OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-127-859-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the admitted 19% scheduled impairment of his left upper extremity should be converted to an 11% whole person impairment rating.

II. Whether Claimant proved he sustained a serious and permanent disfigurement as a result of his work injury entitling him to a disfigurement award.

FINDINGS OF FACT

1. Claimant, a 55-year-old left-hand dominant male, sustained an admitted industrial injury on January 4, 2020 when he felt a pop in his left shoulder while grabbing and pulling a pallet. Claimant reported the incident to Employer but was able to finish the one hour remaining of his shift.

2. Claimant sought treatment at the emergency department of St. Joseph's Hospital on January 6, 2020 and underwent x-rays of the left shoulder, which showed no acute findings. Later that day Claimant also saw Jennifer Pula, M.D. at Employer's Employee Health and Wellness Center. Claimant reported feeling and hearing a pop in his left shoulder that extended to his elbow. He complained of severe pain and limited range of motion in the left shoulder. He denied neck or back pain. Examination of the spine was normal. Dr. Pula referred Claimant for MRIs of the left shoulder and elbow.

3. Claimant underwent the recommended MRIs on January 11, 2020. Scot E. Campbell, M.D. documented the following impression of the left shoulder MRI:

> 1. Full-thickness tears of the supraspinatus and subscapularis tendons.
> 2. Larger articular surface partial tear of the supraspinatus tendon as well.
> 3. Medial dislocation of the long head biceps tendon from the bicipital groove.
> 4. SLAP tear with extension into the biceps/labral anchor and the posterior labrum with paralabral cysts.
> 5. Moderate arthrosis of the acromioclavicular joint.

(Cl. Ex. p. 3)

4. Dr. Pula reviewed the MRIs with Claimant on January 13, 2021 and referred him to Patrick McNair, M.D. for an orthopedic shoulder evaluation.

5. Claimant first presented to Dr. McNair on January 14, 2020. Dr. McNair examined Claimant and reviewed his imaging studies. He recommended surgical intervention with

arthroscopic left supraspinatus tendon repair, arthroscopic left subscapular tendon repair, subacromial decompression and potential biceps tenotomy.

6. On February 24, 2020 Claimant underwent surgery of the left shoulder performed by Dr. McNair. The procedures noted in the operative report included arthroscopic subcapularis repair, arthroscopic supraspinatus tendon repair and arthroscopic subacromial decompression to include acromioplasty. Findings during surgery included: a high-grade partial-thickness tear of the subscapularis; complete disruption of the supraspinatus; thick subacromial bursitis; and stability of the post rotator cuff repair. Dr. McNair noted, "[t]he articular surface of the humeral head and glenoid were pristine. The bicipital labral anchor was pristine; The circumferential labrum was without injury" and "the inferior glenohumeral pouch demonstrated no loose bodies. The glenohumeral ligaments were without injury." (Cl. Ex. p. 4). No complications were noted.

7. Claimant subsequently underwent several sessions of post-operative physical therapy at Rocky Mountain Spine and Sport Physical Therapy. On March 11, 2020 Claimant reported pain throughout his left shoulder girdle and down his biceps and lateral upper arm. He complained of difficulty sleeping due to pain. The physical therapist noted tenderness throughout Claimant's shoulder and upper trapezius. Claimant was treated with some neuromuscular reeducation in the scapular area.

8. On May 7, 2020 Claimant reported to Dr. Pula that he could move his left shoulder above his head and his range of motion was continuing to improve. He reported continued achy burning pain in the left shoulder.

9. As of May 11, 2020 Claimant had attended 26 physical therapy sessions. At this session, the physical therapist noted improved range of motion but lack of strength.

10. Claimant attended a follow-up evaluation with Dr. McNair on June 23, 2020. Claimant reported experiencing pain with range of motion, shoulder stiffness, and pain and difficulty with overhead activities. Dr. McNair noted that there was not a guarantee the rotator cuff had healed but there were positive indications it had. Due to persistent post-injury and post-surgical inflammation, Dr. McNair administered a corticosteroid injection in Claimant's left subacromial space. He released Claimant to work with restrictions of no lifting, pushing or pulling greater than five pounds and no lifting, pushing or pulling above the shoulder.

11. Dr. McNair reevaluated Claimant on July 29, 2020. Claimant reported that the injection did not provide him any significant benefit. Dr. McNair noted that Claimant was doing well overall and that most of the significant injury to Claimant's shoulder had healed. He noted, however, that Claimant did not have all of his range of motion nor normal body mechanics and strength for his normal work activities involving heavy lifting, pushing and pulling. He recommended Claimant undergo a work performance, work hardening and strengthening program.

12. Claimant continued to participate in physical therapy with noted continued difficulty with external rotation, adduction and overhead movement. On September 29, 2020, the physical therapist noted significant spasms and tissue restrictions in the rotator cuff, latissimus biceps, and pectorals. On October 1, 2020, Claimant reported that he had been getting headaches 3-4 times a week for several months. The physical therapist felt that Claimant's headaches were related to muscle tension. Claimant's headache resolved with treatment. The physical therapist recommended more treatment to the muscles of the shoulder girdle, scapulothoracic joint, chest and mid-back.

13. On October 26, 2020, Claimant filled out a pain diagram which reflected 1/10 pain and 8/10 function. Claimant indicated on the diagram that he was experiencing symptoms of aching in the anterior and posterior shoulder at approximately the glenohumeral region as well as the posterior arm in the triceps region.

14. On October 29, 2020, Dr. Pula placed Claimant at maximum medical improvement ("MMI") with a 4% scheduled impairment of the upper extremity (2% whole person) for loss of range of motion. At the time of Dr. Pula's examination, Claimant reported 1/10 pain and 8-9/10 level of function. On examination, Dr. Pula noted adduction, abduction, extension and external rotation were within normal functional ranges. Flexion and internal rotation were 157 degrees and 39 degrees, respectively. She noted Claimant was able to perform all of the functions of his current position as a blow mold operator, which did not require more than five pounds of overhead lifting. Claimant was discharged from care with no permanent work restrictions.

15. On February 19, 2021, Anjmun Sharma, M.D. performed a Division Independent Medical Examination ("DIME"). Claimant reported that he was working full duty to the best of his ability with no restrictions. He complained of shoulder tightness and decreased range of motion. The medical record from this evaluation contains no documented complaints into the neck or back. On examination, Dr. Sharma noted decreased left shoulder range of motion and mild impingement sign of positive Hawkins-Kennedy sign.

16. Dr. Sharma's diagnoses included: left shoulder subscapularis tear; left shoulder supraspinatus tear; left shoulder diagnostic arthroscopy; left shoulder subacromial decompression; left shoulder acromioplasty; left shoulder labral tear repair; and left shoulder biceps tenodesis. Based on his review of the medical records, Dr. Sharma determined that the "pertinent medical issue" was confined to Claimant's left shoulder only.

17. Dr. Sharma assigned Claimant a combined 19% scheduled rating of the upper extremity (11% whole person). The rating consisted of 10% impairment for range of motion deficits as well as 10% scheduled impairment for subacromial decompression. Regarding work restrictions, Dr. Sharma wrote both that "the only work restriction for the patient will be maximum overhead lifting, no more than 10 pounds," and "the patient can return back to work full duty, no restriction without the need for any maintenance care." (R. Ex. C, p. 44).

18. On March 10, 2021, Respondents filed a Final Admission of Liability ("FAL") admitting for a 19% scheduled upper extremity rating per Dr. Sharma's DIME report. Claimant objected to the FAL and filed an Application for Hearing.

19. On June 24, 2021, Carlos Cebrian, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Cebrian issued an IME report dated July 8, 2021. Claimant reported left shoulder pain and limited range of motion, some neck pain into the right shoulder, as well as numbness and tingling in the first through third digits of left hand since surgery. He further reported that he was not doing any overhead activity with his left side and waking up throughout the night. Dr. Cebrian noted normal examinations of the cervical, thoracic and lumbar spine. There was tenderness to palpation of the left AC joint and decreased left shoulder range of motion. There was no pain to palpation to the left shoulder posteriorly or into the trapezius. Dr. Cebrian agreed Claimant reached MMI as of October 29, 2020. He disagreed with Dr. Sharma's opinion that Claimant qualified for a 10% impairment for subacromial decompression, noting the procedure was minor, did not remove any portion of the distal clavicle, and was performed for the purpose of removing osteophytes. Dr. Cebrian opined that Claimant did not sustain any functional impairment extending beyond the glenohumeral joint. He explained that the situs of functional impairment is in the left rotator cuff tendon, which is in the left upper extremity. He opined that impairment did not extend into Claimant's neck or trunk and that Claimant's functional impairment is the result of decreased range of motion. Dr. Cebrian concluded that Claimant could return to work full duty with no restrictions.

20. The ALJ viewed surveillance footage of Claimant obtained on July 23, 2021. The footage shows Claimant exiting his pickup truck at a convenience store and opening the bed of the truck, which was approximately the height of Claimant's waist. Claimant is observed briefly reaching above shoulder level to open a large cooler to inspect its contents. Claimant then retrieves three bags of ice from the store, holding two bags in the left hand below waist level and one bag in the right hand. Claimant estimated each bag of ice weighed approximately eight pounds. Claimant placed two bags of ice onto the truck bed with his left arm and then reached at shoulder level with both arms to pour each bag ice into the cooler and secure the top of the cooler. Claimant enters and exits his vehicle without any visible issue. He performed these activities without any signs of visible pain.

21. Dr. Cebrian testified at hearing on behalf of Respondents as a Level II accredited expert in family medicine and occupational medicine. Dr. Cebrian testified consistent with his IME report. He explained that the surgery performed by Dr. McNair involved repairing the supraspinatus and subscapularis where they attach to the humeral head. Dr. McNair smoothed out osteophytes that were present under the acromion in the subacromial space to recreate and restore the normal subacromial geometry. He explained that although the original MRI showed some labral pathology, Dr. McNair's operative report noted the labrum looked normal at the time of surgery; thus, no labral repair was performed. Dr. Cebrian testified that the purpose of the subacromial decompression was to create additional space for the rotator cuff mechanism to function and there was no impairment due to this procedure. He continued to opine Claimant did not suffer any

impairment beyond the glenohumeral joints. Dr. Cebrian testified that the functional impairments indicated by Claimant are secondary to decreased motion of the shoulder which impacts the arm, and there are no functional issues or limitations above the glenohumeral head or into the neck or trunk region. He noted that the pain complaints based on the October 26, 2020 pain diagram did not reflect pain above the glenohumeral joint. He explained that his review of surveillance footage showed Claimant lifting above 90 degrees with his left arm with good function and the absence of any functional limitations.

22. Claimant credibly testified at hearing. Claimant testified that he has been working full duty in a different position, as a blow molder machine operator, for approximately one year. He explained that the position involves making plastic bottles. Claimant testified that he has been able to perform all of the functions of his job without accommodation since being released to full duty, but that he experiences difficulties emptying the preforms out of the bag, which entails lifting and dumping the bag upside down. He testified that he uses his right hand more to compensate. Claimant testified that his job requires occasionally driving a forklift, which he steers with his left hand. He stated that if he makes too many quick let turns his left shoulder begins to strain and burn. Claimant testified that he has slowed in his performance due to his limitations. He opens heavy doors with his right hand and mostly pulls pallet jacks with his right hand, although he occasionally uses his left hand. Claimant testified he has not participated in bowling or archery since his work injury, and that he learned to shoot right-handed and can no longer do overhand throwing. Claimant further testified he can no longer do certain work on vehicles as he cannot hold up his left arm. Claimant stated that he wakes up two to three times throughout the night in pain, which did not occur prior to the work injury. He testified that if he does something strenuous the pain runs up his shoulder into his neck.

23. The ALJ credits the testimony of Claimant, as supported by the medical records, over the testimony of Dr. Cebrian and finds that Claimant proved it is more probable than not he sustained functional impairment beyond the arm at the shoulder and is entitled to whole person conversion.

24. As a result of his industrial injury and related surgery, Claimant has a visible disfigurement to the body consisting of two visible arthroscopic scars on his left shoulder. Each scar measures approximately one centimeter in length. One scar is discolored, while the other scar is well-healed without significant discoloration or texture. Claimant proved by a preponderance of the evidence he is entitled to an award for disfigurement in the amount of $300.00.

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).

Conversion of Impairment Rating

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. When an injury results in a permanent medical impairment not on the 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. The schedule includes the loss of the "arm at the shoulder." but the "shoulder" is not listed on the schedule of impairments. *See* §8-42-107(2)(a), C.R.S.

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).

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* WC 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*, WC 4-868-996-01 (ICAO, Feb. 1, 2016). 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*, WC 4-536-198 (ICAO, June 20, 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).

In *Newton v. Broadcom, Inc.*, WC 5-095-589 (ICAO, July 8, 2021), the Panel upheld an ALJ's determination that the claimant's right upper extremity rating should be converted to a whole person impairment. The claimant in *Newton* suffered rotator cuff tears of his right shoulder, including full thickness tears of the infraspinatus and supraspinatus tendons, for which he underwent surgical repair. The claimant subsequently reported issues with pain in the shoulder, scapular, trapezius and chest regions with limited shoulder range of motion, including issues with overhead motion. The ALJ relied on testimony of the claimant's medical expert, who explained that the dispositive scheduled body part is limited to the arm where it first meets the shoulder, which is anatomically the glenohumeral joint. The Panel reasoned,

> We agree that this joint becomes the dividing point, or marker, between what is limited to the arm at the shoulder, and if not so limited, requires conversion to whole person impairment. When a rotator cuff tendon (or muscle) is torn, the tendon and its attached muscle are partially or fully severed from the "arm," read humeral head. The tears are the situs of the functional impairment and this situs is proximal to the torso from the glenohumeral joint.
>
> In our view, the findings of the ALJ 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. As an example, loss of range of motion is an effect of an impairment but not the underlying impairment itself. As another example, pain may be debilitating but it is not a specific medical impairment (in other words—pain resulting from the rotator cuff tear is not the bodily impairment; rather the damage to the rotator cuff is where the body is impaired). Difficulty with certain aspects of daily living, such as sleeping, putting on clothes, pushing and pulling objects are limitations of activity (disability) but are not medical impairments. We are not persuaded by Respondents'

suggestion that unless there is pain in the neck or the back, no conversion is proper.

(Id.)

Claimant suffered a shoulder injury which entailed, *inter alia*, complete disruption of the supraspinatus and partial thickness tear of the subcapularis and underwent shoulder surgery. Claimant subsequently participated in multiple sessions of physical therapy which included treatment in the scapular and pectoral area. The medical records reflect consistent issues with shoulder range of motion and reports of limitations with overhead use. Claimant credibly testified he continues to experience pain in the shoulder, limitations with overhead use, and issues sleeping due to shoulder pain. Due to his functional limitations, Claimant has made adjustments in the performance of his work and outside activities, using his right extremity to compensate for limitations of the left shoulder.

Here, as in *Newton*, the functional impairment arises from an anatomical disruption of the tissues of the rotator cuff tendons and the muscles attached thereto, which is the shoulder complex proximal to the torso from the glenohumeral joint. The preponderant evidence demonstrates that Claimant is functionally limited beyond the arm at the shoulder, and thus entitled to conversion of his upper extremity impairment to whole person impairment.

Disfigurement

Section 8-42-108 (1), C.R.S. provides that at claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

As found, as a result of the work injury and related surgeries, Claimant sustained a serious permanent disfigurement in an area of the body normally exposed to public view entitling him to an award of $300.00.

ORDER

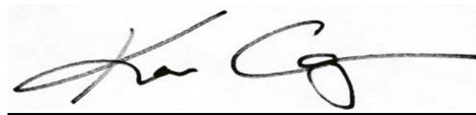
1. Claimant suffered functional impairment beyond the arm at the shoulder and off the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is entitled to permanent partial disability benefits based upon a whole person impairment rating of 11%.

2. Respondents shall pay claimant $300.00 for his disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. 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: August 2, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment to her neck and bilateral wrists is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

3. If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment to her neck and bilateral wrists is authorized.

FINDINGS OF FACT

1. The claimant has worked for the employer as a grocery checker/cashier since 2014[1]. The claimant's job duties include scanning and bagging customer grocery items. This involves reaching with her right hand to scan the item, then moving it with her left hand to the bagging area. In addition, she uses a monitor with a touch screen to type in various codes, as needed. At times, the claimant bags the groceries by herself and there are times when she has help. If she is bagging by herself, the claimant lifts the full bags and places them in the customer's grocery cart.

2. The claimant testified that she believes that over time she injured her neck and wrists because of the nature of her repetitive work. The claimant further testified that in 2017 she began to notice an increase in her neck and wrist pain. The claimant testified that she works 32 hours per week and then she has three days off. During her days off, she feels better.

3. The claimant has a prior history of wrist injuries dating back to 2003. At that time, she was employed with a different grocery store. In 2003, the claimant underwent a right carpal tunnel release. The claimant testified that following that surgery, she had a full recovery.

4. The claimant also has a prior history of neck pain. The claimant has undergone chiropractic treatment for her neck and bilateral wrists with Dr. Donald Cannon, since 2016. The claimant continues to treat with Dr. Cannon.

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[1] At that time, the claimant was hired at an Albertsons store, and now works at a Safeway location.

5. On May 6, 2021, the claimant was seen by her personal medical provider, Tephi Mannlein, PA-C. On that date, the claimant reported that she was experiencing increased neck pain with pain and numbness in her hands. as the result of a work related injury.The claimant could not identify a specific injury. PA Mannlein recommended the use of wrist braces and referred the claimant to physical therapy.

6. Also on May 6, 2021, the claimant reported her symptoms to her supervisor. The claimant was not provided with a list of medical providers by her employer.

7. Subsequently, PA Mannlein made referrals to occupational therapy, and surgeon Dr. James Rose.

8. The claimant was first seen by Dr. Rose on November 8, 2021. At that time, the claimant reported bilateral wrist pain that started in May 2022, without an acute injury. The claimant identified her symptoms as pain, numbness, and tingling. The claimant also reported cervical pain. Dr. Rose opined that the claimant had left carpal tunnel syndrome, trigger fingers in her right long and right index fingers, and potential cervical nerve root impingement. Dr. Rose ordered magnetic resonance imaging (MRI) of the claimant's cervical spine. In addition, he recommended left carpal tunnel release surgery.

9. On February 18, 2022, an MRI of the claimant's cervical spine showed moderate foraminal stenosis at the C3-C4 level, mild to moderate right foraminal stenosis at the C4-C5 level, and moderate central and bilateral foraminal stenosis at the C5-C6 level.

10. On March 2, 2022, Dr. Rose authored a letter in which he stated his opinion that it is plausible that repetitive wrist extension and grip could contribute to an exacerbation of carpal tunnel and cervical nerve compression.

11. On April 7, 2022, the claimant was seen in Dr. Rose's practice by Dr. Peter Shorten. At that time, Dr. Shorten reviewed the claimant's MRI and noted that the claimant did not have clear radiculopathy. Dr. Shorten recommended the claimant undergo electromyography (EMG) testing of her upper extremities to confirm bilateral carpal tunnel syndrome.

12. At the request of the respondent, on April 11, 2022, the claimant attended an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his April 29, 2022 IME report, Dr. Cebrain identified the claimant's diagnoses as bilateral wrist pain (with a differential diagnosis of carpal tunnel versus wrist tendonitis) and chronic neck pain. It is Dr. Cebrian's opinion that these diagnoses are not work related. In support of his opinion, Dr. Cebrian engaged in a formal causation analysis as identified by the Colorado Medical Treatment Guidelines (MTG). In performing this analysis, Dr. Cebrian noted that the claimant's work activities include no primary or secondary risk factors. Dr. Cebrian

opined that the claimant did not have significant enough work related exposures to establish a causal connection between her symptoms and her work activities. Dr. Cebrain further explained that even given the claimant's pre-existing wrist and neck conditions, any repetitive work activities did not aggravate those conditions.

