidence that jobs requiring heavy lifting, heavy carrying, above-shoulder work, and handheld vibration, are likely to be associated with an increased risk of symptomatic supraspinatus tendon lesions, either partial or full thickness tears.

Given all of this information, it is reasonable to consider that there is some evidence for the following causative risk factors for shoulder tendon related pathology:

1. Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.

…
It is also likely that jobs requiring daily heavy lifting at least 10 times per day over the years may contribute to shoulder disorders.
…
Given the lack of multiple high quality studies it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology.

Dr. Papilion made a causation analysis in this matter, looked at the evidence, both prior and following the surgery and his opinion that Claimant's injury was caused by both the specific injury of October 6, 2020 is more persuasive and credible than any contrary evidence. It is specifically found that he complied with the Medical Treatment Guidelines in this matter. He initially made the assessment when he reviewed the MRI diagnostic testing, which is an objective measure and finding. He later reiterated that opinion upon viewing, personally, Claimant's tissue during the surgery and continuing to opine that the rotator cuff tear was acute, not chronic, in nature. This opinion if further strengthen by Dr. Hughes' analysis. Dr. Fall, on the other hand, fails to address both of these objective measures and simply relies on the MTG for CTC for failure to meet primary and secondary factors, which is not credible.

Respondents' argument that the lack of medical providers documenting the specific incident is not persuasive as Claimant herself may not have understood the pathology of the injury in light of the preexisting prior conditions. Further, Claimant credibly testified that she explained to her providers of the incident of October 6, 2020 but was likely more focused on the fact that she continued to work and her shoulder continued to worsen due to the nature of lifting boxes and working overhead causing her increases in symptomology. This is further supported by the fact that the Employer's First Report of Injury dated October 9, 2020 stated that Employer was notified on October 9, 2020 that Claimant advised she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. There is no mention in the FROI that Claimant was making a claim for an occupational disease. This ALJ has considered the lack of documentation by providers in properly documenting the mechanism of injury and has made a conscious decision with regard to this in favor of Claimant's testimony as the more likely scenario. Based on the totality of the evidence, the fact that Claimant did not have any muscle atrophy, and the opinions of Dr. Papilion and Dr. Hughes that Claimant suffered an acute rotator cuff tear, and Claimant's testimony, Claimant has proven by a preponderance of the evidence, that it is more likely than not, that the Claimant's rotator cuff tear was proximately caused by the traumatic event on October 6, 2020, within the course and scope of her employment with Employer and is compensable.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that she sustained a work related injury on October 6, 2020, causing the rotator cuff tear, specifically the full-thickness tear of the supraspinatus tendon. Respondents stipulated that both Dr. Hepp and Dr. Papilion were Claimant's authorized providers if Claimant was able to prove compensability of the claim. Claimant was initially diagnosed by MRI findings as having a full thickness rotator cuff tear. Dr. Papilion persuasively opined that Claimant required rotator cuff surgery, which took place on May 28, 2021. Therefore, the medical care

Claimant received for the compensable injury, including the diagnostic work up, surgery and physical therapy are found to be reasonably necessary and related to the October 6, 2020 accident that Claimant sustained in the course and scope of her employment.

Both Dr. Fall and Dr. Hughes also opined that Claimant was not at maximum medical improvement and required further care, including further physical therapy. Claimant continues to require medical care that is reasonably necessary and related to the claim. Dr. Papilion, Dr. Hughes and Dr. Fall are found credible and persuasive in this matter with regard to Claimant's ongoing need for care, including continued physical therapy in order for Claimant to achieve maximum medical improvement. Claimant has proven by a preponderance of the evidence that she continues to require ongoing medical care in order to achieve MMI, including physical therapy.

D. Reimbursement of Medical Benefits Payments Upon a Findings of Compensability

Claimant is entitled to reimbursement for out of pocket expenses where she paid the providers prior to the determination of compensability.

The Act, under Sec. 8-42-101(6)(a) states as follows:

> If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud

Here, Claimant is found credible that she reported the accident to her employer immediately on October 6, 2020 when she called her supervisor to explain she had been injured as she lifted a box. The Employer's First Report of Injury dated October 9, 2020 stated that Claimant advised Employer she was injured on October 6, 2020, injuring her upper extremity, causing pain in the right shoulder. While it does not specify the mechanism, it is found that Claimant did not understand the extent of her injury only that it was pain that was different and much worse than the pain she had felt in the past. The FROI also specifies that Claimant was treated at a clinic. Respondents conceded that they had not issued a W.C.R.P. Rule 8, Section 8-2 letter and Claimant selected as her ATP her PCP, including but not limited to Dr. Hepp and Dr. Papilion, her orthopedic surgeon. Claimant stated that she made payments and is out of pocket funds she paid to her providers during the pendency of the determination regarding compensability. Claimant has shown by a preponderance of the evidence she is entitled to be reimbursed for any funds that she paid out of pocket to her providers.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's October 6, 2020 claim for her right shoulder injury of a rotator cuff tear is found compensable.

2. Respondents shall pay for all reasonably necessary and related medical care caused by the October 6, 2020 compensable accident, including for Dr. Hepp, Dr. Papillion, Health Images Cherry Creek, DTC Surgery Center/Colorado Perioperative Medicine, Orthopedic Centers of Colorado, and Advanced Integrative Medicine as well as the unidentified physical therapy provider, or other providers within the chain of referral.

3. Claimant shall submit to Insurer receipts of any out of pocket funds for purposes of reimbursement within 60 days of this order and Respondents shall have 30 days from the date of receipt to reimburse Claimant for her out of pocket expenses paid to the providers who provide reasonably necessary and related medical care to Claimant as stated above.

4. All matters not determined here are reserved for future determination.

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

DATED this 29th day of April.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-144-896-001

ISSUES

I. Whether Respondents have overcome the opinion of the DIME physician by clear and convincing evidence that Claimant is not at Maximum Medical Improvement ("MMI").