13. Dr. Cebrian's testimony was consistent with his written report. Dr. Cebrian reiterated his opinion that the claimant did not have any work-related exposures that would cause a work-related cervical spine condition. Dr. Cebrian testified that his opinion was based, in part, upon the claimant working less than full-time. Dr. Cebrain also testified that even considering the claimant worked 32 hours per week, (as indicated by her testimony), the risk factors of force, repetition, and activities do not amount to the required potential exposure to cause or aggravate her wrist and neck symptoms.

14. On May 27, 2022, a job demand analysis (JDA) was performed by Sara Nowotny, CRC, CCM, CEAS. The JDA involved an interview of the claimant as well as observations of the claimant performing her normal job duties. In her May 28, 2022 report, Ms. Nowotny noted that the position of cashier/checker falls within the light to medium physical demand category. Ms. Nowotny also noted that the claimant works three to four eight hours shifts each week (24 to 32 hours per week). Ms. Nowotny found that no primary or secondary risk factors exist in the claimant's performance of her job duties.

15. On May 31, 2022, the claimant returned to Dr. Shorten. In the medical record of that date, Dr. Shorten opined that if the EMG testing showed bilateral carpal tunnel syndrome, then "the repetitive motion from {the claimant's] daily job requirements may have, indeed, exacerbated her symptoms."

16. The claimant testified that her current neck symptoms include constant pain and stiffness. The claimant's current bilateral wrist symptoms include pain, numbness, and tingling.

17. The respondents have filed a Notice of Contest in this case. The claimant's medical treatment has been paid for by the claimant and by her private insurance, UMR.

18. The ALJ credits the medical records, the JDA, and the opinions of Dr. Cebrain over the contrary opinions of Drs. Rose and Shorten. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that her work activities led to an occupational disease in her wrists. The ALJ likewise finds that the claimant has failed to demonstrate that it is more likely than not that her work activities led to an occupational disease in her neck/cervical spine. The ALJ finds that the claimant's work activities were not sufficient to cause an occupational disease or an aggravation of her pre-existing conditions.

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. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing 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. *H* & *H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *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." *H* & *H Warehouse v. Vico,y, supra.*

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. 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 work.er would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. The Colorado Workers' Compensation Medical Treatment Guidelines (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). The statement of purpose of the MTG 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.'' WCRP 17-1(A). In addition, WCRP 17-S(C) provides that the MTG "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."

9. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease while working for the employer. The claimant's work activities did not rise to the level of sufficient exposure to result in an occupational disease. In addition, the claimant's work activities did not rise to the

level of sufficient exposure to aggravate or accelerate her pre-existing wrist and neck conditions. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's claim is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated August 3, 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. 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-135-393-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her scheduled impairment rating for her left upper extremity should be converted to a whole person rating.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a disfigurement award pursuant to § 8-42-108, C.R.S.

FINDINGS OF FACT

1. On March 20, 2020, Claimant sustained an admitted injury arising out of the course of her employment with Employer when she was sweeping snow and fell on her outstretched left arm. Claimant sustained a left wrist fracture and injured her left shoulder.

2. On March 20, 2020, Claimant was seen at UC Health, where her left wrist was placed in a cast. (Ex. F).

3. Claimant then began treatment at Aurora Comp where she saw Martin Kalevik, D.O. At her first visit on April 7, 2020, Claimant reported symptoms related to her left wrist fracture and mild stiffness in her left shoulder. (Ex. G). Dr. Kalevik diagnosed Claimant with a Colles' fracture of the left radius, and a sprain of the left shoulder joint. (Ex. G).

4. On May 20, 2020, Claimant saw Thanh (Tom) Chau, P.A., at Aurora Comp. Mr. Chau is the physician assistant for Matthew Lugliani, M.D., who served as Claimant's authorized treating physician (ATP) after May 20, 2020. Claimant saw Mr. Chau five additional times through September 11, 2020. During these visits, Claimant reported stiffness and limited range of motion in her left shoulder. Claimant also received physical therapy for her shoulder and wrist, although physical therapy records were not offered or admitted into evidence. (Ex. G).

5. By June 10, 2020, Claimant's left shoulder had not improved, and she was referred for a left shoulder MRI. The MRI, performed on June 19, 2020, showed a moderate partial-thickness interstitial and bursal sided tear of the infraspinatus in Claimant's left shoulder, with underlying tendinosis, bursal fraying, an interstitial tear of the cranial subscapularis insertion, thickening of the inferior glenohumeral ligament, and joint capsulitis. (Ex. 8). Based on the results of the MRI, Mr. Chau referred Claimant to Sean Griggs, M.D., for an orthopedic evaluation. (Ex. G).

6. Claimant saw Dr. Griggs on July 7, 2020, for evaluation of her left shoulder. Based on his examination, Dr. Griggs diagnosed Claimant with a left shoulder sprain with partial-thickness rotator cuff tearing and early adhesive capsulitis. He recommended a

subacromial injection and continued therapy to regain shoulder motion. Dr. Griggs performed the shoulder injection on July 7, 2020. (Ex. H).

7. Claimant returned to Dr. Griggs on August 6, 2020, reporting some improvement in her symptoms, but with continued tightness in the left shoulder and pain radiating to the biceps area. Dr. Griggs noted that Claimant's shoulder range of motion had improved significantly, and recommended that she continue therapy. (Ex. H).

8. On September 3, 2020, Claimant returned to Dr. Griggs, who noted she had some evidence of adhesive capsulitis in the left shoulder which was improving with therapy. (Ex. H).

9. On October 1, 2020, Dr. Griggs indicated that Claimant's left shoulder was much improved, with some ongoing weakness that had gradually improved. Claimant continued to have mild pain with impingement maneuvers and with external rotation of the left shoulder. (Ex. H).

10. On October 8, 2020, Dr. Lugliani, performed an impairment evaluation, placed Claimant at MMI on that date, and assigned permanent impairment for her left wrist and shoulder. For Claimant's left wrist, Dr. Lugliani assigned a 7% impairment rating for range of motion deficits, and an impairment rating of 8% for claimant's left shoulder. Combined, the impairment rating yields a 14% left upper extremity impairment, which corresponds to an 8% whole person impairment pursuant to table 3, page 16 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised ("AMA Guides"). Dr. Lugliani recommended a permanent restriction of no snow-removal duties and a 6 month follow up with orthopedics for flareups and surgery of the left shoulder if needed. (Ex. 5).

11. On November 3, 2020, Respondents filed a Final Admission of Liability (FAL), admitting for a 14% left upper extremity permanent impairment rating. (Ex. 5).

12. Claimant testified at hearing that she has no prior history of injuries to her left wrist or shoulder. Claimant testified that her left wrist is now crooked, and that it was not that way before her injury. Photographs submitted as Exhibit 11 show a visible lump on the lateral aspect of her left wrist. The lump is visibly distinct when compared to Claimant's right wrist. (Ex. 11). The lump on Claimant's left is a disfigurement sustained as a direct and proximate result of her March 20, 2020 injury.

13. Claimant testified that she has difficulty and pain lifting her left arm above shoulder, and that she has pain in the shoulder joint and her neck when raising her left arm. Claimant also testified that she cannot lay on her left side due to her shoulder and neck pain. She further testified that her shoulder has neither improved nor worsened over the past year.

14. On February 24, 2021, Sander Orent, M.D., performed an independent medical examination (IME) at Claimant's request. The IME was conducted virtually. In conjunction with the IME, Claimant had a "Functional Abilities Evaluation" performed by Kristine Couch, OTR, during which Ms. Couch performed range of motion measurements of Claimant's left wrist and shoulder. (Ex. 10). Dr. Orent relied upon Ms. Couch's

measurement for his opinion regarding impairment. Based on Ms. Couch's measurements, Dr. Orent concluded Claimant' has a 16% impairment rating of the left wrist, and a 21% impairment of the left shoulder, which resulted in a 34% upper extremity impairment. The 34% upper extremity impairment converts to a 20% whole person impairment. (Ex. 9). Given the significant discrepancy between Dr. Orent's assigned impairment rating and Dr. Lugliani's impairment rating four months earlier, the fact that Dr. Orent did not personally conduct a physical examination, and Claimant's testimony that her left shoulder has neither improved or worsened over the past year, Dr. Orent's assigned impairment rating is neither credible nor persuasive.

15. On July 8, 2021, Claimant underwent an independent medical examination (IME) at Respondents request performed by Lawrence Lesnak, D.O. Dr. Lesnak opined that Claimant sustained no work-related injury to her left shoulder and has no work-related impairment related to her left shoulder. (Ex. A). Dr. Lesnak's opinions are inconsistent with Claimant's treating providers, and are neither credible nor persuasive.

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).

Conversion of Scheduled Impairment to Whole Person Impairment

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. 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. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ 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).

In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002.) Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO April 24, 2020).

Where an accident has caused measurable impairment to more than one part of the body, a claimant may have more than one "injury" for purposes of § 8-42-107(7)(b)(II), C.R.S. *Warthen v. Indus. Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004). Section 8-42-107(8)(b)(II), C.R.S., "precludes conversion of a scheduled disability to a whole person impairment rating for the purposes of combining a scheduled disability with a whole person impairment where the claimant sustains both scheduled and nonscheduled

injuries." *Guzman v. KBP Coil Coaters*, (W.C. No. 4-444-246 (January 10, 2003); *see also Jesmer v. Portercare Hosp.*, W.C. No. 4-442-706 (March 27, 2002).

Claimant sustained two injuries as a result of her March 20, 2020 work accident: a left wrist fracture, and a left shoulder injury. Neither Claimant nor Respondent has established by a preponderance of the evidence that Dr. Lugliani's assigned impairment ratings are incorrect. The ALJ therefore finds the impairment ratings assigned by Dr. Lugliani to be the appropriate impairment ratings for both the left wrist and shoulder.

Claimant has failed to establish any impairment related to her wrist extending beyond the arm at the shoulder. Consequently, Claimant's 7% scheduled impairment for her left wrist is not converted to a whole person impairment.

With respect to her left shoulder, Claimant has established by a preponderance of the evidence an impairment of anatomical structures beyond the arm at the shoulder. Claimant's MRI and diagnosis from Dr. Griggs demonstrate that Claimant has sustained injuries to the shoulder joint, which is beyond the arm. The injury has resulted in decreased range of motion of the shoulder joint, which limits Claimant's ability to raise her left arm, and limits Claimant's ability to sleep. These functional limitations are more probable than not, manifestations of a functional impairment of her shoulder joint, beyond the arm.

Accordingly, Claimant's 8% left upper extremity impairment rating related to her shoulder range of motion is converted from an 8% scheduled impairment to a whole person impairment. The ALJ takes judicial notice of the AMA Guides, which provide for the appropriate conversion of scheduled impairment to whole person impairment. *See In re Claim of Serena*, 120115 W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015). Pursuant to Table 3, p. 16 of the AMA Guides, entitled "Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person," an 8% upper extremity impairment converts to a 5% whole person impairment. Claimant's upper extremity impairment for her left shoulder range of motion deficits is therefore converted to a 5% whole person impairment.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her March 20, 2020 injury. Claimant is awarded $600.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's 8% scheduled upper extremity impairment for range of motion deficits for her left shoulder is converted to a 5% whole person impairment.

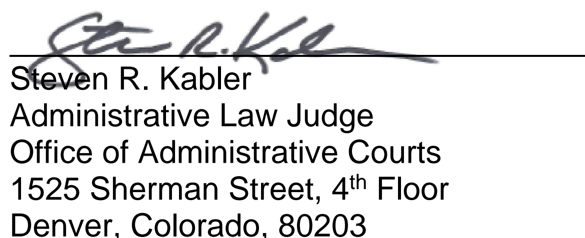
2. Claimant's impairment rating of 7% for her left wrist is not converted, and shall be paid as a scheduled impairment.

3. Respondents shall pay Claimant $600.00 for disfigurement of her left wrist.

4. 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: August 4, 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. 5-091-590-001

ISSUES

The issues set for determination included:

- Did Respondents overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [Brian Shea, M.D.] regarding permanent medical impairment by clear and convincing evidence?

- If Respondents overcame Dr. Shea's opinions, what was Claimant's medical impairment rating?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on December 9, 2021, which was served on December 12, 2021. Respondent requested a full Order on December 12, 2021. This Order follows.

FINDINGS OF FACT

1. Claimant was employed as nurse for Employer. In this position, Claimant was a supervisor and conducted home visits.

2. There was no evidence in the record that prior to October 2018, Claimant suffered an injury to her cervical or lumbar spine or required treatment for those areas of the body.

3. On October 3, 2018, Claimant was injured in a motor vehicle accident while in the course and scope of her employment. The car she was driving was rear-ended by another vehicle.

4. Claimant treated with Thomas Corson, M.D. at Concentra on October 5, 2018, who was the ATP designated by Employer. Claimant complained of right sided neck and back pain. On exam, Dr. Corson described full range of motion ("ROM") in her cervical spine, although the record had no indication that the ROM was measured by Dr. Corson. Dr. Corson diagnosed Claimant with multiple ligament and muscle strains, as well as issuing work restrictions. Claimant was referred for physical therapy ("PT").

5. On October 11, 2018, Claimant began PT at Select Physical Therapy in Castle Rock. The records documented Claimant had restricted ROM in the cervical spine and thoracic spine.

6. Dr. Corson oversaw Claimant's treatment and the treatment notes reflected that she continued to have pain in her cervical and lumbar spine. On October 18, 2018, Dr. Corson noted Claimant reported neck and back stiffness. Dr. Corson documented spasms the cervical and thoracic spine, along with ROM restrictions in the lumbosacral spine. Dr. Corson's assessment on October 31, 2018 was: cervicalgia; MVA; sprain of thoracic region; lumbar strain.

7. On November 15, 2018, Claimant underwent an MRI of her thoracic and lumbar spine. The films were read by Matthew Hudkins, M.D. At T10-11, there was a 3 mm posterior right paracentral focal broad-based disc protrusion, moderately narrowing the right lateral recess and mildly narrowing the right neural foramina. The lumbar spine had a mildly degenerated disc at L5-S1. The ALJ inferred that Claimant's symptoms in the thoracic spine and lumbar spine prompted Claimant's ATP-s to order the MRI-s.

8. Claimant was evaluated by John Sacha, M.D. on December 5, 2018, at which time she reported neck pain, periscapular headaches, bilateral low back and bilateral buttocks pain, as well as increased anxiety. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome, post-traumatic in nature; whiplash-associated disorder; occipital neuralgia. Dr. Sacha ordered chiropractic treatment and acupuncture, as well as PT and a L5-S1 transforaminal injection.

9. On December 10, 2018, Claimant returned to Dr. Corson and the diagnoses were the same as on October 31, 2018. Claimant received chiropractic manipulation from Don Aspergren, D.C starting on December 18, 2018.

10. Dr. Sacha re-evaluated Claimant on December 31, 2018 and noted she had a diagnostic response to the injection. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome, post-traumatic in nature; whiplash-associated disorder. Dr. Sacha ordered an MRI of the cervical spine and continued chiropractic and acupuncture treatments.

11. Dr. Aspegren's assessment on January 4, 2019 mirrored Dr. Sacha's: lumbosacral radiculopathy; cervical facet syndrome; whiplash; headaches. Claimant also received additional PT in February 2019. Dr. Corson noted continued tenderness in Claimant's cervical spine and lumbosacral spine on February 11, 2019. Dr. Corson's assessment was: cervicalgia; sprain of thoracic region; lumbar strain.

12. On February 14, 2019, Claimant received a second set of bilateral L5-S1 transforaminal epidural injections, which were administered by Dr. Sacha. The injections provided a diagnostic response and longer lasting relief than the previous injections.[1]

13. Claimant returned to Dr. Sacha on February 27, 2019, at which time he noted Claimant had a good response to the injections. Claimant had lumbar paraspinal spasm and cervical paraspinal spasm, along with segmental dysfunction. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome; whiplash-associated disorder; opioid use, uncomplicated. He recommended physical therapy and

[1] Exhibit 2, pp. 116-117, 121.

IMS needling for the neck and lower back. The ALJ found this report documented continued symptoms in the cervical and lumbar spine.

14. Dr. Corson evaluated Claimant on March 4, 20219 and noted continued tenderness in Claimant's thoracic spine and lumbosacral spine on February 11, 2019. Dr. Corson's assessment was: cervicalgia; sprain of thoracic region; lumbar strain. Dr. Corson referred Claimant for chiropractic treatment, which was provided by Dr. Aspegren.

15. On March 20, 2019, Dr. Sacha evaluated Claimant and noted she was doing better after completing several physical therapy and IMS needling sessions, but still had lumbar paraspinal spasm and cervical paraspinal spasm. Claimant completed chiropractic treatments with Dr. Aspegren on March 29, 2019.

16. On May 6, 2019, Claimant returned to Dr. Sacha. Claimant report she was still having bilateral low back pain, bilateral buttocks pain and posterior thigh pain. Her neck symptoms had essentially resolved at that point. On examination, Claimant had lumbar paraspinal spasm, along with pain on straight leg raise and neural tension testing. Pain was present with extension and external rotation. Dr. Sacha's impression was: lumbosacral radiculopathy; cervical facet syndrome; whiplash associated disorder. The ALJ noted Dr. Sacha's findings of spasm were more than six months after the subject accident.

17. Dr. Sacha concluded Claimant was at MMI and noted she was performing full duty work. Dr. Sacha assigned a medical impairment rating pursuant to the *AMA Guides.* He stated Claimant sustained a 7% whole person impairment due to the lumbar displaced disc. She received an additional 4% for loss of ROM of the lumbar spine. Dr. Sacha did not assign a permanent impairment to Claimant's cervical spine. Claimant's total medical impairment was an 11% whole person. For maintenance treatment, Dr. Sacha said Claimant should be allowed medications and follow-up appointments, as well as chiropractic treatment and acupuncture (8 to 12 visits over the next 12-24 months).

18. Dr. Corson evaluated Claimant on May 8, 20219, at which time he released her form care at MMI. His diagnoses were: cervicalgia; lumbar strain; MVA; sprain of thoracic region. He recommended maintenance treatment in the form of follow-up evaluations, chiropractic treatment and acupuncture.

19. Based upon the treatment records of the ATP-s, the ALJ concluded Claimant required treatment for injuries to her cervical, thoracic and lumbar spine in the October 3, 2018 MVA.

20. On January 27, 2020, Claimant underwent a DIME that was performed by Dr. Shea. At that time, she complained of low back pain; bilateral pain in the back of the legs; right neck pain and periodic episodes of left restless leg syndrome. On examination, no gross motor or sensory neurological deficits were noted. There were no thoracic outlet syndrome signs or symptoms. Tenderness was found in the trapezius, rhomboid, lumbar and sacral musculature.

21. Dr. Shea found Claimant's ROM in her lumbar spine was as follows: 55° of flexion, 20° of extension, 45° of right leg raise, 50° of left straight leg raise, 30° of right lateral flexion and 31° of left lateral flexion. Her cervical ROM was: 59° of flexion, 61° of extension, 42° of right lateral flexion, 36° of left lateral flexion, 60° of right rotation and 50° of left rotation. The ALJ noted the ROM measurements showed a loss of ROM in the cervical spine and lumbar spine, pursuant to the *AMA Guides*.

22. Dr. Shea's diagnoses were: lumbar strain; cervical strain; motor vehicle accident while driving for work; myofascial pain syndrome of the cervical, upper thoracic and left lumbar sacral region; T10 -11 disc herniation per MRI. Dr. Shea assigned a 4% whole person cervical impairment rating for specific disorder and 4% for loss of ROM. Dr. Shea assigned 5% whole person lumbar impairment rating pursuant to Table 53, along with 6% for loss of lumbar ROM. These ratings combined for a total 18% impairment rating. The ALJ found the findings made with regard to the cervical and lumbar spine, including ROM measurements were valid. The ALJ credited Dr. Shea's opinions regarding Claimant's permanent medical impairment.

23. Dr. Shea recommended another set of lumbar injections for maintenance care, along with over-the-counter use of Tylenol or Advil as needed. Claimant also should be able to use chiropractic care for 8 to 12 visits over the next 1 to 2 years, along with a home exercise program that Dr. Shea felt would be facilitated by a gym membership.

24. On July 9, 2020, Lawrence Lesnak, M.D. examined Claimant at the request of Respondents. Claimant reported neck and back pain. On examination, Dr. Lesnak stated Claimant did not have any clinical findings of cervical or thoracic injury, radiculitis, or facet joint arthropathy.

25. Dr. Lesnak opined Claimant did not qualify for a Table 53 impairment for the cervical spine. Based on his evaluation and records review, Dr. Lesnak determined Claimant qualified for a 7% impairment rating of the lumbar spine based on Table 53 and ROM measurements. Dr. Lesnak noted that Claimant's lumbar flexion measurements were not valid. Dr. Lesnak testified Claimant did not qualify for a cervical impairment and that Dr. Shea did not explain the discrepancies between his ROM measurements and those of Dr. Sacha and his own.

26. Dr. Lesnak testified as an expert via deposition. Dr. Lesnak is Level II certified by the Division of Workers' Compensation. Dr. Lesnak testified that there was no medical evidence of impairment to the cervical spine. He opined the medical records indicated that Claimant's cervical condition had resolved at the time of MMI and she had subjective complaints of pain, which were insufficient to form the basis for an impairment rating. Dr. Lesnak disagreed with Dr. Shea's cervical impairment rating. He pointed out that Dr. Sacha found no cervical symptoms at the time of MMI and there was no ROM deficit. He opined Dr. Shea erred by failing to address the inconsistencies between range of motion measurements. Dr. Lesnak testified that the treatment Claimant received for her cervical spine did not equate to a ratable condition.

27. Dr. John Sacha testified as an expert at hearing. Dr. Sacha is Level II certified by the Division of Workers' Compensation. Dr. Sacha testified that Claimant did not qualify for a cervical impairment rating based on her range of motion and complete resolution of symptoms at the time of MMI. That was why he did not assign permanent impairment for her cervical spine. Dr. Sacha also testified that pursuant to Division of Workers' Compensation Level II requirements, all DIME physicians are required to address inconsistencies between a treating physician's range of motion measurements and the DIME physician's own measurements.

28. The opinions of Dr. Lesnak and Dr. Sacha regarding Claimant's permanent impairment differed from those of Dr. Shea.

29. Respondents did not prove that it was highly probable that the conclusions of Dr. Shea were incorrect.

30. Based upon the medical evidence in the record, the ALJ determined Claimant suffered a permanent medical impairment to her cervical and lumbar spine as a result of her October 3, 2018 work injury.

31. The ALJ determined Respondents failed to overcome the opinions of DIME physician, Dr. Shea.

32. 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). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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). In the case at bench, there were conflicting expert opinions regarding Claimant's medical impairment.

Overcoming the DIME

As determined in Findings of Fact 3-9, Claimant was injured in an admitted work injury on October 13, 2018. Claimant's ATP-s Dr. Corson and Dr. Sacha prescribed treatment for symptoms in Claimant's cervical, thoracic and lumbar spine. *Id.* As Claimant's treatment progressed, most of her pain complaints were in the cervical and lumbar spine. However, Claimant reported symptoms and both Drs. Sacha and Corson continued to provide diagnoses related to the cervical and lumbar spine. (Findings of Fact 11-15).

On May 6, 2019, Dr. Sacha concluded Claimant was at MMI. He assigned permanent impairment to Claimant's lumbar spine. After performing the DIME, Dr. Shea concluded Claimant sustained a permitted impairment to both the cervical and lumbar spine. This hearing concerned the dispute over the rating assigned to Claimant's lumbar spine. In this regard, Respondents argued that Dr. Shea's conclusions were overcome by clear and convincing evidence. Claimant averred that Respondents did not meet their burden of proof.

To resolve this issue, the ALJ noted the question of whether Respondents overcame Dr. Shea's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and 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). The mere difference of medical opinions 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).

In the case at bar, the ALJ determined Respondents did not meet their burden of proof. (Finding of Fact 29). The ALJ's rationale was twofold; first, there was no evidence that Dr. Shea's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. *Id.* In this regard, Dr. Shea's conclusions that Claimant had a

permanent medical impairment in her cervical and lumbar spine were supported by the fact that she had pain and qualified for such an impairment under the *AMA Guides*. (Finding of Fact 21). The ALJ found that Dr. Shea's ROM measurements were valid at the time he performed the evaluation and Respondents did not refute this fact. (Finding of Fact 22).

Second, the evidence adduced by Respondents to contravene Dr. Shea's opinion simply constituted a difference of opinion. (Finding of Fact 28). Dr. Sacha disagreed that Claimant had a medical impairment to her cervical spine, but did not provide an opinion that Dr. Shea was more probably wrong. *Id.* The ALJ found, Claimant continued to have cervical spine symptoms and these were documented in the Concentra records (including Dr. Sacha's). (Finding of Fact 12-16). Dr. Lesnak opined Claimant did not have a cervical impairment and did not have impairment based upon a loss of lumbar ROM, which the ALJ determined was also a difference of opinion.[2] The ALJ found neither of these opinions overcame Dr. Shea's conclusions by clear and convincing evidence. (Finding of Fact 31). Claimant is therefore entitled to PPD benefits based upon Dr. Shea's rating.

ORDER

It is therefore ordered:

1. Respondents did not meet their burden to overcome the DIME physician's findings with regard to permanent impairment by clear and convincing evidence.

2. Claimant sustained an 18% whole person impairment of her cervical and lumbar spine as a result of her industrial injury.

3. Respondents shall pay PPD benefits based upon Dr. Shea's medical impairment rating. Respondents are entitled to a credit for PPD benefits previously paid.

4. Respondents shall pay 8% statutory interest on all benefits not paid when due.

5. 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

[2] Dr. Shea's evaluation was conducted six months before Dr. Lesnak's, which could account for the differences in the ROM findings.

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: August 4, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondent prove this claim is closed because Claimant did not timely contest the January 10, 2022 Final Admission of Liability?
- If the claim is closed, did Claimant prove the claim should be reopened based on error or mistake?
- If the claim is reopened, did Claimant prove entitlement to additional medical benefits?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to her left ankle on February 8, 2021 when she missed a step while descending a ladder.

2. Claimant was referred to Concentra for authorized treatment. Her care was primarily managed by Dr. George Johnson and PA Mendy Peterson.

3. She was initially diagnosed with a left ankle sprain and prescribed medications, a walking boot, and physical therapy.

4. The ankle did not heal as quickly as expected, so Claimant was referred for an MRI on March 11, 2021. The MRI showed a deltoid ligament sprain and mild osteoedema consistent with a contusion or stress injury.

5. Claimant was referred to Dr. Michael Simpson for an orthopedic evaluation. Dr. Simpson saw Claimant on March 16, 2021 and ordered a corticosteroid injection. The injection provided a good short-term diagnostic response but no lasting therapeutic benefit.

6. Dr. Simpson recommended arthroscopic debridement, but Claimant declined and wanted to try other non-surgical options. Dr. Simpson requested authorization for PRP injections. Respondent denied the PRP injections based on peer review by Dr. Steven Arsht in August 2021. Dr. Arsht opined there was insufficient objective evidence of tendon damage or osteoarthritis to support PRP injections.

7. On August 3, 2021, Claimant told Dr. Johnson her pain was getting worse. She had been unable to pursue the PRP injection and wanted to try narcotics. Dr. Johnson referred Claimant to Dr. Kenneth Finn for a pain management evaluation.

8. Claimant saw Dr. Finn on September 7, 2021. Claimant told Dr. Finn that Tramadol had upset her stomach. She was prescribed Celebrex but had not yet picked it up. Dr. Finn documented Claimant had "lost" prescriptions and used a friend's pain

mediation. Physical examination showed "nonanatomic" sensory deficits to pinprick and light touch, and giveaway weakness of the left ankle but no atrophy. Ankle ROM was decreased because of pain complaints. Dr. Finn opined Claimant "may be at risk for opioids and recommended trial of Nucynta . . . She has already reportedly lost prescription and used a 'friend's' pain medication."

9. Claimant had a telemedicine appointment with Ms. Peterson on October 13, 2021. Ms. Peterson noted Claimant had missed about 10 appointments over the past two months. She had seen Dr. Finn and he gave her Nucynta for pain, but she lost the prescription and admitted taking her friend's narcotics. Ms. Peterson documented that Claimant's symptoms were unchanged, did not follow any particular pain pattern, and were not reproducible on serial examinations. She discussed a trial of full duty and MMI. Claimant was upset but said she would try the full duty and then abruptly hung up. Ms. Peterson concluded, "Pt at stability – condition is unchanged. MRI shows non-surgical changes. Poor compliance, pain-seeking behaviors. I feel pt is at MMI. Pt's adjustor [sic] had denied any further procedures."

10. Shortly after Ms. Peterson signed her report, Dr. Johnson reviewed the chart and concurred with the disposition and determination of MMI. He provided an addendum and completed a WC 164 form. He released Claimant to full-duty with no impairment and no need for maintenance care. Dr. Johnson opined the objective findings were not consistent with the history and/or a work-related injury.

11. Claimant disputes most of the information in the October 13, 2021 report. She denied that the visit on October 13, 2021 was via telemedicine. She did not recall talking about full duty or MMI, nor did she recall being upset by any such discussion. Because she testified the visit was not via telemedicine, she denied hanging up on Ms. Peterson. Claimant also denied that she told Ms. Peterson she was taking a friend's narcotics. She testified she missed "three or four" PT sessions but denied missing 10 appointments as noted in the report.

12. Employer is self-insured and uses Sedgwick Claims Management Services, Inc. ("Sedgwick") as the third-party administrator to adjust its workers' compensation claims.

13. Sedgwick filed a Final Admission of Liability ("FAL") dated January 10, 2022 based on Dr. Johnson's MMI report. The FAL admitted for $5,791.44 in medical benefits "to date," and denied all other benefits. The FAL was mailed to Claimant's correct address.

14. Claimant did not object to the FAL within 30 days of January 10, 2022. Although Claimant conceded the mailing address on the FAL is correct, she claims she did not receive it.

15. The FAL was prepared and filed by [Redacted] JS, an adjuster at Sedgwick. Although the claim was formally assigned to a different adjuster, Ms. JS[Redacted] had been asked to assist with some tasks. Ms. JS[Redacted] prepared the FAL after the close

of business on Friday, January 7, 2022. The FAL was filed electronically with the Division of Workers' Compensation ("DOWC"), consistent with WCRP 5-1(D)(d). Claimant's copy of the FAL was sent by U.S. Mail, as required by WCRP 1-4(A). But because the FAL would not be logged by the Division, or placed in the U.S. Mail to Claimant until the next business day, Ms. JS[Redacted] dated the certificate of service for Monday, January 10, 2022. This ensured that Claimant received the full 30-day objection window prescribed by statute.

16. The FAL was accompanied by a cover letter dated January 7, 2022. Ms. JS[Redacted] credibly explained that Sedgwick's document assembly system automatically generated the cover letter, and she inadvertently neglected to change the date on the cover letter when she changed the date on the FAL.

17. Sedgwick uses a centralized mailing facility to print and send all outgoing mail. Sedgwick's computer system shows the FAL was sent on January 10, 2022.

18. Sedgwick sent Claimant multiple documents during her claim, including an initial information packet and at least 11 sets of medical records. When asked at hearing if she received any of these documents, Claimant testified, "No, not a single piece of correspondence [from Sedgwick] of any shape, form, or fashion."

19. Any mail returned as undeliverable is logged into Sedgwick's computer system and attached to the claim file. Sedgwick has no record of any documents being returned regarding this claim, including the FAL.

20. Claimant also testified she called Sedgwick "a million times," but was sent to voicemail "each time" and "never" received a return call despite leaving "about 100 voicemails, with probably every adjuster at Sedgwick."

21. Ms. JS[Redacted]'s testimony is credible and persuasive.

22. Claimant's testimony is not credible.

23. Claimant was unrepresented when the FAL was filed. She retained counsel in late February or early March 2022. Claimant's counsel requested a copy of the claim file and found the January 10, 2022 FAL therein. Claimant's counsel promptly objected to the FAL on March 9, 2022.

24. Respondent proved the claim is closed by Claimant's failure to object to the FAL within 30 days. The FAL was properly addressed and sent to Claimant on January 10, 2022. The FAL was based on a valid determination of MMI by an ATP and otherwise complied with the statutory requirements. The claim was already closed by operation of law when the objection was filed on March 9, 2022.

25. Claimant failed to prove a mistake or error that would justify reopening the claim.

CONCLUSIONS OF LAW

A. The claim is closed by the January 10, 2022 FAL

An FAL provides a statutory mechanism for the respondents to close a claim. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Once an FAL is filed, the claimant must perfect an objection within thirty days or the claim will "automatically close." Section 8-43-203(2)(b)(II)(A). The purpose of an FAL is to notify the claimant of the exact basis on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). To that end, due process requires a claimant receive "actual notice" of an FAL before it can close a claim. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). The requirement of "actual notice" has repeatedly been interpreted to require receipt of the FAL itself, rather than mere knowledge of its potential existence. *E.g.*, *Duran v. Russell Stover Candies*, W.C. No. 4-524-717 (April 13, 2004); *Meskimen v. Fee Transportation*, W.C. No. 3-966-629 (March 31, 2003); *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999).

An assertion that a claim is closed is an affirmative defense that the respondents must prove by a preponderance of the evidence. *E.g.*, *Stubbs v. Choice Hotels International*, W.C. No. 4-299-627 (November 3, 2003); *Winters v. Cowen Transfer and Storage*, W.C. No. 4-153-716 (December 28, 1995). Proof that a document was properly addressed and mailed creates a rebuttable presumption of receipt. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). If the addressee denies receipt, the issue becomes a question of fact to be resolved by the ALJ. *Trujillo v. Industrial Commission*, 735 P.2d 211 (Colo. App. 1987).

As found, Respondent proved the claim was closed by Claimant's failure to timely object to the January 10, 2022 FAL. Ms. JS[Redacted]'s testimony is credible and persuasive. The FAL was properly addressed and placed in the U.S. Mail on January 10, 2022, as stated on the certificate of service. Although Ms. JS[Redacted] did not personally witness the FAL being placed in the mail, there is no persuasive reason to doubt the FAL was mailed on January 10, 2022 consistent with Sedgwick's established business practices. Claimant's allegation that she did not receive the FAL is not credible.

The procedure followed by Sedgwick in this case, whereby the FAL was filed electronically with the DOWC but sent to Claimant by U.S. Mail, was consistent with WCRP 5-1(D)(d) and WCRP 1-4(A). There is no persuasive evidence Claimant had previously requested Sedgwick to send important documents via email, as contemplated by § 8-43-203(3).

Respondent proved the FAL was properly supported by a determination of MMI from "an authorized treating physician" as required by § 8-42-107(8)(b)(I). Although the initial determination was made by a physician assistant, Dr. Johnson reviewed the chart and agreed that Claimant was at MMI with no impairment. The ICAO has previously held that "medical determinations made by physician assistants . . . may be adopted by the

physician and relied upon as a decision of the physician himself." *Flake v. JE Dunn Construction Co.*, W.C. No. 4-997-403-03 (September 19, 2017). The critical question is whether the treating physician was involved in, adopted, or ratified the determination by the non-physician provider working under their supervision. E.g., *MacDougall v. Bridgestone Retail Tire Operations LLC*, W.C. No. 4-908-701-07 (April 12, 2016); *Terry v. Captain D's Seafood Restaurant*, W.C. No. 4-226-464 (December 9, 1997); *Bassett v. Echo Canyon Rafting Expeditions*, W.C. No. 4-260-804 (April 3, 1997). Here, the persuasive evidence shows that the ultimate responsibility for the determination of MMI remained with, and was exercised by, Dr. Johnson.

Nor is the ALJ persuaded the determination of MMI was invalid because it was based on non-medical administrative concerns related to authorization of treatment. The MMI report references several medical factors such as the nonanatomic distribution of Claimant's symptoms, the MRI results, variability of clinical examination findings, drug-seeking behavior, and her failure to respond to prior treatment modalities. These are legitimate factors for a provider to consider when deciding whether a claimant is at MMI from a medical standpoint.

The deadline for Claimant to object to the FAL was February 9, 2022. The objection filed on March 9, 2022 was untimely, and the claim is closed.

B. Claimant failed to prove the claim should be reopened

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The opportunity to request reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005). The party requesting reopening bears the burden of proof. Section 8-43-304(4).

In determining whether to reopen a claim based on error or mistake, the ALJ must determine whether a mistake or error was made, and if so, whether it was the type of mistake that justifies reopening the claim. *Travelers Insurance Company v. Industrial Commission*, 646 P.2d 399 (Colo. App. 19810. The ALJ can consider whether the mistake could have been avoided by the exercise of due diligence. *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984). But the failure to exercise a procedural right is not dispositive, and is only one factor for the ALJ to consider when determining whether to reopen the claim. *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989).

As found, Claimant failed to prove an error or mistake relating to the FAL. The FAL was based on a valid determination of MMI by an ATP, and otherwise complied with all statutory requirements.

ORDER

It is therefore ordered that:

1. This claim is closed pursuant to the uncontested January 10, 2022 Final Admission of Liability.

2. Claimant's request to reopen this claim based on mistake or error is denied and dismissed.

3. Claimant's request for medical benefits 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: August 5, 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 5-188-401-001

ISSUES

1.Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021.

2.Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3.Whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries.

4.Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 14, 2021 until terminated by statute.

5.Whether Respondent has established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

6. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1.Claimant is an 82-year-old female who worked for Employer as a Clerk. Her job duties involved cleaning registers, cleaning glass doors and vacuuming.

2.Based on Employer's wage records, Claimant earned gross wages of $14,059.71 during the period from March 28, 2021 to October 12, 2021. The period consists of 199 days or 28 3/7 weeks. Dividing $14,059.71 by 28 3/7 weeks yields an AWW of $494.56. An AWW of $494.56 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3.On October 13, 2021 Claimant returned from a break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart

forward. Claimant fell down onto her right side. A couple of guests and a co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip.

4.Although Claimant experienced pain after the incident, she did not report a work injury or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She specifically testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. Claimant explained that she attempted to rest and recover at home without medical treatment because she feared termination if she reported a work injury. She has been on a medical leave of absence since the work injury.

5.Claimant reviewed video of her interaction with the suspected shoplifter and the recording showed her grabbing the cart. She acknowledged that confronting the shoplifter was a violation of company policy. Claimant's computer training records reflect that she completed Employer's "Denver Shoplifting Guidelines for all Employees" (Shoplifting Guidelines) on April 27, 2021. Although Claimant did not deny completing the course, she did not specifically recall the training.

6.Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture that required in-patient hip surgery. Claimant reported that her injury occurred when she fell in her yard on October 14, 2021. She did not disclose that the injury occurred at work because she feared the potential loss of employment. Claimant later acknowledged that she did not fall in her yard on October 14, 2021.

7.Claimant's surgery at Lutheran consisted of a right hip hemiarthroplasty. After the procedure Claimant suffered an acute stroke. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA stenosis versus occlusion. Claimant testified that, following treatment at Lutheran, she was released to a rehabilitation center and then to an extended nursing care facility.