II. If the DIME opinion has been overcome by clear and convincing evidence, what is Claimant's impairment rating.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work-related injury to his lower back, while working for Employer.
2. Claimant was hired to work for Employer on August 19, 2019. Employer is a meat processing and packaging facility. Claimant was hired as a box handler and machine operator for Employer. In that position, he was tasked with lifting and unloading boxes that weighed between 35-99lbs. to a conveyor belt. (Hearing TR. pp. 20. 1-5; Claimant's Exhibit 7, pg. 28).
3. On March 28, 2020, Claimant experienced an injury to his low back, which also resulted in radicular pain radiating into his left leg. He did not begin to experience the symptoms until after he got home that night after taking a shower, when he experienced the onset of pain to his left side near the buttocks area. (Hearing TR. pp. 20. 13-20; Respondents' Exhibit C, pg. 57).
4. Claimant reported his injury the following Monday, March 30, 2020, to a nurse for Employer. (Claimant's Exhibit 23, pg. 87).
5. Claimant began to develop low back and left buttock pain that went down his left leg. He was determined to have sciatica. (Respondents' Exhibit B, pg. 48; Claimant's Exhibit 1, pg.4).
6. Claimant first treated with Daniel Hatch, DPM, complaining of pain in his left leg and foot along with a burning sensation. (Claimant's Exhibit 1, pg. 3).
7. When a nurse from Employer spoke with Claimant via telephone on May 16, 2020, about his low back, thigh, and posterior knee pain, he reported he was no longer having any pain and declined any further treatment. (Claimant's Exhibit 23, pg. 89).
8. However, on May 18, 2020, Claimant underwent an EMG. At the visit, he reported he had noticed left low back/button pain that started on March 28, 2020. He reported the pain slowly got worse that day, eventually travelling down the back of his leg to his foot. At this visit, Claimant's symptoms had returned, and he did not decline treatment.

(Claimant's Exhibit 2, pg. 10). The EMG demonstrated Claimant had a left L5 radiculopathy. Based on the EMG findings, Claimant was prescribed gabapentin and amitriptyline. (Claimant's Exhibit 2, pg. 9).

9. On May 23, 2020, and because of ongoing symptoms, Claimant underwent an MRI of the lumbar spine that revealed L5-S1 disc degeneration, a 5mm extrusion on the left posterior side of the L5-S1 disc, multilevel foraminal narrowing, and degenerative left L5 pillar edema. (Claimant's Exhibit 5, pg. 23). And based on the MRI findings, and Claimant's symptoms, Dr. Alexandra Garnett referred Claimant to neurosurgery for consideration of a microdiscectomy. (Claimant's Exhibit 5, pg. 22).

10. On June 2, 2020, Claimant had an initial visit with Carlos Cebrian, M.D. (Cebrian depo. pp. 5. 19-21).

11. Dr. Cebrian is Employer's onsite medical clinic medical director and Claimant's authorized treating physician.

12. Claimant complained of low back pain with radiation down his left leg to his foot, with some sensory complaints in the left leg. (Cebrian depo. pp. 5. 24-25; pp. 6. 1-2).

13. Dr. Cebrian recorded the pain had begun on March 29, 2020, while Claimant was in the shower, and he began to notice that his low back was hurting. Although Claimant's job involved lifting and moving boxes, Claimant did not recall a specific incident at work that had led to his pain. (Claimant's Exhibit 7, pg. 28). Despite there being no credible and persuasive evidence that Claimant previously had a 5mm disc extrusion/herniation, Dr. Cebrian opined Claimant had sustained a work-related aggravation of a preexisting and asymptomatic lumbar disc extrusion at L5-S1. (Cebrian depo. p. 6. 16-18; p. 28. 21-23). In the record from the visit, but without much explanation regarding his conclusion that the disc herniation was not caused by Claimant's work, Dr. Cebrian did conclude that it was aggravated by work. (Claimant's Exhibit 7, p. 29).

14. Claimant was referred to see Samuel Chan, M.D. for an evaluation of his reported symptoms with the possibility of an epidural steroid injection ("ESI"). (Cebrian depo. p. 7. 1-2).

15. On June 22, 2020, Claimant saw Dr. Chan for the first time. Claimant reported his back pain was still present, with radiation into his left lower extremity and affecting his second and third toes. (Claimant's Exhibit 9, pg. 33).

16. Dr. Chan reviewed Claimant's medical records and diagnosed radiculopathy of the lumbar region, a lumbar sprain, and low back pain. Dr. Chan opined Claimant had L5-S1 discogenic issues. (Claimant's Exhibit 9, pg. 34). As a result, Dr. Chan recommended a transforaminal ESI at the L5 left on the left side. (Claimant's Exhibit 9, pg. 35).

17. On July 7, 2020, when Claimant was seen by Dr. Chan again, Claimant alleged his "neurologist" was adamant he would require surgery otherwise he would not have any improvement. He was also concerned about proceeding with the ESI rather than surgery. (Claimant's Exhibit 10, pg. 37). At this appointment, Dr. Chan referred Clamant to Dr. Castro for a surgical evaluation and treatment. (Claimant's Exhibit 10, pg. 38; Exhibit 24, pg. 309).

18. At hearing, Claimant testified he disagreed with the treatment being recommended by Dr. Chan. Specifically, that he was, "made to understand that [he] would need surgery, not just the pain management." (Hearing TR. pp. 28. 3-6).

19. Claimant was of the opinion surgery was the only medical option to treat his work-related injuries. Contrary to that opinion, Dr. Chan had recommended pursuing more conservative treatment modalities, such as therapy, injections, and time, which Claimant disagreed with. (Fall depo. p. 40. 6-10).