8.Claimant has not returned to work for Employer. She has not been disciplined in any way related to her interaction with the shoplifter on October 13, 2021. Specifically, Claimant has not received a verbal or written reprimand, and her employment has not been terminated. Finally, Claimant has not earned income from any other source since her October 13, 2021 industrial injuries.

9.[Redacted, hereinafter AK] is Employer's District Asset Protection Manager. His duties involve supervising Employer's security programs and conducting investigations. AK[Redacted] testified that on October 13, 2021 Employer's policy prohibited all employees, except specially trained asset protection specialists, from any kind of confrontation with a shoplifter.

10.AK[Redacted] verified that Claimant completed the training on Employer's Shoplifting Guidelines on April 27, 2021. The e-signature showing completion of this training required Claimant to log on to the system using her employee identification LDAP. The LDAP is a unique identifier with the first couple of letters of the employee's name and an additional five or six numbers. In completing the training, Claimant would have had to enter a password that was not available to Employer's management. If Claimant forgot the password, the manager would have sent her a password reset link to create a new password.

11.The Shoplifting Guidelines specify that Employer's "primary focus and commitment is to the safety and security of all our employees, customers, and vendors. Improperly handling a shoplifting situation could lead to personal, financial, and reputational risk to you, customers, vendors, the shoplifter, and [Employer]." The Shoplifting Guidelines specifically provide, in relevant part, that employees shall:

• NEVER accuse someone of having shoplifted or taken something from the store.

• NEVER confront or stop a suspected shoplifter. You are NOT allowed or authorized to do so.

• NEVER attempt to stop a suspected shoplifter from leaving the store. Let them leave.

• NEVER grab or step in front of the suspected shoplifter's shopping cart. Let them leave with the cart.

The Shoplifting Guidelines note that "[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy." Claimant verified through her e-signature that she understood the Shoplifting Guidelines on April 27, 2021.

12.AK[Redacted] explained that a violation of the Employer's Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

13. AK[Redacted] testified that Employer's "New Company-Wide Shoplift Policy" (Updated Policy) was distributed to store directors via an interoffice memo on September 14, 2021. The Updated Policy did not change Employer's position on shoplifting as detailed in Claimant's April 27, 2021 training. The Updated Policy reiterates that "NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates." The Updated Policy specifies that "[a]ssociates who violate this policy will be subject to disciplinary action up to and including termination." Notably, store directors would ensure all employees reviewed and understood the policy. AK[Redacted] specified that the Updated Policy would have been communicated from store managers to employees during meetings or huddles. However, Claimant denied that Employer communicated that Updated Policy to her.

14.Claimant has demonstrated that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021. Initially, Claimant returned from break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Claimant fell down onto her right side. A couple of guests and a co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment.

15.Claimant explained that on October 26, 2021 she went to Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture and required in-patient hip surgery. Although Claimant reported that her injury occurred when she fell in her yard on October 14, 2021, she credibly testified that she did not fall in her yard. She feared the potential loss of employment if she reported a work injury. Store video of the accident reveals that Claimant fell to the floor after confronting a potential shoplifter and reaching for the handle of his cart during the course and scope of her employment on October 13, 2021.

16.Respondent asserts that Claimant deviated from her sphere of employment by confronting the shoplifter on October 13, 2021. Claimant acted in direct violation of Employer's Shoplifting Guidelines by confronting a suspected shoplifter. Respondent reasons that specific language in Employer's Shoplifting Guidelines demonstrates the intent to restrict employees from interacting with shoplifters and effectively eliminated the activity from the sphere of employment. Because Claimant was not acting within the sphere of employment when she confronted the suspected shoplifter, her injuries are not compensable.

17.Although an employer's direction to an employee may potentially limit the sphere of the employment relationship, the direction must be specific and show a clear intent to limit the sphere of the employment relationship. Employer provided Claimant with training about interacting with suspected shoplifters, but the directives do not evidence an intent to cease the employment relationship for a violation. The directives in Employer's Shoplifting Guidelines and training reveal they were intended to regulate Claimant's conduct while performing the duties of her position and not to limit the scope of her employment. The Shoplifting Guidelines specifically address appropriate behavior and actions in dealing with potential shoplifters rather than creating a restriction on the scope of Claimant's job. Employer's training about confronting potential shoplifters thus did not remove Claimant's injuries from the realm of compensability. Because Claimant's risk of injury was inherent in the work environment and she was performing her job duties, her injuries on October 13, 2021 occurred within the course and scope of her employment with Employer. Store video, in conjunction with Claimant's credible testimony, demonstrate that she suffered work injuries as a result of the October 13, 2021 accident in which she fell in the entryway to Employer's store. Accordingly, Claimant's work

activities on October 13, 2021 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

18.Claimant has established that it is more probably true than not that the right to select an ATP passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on October 13, 2021 Claimant suffered industrial injuries when she reached for the handle of a shopping cart and was pulled down when the shoplifter yanked the cart forward. Claimant suffered injuries to her arm, leg and hip, and did not complete the remainder of her work shift. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She has been on a medical leave of absence since the work injury.

19.Claimant first sought medical treatment on October 26, 2021 at Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was diagnosed with a closed right hip fracture that required in-patient hip surgery. Claimant then suffered an acute stroke. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

20.Employer was aware of Claimant's injuries immediately following the incident with the shoplifter on October 13, 2021. Claimant needed assistance to get up from the ground and reach the breakroom to try to recover and compose herself. Employer also knew that Claimant was unable to complete her shift on October 13, 2021 because of her pain and injuries. Because of Claimant's subsequent surgery and rehabilitation, she has been on a medical leave of absence from employment since the work injury. Employer thus had some knowledge of the accompanying facts connecting Claimant's injury to her employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim.

21.Despite Claimant's injuries on October 13, 2021 Respondent did not supply Claimant with a list of at least four designated medical providers. Specifically, Claimant credibly testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. The record is also devoid of a written list of four designated providers. Finally, Respondent has acknowledged that they did not explicitly meet the requirements of §8-43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

22.Claimant has demonstrated it is more probably true than not that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries. Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was assessed with a closed right hip fracture and required in-patient hip surgery. Claimant suffered an acute stroke after the procedure. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA

stenosis versus occlusion. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

23.Claimant's medical treatment and subsequent surgery at Lutheran were designed to address the injuries she sustained at work on October 13, 2021. Her acute stroke as a result of her surgery as well as her subsequent treatment at a rehabilitation center and an extended nursing care facility were causally connected to her industrial injuries. All of Claimant's medical treatment was thus reasonable and necessary to cure or relieve the effects of her October 13, 2021 work injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical benefits to cure or relieve the effects of her industrial injuries.

24.Claimant has proven that it is more probably true than not that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 14, 2021 until terminated by statute. The record reveals that Claimant's October 13, 2021 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered injuries as a result of the October 13, 2021 fall that eliminated her ability to earn wages. Claimant has not returned to work for Employer and has not earned income from any other source since the October 13, 2021 accident. Accordingly, Claimant is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute.

25.Respondent has established that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and her non-medical benefits should thus be reduced by fifty percent. On October 13, 2021 a suspected shoplifter walked past Claimant while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Video of Claimant's interaction with the suspected shoplifter showed her grabbing his shopping cart. She acknowledged that confronting the shoplifter was a violation of company policy.

26.Claimant testified that she did not recall Employer's Shoplifting Guidelines from training in April, 2021. In contrast to Claimant's testimony, computer training records reflect that Claimant completed Employer's Shoplifting Guidelines. Claimant verified through her e-signature that she reviewed and understood the Shoplifting Guidelines on April 27, 2021.The e-signature showing completion of the training required Claimant to log on to the system using her employee identification LDAP. In completing the training, Claimant would have had to enter a password that was not available to Employer's management. AK[Redacted] verified that Claimant completed the training.

27.The record reflects that Employer has adopted reasonable safety rules regarding interactions with suspected shoplifters. Employer's Shoplifting Guidelines specifically provide, in relevant part, that employees should never engage in any of the following: accuse an individual of shoplifting or taking something from the store; confront or stop a suspected shoplifter; attempt to stop a suspected shoplifter from leaving the

store; and grab or step in front of the suspected shoplifter's shopping cart. The Shoplifting Guidelines specify that "[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy." AK[Redacted] persuasively testified that Employer's Shoplifting Guidelines prohibit all employees, except specially trained asset protection specialists, from any kind of confrontation with shoplifters. Employer's safety rules are unambiguous, definite, and non-conflicting.

28.AK[Redacted] also testified that Employer's "New Company-Wide Shoplift Policy" (Updated Policy) was distributed to store directors through an interoffice memo on September 14, 2021. The Updated Policy did not change Employer's position on shoplifting as detailed in Claimant's April 27, 2021 training. The Updated Policy reiterated that "NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates." However, Claimant denied that Employer communicated that Updated Policy to her.

29.The record also reflects that Employer enforces its safety rules. Notably, AK[Redacted] persuasively explained that a violation of Employer's Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

30. Respondent has satisfied its burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding interactions with suspected shoplifters. Under the circumstances, Claimant's confrontation with the suspected shoplifter directly violated Employer's Shoplifting Guidelines involving never accusing an individual of shoplifting or taking something from the store; confronting or stopping a suspected shoplifter; attempting to stop a suspected shoplifter from leaving the store; and grabbing or stepping in front of the suspected shoplifter's shopping cart. Claimant directly violated Employer's reasonable safety rules regarding interactions with suspected shoplifters during the October 13, 2021 accident. Video of Claimant's interaction with the suspected shoplifter on October 13, 2021 showed her grabbing the cart. Claimant also acknowledged that confronting the shoplifter was a violation of company policy. Confronting the suspected shoplifter and grabbing his cart as he was exiting Employer's store constituted the direct cause of Claimant's right hip fracture and need for medical treatment.

31.Despite Claimant's testimony, the record reflects that Claimant was aware of Employer's Shoplifting Guidelines but deliberately confronted a suspected shoplifter. Notably, training on the Shoplifting Guidelines, the obviousness of the danger presented by the shoplifter and grabbing his shopping cart demonstrate that Claimant's actions were the result of deliberate conduct. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021 and her non-medical benefits should thus be reduced by fifty percent.

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).

Compensability

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

5.A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6.The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing

condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7.In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of Colorado's Workers' Compensation Act and is thus compensable as a work-related injury. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. *Id.* at 504-05. The Court also explained that the but-for test does not relieve the employee of the burden of proving causation, nor does it suggest that all injuries that occur at work are compensable. Id. at 505.

8.As a general rule, an employer has the right to issue directives concerning what an employee may do, and when she may do it. Commands of the preceding type regulate the "sphere" of employment. If an employee sustains an injury while violating a directive the injury is not compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Id.* at 1033.; *see In re Claim of Elorriage*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018).

9.As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021. Initially, Claimant returned from break and finished vacuuming the floor in Employer's entryway. A shoplifter who did not pay for his groceries then walked past her while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied "no," Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Claimant fell down onto her right side. A couple of guests and a

co-employee helped her to Employer's lunchroom where she sat for about 45 minutes. Claimant ultimately did not return to complete the remainder of her shift because of injuries to her arm, leg and hip. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment.

10.As found, Claimant explained that on October 26, 2021 she went to Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was admitted to Lutheran for a closed right hip fracture and required in-patient hip surgery. Although Claimant reported that her injury occurred when she fell in her yard on October 14, 2021, she credibly testified that she did not fall in her yard. She feared the potential loss of employment if she reported a work injury. Store video of the accident reveals that Claimant fell to the floor after confronting a potential shoplifter and reaching for the handle of his cart during the course and scope of her employment on October 13, 2021.

11.As found, Respondent asserts that Claimant deviated from her sphere of employment by confronting the shoplifter on October 13, 2021. Claimant acted in direct violation of Employer's Shoplifting Guidelines by confronting a suspected shoplifter. Respondent reasons that specific language in Employer's Shoplifting Guidelines demonstrates the intent to restrict employees from interacting with shoplifters and effectively eliminated the activity from the sphere of employment. Because Claimant was not acting within the sphere of employment when she confronted the suspected shoplifter, her injuries are not compensable.

12.As found, although an employer's direction to an employee may potentially limit the sphere of the employment relationship, the direction must be specific and show a clear intent to limit the sphere of the employment relationship. Employer provided Claimant with training about interacting with suspected shoplifters, but the directives do not evidence an intent to cease the employment relationship for a violation. The directives in Employer's Shoplifting Guidelines and training reveal they were intended to regulate Claimant's conduct while performing the duties of her position and not to limit the scope of her employment. The Shoplifting Guidelines specifically address appropriate behavior and actions in dealing with potential shoplifters rather than creating a restriction on the scope of Claimant's job. Employer's training about confronting potential shoplifters thus did not remove Claimant's injuries from the realm of compensability. Because Claimant's risk of injury was inherent in the work environment and she was performing her job duties, her injuries on October 13, 2021 occurred within the course and scope of her employment with Employer. Store video, in conjunction with Claimant's credible testimony, demonstrate that she suffered work injuries as a result of the October 13, 2021 accident in which she fell in the entryway to Employer's store. Accordingly, Claimant's work activities on October 13, 2021 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. *See In re Claim of Elorriage*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's attempt to regulate driving by prohibiting phone calls while driving constituted an effort to control the claimant's methods of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable). *Compare Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait

for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable).

Right of Selection

13. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

14. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

15. As found, Claimant has established by a preponderance of the evidence that the right to select an ATP passed to her through Respondent's failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. Initially, on October 13, 2021 Claimant suffered industrial injuries when she reached for the handle of a shopping cart and was pulled down when the shoplifter yanked the cart forward. Claimant suffered injuries to her arm, leg and hip, and did not complete the remainder of her work shift. Although Claimant experienced pain after the incident, she did not report a work injury to Employer or seek medical treatment. Claimant did not receive a list of at least four designated medical providers. She has been on a medical leave of absence since the work injury.

16. As found, Claimant first sought medical treatment on October 26, 2021 at Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was diagnosed with a closed right hip fracture that required in-patient hip

surgery. Claimant then suffered an acute stroke. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

17.As found, Employer was aware of Claimant's injuries immediately following the incident with the shoplifter on October 13, 2021. Claimant needed assistance to get up from the ground and reach the breakroom to try to recover and compose herself. Employer also knew that Claimant was unable to complete her shift on October 13, 2021 because of her pain and injuries. Because of Claimant's subsequent surgery and rehabilitation, she has been on a medical leave of absence from employment since the work injury. Employer thus had some knowledge of the accompanying facts connecting Claimant's injury to her employment and suggesting to a reasonably conscientious manager that the case might involve a potential compensation claim.

18.As found, despite Claimant's injuries on October 13, 2021 Respondent did not supply Claimant with a list of at least four designated medical providers. Specifically, Claimant credibly testified that she never received a list of designated medical providers through hand-delivery, e-mail or regular mail after her work accident. The record is also devoid of a written list of four designated providers. Finally, Respondent has acknowledged that they did not explicitly meet the requirements of §8-43-404(5), C.R.S. and WCRP Rule 8-2 WCRP 8-2 by providing a list of designated providers within seven days of Claimant's injuries. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

Medical Benefits

19. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

20.Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d

1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

21.As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her October 13, 2021 industrial injuries. Claimant first sought medical treatment on October 26, 2021 when she visited Lutheran Medical Center because of worsening pain. The medical records reveal that Claimant was assessed with a closed right hip fracture and required in-patient hip surgery. Claimant suffered an acute stroke after the procedure. Imaging following the stroke revealed right-sided ischemic infarct in the ACA distribution and severe right ECA stenosis versus occlusion. Following the surgery and stroke, Claimant was released to a rehabilitation center and an extended nursing care facility.

22.As found, Claimant's medical treatment and subsequent surgery at Lutheran were designed to address the injuries she sustained at work on October 13, 2021. Her acute stroke as a result of her surgery as well as her subsequent treatment at a rehabilitation center and an extended nursing care facility were causally connected to her industrial injuries. All of Claimant's medical treatment was thus reasonable and necessary to cure or relieve the effects of her October 13, 2021 work injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical benefits to cure or relieve the effects of her industrial injuries.

TTD Benefits

23.Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). 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 the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). 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. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

24. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute. The record reveals that Claimant's October 13, 2021 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant suffered injuries as a result of the October 13, 2021 fall that eliminated her ability to earn wages. Claimant has not returned to work for Employer and has not earned income from any other source since the October 13, 2021 accident. Accordingly, Claimant is entitled to receive TTD benefits for the period October 14, 2021 until terminated by statute.

Safety Rule Violation

25. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003).

26. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006).

27. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

28.Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

29. As found, Respondent has established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and her non-medical benefits should thus be reduced

by fifty percent. On October 13, 2021 a suspected shoplifter walked past Claimant while pulling a cart of groceries. As the shoplifter was leaving the store, Claimant asked him if he wanted to pay for the groceries in his cart and he replied “no,” Claimant then reached for the handle and was pulled down when the shoplifter yanked the cart forward. Video of Claimant’s interaction with the suspected shoplifter showed her grabbing his shopping cart. She acknowledged that confronting the shoplifter was a violation of company policy.

30. As found, Claimant testified that she did not recall Employer’s Shoplifting Guidelines from training in April, 2021. In contrast to Claimant’s testimony, computer training records reflect that Claimant completed Employer’s Shoplifting Guidelines. Claimant verified through her e-signature that she reviewed and understood the Shoplifting Guidelines on April 27, 2021.The e-signature showing completion of the training required Claimant to log on to the system using her employee identification LDAP. In completing the training, Claimant would have had to enter a password that was not available to Employer’s management. AK[Redacted] verified that Claimant completed the training.

31. As found, the record reflects that Employer has adopted reasonable safety rules regarding interactions with suspected shoplifters. Employer’s Shoplifting Guidelines specifically provide, in relevant part, that employees should never engage in any of the following: accuse an individual of shoplifting or taking something from the store; confront or stop a suspected shoplifter; attempt to stop a suspected shoplifter from leaving the store; and grab or step in front of the suspected shoplifter's shopping cart. The Shoplifting Guidelines specify that “[t]o perform any of the above actions places your safety and the safety of your co-workers, customers, and vendors in jeopardy.” AK[Redacted] persuasively testified that Employer’s Shoplifting Guidelines prohibit all employees, except specially trained asset protection specialists, from any kind of confrontation with shoplifters. Employer’s safety rules are unambiguous, definite, and non-conflicting.

32. As found, AK[Redacted] also testified that Employer’s “New Company-Wide Shoplift Policy” (Updated Policy) was distributed to store directors through an interoffice memo on September 14, 2021. The Updated Policy did not change Employer’s position on shoplifting as detailed in Claimant’s April 27, 2021 training. The Updated Policy reiterated that “NO Associate is authorized to make a shoplifting stop except for trained and certified Asset Protection Associates.” However, Claimant denied that Employer communicated that Updated Policy to her.

33. As found, the record also reflects that Employer enforces its safety rules. Notably, AK[Redacted] persuasively explained that a violation of Employer’s Shoplifting Guidelines can result and has resulted in the termination of employees. The policy exists to avoid potential safety hazards and interactions involving shoplifting incidents.

34. As found, Respondent has satisfied its burden of proof to establish that Claimant acted with deliberate intent in violating Employer’s reasonable rules regarding interactions with suspected shoplifters. Under the circumstances, Claimant’s confrontation with the suspected shoplifter directly violated Employer’s Shoplifting Guidelines involving never accusing an individual of shoplifting or taking something from

the store; confronting or stopping a suspected shoplifter; attempting to stop a suspected shoplifter from leaving the store; and grabbing or stepping in front of the suspected shoplifter's shopping cart. Claimant directly violated Employer's reasonable safety rules regarding interactions with suspected shoplifters during the October 13, 2021 accident. Video of Claimant's interaction with the suspected shoplifter on October 13, 2021 showed her grabbing the cart. Claimant also acknowledged that confronting the shoplifter was a violation of company policy. Confronting the suspected shoplifter and grabbing his cart as he was exiting Employer's store constituted the direct cause of Claimant's right hip fracture and need for medical treatment.

35. As found, despite Claimant's testimony, the record reflects that Claimant was aware of Employer's Shoplifting Guidelines but deliberately confronted a suspected shoplifter. Notably, training on the Shoplifting Guidelines, the obviousness of the danger presented by the shoplifter and grabbing his shopping cart demonstrate that Claimant's actions were the result of deliberate conduct. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021 and her non-medical benefits should thus be reduced by fifty percent.

Average Weekly Wage

36. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007).

37. In *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010) the court reaffirmed that, in determining an employee's AWW, the ALJ may choose from two different methods set forth in §8-42-102, C.R.S. The court noted 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." *Id.* The court then explained that the second method for calculating an employee's AWW, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." *Id.*

38. The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability

instead of the earnings on the date of the injury. *Id.; see Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001) (stating that "the fact that claimant was not concurrently employed by the hospital and the employer at the time of the injury does not preclude the exercise of discretion under §8-42-102(3)").

39.As found, based on Employer's wage records, Claimant earned gross wages of $14,059.71 during the period from March 28, 2021, to October 12, 2021. The period consists of 199 days or 28 3/7 weeks. Dividing $14,059.71 by 28 3/7 weeks yields an AWW of $494.56. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant suffered compensable injuries during the course and scope of her employment with Employer on October 13, 2021.

2. Because Respondent failed to provide a written list of at least four designated medical providers, the right to select an ATP passed to Claimant.

3. Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of her October 13, 2021 work injuries.

4. Claimant shall receive TTD benefits for the period October 14, 2021 until terminated by statute.

5. Because Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 13, 2021, her non-medical benefits shall be reduced by fifty percent.

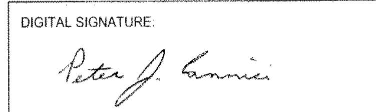
6. Claimant earned an AWW of $494.56.

7. 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 http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2022.



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

STIPULATIONS

Prior to the hearing, the parties reached the following stipulations in the event that the claimed injuries were determined to be compensable:

- Claimant's average weekly wage (AWW) is $1,115.38.
- Claimant is entitled to payment of temporary total disability benefits from August 23, 2021 through September 22, 2021.
- Dr. McFarland with Mt. San Rafael Clinic is the authorized treating provider under the claim.
- Claimant is entitled to a general award of medical benefits reasonably necessary to cure and relieve the effects of the work-related condition.

REMAINING ISSUES

I. Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable injuries to her low back and SI joint, right hip, right shoulder, and right foot and ankle on August 22, 2021.

FINDINGS OF FACT

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

Claimant's Alleged August 22, 2021 Slip and Fall

1. Claimant is now a former employee of Respondent-Employer. At the time of the alleged injury, Claimant was working as the "grocery manager" for Respondent's store in Trinidad, Colorado. She had been working at this store since approximately May of 2018. Claimant was originally hired as the "grocery night stocker" and was subsequently promoted to grocery manager, a position she described as that of assistant store manager. (Tr. 17:18 – 18:23). According to Claimant, she directed store operations if the District Manager was not physically present in the store. Because of her position, Claimant testified that she felt unable to leave the store unless another manager was on site.

2. In response to the COVID-19 pandemic, Respondent implemented a program called "Drive Up and Go" ("DUAG") before Claimant's alleged date of injury. (August 22, 2021). The DUAG program enabled shoppers to place their grocery orders online through the Respondent-Employer's website. Employees would then gather,

mark and “stage” the items for customer pickup. Frozen goods picked for an order were stored in totes in the store’s large walk-in freezer.

3. Claimant testified that she sustained an injury while preparing a DUAG order on August 22, 2021. (Tr. 19:1 – 20:12). According to Claimant, she had finished picking items for the order and was in the process of placing the frozen items connected with that order into the walk-in freezer when she slipped and fell injuring her low back and SI joint, right hip, right shoulder, and right foot and ankle. Claimant testified as follows:

> I was getting ready to put my frozen tote in the freezer, walked in, had the tote in my hand, put it on the shelf, went to turn and when I did, I slipped on the ice…. My right foot flipped, went underneath the U-boat and twisted. And as I started to fall, I was afraid to go straight back and hit my head, so I twisted my body a little bit to the right, I extended my right arm out and, when I did, I was using my right arm and my right hand to try and catch myself. I landed on my buttocks and my hip on the right-hand side and my hand reached out, and my shoulder went into my neck and preventing my head from hitting the floor. I went down.

(Tr. 21:19 - 22:12).

4. After her fall, Claimant was able to gather herself and get up off the floor on her own. She testified that there was no one in the area when she fell so no one came to help her get to her feet. Once on her feet, Claimant testified that she walked through the grocery area of the store and found a co-worker ([Redacted, hereinafter AK) and asked her if she knew where [Redacted, whereinafter MC], the store’s courtesy clerk was. According to Claimant, it was the responsibility of the courtesy clerk to chip the ice in the freezers and remove it. Apparently, Ms. AK[Redacted] did not know where Mr. MC[Redacted] was because Claimant testified that she returned to the freezer and took pictures of the ice on the floor. She testified that she intended to show the pictures to Mr. MC[Redacted] as proof that the ice on the floor had not been chipped as required and he needed to get it done. (Tr. 22:13- 23:13).

5. The photographs of the walk-in freezer taken by Claimant were submitted into evidence as Claimant’s Exhibit 9. Claimant explained at hearing the pictures she took were of the ice on the floor “right where my foot slipped, right next to the cart, there’s a picture of a U-boat, which is… what my ankle went under, and then just the remaining amount of ice that was in the freezer.” (Tr. 23:22 – 24:3). The ALJ has carefully reviewed the photographs admitted into evidence. Although some of the images appear rather grainy, when viewed in their totality, the pictures reveal a room with a floor largely covered in ice. (Clmt’s Ex. 9). In some of the pictures, a portion of the ice appears to have been chipped while in other areas of the room there is obvious ice buildup. *Id*. The area where Claimant testified she fell in shown in the pictures admitted into evidence. (Clmt’s Ex. 9, p. 113, 115). These photographs clearly depict

an area where the expanse of the floor is substantially covered in ice, including chipped ice. *Id.*

6. Claimant testified that she attempted to contact her store director, Ms. [Redacted, hereinafter Ms. G] after her fall. According to Claimant, Ms. G[Redacted] was not working that day and she was unable reach her to report her fall. Claimant next tried to contact "[Redacted, hereinafter N", the district leader who was on the phone attending to another call and unable to speak with Claimant. Claimant testified that she tried calling N[Redacted] multiple times but was unable to reach her. (Tr. 25:9-23). Claimant's typical shift hours were 7:00am to 4:00pm. Although her injury occurred at an estimated 9:00am to 9:30am[1], Claimant testified that she continued to work until she was relieved at 4:00pm because her director (Ms. G[Redacted]) was not present in the store. Since Claimant was effectively the only onsite manager, she testified she could not leave the store. (Tr. 20:15 – 21:8).

7. Because Claimant did not make contact with and speak to Ms. G[Redacted] or N[Redacted] about her fall, she testified that she worked the balance of her shift in pain and left for the day. Claimant lives approximately 20 miles from the store[2] and by the time she arrived home after her August 22, 2021 shift, she was very sore. (Tr. 26:8-23). Once home, Claimant sent a text message to Ms. G[Redacted] and N[Redacted] to inform them she had fallen. (Tr. 25:9-24). The text from the evening of Sunday August 22, 2021 was sent to both Ms. G[Redacted] and N[Redacted], stating, "I was going to put in an accident report. I fell in the walk in. Landed on my right side." (Clmt's. Ex. 8, p. 95). Claimant sent N[Redacted] a text message separately on the morning of August 23, 2021. *Id.* at 94. She sent N[Redacted] the message separately, as Ms. G[Redacted] was not working. She inquired as to how she was supposed to go about filing a claim, expressing that although she had done this for workers before, she had never done it for herself. *Id.* Claimant was instructed to call "K[Redacted]" at the store to put the claim in "ASAP." *Id.*

8. Claimant followed her supervisor's instruction and provided a written incident statement to her Employer on August 23, 2021[3]. (Resp. Ex. F, p. 91). Her written statement is consistent with her testimony and her reporting of the incident to her medical providers. It also provides support for a critical fact. Claimant writes, "I did continue to work **and as the day went on I began to hurt**." *Id.* (emphasis added). Claimant testified, "the pain didn't subside [sic] as bad until when I finally got home after I left work." Claimant clarified her incorrect usage of "subside." "[The pain] got worse **after** I left." (Tr. 26:20 – 27:9). She further testified that she was in a lot of pain the next morning when she returned to the store to fill out the incident report with K[Redacted]. (Tr. 27:14-24).

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[1] See also (Resp. Ex. F., p. 91) (Claimant estimated the incident occurred at approximately 9:15 am to 9:30 am in her August 22, 2021 witness statement).

[2] Claimant lives in Raton, New Mexico and commutes to work in Trinidad.

[3] Claimant's statement is dated August 22, 2021; however, the content of the statement indicates the statement was filled out the day after the incident. Moreover, the date Claimant came in to fill out her report is not in question.

Dr. McFarland's Treatment and Claimant's Prior Medical History

9. Upon completing her incident report, Claimant was provided the contact information for Dr. Douglas McFarland by K[Redacted], who informed Claimant that Dr. McFarland is Respondent's workers' compensation doctor. Claimant testified that she went straight to Dr. McFarland's office from the store after filling out the incident report. (Tr. 28:3-12).

10. Dr. McFarland examined Claimant on August 23, 2021. (Clm. Ex. 3, pp. 6-9). Claimant reported that she had injured herself in the walk-in freezer the day prior at approximately 9:15am. *Id.* at 8. She informed Dr. McFarland that her right foot slipped on ice while she was walking in the freezer. She reportedly twisted and landed on her right side, causing injury to the foot and ankle. Her right hip directly contacted the ground when she landed. As stated in her testimony, Claimant avoided striking her head by twisting her body to the right. She was also reporting pain in her right shoulder blade across her upper back due to her attempting to catch herself with that arm. *Id.* Examination revealed tenderness in the upper back over the right greater than left scapular area, the right lower back laterally, the right hip, the lateral malleolus, with noted swelling of the posterior aspect of the calcaneus. *Id.* Claimant was diagnosed with contusions of the right hip, lower back, right foot, along with sprains of the right ankle and thoracic spine. *Id.* Dr. McFarland restricted Claimant to no more than 10 pounds lifting, 5 pounds repetitive lifting, and no more than 1-2 hours of walking or standing per day, among other restrictions. *Id.* at 9.

11. Claimant was seen in follow-up by Dr. McFarland on September 3, 2021, September 17, 2021, and October 12, 2021. During these appointments, Claimant reported persistent symptoms in her low back, right shoulder and right hip and proximal thigh. She also reported increased pain in her right ankle noting that she was limping on the right leg. (Clmt's Ex. 3, pp. 13-26). X-rays were ordered on October 12, 2021, which revealed mild degenerative changes in the right hip and shoulder as well as "soft tissue swelling along the lateral malleolus but no visualized fracture. (Clmt's Ex 3, pp. 10-12, 25). The ALJ finds Claimant's ankle swelling to constitute some objective evidence of acute injury.

12. Claimant has no history of any significant injury to any of the body parts alleged to have been injured in her August 22, 2021 slip and fall. She testified that in approximately 2017 to 2018, she did see a doctor about body aches and joint pain. She conceded that she is a "rather heavy set woman" and was experiencing generalized aches and pains. Her doctor advised her to work on her diet and weight management noting that she would probably get better. Claimant testified that she increased her activity level, lost a significant amount of weight, and was generally feeling better. (Tr. 29:4-5). A review of the medical records from Claimant's primary care provider—La Familia Primary Care—corroborates her testimony. (Clmt's. Ex. 6). Claimant reported non-specific "muscle aches" and "joint pain" to her PCP on October 8, 2017. *Id.* at 61. Physical examination of Claimant was benign. *Id.* at 63. However, she was diagnosed

with essential hypertension and a vitamin D deficiency. *Id.* According to her medical records, Claimant's muscle and joint aches went away within months after starting a Vitamin D supplement. *Id.* at 74. There are no documented ongoing problems before or after the February 22, 2018 visit.

Dr. Burris' Independent Medical Examination

13. Claimant underwent an independent medical examination (IME) with Dr. John Burris on February 8, 2022 at the request of Respondents. (Resp. Ex. A). Per Dr. Burris, Claimant was reporting ongoing right shoulder, right low back/buttock, right hip, right ankle, and right heel pain. *Id.* at 3. Claimant reported her mechanism of injury (MOI) to Dr. Burris consistently with her other documented reports. *Id.* at 4. Dr. Burris discussed Claimant's employment history with her as well, noting that she had obtained a new job at Denny's after her employment with the Employer ended. *Id.* at 5. Dr. Burris documented that she started working for Denny's on October 23, 2021, and noted that Claimant's work at Denny's was less physically demanding than her prior work with Respondent-Employer. *Id.* He also noted that Denny's had been working with her restrictions. *Id.*

14. Respondent-Employer maintains a large commercial cardboard compactor in the backroom of the store. This compactor is covered by a security camera, which captures a view of a significant portion of the backroom work area. As part of his IME, Dr. Burris reviewed security video captured in the backroom on the day of Claimant's alleged slip and fall. While much of the room is visible, the freezer where Claimant claims to have fallen is not.

15. Dr. Burris reviewed the security camera and reached conclusions based upon that review. The ALJ has also thoroughly reviewed the video footage from the "Backroom Compactor" camera admitted into evidence Respondent's Exhibit H. There are four videos, the first being 1 hour 4 minutes and 35 seconds long, beginning at 9:00:19 am and ending at 10:19:58 am. The second video is 4 minutes and 59 seconds long, beginning at 12:50:00 am and ending at 12:54:58 am. The third video is shorter at 3 minutes and 54 seconds from 2:10:04 pm to 2:14:59 pm and the fourth video is 9 minutes and 14 seconds long, beginning at 3:42:21 pm and ending at 3:54:59 pm. (See Resp. Ex. H; see also Resp. Ex. A, p. 7).

16. Relying heavily on the in-store surveillance footage from the backroom compactor room from August 22, 2021 and Claimant's prior history of body aches and joint pain, Dr. Burris diagnosed Claimant with "myofascial pain," (Resp. Ex. A., pp. 10-11). Dr. Burris starts his discussion with Claimant's reports of "chronic muscle and joint pain" during medical visits from 2017 and 2018. *Id.* at 10. Dr. Burris' report neglects to mention that the same medical records document Claimant lost weight, supplemented with vitamin D, and her symptoms resolved. Moreover, the ALJ notes that the same medical records only mention approximately four months of non-specific joint aches and pains occurring several years ago. Dr. Burris goes on to discuss the store surveillance video. *Id.* at 11. He acknowledges that the video does not capture the fall, nor does it

cover the freezer where Claimant allegedly fell. Nonetheless, Dr. Burris noted that in the short periods of time Claimant is seen on camera, he did not "observe" her to display any signs of physical distress indicative of having sustained an injury. *Id.* He felt the video was evidence that Claimant was capable of continuing her normal activities. *Id.* It was his opinion, given the surveillance video and the information he reviewed, that Claimant could not have sustained more than soft tissue strains and contusions. According to Dr. Burris, if one were to accept that Claimant fell as claimed, she would have reached maximum medical improvement (MMI) effective October 26, 2021, despite Dr. McFarland recommending continued treatment to the contrary. *Id.* at 11.

Dr. Castrejon's Independent Medical Examination

17. Claimant underwent an IME with Dr. Miguel Castrejon on March 2, 2022 at the request of her counsel. (Clmt's. Ex. 7). Claimant again described her mechanism of injury consistently with her prior reports. *Id.* at 86. She explained that she had to continue working after the incident, given the fact she was the only manager on duty at the time. *Id.* Claimant was able to perform the work, albeit with "ongoing and **worsening** discomfort." *Id.* (emphasis added). Claimant reported that Dr. McFarland had referred her for physical therapy, but she only had six treatments to date, and it was only for the right shoulder, nothing directed at the lower back, right hip, right ankle, or right foot. *Id.* Dr. McFarland discussed ordering an MRI, but this was denied by Respondents. *Id.*

18. Dr. Castrejon reviewed Claimant's prior medical records from La Familia Primary care. (Clmt's. Ex. 7, p. 87). Unlike Dr. Burris, Dr. Castrejon felt these records were "non-contributory" to the present matter. *Id.* He explained further on in his report that the "joint pains" were documented to have resolved long before the work injury, citing Claimant's significant weight loss as the primary factor. *Id.* He noted that Claimant had no limitations prior to the fall at work and that she continued to complain of right shoulder pain extending into her shoulder blade and trapezius; a dull to sharp pain in her right lower back and posterior hip that worsens with prolonged standing, along with the ongoing pain in the foot and ankle after her fall. *Id.* at 88. Dr. Castrejon observed Claimant walking with an antalgic gait, favoring the right limb. *Id.* at 89. Conversely, Dr. Burris documented she walked with a normal gait with no difficulties ambulating less than one month prior. (Resp. Ex. A, p. 9). Eight days prior to the IME with Dr. Burris, Claimant was evaluated by Dr. McFarland, who documented Claimant reportedly continued to walk with a limp, and his physical examination of Claimant was consistent with her report. (Resp. Ex. B, p. 20). Dr. Castrejon specifically tried to have Claimant squat, which she could only perform ¼ of the way, and she was unable to heel and toe walk at all due to right ankle pain. (Clmt's. Ex. 7, p. 89).

19. Dr. Castrejon's physical examination revealed findings in the cervical and lumbar spine, right shoulder, right hip and SI joint. She had pain and decreased ROM, in the right ankle pain with tenderness at the distal Achilles insertion with decreased eversion due to pain. (Clmt's. Ex. 7, p. 89). Dr. Castrejon diagnosed Claimant as having right shoulder girdle myofascial pain syndrome, an element of scapular dyskinesis, a possible right shoulder labral tear, a lumbar spine/strain with right SI joint involvement,

probable piriformis syndrome, a right ankle strain/sprain with a possible ligament injury, and chronic pain. *Id.* at 89-90.

20. Dr. Castrejon specifically addressed Dr. Burris' opinions in his IME report. (Clmt's. Ex. 7, p. 90). Dr. Burris stated Claimant had no objective findings the day after the incident. Dr. Castrejon stated he respectfully disagreed with Dr. Burris attempting to minimize the severity of Claimant's condition. *Id.* Dr. Castrejon goes into great detail providing his opinion on why Claimant's subjective reporting of symptoms are wholly supported by the medical record, noting that during the initial October 4, 2021, physical therapy visit examination revealed "weakness of shoulder flexion, extension, abduction, internal rotation and external rotation all of which were graded at a 3+/5." *Id.* at 91. Claimant also had positive provocative maneuver testing to include a "positive stretch" test, a positive "crank" sign and a positive "Hawkins-Kennedy" maneuver. *Id.* Dr. Castrejon was unable to reconcile the discrepancies between the examination findings of Dr. McFarland, the physical therapist and himself with the "normal" examination of Dr. Burris, especially when Dr. McFarland documented abnormal findings a mere eight before Dr. Burris' IME. *Id. at* p. 92. Dr. Castrejon opined there were sufficient objective findings documented by Dr. McFarland and Claimant's physical therapist to support her initial symptoms and her ongoing complaints. In "contradistinction" to the opinion of Dr. Burris, Dr. Castrejon opined that Claimant suffered a considerable fall. *Id.* Finally, Dr. Castrejon notes that while Dr. Burris opined that Claimant would be at MMI as of October 26, 2021; she had only been treated for her shoulder complaints without treatment directed to any of the other injured body parts, thus calling into question his opinion regarding MMI. *Id.*

21. Dr. Castrejon opined that Claimant remains under physical restrictions and that she sustained multiple injuries as a direct result of the August 22, 2021 incident. (Clmt's. Ex. 7, p. 92). He opined that Claimant should move forward with an MR arthrogram of the right shoulder, an MRI of the right ankle, evaluation by an orthopedic specialist for the shoulder and for the ankle. *Id.* He recommended chiropractic care or physical therapy to address the SI joint dysfunction and piriformis issue, and possibly a right SI joint injection for diagnostic purposes along with a right piriformis injection. *Id.* at 92-93. She should also receive massage therapy, acupuncture, dry needling, and trigger point injections for the right shoulder girdle and the piriformis syndrome. Finally, she should have access to ongoing anti-inflammatories, muscle relaxants, and a TENS unit. Any MMI determination would have to be made after additional workup and treatment. *Id.* at 93.