20. On July 8, 2020, Claimant voiced his disagreement to Dr. Cebrian with the treatment recommended by Dr. Chan. Dr. Cebrian noted Dr. Chan had spent considerable time with Claimant to explain the medical treatment guidelines and his recommendation to proceed with the ESI. (Claimant's Exhibit 11, pg. 41). Based on Claimant's disagreement with the treatment recommended by Dr. Chan, Dr. Cebrian referred Claimant to see John Sacha, M.D. (Cebrian depo. p. 8. 5-7).

21. On August 14, 2020, Claimant saw Dr. Sacha. At this visit, he reported low back pain with radiation down his left leg and foot numbness and tingling. (Claimant's Exhibit 12, pg. 44). Dr. Sacha diagnosed Claimant with lumbar radiculopathy and also recommended an L5-S1 ESI, as had been recommended by Dr. Chan. (Claimant's Exhibit 12, pg. 45).

22. On September 22, 2020, Claimant returned to Dr. Cebrian. At this visit, Claimant reported his radicular symptoms down his left leg had improved. (Claimant's Exhibit 13, pg. 50). Due to ongoing nerve irritation, Dr. Cebrian recommended Claimant proceed with the ESI to help with his nerve irritation. (Claimant's Exhibit 13, pg. 50).

23. On October 8, 2020, Dr. Sacha administered the L5-S1 ESIs. (Claimant's Exhibit 15, pg. 52). Claimant had greater than 80% relief of his symptoms. As a result, Dr. Sacha concluded that Claimant had a diagnostic response to the injections. (Claimant's Exhibit 15, pg. 53).

24. At Dr. Cebrian's November 3, 2020, visit with Claimant, he could go up and down on his toes ten times. He could also move without discomfort and did not show any motor deficits. (Cebrian depo. p. 12. 22-23; p. 13. 7-12). Therefore, Claimant had some relief from the ESIs.

25. Despite Claimant having some relief from the ESIs, Dr. Cebrian opined the injections had in fact did not provide any relief of his pathology. (Cebrian depo. p. 12. 8-9). As a result, Dr. Cebrian did not recommend additional injections. (Claimant's Exhibit 16, pg. 55).

26. On November 6, 2020, Claimant was seen by a nurse at Employer for ongoing back pain. On visual examination Claimant was noted to have full range of motion and the ability to ambulate without difficulty, including bending, twisting, and pulling a sweater around his body without hesitation. (Claimant's Exhibit 23, pg. 147).

27. Claimant returned to Dr. Sacha, on November 19, 2020. Dr. Sacha determined Claimant's neurological examination was normal, demonstrating he was not having any worsening neurological symptoms. (Fall depo. p. 8. 8-15). Dr. Sacha documented while Claimant did have ongoing low back pain, he did not have as much radiation of that pain to his buttocks or leg. Dr. Sacha did not recommend repeating the injections

or any other interventional procedures and discharged Claimant back to Dr. Cebrian. (Claimant's Exhibit 17, pg. 57).

28. Claimant presented to Dr. Cebrian on December 29, 2020. Claimant specifically told Dr. Cebrian that he had an improvement in his symptoms and no longer had any lower extremity pain, but still had symptoms in his toes. (Respondents' Exhibit B, pg. 48; Cebrian depo. p. 14. 11-16). Upon physical examination, Claimant was noted to have full range of motion, no swelling, bruising, or redness of the lumbar spine, with only mild discomfort of the lumbar paraspinal muscles. (Respondents' Exhibit B, pg. 49). On physical examination there were no neurological findings such as weakness, sensory abnormalities, or other indications of nerve root compression at that time. (Cebrian depo. p. 14. 20-24). Claimant's range of motion measurements were all within normal limits. (Cebrian depo. p. 16. 6-7). Dr. Cebrian placed Claimant at maximum medical improvement ("MMI") that day and determined based on his level II training, Claimant sustained a 7% whole person rating based on permanent impairment of his disc pathology at the L5-S1 level pursuant to Table 53 II(C) based on disc abnormality given the L5-S1 disc extrusion. (Respondents' Exhibit B, pg. 49; Cebrian depo. p. 16. 12-17).

29. At his post-hearing deposition, Dr. Cebrian testified Claimant was found to have no neurological permanent impairment when he was placed at MMI. (Cebrian depo. p. 16. 23-25).

30. Dr. Cebrian did recommend permanent work restrictions but opined no maintenance care was necessary to maintain Claimant at MMI. (Respondents' Exhibit B, pg. 49).

31. At hearing, Claimant alleged to still be experiencing lower back pain, swelling in his toes, and radiation of the pain down his leg prior his placement at MMI on December 29, 2020. He also felt as though his second and third toe were, "crossing over each other and that [he] still had the burning and the tingling sensation in [his] toes." (Hearing TR. pp. 30. 10-12; 22-24).

32. Dr. Cebrian testified that the type of symptomology Claimant reported involving his toes is not consistent or associated with L5 radiculopathy. (Cebrian depo. p. 38. 24-25; p. 43. 4-9).

33. Some of Claimant's testimony at hearing is contradicted by the medical records entered into evidence, which document Claimant's denial of any radiation of his pain. (Hearing TR. pp. 34. 17-20). On the other hand, Claimant still complained of some radiating symptoms into his left lower extremity at some of his appointments.

34. When asked about that contradiction at hearing, Claimant testified that he believed Dr. Cebrian was not telling the truth in his documentation of Claimant's denial any of radiation of his pain. (Hearing TR. pp. 34. 20-21). Again, while Claimant might not have had pain radiating into his left lower extremity, he had ongoing symptoms radiating into his left lower extremity.

35. Claimant testified that the radiation of pain continued through January 2021. That testimony was contradicted by Dr. Cebrian's notes in the medical record from his January 26, 2021, visit with Claimant. (Hearing TR. pp. 36. 20-22). But at that visit Claimant did report an increase in his back pain complaints with some tingling in his

foot. (Cebrian depo. p. 17. 13-16; Claimant's Exhibit 23, pg. 233). Therefore, while Claimant did not have radicular pain, he still had radicular symptoms.