The Testimony of Dr. Burris

22. Dr. Burris testified at hearing as expert in the field of occupational medicine. (Tr. 58:5-14). He commented at hearing that he felt Claimant was moving "normally" in the videos he watched. He observed Claimant to reach overhead, lift and move totes from cart to waist level, carry loaded totes, bend over to pick-up debris from the floor, push carts, lift multiple loaded totes off shoulder level, scan and sort items in totes, load cases of bottled water, empty small trash cans into larger trash cans, and

place cardboard boxes into the compactor with both hands overhead. (Resp. Ex. A, p. 7). Dr. Burris noted that at all times in the video, including late in the afternoon, Claimant was observed moving about without limping or signs of difficulty or distress. He further noted that there was a discrepancy between Claimant's reported capabilities on the day of injury and her capabilities as observed on the store video. While conceding that the video captured less than 10% of Claimant's workday, Dr. Burris nevertheless opined that, the security video did not support a conclusion that a work injury of significance occurred on August 22, 2021. (Resp. Ex. A, p. 11; Tr. 62:8-18; 71:1-5). Indeed, Dr. Burris testified that based upon Claimant's described MOI and her demonstrated level of activity, the only injuries she may have suffered were very minor soft tissue strains and contusions.

23. In support of his conclusions, Dr. Burris testified that Claimant had diffuse complaints throughout her right shoulder, right side of her low back, right hip region, right ankle, and right heel. He stressed that his examination of Claimant's right shoulder joint, lumbar spine, and right hip joints were relatively benign with no objective findings. Claimant complained of a lot of myofascial tenderness, but had good range of motion, good strength, normal neurologic function, and negative provocative tests leading Dr. Burris' to conclude that Claimant had myofascial pain. He explained that Claimant's initial evaluation with Dr. McFarland was similar in that it did not document any evidence of trauma. According to Dr. Burris, Dr. McFarland noted findings similar to his, i.e. tenderness in multiple areas, but generally good range of motion and stretch. While Claimant did have some minimal ankle swelling on initial evaluation, there was no documentation of bruising or dysfunction. Further, none of the injuries appeared severe enough to warrant x-rays on the initial visit. (Tr. 60:6-25).

24. Dr. Burris testified that the Medical Treatment Guidelines recognize chronic pain as a psychosocial disease. He noted that Claimant had a past medical history of type 2 diabetes, chronic muscle and joint pain in 2017 and 2018 and PTSD secondary to childhood abuse, which is a well-known contributor to chronic pain complaints later in life. Resp. Ex. A, p. 10; Tr. 58:24 – 60:5).

25. According to Dr. Burris, the natural course of minor strains and contusions, such as those Claimant may have suffered in this case, is rapid, predictable improvement and recovery within days to weeks, regardless of treatment. Dr. Burris opined that because Claimant had numerous non-work-related risk factors for the development of chronic pain combined with a lack of objective examination findings following her work injury, her persistent pain, 5 ½ months after the workplace incident, is probably related to non-work-related psychosocial risk factors rather than the August 22, 2021 slip and fall. (Resp. Ex. A, p. 11; Tr. 65:9 – 69:4).

26. Dr. Burris reviewed the IME report from Dr. Castrejon. He noted that Dr. Castrejon did not appear to have reviewed the store surveillance video and had only spent approximately 1-hour reviewing records pertaining to the claim. Dr. Burris further testified that Dr. Castrejon had misconstrued some of the opinions and conclusions in his report. (Tr. 69:5 – 70:10).

The Security Camera Video

27. As noted, the ALJ has carefully reviewed the security video referenced above. Paragraph 15 of these Findings of Fact document the extent of the video provided. As found, there are four separate video files on a compact disc (Resp. Ex. H), which contain approximately 1 hour, 22 minutes, and 42 seconds of recording. Beginning with the video running from 9:00:19 and ending at 10:19:58 am, Claimant appears in the backroom compactor area at approximately 9:01 am using both arms/hands to prepare DAUG orders. Claimant is active preparing DAUG orders and is seen lifting items and pushing carts about the room until approximately 9:06 am when she pushes a cart out of view of the backroom camera. There is no visible activity in the backroom from 9:06 to 9:15:20, when two male workers enter the room for a very brief period. As noted, the freezer where Claimant reported she fell is not covered by the security camera producing the video. Consequently, any activity that occurred in or near this freezer cannot be verified. Regardless, the video demonstrates that the backroom, where the freezer is located, appears empty from 9:06 to 9:15, which the ALJ finds corroborates Claimant's testimony that there was no one in the vicinity when she fell. After the aforementioned male workers leave the room at approximately 9:15:45 am, the backroom is continually occupied by various workers through the 9:26:38 mark of the video when Claimant appears and is seen lifting DAUG totes onto a shelf. The video evidence supports a finding that the only time the backroom appears unoccupied is between 9:06 and 9:15 am. Claimant testified that the fall occurred between 9:00 and 9:30, which the ALJ finds fall in the window were the backroom appears empty. Based upon the video evidence, the ALJ finds that Claimant's reported fall probably occurred sometime in the ten (10) minute span between 9:06 and 9:15, when the backroom appears unoccupied.

28. Claimant's first actions in the video after the time of her probable fall are seen at approximately 9:26 am. (Resp. Ex. H). Claimant is seen lifting totes onto a shelf and talking briefly to a male co-worker. At 9:27:41, Claimant walks through the backroom carrying a tote and disappears from view until 9:28:07 when she is seen bending over to pick up some trash from the floor. She continues to perform various work duties, coming in and out of view of the camera, throughout the balance of the video, which ends at 10:19:58. Consistent with the observations of Dr. Burris', the ALJ watched Claimant lift, carry, push, pull, reach overhead, bend at the waist and walk while performing a variety of work tasks throughout the video admitted into evidence. Claimant appears to move her right arm and leg without obvious signs of pain or limitation. Nonetheless, Claimant's face is obscured by a mask and the images are taken from a distance making impossible to tell the degree of pain she may be experiencing as she completes her duties. Moreover, Claimant is only seen for transitory periods in video that Dr. Burris admitted comprises less than 10% of her workday. In this case, the ALJ finds the security camera video of limited value when determining the existence and/or severity of the injuries Claimant alleges she sustained as part of her August 22, 2021 slip and fall. Accordingly, the ALJ finds Dr. Burris' opinion that Claimant did not suffer a work injury of significance on August 22, 2021

unpersuasive. The remaining opinions of Dr. Burris regarding Claimant's credibility generally have been weighed against the totality of the evidence presented and are deemed unpersuasive.

The Testimony of KD [Redated]

29. KD[Redacted] testified at hearing in her capacity as the District Outside Protection Manager for Respondent-Employer. Her job is to manage investigations of employees (Tr. 77:11-24). Ms. KD[Redacted] initiated an investigation into Claimant's handling of a shoplifting incident occurring in the store on July 29, 2021. Claimant testified about this particular investigation and the incident during her direct examination. She explained that a customer was suspected of shoplifting at her store. According to Claimant, the suspect was grabbed by the employee running the self-checkout lane in the store in attempt to prevent him from leaving. At the same time, the store's courtesy clerk walked up and joined the altercation. Claimant, seeing what was occurring, instructed her two employees to let the individual go. They let him go and she proceeded to call law enforcement. (Tr. 30:2 – 31:12). Claimant testified that she was verbally reprimanded by Ms. KD[Redacted] because she was "not supposed to call law enforcement due to the fact that, apparently, I had been contacting law enforcement for so many things that now law enforcement no longer wanted to come to our store." (Tr. 31:13-22).

30. Claimant provided a written statement regarding the aforementioned shoplifting incident. (Resp. Ex. F, p. 90). It documents the details of the confrontation with the shoplifter. In her statement, Claimant states that she felt the best thing at the time was for them to let the shoplifter go, get as much information as possible, and call the police. *Id.* The statement is dated August 17, 2021; however, as noted the incident occurred on July 29, 2011, approximately one month before Claimant's slip and fall in the freezer.

31. Ms. KD[Redacted] disputed Claimant's explanation for why she was reprimanded. Ms. KD[Redacted] testified that she reprimanded Claimant because two employees—Jackie and Randy—were violating Employer policy by trying to detain the shoplifter while Claimant allegedly "stood and watched the incident while she was calling 911." (Tr. 79:5-23). Ms. KD[Redacted] testified that Claimant had created a bad relationship with the local police department due to prior incidents and, as a result, was instructed that another manager would need to be involved in the decision to contact the police for future incidents. Claimant expressed that she was "very upset" about her conversation with Ms. KD[Redacted]. Ms. KD[Redacted] then reprimanded Claimant and informed her that she "may" be subject to discipline as a result of the event, but this never took place as Claimant went out on leave for her reported work injury. (Resp. Ex. F, p. 90; Tr. 31:13 – 33:15, 39:2 – 40:18, 77:11 – 81:2, 83:5-15, 88:2-22).

32. During cross-examination, Ms. KD[Redacted] was asked how Claimant should have appropriately handled the situation. It was her testimony that Claimant

should have instructed the employees to stop what they were doing. She also felt that contacting the police over this shoplifting event was unreasonable.

The Testimony of Ms. G[Redacted]

33. Ms. G[Redacted] testified at hearing in her capacity as the store director where Claimant worked. (Tr. 86:14-24). She confirmed she was Claimant's direct supervisor as of August 22, 2021. (Tr. 87:21 – 88:1). She also confirmed Claimant that no corrective or written action against Claimant for the above described shoplifting incident. She was merely instructed not to call the police in the future. (Tr. 88:2-17). Furthermore, she did confirm that Claimant notified her of the alleged work injury the evening following the fall via text message. (Tr. 88:23 – 89:2).

34. Ms. G[Redacted] testified that she personally reviewed the security camera video in order to investigate the alleged injury. Following her review of the video, Ms. G[Redacted] concluded that the injury did not happen, or if it did, not to the severity it was reported. (Tr. 88:9 – 9:15). Ms. G[Redacted] claims to have reviewed other video footage from the store, which she asserts did not reveal any evidence of Claimant appearing to be injured. (Tr. 88:9 – 9:11). She did not preserve any other video from the store from the date of the injury, other than the selected videos outlined above. (Tr. 90:23 – 91:11).

35. Ms. D[Redacted] testified that the photographs submitted by Claimant because she did not "ever remember that freezer looking like that – in that area." (Tr. 92:4-7). She did confirm, however, that there have been past instances of ice accumulation in the freezer. (Tr. 92:8-22). Ms. G[Redacted] also questioned the authenticity of the photos taken by Claimant of the freezer, noting that she had never observed the freezer to look like that. (Tr. 92:4-7). Nonetheless, she admitted that there had been prior issues with ice on the freezer floor in the past. A work order had been put in and the manager in charge was responsible for checking the freezer every day. On the day of the alleged injury, claimant was responsible for checking the freezer floor. (Tr. 91:12 – 93:3).

36. During cross-examination, Ms. G[Redacted] went from being "pretty sure" that Claimant did not try calling her on August 22, 2021 prior to the evening text message; to being "a hundred percent certain", that Claimant did not call her earlier that day. (Tr. 94:1-6). At the 9:35:16 mark of the video, which the ALJ finds would had been shortly after the alleged fall, Claimant is observed to leave the backroom area of the store with a cell phone in hand. (Resp. Ex. H). She returns to the backroom carrying a tote approximately one minute later. While it is impossible to ascertain with 100% certainty, it is plausible that Claimant left the backroom around 9:35 am to call Ms. G[Redacted] only to return one minute later when her attempt failed. While Ms. G[Redacted] testified that, she was 100% certain that Claimant did not attempt to reach her at any time during the day prior to receiving Claimant's text message; she could not recall her whereabouts or what she was doing around the time Claimant's shift ended on August 22, 2021. Based upon the totality of the evidence presented, the ALJ finds

Ms. G[Redacted]'s 100% certainty that Claimant did not attempt to call her regarding the slip and fall unreliable and unpersuasive.

37. Based upon the totality of the evidence presented, the ALJ finds that Claimant probably fell in the freezer as she described. The ALJ credits Claimant's testimony regarding her attempts to report her injuries and her pain levels following this incident over the testimony of Ms. G[Redacted] and Dr. Burris. Specifically, the suggestion of Ms. G[Redacted] that Claimant is fabricating the incident and feigning her injuries is unconvincing.

38. While the ALJ is not convinced that Claimant's described MOI caused the degenerative changes noted on her right hip and right shoulder x-rays, the results of Dr. McFarland's initial physical examination coupled with Claimant's reports of persistent limping and the findings on her right ankle x-ray support a finding that she probably suffered an acute injury to her right hip and ankle consistent with a fall. Moreover, the ALJ is convinced that Claimant's fall caused injuries to her right shoulder, mid-back, and lower back and right SI joint giving rise to Dr. McFarland's treatment. While respondents attempt to minimize Claimant's observed ankle swelling on x-ray by indicating that there is no documentation of "bruising or dysfunction", the x-ray report makes it clear that pain and "injury" prompted the need for this imaging. (Clmt's. Ex. 3, p. 12). As found above, Claimant's ankle swelling constitutes some objective evidence of injury in this case.

39. Based upon the evidence presented as a whole, the ALJ finds the opinions and analyses of Dr. Castrejon to be more reliable and persuasive than those of Dr. Burris.

40. The ALJ finds Claimant has established by a preponderance of the evidence that she sustained compensable injuries to her right hip, right ankle, right foot and heel, right shoulder, mid-back, and lower back/right SI joint as a direct result of the August 22, 2021 work related incident. The scope of these injuries has yet to be determined, as Claimant has not received much of the treatment recommended by Dr. McFarland. Because the ALJ finds that Claimant has proven that she sustained compensable injuries, she is entitled, per the parties' stipulation, to a general award of medical benefits that are reasonably necessary to cure and relieve her of the effects of her work-related condition(s).

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 (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, 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. 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 the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *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'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*, 57 P.2d 1205 (Colo. 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). While there are differences in the testimony of Claimant and Ms. G[Redacted] regarding the reporting of the fall in this case, the ALJ resolves those conflicts in favor of Claimant to conclude that Claimant fell and probably tried to report her injuries to Ms. G[Redacted] shortly after the incident happened. As found, the ALJ credits the testimony of Claimant regarding the MOI in this case as well as her pain/functionality levels following her tumble over the contrary testimony of Dr. Burris.

D. 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). To the extent, 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); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the available medical record supports the expert medical opinions of Dr. Castrejon. Regardless of the documented MOI and effort to report the injuries in this case, Dr. Burris agrees that a slip and fall of the nature Claimant asserts she experienced is likely to at least cause minor soft tissue injuries.

Based upon the evidence presented, the ALJ concludes that Dr. Castrejon's opinion that the accepted MOI likely caused injuries to Claimant's right shoulder, low back, SI joint, right hip and right ankle is supported by the record evidence as a whole and in particular the physical examination of Dr. McFarland and the x-ray of Claimant's right ankle.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Id.*; *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). 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.

F. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *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.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the ALJ finds that Claimant produced sufficient evidence to support a conclusion that her symptoms/injury occurred in the scope of employment after she slipped on ice in the walk in freezer after she was placed a DAUG tote containing frozen goods on a storage shelf. As found, the contrary testimony/suggestions of Ms. G[Redacted] that Claimant is fabricating the incident and feigning her injuries is unconvincing.

G. While Claimant established that she was injured in the course and scope of her employment, it is necessary to address whether her symptoms/injury arose out of that employment. 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.*

H. There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). 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).

I. As found, the ALJ credits the opinions of Dr. Castrejon and the testimony of Claimant. Claimant credibly testified that although she did fall and injure herself, she was not in immediate, excruciating pain. Claimant testified that she was able to continue working that day through the rest of her shift. She has stated, and continues to state, that she began feeling worse and worse as the day progressed, particularly after she had left work and drove the approximate 20 miles to her home. The pain became severe by the next morning, at which time Claimant came into the store, filled out her incident report, and presented directly to Dr. McFarland. Claimant's testimony is consistent with the parsed video provided by Respondents, in that she may not have been experiencing severe pain sufficient to produce obvious signs of injury visible on a low-definition internal security camera. Claimant testified that she was in significant pain and having trouble ambulating into the store on August 23, 2021 to complete her incident report, yet Respondents did not obtain or preserve any video from the store on this date.

J. The ALJ finds the weight of the evidence presented by Claimant to be more persuasive than that offered by Respondents. Here the evidence supports a conclusion that Claimant attempted to report the incident shortly after it occurred while still working. Despite not being able to, it is undisputed her employer was aware of the incident that evening after Claimant sent a text message to Ms. G[Redacted] and "N[Redacted]." Claimant was seeking treatment the next day, and the mechanism of injury reported has remained consistent. The examination findings documented by Dr. McFarland and Claimant's physical therapists and the x-ray of Claimant's right ankle support her version of events. Importantly, the examination and x-ray findings documenting swelling constitute objective evidence of acute injury. As found, the totality of the evidence presented, including opinions of Dr. Castrejon persuade the ALJ that Claimant's sudden slip and fall onto an icy floor in the walk in freezer likely resulted in an acute soft tissue sprain/strain injuries involving aforementioned body parts. The fact that Claimant may have suffered what Dr. Burris characterized as "minor" injuries does not negate the compensable nature of those injuries or compel a finding that Claimant's they are not work-related as suggested by Respondent. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the ALJ is convinced that a logical connection exists between Claimant's slip and fall in the freezer and her need for treatment. Consequently, the claimed injuries are compensable.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she

sustained compensable injuries to her right shoulder, low back, right SI joint, right hip and right ankle after falling in Respondent-Employer's walk-in freezer on August 22, 2021.

2. Prusuant to the parties' stipulation, Respondents shall pay for all reasonable, necessary, and related treatment for Claimant's work related injuries, including but not limited to the treatment rendered by Dr. McFarland.

3. Pursuant to the parties' stipulation, Claimant's AWW is $1,115.38.

4. Pursuant to the parties' stipulation, Claimant is entitled to payment of temporary total disability benefits from August 23, 2021 through September 22, 2021.

5. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not 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: August 5, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-180-039-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable work injury.

2. If compensable, did Claimant establish by a preponderance of the evidence that he is entitled to TTD benefits from July 16, 2021 and ongoing?

3. If compensable, did Claimant establish by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits?

4. What is Claimant's AWW?

FINDINGS OF FACT

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

1. Claimant is a 60 year-old man who was employed as a golf course maintenance crew member at [Redacted, hereinafter RCC]. Claimant worked in this position since 2013. (Tr. 16:9-17:2).

2. Claimant testified that he worked 40 hours a week, and sometimes worked overtime. (Tr. 17:16-23). Claimant's pay records confirm that Claimant was earning $15.50 per hour in June 2021. Based on Claimant's wage records, his salary increased to $15.50 an hour starting the week of May 24, 2021. (Ex. K). From May 24, 2021 through July 4, 2021, Claimant earned $5,035.15. The ALJ finds that Claimant's AWW is $839.19.