36. On April 29, 2021, Claimant was seen by a nurse in Employer's medical clinic. At this visit, Claimant reported he had gone to Boondocks amusement park over the prior weekend and then experienced an onset of pain following the weekend – on Monday. At this visit, Claimant complained of low back pain. (Claimant's Exhibit 23, pg. 300).

37. On May 4, 2021, Claimant was seen by Dr. Cebrian for a one-time follow-up visit. (Claimant's Exhibit E, pg. 69). Dr. Cebrian noted in the record from the visit Claimant told him he had an increase in pain, specifically in his left leg, after going to Boondocks amusement park over the weekend with his son. (Respondents' Exhibit E, pg. 69; Cebrian depo. p. 18. 13-15). Claimant also told Dr. Cebrian he had not been performing his home exercise program but that his modified work was aggravating his symptoms. (Respondents' Exhibit E, pg. 69-70; Cebrian depo. p. 24. 9-11).

38. Dr. Cebrian offered to watch a video of the bone-sorting position Claimant had been working in with Employer to determine whether it had been causing his discomfort. Dr. Cebrian opined the video appeared to require Claimant to perform work within his assigned permanent work restrictions. (Respondents' Exhibit E, pg. 69; Cebrian depo. p. 19. 1-19). Despite Claimant working within the restrictions provided by Dr. Cebrian, the job still aggravated his condition and made his symptoms worse. That said, Dr. Cebrian opined Claimant remained at MMI. (Respondents' Exhibit E, pg. 69).

39. Dr. Cebrian testified there was nothing that had significantly changed in Claimant's medical condition that warranted reversing his placement at MMI. (Cebrian depo. p. 20. 9-14).

40. Dr. Cebrian testified during his post-hearing deposition, there was nothing specific to Claimant's work-related injury that suggested he was no longer at MMI. (Cebrian depo. p. 20. 17-18).

41. Although Claimant had told Dr. Cebrian and his nurse during the visit that he had a recurrence of his left leg pain after going to Boondocks, Claimant testified at hearing that he had lied to Dr. Cebrian about the trip to Boondocks, "to see what they would say." (Hearing TR. pg. 38. 11-19). Claimant testified that "that they would take anything I was saying to them and run with it and make it seem like [he] was doing something wrong." (Hearing TR. pp. 39. 9-11).

42. Claimant explained at hearing that by lying to the nurse and Dr. Cebrian, it would cause him to be referred for additional treatment. (Hearing TR. pp. 42. 12-13).

43. Respondents filed a Final Admission of Liability ("FAL") on February 10, 2021, admitting for Claimant's placement at MMI on December 29, 2020, the 7% whole person rating assigned by Dr. Cebrian, $25,758.58 in PPD benefits, and no maintenance medical care pursuant to Dr. Cebrian's recommendations. (Respondents' Exhibit B, pg. 40).

44. After his placement at MMI, Claimant continued to work for Employer in a job position that required duties within his assigned permanent work restrictions. During that time, he did not seek any medical treatment to obtain a follow-up opinion on whether he remained at MMI. (Fall depo. p. 10. 16-25)

45. Claimant's employment with Employer was terminated on May 25, 2021. (Hearing TR. pp. 33. 21-22).

46. Claimant requested – and attended - a DIME with Ranee Shenoi, M.D. on September 28, 2021. (Claimant's Exhibit 20, pg. 68).

47. Claimant told Dr. Shenoi he had pain in his left leg and low back. He also reported pain in his left big toe, second, and third toes along with burning in his left third toe. (Claimant's Exhibit 20, pg. 70).

48. Dr. Shenoi opined Claimant was not at MMI based on his acute L5-S1 disc herniation that required additional treatment including physical therapy, additional ESIs, a surgical consultation, and a follow-up EMG. (Claimant's Exhibit 20, pg. 71).

49. Although Dr. Shenoi opined Claimant was not at MMI, he was assigned a provisional permanent impairment rating of 20% whole person based on a 6% rating for lumbar range of motion deficits, a 7% rating for specific disorders of the spine under Table 53(II)(C), and a 9% rating for neurological deficits for Claimant's L5-S1 disc herniation and left L5 radiculopathy. (Claimant's Exhibit 20, pg. 72).

50. Dr. Shenoi did not explain the difference in her opinion about Claimant's proximity to MMI and permanent impairment from those determined by Dr. Cebrian.

51. In a September 28, 2021, addendum to the DIME report, Dr. Shenoi opined it was unlikely Claimant has S1 radiculopathy. (Claimant's Exhibit 20, pg. 78).

52. Allison Fall, M.D., a Level II accredited medical expert in physical medicine and rehabilitation, performed an independent medical examination ("IME") of Claimant on December 8, 2021. (Respondents' Exhibit C, pg. 57).

53. At the IME, Claimant told Dr. Fall that "his back hurts 24 hours a day, seven days a week." He also described an incident in which he was changing a tire that caused, "his whole left side and leg [to go] into a 'frenzy" for a period of time. (Respondents' Exhibit C, pg. 57). According to Dr. Fall, Claimant provided no other explanation for his recurrence of pain, to that extent and at that time, other than the incident related to the tire. (Fall depo. p. 27. 15-18).

54. He also alleged that on some mornings, he had radiation of pain down his leg, but that it was not as severe as the pain in his low back. (Respondents' Exhibit C, pg. 58).

55. Dr. Fall reviewed the medical records related to the treatment Claimant received prior to and after the injury in this case. She also reviewed Dr. Shenoi's DIME report. Dr. Fall also noted that Claimant smokes a half-pack of cigarettes every day and has done so for the past nine years. (Respondents' Exhibit C, pg. 60).

56. Dr. Fall's assessment was a left L5-S1 disc extrusion with left L5 radiculopathy, for which he had been placed at MMI on December 29, 2020. (Respondents' Exhibit C, pg. 61). She stated that on that date, Claimant had resolution of his leg pain symptoms, there was no indication for additional injections, surgery was unlikely to have improved his condition, and his condition was overall stable. (Fall depo. p. 9. 2-7).

57. Dr. Fall also opined Dr. Shenoi erred in determining Claimant had not yet reached MMI, as the medical records documented Claimant had much better range of motion and no leg symptoms when he was last treated by Dr. Cebrian. (Respondents' Exhibit C, pg. 61).

58. At her pre-hearing deposition, Dr. Fall testified there was no objective medical evidence contained in the medical records through December 29, 2020, that Claimant did not reach MMI on that date. (Fall depo. p. 8. 13-18). She also testified that there was no objective medical evidence that Claimant's work in the six months after he was placed at MMI aggravated, accelerated, or exacerbated his work-related condition. (Fall depo. p. 10. 12-15). Additionally, Dr. Fall testified Claimant's weight, being 5' 10" and weighing 271lbs., does place more stress on his lumbar spine and plays a role in degeneration as well as disc bulges, protrusions, and extrusions. (Fall depo. p. 14. 22-25; p. 16. 19-21).

59. Dr. Fall also opined Dr. Shenoi had erred in not accounting for the difference in her range of motion measurements and examination findings compared with those of Dr. Cebrian. (Respondents' Exhibit C, pg. 61). As the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition ("AMA Guides") state, "if two medical evaluators have a difference in impairment rating, this needs to be accounted for." (Respondents' Exhibit C, pg. 61; Fall depo. p. 25.13-17). Dr. Fall stated that Dr. Shenoi had failed to account for the alleged worsening of Claimant's symptoms and decreased range of motion. (Respondents' Exhibit C, pg. 61).

60. The ALJ finds that Claimant's back and leg symptoms waxed and waned. For example, on May 16, 2020, Claimant stated that his symptoms had resolved and that he did not want any additional treatment. But just a couple of days later, on May 18, 2020, he presented for an EMG for ongoing pain and radicular symptoms and was diagnosed with radiculopathy. As a result, the ALJ finds that when Claimant was placed at MMI by Dr. Cebrian, his symptoms were better. But, shortly afterward, his symptoms returned and that the return of his symptoms was due to his underlying work injury that resulted in a herniated disc.

61. While Claimant told his providers he got worse after going to Boondocks, Claimant stated that he lied about going to Boondocks. Despite Claimant's contention that he lied about going to Boondocks, the ALJ does not discredit all of Claimant's testimony. In the end, the ALJ finds that Claimant's symptoms waxed and waned, and he was placed at MMI during a time when his symptoms were better - temporarily.

62. The ALJ also finds that Claimant did go to Boondocks, but that such activity did not cause his symptoms to get worse. Claimant merely had symptoms after going to Boondocks. The ALJ finds that Claimant did have a temporary increase in symptoms after changing his tire. But the ALJ finds that changing the tire did not aggravate his underlying condition and sever the causation connection between his work injury and need for medical treatment. The increase in symptoms was merely a consequence of his underlying work injury – a herniated disc.

63. The opinions of Drs. Cebrian and Fall regarding Claimant being at MMI is merely a difference of opinion between them and the DIME physician, Dr. Shenoi.

64. Dr. Shenoi's opinion, that Claimant is not at MMI, is supported by the medical records and Claimant's testimony. As previously found, Dr. Chan did refer Claimant to Dr. Castro, a surgeon, for evaluation and treatment. Plus, Dr. Garnett also recommended a neurosurgery evaluation for a possible microdiscectomy. Such evaluations, however, did not occur.

65. A surgical evaluation is reasonably expected to define Claimant's current condition and suggest further treatment to cure Claimant from the effects of his work injury.

66. The ALJ credits the opinions expressed by Dr. Shenoi in her DIME report that Claimant is not at MMI because he needs additional medical treatment that is intended to define the extent of his injury as well as cure Claimant from the effects of his work injury. This includes physical therapy, additional ESIs, a follow-up EMG, as well as a surgical evaluation. As a result, the ALJ finds that Respondents have failed to overcome that opinion by clear and convincing evidence.

67. The ALJ reviewed the deposition testimony of Dr. Cebrian and Dr. Fall. Regarding Dr. Cebrian's testimony, it would appear that Dr. Cebrian is essentially in agreement with Dr. Shenoi's "Clinical Diagnosis." In particular, the pain generator was L5 radiculopathy resulting in the Claimant experiencing symptoms in his left foot. (Dr. Cebrian's deposition transcript P.37 L. 5-12 P. 32 L. 23-25 and P. 33 L. 23- 25 and P. 33 L.1-25). It is noted there is agreement between Dr. Cebrian and Dr. Shenoi that S1 is not the pain generator. (Dr. Cebrian's deposition transcript P. 33 L. 14-25, P. 34 L.1-25, P. 35 L. 1-12). Dr. Cebrian agreed that Dr. Sacha's injection at L5-S1 was diagnostic. (Dr. Cebrian's deposition transcript P. 12 L.13-17). Of relevance, when Claimant was placed at MMI by Dr. Cebrian, he was experiencing symptoms in his left foot and when he was being reassessed by Dr. Cebrian on January 29, 2021, he was continuing to experience symptoms in his left foot. Per Dr. Cebrian, throughout his treatment of Claimant, this was a consistent complaint. (Dr. Cebrian's deposition transcript P. 38 L14-25, P. 39 L.1-25 P. 40 L.1-12). Dr. Cebrian placed the Claimant at MMI on December 29, 2020, indicating there were no neurological findings or examination, including weakness, sensory abnormalities, or any indication the Claimant was having any nerve root compression at that time. (Dr. Cebrian's deposition transcript P. 14 L.17-25). However, Dr. Cebrian's documentation of Claimant experiencing ongoing left foot symptoms is inconsistent with his deposition testimony, particularly in regard to Claimant not having nerve compression problems when he was placed at MMI. Regarding Dr. Fall's testimony, the ALJ notes that Dr. Fall agreed based on the findings of the MRI as well as the EMG – that referral to neurosurgery was reasonable. (Dr. Fall's deposition testimony P. 36 L. 15-25*)*. In addition, Dr. Fall agreed that Dr. Chan's referral to Dr. Bryan Castro for surgical evaluation and treatment was reasonable. (Dr. Fall's deposition transcript P. 39 L. 5-23*)*. Dr. Fall indicated in her IME report, "A repeat MRI and EMG nerve conduction studies may be helpful to see if there has been improvement in the MRI and/or acute EMG findings." In addition, Dr. Fall testified that these diagnostic findings would indicate one way or the other whether the Claimant was a surgical candidate. (Dr. Fall Deposition Transcript P.54 L. 24-25, P. 55 L. 1-25, and P. 56 L. 1-25). It is noted Dr. Cebrian agrees with Dr. Fall about the MRI and EMG nerve conduction studies. (Dr. Cebrian's Deposition Transcript P. 23 L. 9-23). The ALJ also notes that Dr. Fall under