3. Claimant's job duties included raking sand traps, cutting grass, gardening, and performing work on the sprinkler system. (Tr. 16:16-20). [Redacted, hereinafter SD], Claimant's supervisor and the golf course superintendent, testified that Claimant's primary job duty was to rake sand traps in the morning and that this was performed daily. SD[Redacted] testified that Claimant spent anywhere from three to four hours each day raking sand traps and on Mondays he filled driving range tee divots. In the larger sand traps, Claimant would use a mechanical sand rake (Sand Pro) to ride into the sand trap and smooth out the sand. SD[Redacted] explained that Claimant would drive from sand trap to sand trap in the Sand Pro. After completing the sand traps in the morning, Claimant would perform various "detail tasks" such as filling divots in the fairways, trim work, and trimming drains. (Tr. 37:23-39:13).

4. SD[Redacted] testified that trimming (cleaning) the drains was not a daily task, but was done on a four-to-six week schedule, and he usually sent four people out at a time to do the job so it would not take a long time to complete. (Tr. 39:14-18). Claimant testified

that he cleaned the drains about four times a year, for two to three days at a time. (Tr. 32:24-33:6).

5. The ALJ finds that trimming/cleaning the drains was not a daily task, and Claimant only cleaned the drains approximately four times a year.

6. SD[Redacted] testified that the drains are eight to twelve inches wide, cast iron, and they captured surface water on the golf course. SD[Redacted] testified that the worker was usually on their knees using a sod knife to clean the drain. (Tr. 39:19-40:24).

7. Claimant testified that it took him approximately five minutes to clean one drain and he would clean approximately thirty drains in one afternoon. (Tr. 31:21-32:7). The ALJ finds that Claimant spent approximately two and a half hours on a given afternoon trimming drains.

8. Claimant testified that it was wet in the drainage areas and that his boots and socks would get wet while cleaning the drains. According to Claimant "there [was] water running from the grass." Claimant testified that his boots and socks would remain wet the entire shift and when he got home, he would have to put his boots outside to dry. (Tr. 20:4-21). Claimant testified, however, that none of the drains were in the pond. (Tr. 31:13-20).

9. Claimant worked in leather work boots from Wal-Mart and wore sandals when not at work. (Tr. 21:10-20). Claimant testified his work boots remained dry, but for when cleaning the drains. (Tr. 33:17-20).

10. SD[Redacted] credibly testified that there was never standing water around the drains, but the area could be moist. (Tr. 40:25-41:4). He explained that the golf course irrigated at night, usually starting at 8:15 p.m. The golf course used drone technology that flew over the course daily to obtain data of what locations were getting too dry or too wet, to determine daily which area needed irrigation. SD[Redacted] testified that it was very rare for an area of the golf course to be "soggy." (Tr. 41:13-42:9).

11. The ALJ finds that Claimant did not enter, nor did he stand in the pond, to clean the drains. The ALJ further finds that Claimant did not consistently stand in water to clean the drains.

12. Claimant testified that he developed a blister on the second toe of his left foot. (Tr. 21:3-9) He first noticed the blister in mid-June 2021. Claimant testified that he also started having pain in his left foot at this time. Claimant testified that he told his managers, SD[Redacted] and [Redacted, hereinafter TA] that his foot was hurting, but they made a joke about it, and did not send him to a doctor. (Tr. 18:12-19:9 and 23:21-24:12). There was no testimony that Claimant ever told Employer that his foot pain was related to his work.

13. Claimant developed gangrene in his left foot. (Tr. 18:2-6). He went to the emergency room at Saint Joseph Hospital on July 17, 2021 complaining of a left toe infection. Claimant reported that he noticed his toe becoming swollen and red approximately 15 days prior, which would have been the beginning of July 2021. Claimant

denied any injury to his toe. His x-ray was positive for osteomyelitis, and his lab work showed a glucose level of 244 and WBC of 13.2. The doctor noted "probable newly diagnosed diabetes." Claimant was diagnosed with osteomyelitis left second toe with cellulitis. (Ex. H).

14. Claimant was admitted to the hospital for further workup. Rachel Kubowicz, M.D. evaluated him. Claimant told Dr. Kubowicz that his pain started one month prior, and he thought it was related to his "workboot pinching." Dr. Kubowicz noted that Claimant's distal phalanx of the second digit of his left foot was erythematous and necrotic. She thought this was most likely due to long-standing, previously undiagnosed diabetes mellitus. A wound culture showed strep group B, staphylococcus aureus, and heavy gram positive cocci. (Ex. H).

15. On July 18, 2021, Claimant underwent a left second toe amputation. The following day, Claimant received diabetes education while in the hospital. According to the medical record, even though Claimant reported that this was a new diagnosis, he had been given a glucometer in 2007 for home use. Patients with diabetes use a glucometer to measure the glucose in their blood. Claimant told the nurse that he knew how to use the glucometer and it was provided to him by "Lutheran Medical Center" in 2007. (Ex. H).

16. The ALJ finds that Claimant has been diagnosed with diabetes since approximately 2007, and his 2021 diagnosis was not a new diagnosis.

17. Respondents filed a Notice of Contest on August 20, 2021 for further investigation to obtain prior medical records. (Ex. 3).

18. Claimant returned to St. Joseph's Hospital on August 1, 2021 with worsening redness to his third toe on his left foot. The areas of necrosis had expanded and involved the third and fourth toes and possibly the proximal foot. Claimant underwent a transmetatarsal left foot amputation, and an incision and drainage procedure of the left foot. On August 12, 2021, Claimant underwent repeat incision and drainage with wound VAC placement. (Ex. I).

19. On September 7, 2021, Claimant underwent additional surgery including incision, drainage and debridement of the chronic gangrene infection of the left foot with partial resection of the fourth and fifth metatarsals. Claimant underwent additional surgery on December 7, 2021 including resection of the first metatarsal bone remnant and a skin graft. (Ex. F).

20. Claimant testified that the blister, infection, and subsequent amputation was caused by him working in socks and boots that were soaking wet. Claimant testified that this occurred when he was cleaning the drains in June 2021. He testified that the water he stood in was dirty, his socks and boots became soaking wet, and he worked that way until he took his boots off at home. (Tr. 27:2-7).

21. Dr. Paz was admitted as an expert in internal medicine with a specialized knowledge in Level II accreditation. (Tr. 60:14-16). Dr. Paz is the chief medical director

for Restore Osteo. In this position, he is involved with chronic wound care and diabetic peripheral neuropathy. (Tr. 59:12-60:2).

22. Dr. Paz performed an Independent Medical Evaluation (IME) of Claimant on January 21, 2022 at the request of Respondents. Claimant told Dr. Paz that sometime in mid-June 2021, he developed pain in one of his toes on his left foot. Claimant said the pain worsened when his socks became wet. He told Dr. Paz that he periodically serviced the drainage pond on the course, which required him to clean the drain with a knife. Claimant said he had to enter the pond and his feet would become submerged in water from 8:00 a.m. to 3:30/4:00 p.m. (Ex. E).

23. During his examination, Dr. Paz noted that Claimant had decreased pulses in his upper and lower extremities along with neurologic findings in the right and left lower extremity consistent with peripheral neuropathy. Dr. Paz assessed Claimant with a diabetic foot ulcer and osteomyelitis. He opined that these conditions were not causally related to the alleged work injury and were not aggravated or accelerated by the alleged work injury. (Ex. E).

24. Claimant also underwent an IME with Tashof Bernton, M.D. on February 22, 2022. Dr. Bernton noted that Claimant reported he trimmed drain grates and stood in water wearing leather boots. Claimant told Dr. Bernton that when he cleaned the drainage pond, he "entered the pond" to clean the drains and Claimant's feet would be in water for many hours. (Ex. 9).

25. Dr. Bernton also concluded that Claimant had a diabetic foot ulcer in the setting of diabetes and probable peripheral neuropathy. Dr. Bernton opined that "[w]hile the necessary preconditions for diabetic foot ulcer include the presence of diabetes and probably neuropathy and microvascular disease, those conditions are not sufficient in themselves to result in a diabetic foot ulcer." Dr. Bernton further opined that Claimant's work duties may well have been the initiating factor for the formation of the ulcer and caused a significant and lasting exacerbation of the condition. (Ex. 9).

26. Dr. Bernton reached his opinion based on the fact that Claimant had "prolonged submersion" of his feet in water, and the "pond situation is one in which bacterial contamination would be presumed to be present." Dr. Bernton also reasoned that Claimant's other job duties, which included continued standing and walking, materially exacerbated his condition. (Ex. 9).

27. Dr. Paz testified in conjunction with his IME report. He testified that diabetic foot ulcers develop in diabetics when the individual has advancing underlying peripheral vascular disease, which is insufficient delivery of blood flow to the foot. (Tr. 61:6-14). When there is insufficient blood flow to an area of the foot and there is concurrent loss of sensation and poorly controlled blood sugars, a person can develop a diabetic foot ulcer. (Tr. 61:19-23).

28. Dr. Paz opined that based on the records and the history from Claimant, he was probably diagnosed with diabetes as early as 2007. (Tr. 63:1-7, 66:12-17). Dr. Paz

testified that Claimant had uncontrolled diabetes with an elevated A1C of 11.5 in the emergency room. (Tr. 63:22-25). Claimant also had hypertension, which is another risk factor for diabetic foot ulcer. The most prominent risk factor for a diabetic foot ulcer that Claimant had was diabetic peripheral neuropathy which puts the tissues in the foot at risk. (Tr. 64:1-13).

29. Dr. Paz testified that the natural history of a diabetic foot ulcer if it goes untreated is that the ulcer begins below the skin and is usually undetected because of the peripheral neuropathy. The next stage if the ulcer remains untreated is the loss of tissue over the top of the foot when the epidermis and dermis stop regenerating. A Grade 2 ulcer goes deeper below the epidermis and the dermis into the fatty tissue. A Grade 3 ulcer involves the bone and tendon and is when the patient ends up with osteomyelitis. This is the most serious level of a diabetic foot ulcer and is when the person develops gangrene. Dr. Paz explained that this last stage was when the infection starts. (Tr. 64:12-65:25).

30. Dr. Paz credibly testified that the etiology of a diabetic foot ulcer can occur simply with walking and the cause is not always identifiable. (Tr. 69:11-70-1). Dr. Paz opined that the mechanism of injury in this specific claim was Claimant's diabetes mellitus, diabetic peripheral neuropathy, small and microvascular disease secondary to diabetes mellitus, and progressive ulceration secondary to lack of re-epithelialization secondary to neurovascular dysfunction. (Ex. E, p. 28).

31. Dr. Paz credibly testified that by the time Claimant's diabetic foot ulcer was inspected in July 2021, it had reached the level of gangrene and the infection had entered into the bone. (Tr. 66:1-11). Thus, Dr. Paz determined that the diabetic foot ulcer would have begun prior to June and when Claimant sensed the pain in his toe, the diabetic foot ulcer had progressed to osteomyelitis or necrosis of the bone. Dr. Paz credibly testified that the initial development of the diabetic foot ulcer was likely as early as May 2021, which was prior to trimming the drains. (Tr. 66:22-67:17).

32. Dr. Paz explained that in the absence of treatment for the diabetes, little can be done for the microvascular disease and with no blood supply to the foot, Claimant's diabetic foot ulcer was going to progress with or without standing in water. (Tr. 70:12-22). Dr. Paz also testified that there were no aquatic bacterial flora identified on the cultures obtained in the emergency room. (Tr. 68:11-20). Dr. Paz credibly testified that it was not medically probable that working in wet boots and socks would aggravate a diabetic foot ulcer. (Tr. 83:9-17).

33. The ALJ finds Dr. Bernton's opinion to be credible, but not persuasive. In reaching his conclusion that Claimant's work duties caused or exacerbated his diabetic foot ulcer, Dr. Bernton relied upon Claimant's account that his feet were submerged in water, he stood in a pond, and the water was contaminated. As found, Claimant's feet were never submerged in water while he was cleaning the drains. Also as found, there was no indication that the water Claimant walked through was contaminated with bacteria.

34. Dr. Paz's opinions were both credible and persuasive. The ALJ finds that is was not medically probable that Claimant's working in wet boots and socks in mid-June 2021 either caused or aggravated Claimant's diabetic foot ulcer.

35. The ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable work injury.

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 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., *Boulder v. Streeb,* 706 P.2d 786 (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 (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 (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. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004).

Claimant contends that his feet were wet while trimming drains in mid-June 2021, and this caused his diabetic foot ulcer. Claimant testified that this was his only job duty that would cause his feet to become wet. Trimming drains was not a daily occurrence, only took place a few times a year, and did not take a long time to complete. (Findings of Fact ¶¶ 5 and 7). Dr. Paz credibly testified and explained that due to the level of progression of Claimant's diabetic foot ulcer and infection when he presented to the emergency room on July 16, 2021, the diabetic foot ulcer likely started in May 2021. (Findings of Fact ¶ 31). As found, trimming drains and having wet boots in mid-June 2021 did not cause Claimant's diabetic foot ulcer. (Findings of Fact ¶ 34).

Furthermore, Dr. Paz credibly explained that diabetic foot ulcers are a metabolic condition caused by uncontrolled diabetes, peripheral neuropathy, and microvascular disease all of which Claimant suffers from. Dr. Paz explained that the diabetic foot ulcer can develop with any sort of micro-injury to the foot because of the complications of diabetes including peripheral neuropathy and microvascular disease. Dr. Paz explained that diabetics can develop diabetic foot ulcers from simply walking and the etiology of the ulcer is difficult to determine. Dr. Paz also credibly explained that once a diabetic foot ulcer develops, it will progress through the stages if it remains untreated regardless of a diabetic's occupation or work duties. (Findings of Fact ¶¶ 29-32).

As found, Claimant likely had been diagnosed with diabetes since 2007. (Findings of Fact ¶ 16). Claimant testified that he had been working for the golf course since 2013. It is likely that Claimant had diabetes throughout his employment with the golf course, yet he never developed a diabetic foot ulcer performing the same duties that he performed in 2021.

Claimant relies on Dr. Bernton's opinion that being submerged in water was a substantial risk factor for a diabetic foot ulcer. As found, however, Claimant was not submerged in water while at work, he did not enter a pond, and there is no evidence that the water he stood in had any sort of bacteria. (Findings of Fact ¶¶ 11 and 32).

Dr. Paz' testimony and opinions were credible and persuasive. The medical evidence supports Dr. Paz' opinion that Claimant had a long-standing history of uncontrolled diabetes, peripheral neuropathy, and microvascular disease which were all risk factors for a diabetic foot ulcer. Dr. Bernton's opinions were credible, but not persuasive. Several of the key facts relied upon by Dr. Bernton about Claimant's work duties were contradicted by Claimant and SD's[Redacted] testimony. Thus, Dr. Bernton's opinions were not persuasive.

Claimant failed to prove by a preponderance of the evidence that he sustained a compensable work injury. (Findings of Fact ¶ 35).

Average Weekly Wage

Where the Claimant is earning an hourly wage at the time of the injury, the AWW is to be determined by multiplying the hourly rate by the number of hours in a day the claimant would have worked but for the injury, then multiplying that sum by the number of days in a week the Claimant would have worked. § 8-42-102(2)(d), C.R.S. Section 8-42-102(3), C.R.S., however, provides that an ALJ may diverge from the statutorily-prescribed methods of calculating the AWW if, for any reason, they will not fairly compute the AWW. The ALJ has wide discretion to decide whether the statutorily-prescribed methods will fairly calculate the AWW, and if not, to devise a method which will fairly determine the AWW. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). Based on Claimant's wage records, his salary increased to $15.50 an hour starting the week of May 24, 2021. From May 24, 2021 through July 4, 2021, Claimant earned $5,035.15. This correlates to an AWW of $839.19. (Findings of Fact ¶ 2).

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable work injury.

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

3. Claimant's claim for TTD benefits is denied and dismissed.

4. 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: August 9, 2022

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

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the L3-S1 anterior interbody fusion, as recommended by Dr. Basheal Agrawal, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 10, 2020 work injury?

FINDINGS OF FACT

1. The claimant began working for the employer's Road and Bridge Department on April 23, 2009. The claimant worked as a heavy equipment operator. His job duties primarily involved installation of culvert pipes under roads.

2. On August 10, 2020, the claimant suffered an injury while performing his normal job duties. The injury occurred when the claimant attempted to remove a spare tire from the back of his service truck. The tire in question was wedged in place, making removal difficult. While attempting to remove the tire, the claimant felt a pop in his low back.

3. The respondent admitted liability for the August 10, 2020 work injury via a General Admission of Liability filed on April 1, 2022.

Medical Treatment Prior to August 10, 2020

4. In approximately 2012, the claimant was diagnosed with rheumatoid arthritis (RA). The claimant testified that his RA symptoms typically involve joint swelling in his hands, feet, and knees. The claimant further testified that since taking medication for his RA diagnosis, he rarely has RA related symptoms.

5. The claimant also has a history of low back concerns. On September 27, 2012, magnetic resonance imaging (MRI) of the claimant's lumbar spine was performed. The MRI showed degenerative disc and degenerative facet changes from the L3 level to the 51 level. The MRI also showed some circumferential spinal stenosis at the L3-L4 level.

6. On January 10, 2017, x-rays of the claimant's lumbar spine showed degenerative changes that had progressed since November 30, 2012.

7. The claimant does not recall prior low back treatment. The claimant testified that it is possible that his rheumatologist, Dr. Jessica Mears, ordered the 2017 x-rays.

Medical Treatment After August 10, 2020

8. Initially, the claimant's authorized treating physician (ATP) for this claim was Dr. Robert McLaughlin. The claimant was seen on August 10, 2020 in Dr. McLaughlin's practice by Jim Harkreader, PA-C[1]. Thereafter, the claimant was seen by Dr. McLaughlin on August 13, 2020. At that time, the claimant reported ongoing numbness and tingling in his left leg and into his left foot. Dr. McLaughlin noted that PA Harkreader had prescribed Tramadol and Flexeril. Dr. McLaughlin referenced the claimant's prior lumbar spine imaging and diagnosed a lumbar injury with radiculopathy. Dr. McLaughlin recommended lumbar spine x-rays and an MRI. He also referred the claimant to physical therapy.

9. On August 13, 2020, lumbar spine x-rays showed bilateral L4-L5 foraminal stenosis and multilevel degenerative disc disease.

10. On August 21, 2020, the claimant returned to Dr. McLaughlin and reported constant left leg numbness from his hip to his foot. In the medical record of that date, Dr. McLaughlin explained that the loss of disc space (as evident in the recent x-rays) can make the spinal area "small to begin with". When this was this combined with the claimant's injury, it led to the radicular symptoms. Dr. McLaughlin again recommended an MRI of the claimant's lumbar spine. In addition, he referred the claimant for a surgical consultation.

11. On September 1, 2020, the claimant was seen by Dr. Peter Shorten. On that date, Dr. Shorten recommended an MRI of the claimant's cervical spine to determine whether the claimant had cervical myelopathy. Dr. Shorten prescribed a Medrol dose pack, Meloxicam, and Gabapentin.

12. On September 14, 2020, the claimant returned to Dr. Shorten. At that time, Dr. Shorten noted that the cervical spine MRI showed no significant canal stenosis. Dr. Shorten opined that the claimant's symptoms were consistent with L4 or L5 radiculopathy. He recommended left L5-L5 and L5-S1 transforaminal epidural steroid injections {TFESIs). The claimant underwent the recommended TFESIs on September 20, 2020. The claimant reported that the injections provided limited, short-term relief.

13. On October 29, 2020, the claimant returned to Dr. Shorten and reported no relief from the injections. In the medical record of that date, Dr. Shorten noted that the claimant had undergone extensive conservative treatment without significant improvement. At that time, Dr. Shorten recommended that the claimant undergo an L4-S1 laminectomy, foraminotomy, and an L4-L5 and L5-S1 posterior lumbar interbody fusion (PLIF).

[1] The August 10, 2020 medical record was not included in the parties' hearing submissions. However, Dr. McLaughlin made reference to that visit in the August 13, 2020 medical record.

14. At the request of the respondent, on November 10; 2020, Dr. Michael Rauzzino reviewed the claimant's medical records. In his report, Dr. Rauzzino opined that the surgery recommended by Dr. Shorten was not reasonable, necessary, or related to the claimant's work injury. In support of his opinion, Dr. Rauzzino noted a discrepancy regarding the relief provided by the various injections. Specifically, Dr. Rauzzino noted that the claimant reported improvement from five out of ten pain to no pain to Dr. Clifford, while Dr. McLaughlin recorded no relief from the same injections. Dr. Rauzzino also noted that a pain generator had not yet been identified.

15. On January 27, 2021, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records and obtained a history from the claimant. The IME was conducted by "telemedicine", so a physical examination was limited to what Dr. Reiss was able to see on video. In his IME report, Dr. Reiss opined that the claimant sustained a lumbosacral strain, and possibly a strain of his sacroiliac (SI) joint. Dr. Reiss further opined that the claimant's pre-existing low back condition was likely aggravated on August 10, 2020. With regard to the surgery recommended by Dr. Shorten, Dr. Reiss opined that the claimant is not a candidate for an L4-S1 decompression and fusion. In support of this opinion, Dr. Reiss noted that a two level fusion is not indicated for low back pain. As the fusion would not be indicated, then the decompression portion of the recommended surgery would likewise not be indicated. Dr. Rauzzino recommended that the claimant undergo core strengthening, aerobic conditioning, and stretching.

16. Based upon the reports of Drs. Rauzzino and Reiss; the respondent denied authorization of the surgery recommended by Dr. Shorten.

17. Thereafter, the claimant underwent a number of injections. On March 9, 2021, Dr. Robert Frazho administered bilateral SI joint injections. On April 30, 2021, Laramie Chandler, NP recommended the claimant undergo TFESls on the left at the L3-L4, L4-L5, and L5-S1 levels. On June 10, 2021, Dr. Kyle Christopherson administered left L2 through L5 medial branch blocks. On July 8, 2021, Dr. Christopherson administered repeat left L2 through L5 medial branch blocks. On August 2, 2021, Dr. Christopherson performed radiofrequency ablation (RFA) at the left L2 through the L5 levels. On September 13, 2021, Dr. Christopherson administered bilateral L5-S1 TFESls.

18. In August 2021, the claimant's treatment with Dr. McLaughlin was transitioned to Dr. Craig Stagg because Dr. McLaughlin was leaving the Grand Junction practice. On September 15, 2021, the claimant was seen by Dr. Stagg. At that time, the claimant reported that his most recent injection from Dr. Christopherson did not provide any relief. The claimant asked for a referral for a second opinion. Dr. Stagg agreed that a second opinion from a neurosurgeon was appropriate.

19. On October 7, 2021, the claimant returned to Dr. Shorten. On that date, Dr. Shorten opined that the majority of the claimant's symptoms were myofascial lumbosacral back pain. Dr. Shorten informed the claimant that surgery would not be effective in treating those symptoms.

20. On November 29, 2021, x-rays were taken of the claimant's lumbar spine. The x-rays showed multilevel degenerative disc disease and facet arthrosis.

21. On November 29, 2021, the claimant was seen by Sara Winsor, Nurse Practitioner with the SCL Center for Brain and Spine. On that date, NP Winsor recommended the claimant undergo right and left L4-L5 TFESIs. NP Winsor identified the purpose of these injections would be both therapeutic and diagnostic.

22. On December 6, 2021, Dr. Reiss issued a supplemental report after reviewing additional medical records. Dr. Reiss was asked to state an opinion on whether repeat ESIs were reasonable, necessary, and related to the claimant's work injury. In that report, Dr. Reiss opined that repeat injections were not indicated. In support of this opinion, Dr. Reiss noted that prior epidural injections, facet injections, SI joint injections and a rhizotomy provided little, if any, relief of the claimant's symptoms. Dr. Reiss again recommended the claimant undergo intensive core strengthening.

23. On January 27, 2022, the claimant returned to SCL Center for Brain and Spine and was seen by Dr. Basheal Agrawal. At that time, the claimant reported low back pain that was radiating down the lateral aspect of his legs to his knees. Dr. Agrawal noted that the claimant had no benefit from physical therapy and only limited relief with injections and related procedures. Dr. Agrawal also noted that the claimant had foraminal stenosis and desiccation at the L3-L4, L4-5, and L5-S1 disc spaces. Dr. Agrawal recommended an L3 to S1 anterior lumbar interbody fusion (ALIF). Despite this recommendation, Dr. Agrawal explained to the claimant that surgery for back pain alone would provide only "marginal success".

24. On March 9, 2022, Dr. Reiss reviewed the request for surgery as recommended by Dr. Agrawal. In that report, Dr. Reiss opined that the recommended surgery was not likely to decrease the claimant's pain symptoms nor improve his function. Dr. Reiss noted that the Colorado Medical Treatment Guidelines (MTG) address lumbar fusions of one to two levels, but do not address a three-level fusion. Dr. Reiss further noted that the claimant has axial low back pain with extensive degenerative changes without instability. Dr. Reiss further opined that the claimant should not undergo any additional invasive procedures to treat his low back pain.

25. On April 21, 2022, Dr. Stagg recommended that the claimant undergo a functional capacity evaluation (FCE) to determine whether the claimant has permanent work restrictions.

26. On June 6, 2022, the claimant participated in an FCE that was administered by Marty Haraway, OTR. In Therapist Haraway's FCE report, the claimant's physical tolerances were identified as sitting and standing up to 20 minutes at a time; walking up to 15 minutes at a time; lift 15 pounds occasionally to shoulder level; carry up to 10 pounds occasionally for short distances; occasionally push and pull up to 15 pounds of force; climb stairs with railing; reach close with no limit; extended reach occasionally (but not repetitively). Therapist Haraway also noted that the claimant could not safely bend, squat, crouch, kneel, crawl, climb, or perform repetitive tasks.

27. Dr. Reiss provided testimony that was consistent with his written reports. Dr. Reiss reiterated his opinion that the three-level spinal fusion recommended by Dr. Agrawal is not medically reasonable or necessary. Dr. Reiss noted that the claimant has multilevel degenerative changes without instability. Therefore, the recommended surgery is not likely to be helpful. Dr. Reiss also testified regarding his recommendation that the claimant undergo a core strengthening program. Such a program would help the claimant strengthen all of the muscles around his spine, which may help his back pain symptoms. Dr. Reiss testified that such a program requires exercising multiple days per week over many weeks. It is Dr. Reiss' opinion that the claimant has not participated in such a program. Dr. Reiss testified that the claimant has undergone passive modalities rather than core strengthening. Dr. Reiss further testified that the surgery is not recommended pursuant to the MTG because this would be a fusion of three levels and the claimant's pain generators have not been identified.

28. The claimant testified that his current symptoms included a dull ache in his back and legs, numbness in his left leg and foot, and a sharp, shooting pain in his right thigh. The claimant also testified that his left leg symptoms are worse than those on the right. The claimant further testified that his RA symptoms are different from those he has experienced since August 10, 2020. Specifically, the claimant's RA symptoms are not in his legs. In addition, his RA symptoms typically resolve within a few days.

29. The claimant also testified that he has engaged in core strengthening exercises in formal physical therapy and in a home exercise program. The claimant testified that core strengthening has not improved his symptoms.

30. The ALJ takes administrative notice of WCRP 17 and notes that Section 8.b.iii. of the Low Back Pain MTG addresses spinal fusion. Recommendation 152 identifies the requirements of proceeding with spinal fusion Those requirements include: all pain generators are adequately defined and treated; all physical medicine and manual therapy interventions are completed; imaging studies demonstrate spinal stenosis with instability or disc pathology, requiring decompression; spine pathology is limited to 2 levels; and a psychological evaluation. Recommendation 153 identifies diagnostic indications for pursuing a fusion. That list includes: neural arch defect with associated stenosis or instability; spondylolytic spondylolisthesis; degenerative spondylolisthesis (four mm or greater); surgically induced segmental instability; symptomatic spinal stenosis in the presence of spondylolisthesis (greater than two mm); or primary mechanical low back pain/functional spinal unit failure (with objective

evidence of two or more of the following: internal disc disruption, painful motion segment, disc resorption, facet syndrome, and/or ligamentous tear.)

31. The ALJ credits the medical records and the opinions of Dr. Reiss and finds that the claimant has failed to demonstrate that it is more likely than not that the surgery recommended by Dr. Agrawal constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ notes that in this instance the claimant's pain generator has not been identified and the recommended procedure is for a three level fusion. Both of these factors are specifically identified in the MTG with regard to lumbar fusion. The ALJ further notes that despite recommending the surgery, Dr. Agrawal has informed the claimant that such surgeries have marginal success rates. In addition, Dr. Shorten opined that the claimant's myofascial back pain would not benefit from surgery.

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. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing 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. 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).

6. The Colorado Workers' Compensation Medical Treatment Guidelines (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). The statement of purpose of the MTG 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. 17-1(A). W.C.R.P. 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."

7. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the Medical Treatment Guidelines 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) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *Burchard v. Preferred Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTO); *see also 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).

8. As found, the claimant has failed to demonstrate by a preponderance of the evidence, that the L3-S1 anterior interbody fusion, as recommended by Dr. Agrawal, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 10, 2020 work injury. As found, the medical records and the opinions of Dr. Reiss are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for L3-S1 anterior interbody fusion, (as recommended by Dr. Agrawal}, is denied and dismissed.

Dated August 10, 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. 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-833-001

ISSUES

- Whether Respondents proved by a preponderance of the evidence that Claimant performed casual farm or ranch labor pursuant to §8-40-302(3) C.R.S.

- Whether Respondents proved by a preponderance of the evidence that Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S.

- Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury arising out of and in the course of employment for Respondent-Employer.

- Whether Claimant proved by a preponderance of the evidence the medical treatment he received was reasonable, necessary and related.

- Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits.

- Determination of Claimant's average weekly wage "AWW."

FINDINGS OF FACT

1. Owner is the sole proprietor of Respondent-Employer. Respondent-Employer operates leased stables at a location in Colorado Springs, Colorado (the "Stables"). Respondent-Employer is in the business of boarding, training and grooming horses, as well as showing horses at horse shows. Respondent-Employer also provides riding lessons at the Stables.

2. Owner testified that she was subject to a prior workers' compensation audit in which she was advised that the individuals working as stable hands at the Stables were considered employees.

3. Some of Respondent-Employer's clients compete in horse shows across the country. Owner's children also occasionally compete in horse shows with their own horses. Owner has no involvement in the organization of these horse shows and has no financial interest in the entities that host the horse shows. Each horse owner who participates in a horse show pays the costs associated with the horse show.

4. If a horse is stabled at Respondent-Employer's stables, either Owner or a commercial hauler will transport the horse to the horse show location where it is then stabled during the competition.

5. When her children and/or client's horses participate in horse shows, Owner arranges for grooms to be present at the horse show. A groom is responsible for physically taking care of the horses and setting up stalls. Grooms typically travel year-round to different horse shows and provide services for numerous horse owners and stables across the country.

6. To arrange grooms for horse shows, Owner typically contacts JL[Redacted], who either provides such services himself or assists Owner in finding a groom.

7. Owner contacted JL[Redacted] to arrange for grooms for her children's and clients' horses participating in the Summer in the Rockies Horse Show in Parker, Colorado on June 16-20, June 23-27 and July 7-11, 2021.

8. JL[Redacted] was injured at the time and unable to provide his services. As such, he contacted and arranged for another groom, Claimant, to provide groom services for Respondent-Employer. At the time JL[Redacted] contacted Claimant, Claimant was already working at the Summer in the Rockies Horse Show for other horse owners and stables. Respondent-Employer and Claimant did not sign any written document regarding the work arrangement.

9. Claimant has approximately 20 years of experience working as a groom. Respondent-Employer did not provide any training to Claimant nor instruct Claimant how to perform the grooming services. Respondent-Employer did not establish any specific quality standard for Claimant or dictate the time of his performance, other than providing Claimant the schedule for the horse shows. Respondent-Employer did not supervise Claimant's work.

10. Owner agreed to pay JL[Redacted] $70/horse per day and $200 for setup. JL[Redacted] informed Claimant of the pay and JL[Redacted] and Claimant agreed to split the money. Claimant was not given any employee or work benefits.

11. Regarding tools and equipment, Claimant testified that "they" provided equipment such as scissors, a hammer, a stapler, a shovel, a pitchfork, and cleaning materials. Claimant did not identify who "they" was, indicating that the equipment was already present at the horse show. He testified that he was also given a banner with Respondent-Employer's name to hang in the stable. Owner testified that the tools and equipment used by grooms come from a variety of sources, including the groom, individual horse owners, and stables at the show. JL[Redacted] testified he sometimes takes his own tools to the horse shows, but that each stable also brings tools to use.

12. Claimant first provided grooming services for Respondent-Employer at the horse show on June 14 and 15, 2021.

13. Claimant was performing grooming services for Respondent-Employer on June 16, 2021 when the horse of one of Respondent-Employer's clients kicked him in the face,

rendering Claimant unconscious. Claimant woke up in an ambulance. He sustained injuries to his face, teeth, and neck. Claimant received medical care at the emergency room, Centura Health, Comfort Dental and Altitude Oral and Facial Surgery. Claimant was unable to return to work for five days because his medication made him dizzy and he felt that it was unsafe to be around animals in such condition.

14. Claimant returned to work for Respondent-Employer on June 23, 2021.

15. Respondent-Employer issued a check to Claimant (first made out to “cash” then made out to Claimant’s name for a total of $2,640 which consisted of (1) $140 for grooming services for Owner’s children’s horses; (2) $700 for grooming services for clients’ horses; (3) $200 for set up and tear down; (4) $600 from Owner for Claimant’s injury; and (5) $1,000 from a client as a tip. Owner testified that she paid Claimant the extra $600 because she felt bad that he was injured. Claimant did not split any of the first payment with JL[Redacted] per an agreement with JL[Redacted]. The first check was for services provided June 16-20, 2021.

16. Respondent-Employer issued a second check in JL[Redacted] name in the amount of $940 for grooming services for Owner’s children’s horses. JL[Redacted] split this amount with Claimant. The second check was for services provided June 23-27, 2021.

17. Respondent-Employer issued a third check in Claimant’s name in the amount of $1,260, representing: (1) $1,050 for grooming services for Owner’s children’s horses; (2) $210 for grooming services for a client’s horse. Claimant split this money with JL[Redacted]. The third check was for services provided July 7-11, 2021.

18. Based on the above findings, Respondent-Employer paid Claimant at least $2,140 in wages in 2021 ($1,040 in wages from the first check, which Claimant did not split with JL[Redacted], plus $470 for Claimant’s half of the second check, plus $630 for Claimant’s half of the third check).

19. JL[Redacted] estimates that Respondent-Employer paid him between $1,000 to $2,000 in 2021.

20. Typically, Respondent-Employer’s clients pay grooms directly; however, for some of the Summer in the Rockies horse shows, Owner paid JL[Redacted] and Claimant on behalf of her clients and then invoiced the clients for reimbursement. Owner testified that she did this because Claimant was injured two days into the show so she and her assistant, SW[Redacted], had to provide grooming services for the remainder of the first dates. Rather than asking everyone to write multiple checks to Claimant, JL[Redacted], herself, and SW[Redacted], Owner attempted to simplify the situation by paying Claimant and JL[Redacted] on behalf of all clients and then seeking reimbursement.

21. Respondent-Employer’s clients paid Claimant and JL[Redacted] directly for grooming services provided at the horse show July 7-11, 2021, with the exception of one

client, for whom Owner paid on her behalf and then sought reimbursement. All of Respondent-Employer's clients reimbursed Owner for her advancement of groom fees.

22. Owner also paid for Claimant's dental services resulting from the injury in the amount of $197 (Comfort Dental) and $697 (Altitude Oral and Facial Implant Center). Owner testified she paid these medical costs because she felt bad for Claimant due to his injury.

23. Claimant did not provide services for Respondent-Employer after the Summer in the Rockies horse show. Claimant completed his work as agreed at the Summer in the Rockies horse show then travelled to Virginia to work as a groom at other horse shows for other owners and stables. Claimant never provided services for Respondent-Employer at the Stables.

24. Respondent failed to prove by a preponderance of the evidence the casual farm or ranch labor under §8-40-302(3) applies.

25. Respondent proved by a preponderance of the evidence Claimant was an independent contractor and not an employee.

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).

Casual Farm or Ranch Labor

Section 8-40-302(3), C.R.S. provides that the Act is

> [n]ot intended to apply to employers of casual farm and ranch labor or employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year, and if the amounts expended for wages by the employer of casual farm and ranch labor do not exceed the sum of two thousand dollars for any calendar year.

Section 8-40-302(3), C.R.S. creates a statutory exception to the general rule providing workers' compensation coverage to persons performing services under a contract of hire. *Butland v. Industrial Claim Appeals Office*, 754 P.2d 422 (Colo. App. 1988) (statute exempts casual laborers from coverage only if, among other things, the duties they perform are not within the course of the trade, business or profession of the employer). Because §8-40-302(3) establishes an exception or defense to the general rule that injuries to an "employee" are compensable the employer bears the burden of proof to establish the factual predicates for application of the statue. *See Cowin and Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Here, Respondent-Employer failed to prove the exception under §8-40-302(3), C.R.S applies. Owner testified that she was previously subject to a workers' compensation audit and had been informed that the stable hands working at the Stables are employees. Thus, Respondent-Employer does have other employees. Additionally, such employments are within the course of Respondent-Employer's business, which

includes boarding, training, and grooming horses, as well as showing horses at horse shows.

Lastly, Respondent-Employer paid Claimant at least $2,140 in wages in 2021. Claimant argues that Respondent-Employer paid Claimant a total of $1,135 in wages in 2021 for the care of her children's horses. Although Respondent-Employer invoiced her clients for Claimant's grooming services and received payment from the clients, Respondent-Employer directly paid Claimant on behalf of the clients in some circumstances. Such payments were wages paid to Claimant by Respondent-Employer. Additionally, Respondent-Employer paid JL[Redacted] approximately $1,000 to $2,000 in 2021. Considering the amount of wages paid to Claimant, JL[Redacted], and any other potential groomers who performed similar grooming services for Respondent-Employer in 2021, Respondent-Employer paid more than $2,000 in wages for such labor. Accordingly, Respondent-Employer failed to prove that it is more probable than not that the casual farm and ranch labor exception applies in Claimant's case.

Independent Contractor

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Independence may be demonstrated through a written document. §8-40-202(2)(b)(I), C.R.S.

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006).

The determination regarding whether a worker is an independent contractor or employee requires analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014). In *Softrock*, the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. *Softrock Geological Services,* 325 P.3d 565. The statutory requirement that the

worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

If the evidence establishes that the claimant was performing services for pay, and there is no written document establishing the claimant's independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office of Colo.,* 981 P.2d 210 (Colo. App. 1998)

No written document was offered as evidence establishing a rebuttable presumption of an independent contractor relationship between Claimant and Respondent-Employer. Therefore, it is Respondent-Employer's burden of proof to establish that Claimant was both free from direction and control in the performance of services and customarily engaged in an independent business related to the service performed.

Although Respondent-Employer provided some tools and equipment and paid Claimant in his personal name, the remaining factors under §8-40-202(2)(b)(II), as well consideration of the actual nature of the working