"Review of Systems" states, "significant for numbness or tingling at the left foot and first three toes." Dr. Shenoi in her DIME report concerning the results of her physical examination stated. "Neurological exam revealed decreased sensation on the top of the left foot and left calf to light touch." Both Dr. Fall and Dr. Shenoi are reporting neurological deficits in Claimants left lower extremity. It is also noted both Dr. Fall and Dr. Shenoi are reporting positive pain findings when testing Claimant's left SLR. Dr. Fall agreeing with Dr. Cebrian's opinion about the Claimant achieving MMI on December 29, 2020, because of normal neurological examination and normal range of motion etc. is inconsistent with her own findings regarding deficits in range of motion, positive neurological findings, and her recommendation for additional diagnostic testing to rule in or rule out surgical intervention.

68. In this case, based on the review of the DIME report from Dr. Shenoi, the deposition testimony of Drs. Fall and Cebrian, Claimant's testimony, and the corresponding medical records, the ALJ finds and concludes Respondents have failed to establish that it is most likely true and free from substantial doubt that Dr. Shenoi erred in finding Claimant not at MMI for the effects of his March 28, 2020, work related injury.

69. The ALJ will not address what whole person impairment rating should be assigned because Dr. Shenoi's medical impairment rating was "provisional" as Claimant is not at MMI. Since Claimant is not at MMI, the Claimant's permanent medical impairment rating is not ripe for adjudication.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See*

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

I. Whether Respondents have overcome the opinion of the DIME physician by clear and convincing evidence that Claimant is not at Maximum Medical Improvement ("MMI").

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Based on the review of the DIME report issued by Dr. Shenoi, which the ALJ credits, plus the testimony of Dr. Cebrian, Dr, Fall and Claimant, and the medical records entered into evidence, the ALJ finds and concludes that Respondents have failed to overcome by clear and convincing evidence the opinion of Dr. Shenoi that Claimant is not at MMI. Claimant's symptoms waxed and waned. Therefore, the fact that his symptoms were not as bad when he was placed at MMI does not mean that he was at MMI at that time.

It was medically documented that Claimant suffers from chronic radiating pain and symptoms into his left leg and foot due to his L5 disc herniation. Prior to Claimant being placed at MMI, there were two referrals for surgical evaluations which were never completed. It is noted that Dr. Fall, the IME physician, agreed these referrals were reasonable. A surgical evaluation is reasonably expected to define Claimant's current condition and suggest further treatment to cure Claimant from the effects of his work injury. As a result, the need for a surgical evaluation is inconsistent with a finding of MMI. Plus, Dr. Shenoi is of the opinion that Claimant needs additional physical therapy and ESIs before he can be placed at MMI. Thus, the ALJ finds and concludes that Respondents have failed to overcome Dr. Shenoi's opinion that Claimant is not at MMI by clear and convincing evidence. Therefore, Claimant is not at MMI.

ORDER

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

1. Claimant is not at MMI.

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

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

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

DATED: April 29, 2022.

/s/ Glen Goldman

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury to his low back on April 2, 2018.[1]

FINDINGS OF FACT

1. Claimant began working for Employer as a relief operator in 2013. Claimant's job duties involved lifting, bending and twisting.

2. Claimant has a prior history of low back problems and treatment, including a surgery at L4-5 in the mid 1990s and a subsequent surgery at the L5-S1 level in 2003.

3. On December 5, 2015, Claimant suffered a low back injury while working for Employer (WC No. 5-103-240). This was a no lost-time claim.

4. Claimant sought care for his 2015 back injury with his primary care physician, Anna Roth Wilkins, M.D., on December 8, 2015. Claimant reported that he had strained his back at work on December 5, 2015. He conveyed a long history of back pain with surgeries. Claimant reported that the numbness in his great toes was his baseline. Dr. Wilkins characterized Claimant's condition as a recurrent problem.

5. Claimant did not initially report his 2015 back injury as a workers' compensation claim. Claimant testified that when he called off work shortly after the injury and told his manager that he hurt his back at work, the manager required him to report it as a workers' compensation claim.

6. Claimant subsequently underwent treatment with Kevin Keefe, M.D. at Employer's authorized clinic, Workwell. Dr. Keefe placed Claimant at maximum medical improvement ("MMI") on January 4, 2016 with no permanent impairment, restrictions or need for maintenance care.

7. Claimant testified that he received a written warning from Employer for his failure to timely report his 2015 work injury. He further testified that due to his failure to timely report the injury, Employer required him to present a PowerPoint presentation to his

[1] Two claims were consolidated for hearing (WC No. 5-103-242, DOI April 2, 2018, and WC No. 5-103-241, DOI March 29, 2016). After discussion between the parties at the outset of hearing, it was determined that the hearing would proceed only on the issue of compensability under WC No. 5-103-242 (DOI April 2, 2018). All additional issues were held in reserve for future determination.

superiors regarding the injury and how it could be avoided. He testified that this experience was degrading and humiliating, as was working light duty.

8. Claimant alleges he sustained another work injury on or around March 29, 2016 (WC No. 5-103-241) while lifting and shoveling.

9. Claimant did not report a work injury to Employer at the time. He testified he did not report the alleged March 2016 injury to Employer as being work-related because he did not want to go through all the steps Employer had required of him for his 2015 injury. Claimant further testified that his goal was to continue working for Employer and ultimately become a supervisor. Claimant believed from his experience with the 2015 injury he would not be able to achieve those goals if he reported the alleged work injury.

10. Claimant again sought treatment with Dr. Wilkins on March 29, 2016. Claimant reported to Dr. Wilkins that he had ongoing pain in his low back and previous surgeries. He stated that he had an exacerbation of symptoms since the December 2015 injury, and had no improvement with conservative management for three months. Claimant reported a new symptom of weakness in his right leg. Dr. Wilkins' medical note contains no mention of any reported work-related mechanism of injury or any specific incident leading to Claimant's complaints.

11. Claimant testified that he did not report any work event to Dr. Wilkins at the time because he did not want to involve workers' compensation due to his prior experiences.

12. Claimant obtained a certification for leave under the Family and Medical Leave Act ("FMLA") from Dr. Wilkins for his back pain for the period of December 2015 through January 2016.

13. Claimant also underwent evaluation and treatment for his low back with Hans Coester, M.D. At a June 16, 2016 evaluation with Dr. Coester, Claimant described having a long history of intractable pain, tingling, and numbness in his right leg. Dr. Coester reviewed an April 21, 2016 lumbar MRI and recommended Claimant undergo a L3-4 and L4-5 right-sided laminectomy and possible discectomy. He predicted that Claimant would never be pain free. Dr. Coester performed the recommended surgery on Claimant on July 14, 2016.

14. On September 20, 2016, Dr. Wilkins cleared Claimant to return to work beginning October 10, 2016 at a position with Employer that would not require repetitive twisting, bending, or lifting. Claimant underwent a lift test with Employer on October 11, 2016. In the associated questionnaire, Claimant represented that he had no lifting or pulling restrictions from a physician, and that he had not recently had a surgery that would limit his lifting or pulling. Claimant He denied back pain and denied that a doctor ever told him that he had a bone, joint, or musculoskeletal problem that was made worse by exercise, or that he was under medical care for any such condition. He denied being on any medication, despite being on several medications, including cyclobenzaprine and oxycodone, as listed in Dr. Wilkins' September 20, 2016 report.

15. Claimant returned to work performing his regular job duties in October 2016 . He continued to experience back pain. Claimant continued to suffer back pain. On May 25, 2017, the nurse practitioner at his family clinic described Claimant's history of chronic low back pain. Claimant informed her that he would have flare-ups with back spasms that would prevent him from bending and lifting, causing him to miss work, and leading him to again request leave under FMLA.

16. Claimant presented to Alyssa Gonzalez, D.O. on February 26, 2018. He reported new worsening symptoms of right calf pain, right groin pain, and the sensation of cold in his right lower extremity. Dr. Gonzalez was initially worried that the symptoms were coming from an aneurysm, which was later ruled out.

17. On March 15, 2018, Claimant saw William Oligmueller, M.D. with continued complaints of right calf pain. The medical record contains no mention of an injury-causing event. Dr. Oligmueller could not point to a specific cause of the symptoms, but noted he did not feel there was a circulation or nerve issue.

18. Claimant alleges he sustained a subsequent work injury to his low back on or around April 2, 2018. Claimant testified that a pipe burst, causing whey to fall to the floor. Claimant testified he used a five-gallon bucket and shovel to pick up the whey, and then carried the whey up and down stairs. Claimant testified that this involved lifting and carrying up to 80 pounds. Claimant testified that, upon finishing the task, he had significant low back pain, worse than what he had previously experienced from his 2015 and 2016 injuries.

19. Claimant did not work on April 2, 2018.

20. Claimant again did not report the alleged April 2018 injury to Employer. Claimant testified that he did not do so for the same reasons he failed to report his alleged 2016 work injury to Employer.

21. Claimant sought care with Dr. Wilkins on April 2, 2018. Claimant complained of right leg pain and numbness, which had been occurring for about a month. Claimant also reported right groin pain that worsened with physical activity at work. Claimant specifically denied any recent injury. Dr. Wilkins ordered a lumbar x-ray and referred Claimant back to Dr. Coester and a possible MRI. The medical record from this date is devoid of any mention of a specific incident.

22. Dr. Coester's PA evaluated Claimant on April 4, 2018. Claimant reported progressive back pain, right lower extremity radicular pain, and numbness and weakness that had been progressing over the previous two months. Claimant specifically denied any precipitating event, only a progression of symptoms.

23. Claimant last worked on April 9, 2018.

24. Claimant returned to Dr. Wilkins on April 18, 2018. Dr. Wilkins removed Claimant from work for four weeks due to the physically demanding nature of his job, noting Claimant was unable to lift, twist, or bend at that time. Claimant was instructed to follow-up with neurosurgery and review the MRI results with the neurosurgeon. Dr. Wilkins stated in her note of April 18, 2018, that Claimant had chronic low back pain, and an exacerbation, and that the exacerbation started over a month ago. Dr. Wilkins did not specify any work-related incident leading to the exacerbation.

25. On May 1, 2018, Claimant asked Dr. Wilkins to complete FMLA paperwork due to his low back pain.

26. On May 12, 2018, Dr. Coester performed a laminectomy and discectomy at the right L4-5 level, and decompression of the right L5 nerve root. The post-operative diagnosis was recurrent right-sided L4-5 disc herniation with right L5 radiculopathy.

27. Claimant continued to experience low back issues post-operatively despite undergoing a course of treatment. On August 15, 2018, Claimant reported to Dr. Coester's PA a sudden return of back pain and right leg radicular symptoms while working with a therapist two weeks earlier. Examination showed worsening weakness on the right side. On September 5, 2018, Dr. Wilkins referred Claimant to physical therapy for a disability evaluation. On October 29, 2018, Dr. Wilkins noted Claimant was currently on short term disability and was planning on applying for long term disability. Dr. Wilkins continued to keep Claimant off of work due to the physical nature of his job.

28. Claimant received an opinion from William Biggs, M.D. an orthopedic surgeon, on whether an additional surgery would help him to return to work. It was ultimately determined that the Claimant would not proceed with any surgery. Dr. Wilkins ultimately determined that Claimant was unable to work in any capacity due to limitations brought on by his low back condition.

29. On March 22, 2019, Employer notified Claimant that his leave was expiring. Claimant notified Employer that, due to his back issues, he would no longer be able to perform the duties for his job and resigned on April 14, 2019.

30. Claimant testified that during his course of physical therapy in recovering from the 2018 injury, his physical therapist recommended that he report his injuries as work-related.

31. On March 27, 2019, Claimant filed a claim for workers' compensation alleging that he sustained an injury to his low back while at work on April 2, 2018. The injury was allegedly caused by "lifting, shoveling bags of whey powder." (Cl. Ex. 8, p.198).

32. Also on March 27, 2019, Claimant filed a claim for workers' compensation benefits alleging that he sustained an injury to his low back while at work on March 29, 2016. The injury was allegedly caused by "lifting, shoveling bags of whey powder." (Cl. Ex. 9, p.199).

33. Claimant testified that he was unaware of the exact dates of his injuries. He testified that the dates utilized for his dates of injury were the dates he reported to his physician, Dr. Wilkins, for treatment for low back pain which he believes was caused by his work activities for Employer.

34. Respondents denied both claims.

35. On September 7, 2019, Elizabeth Bisgard, M.D. conducted an independent medical examination ("IME") at the request of Respondents. Dr. Bisgard noted that, according to the medical records and the history reported to her by Claimant, there was no evidence of work injuries that occurred around March 29, 2016 or April 2, 2018. She noted Claimant could not recall any specific event that caused an injury, despite her specifically asking him multiple times. Based on the records, including multiple imaging studies, Dr. Bisgard concluded Claimant had a long-standing history of degenerative changes dating back to the 1990s, and that his condition had gradually worsened, and continues to worsen, with increased stenosis and symptoms due to arthritic changes. She opined that the need for further surgery was due to Claimant's ongoing degenerative changes.

36. Dr. Bisgard testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Bisgard testified consistent with her IME report and continued to opine there is no evidence of any April 2018 work-related injury. Dr. Bisgard reiterated her opinion that Claimant's condition and need for treatment are the result of the natural progression of his chronic, longstanding, deteriorating degenerative condition. Dr. Bisgard testified that Dr. Coester performed repeat back surgery in May 2018 due to his belief that Claimant had a reherniated disc. She explained that a disc herniation can result from chronic degenerative changes, opining that Claimant's 2018 back surgery was due to the progression of degenerative changes and not any specific event.

37. The ALJ finds the opinion and testimony of Dr. Bisgard, as supported by the medical records, more credible and persuasive than Claimant's testimony.

38. The ALJ finds that Claimant failed to prove it is more probable than not he sustained an injury arising out of and during the course of his employment with Employer on or around April 2, 2018.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

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

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

As found, Claimant failed to meet his burden to prove he sustained a compensable industrial injury on or around April 2, 2018. Claimant has an extensive, longstanding history of chronic low back problems. Claimant alleges that a specific work event on or around April 2, 2018 resulted in increased back symptoms. Claimant did not report his alleged work injury to Employer, nor is there any reference in the medical records to the alleged specific event Claimant now claims exacerbated his condition. Claimant was aware of the expectation that he timely report any work injuries and had been previously reprimanded for his failure to do so. Despite this, Claimant purports that he simply chose not to report the alleged April 2018 injury because he had previously felt demeaned by Employer. The ALJ is not persuaded by Claimant's explanation. A reasonable person under Claimant's circumstances would promptly report such injury. Claimant only chose to report the alleged injury after undergoing extensive treatment and a significant period of disability that caused Claimant to separate from his employment. Claimant's failure to previously report the alleged injury, as well as the absence in the medical records of any mention of the alleged specific event undermines Claimant's contention that he did, in fact, suffer a work injury in April 2018.

Additionally, there is insufficient medical evidence establishing Claimant sustained the alleged work injury. While Claimant may have experienced symptoms at some point at work in April 2018, the preponderant evidence does not establish the requisite causal nexus between Claimant's work and his condition and need for treatment. Dr. Bisgard credibly and persuasively opined that Claimant's condition and need for treatment is the result of the natural progression of his longstanding, deteriorating degenerative back condition. To the extent Claimant suffered a reherniated disc, Dr. Bisgard credibly explained such condition was more likely due to Claimant's chronic degenerative condition and not any acute event. Here, the preponderant evidence does not establish Claimant sustained a compensable industrial injury.

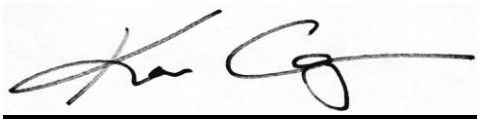
ORDER

1. Claimant failed to prove he sustained a compensable industrial injury on or around April 2, 2018. Claimant's claim for benefits is denied and dismissed.

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

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

DATED: April 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts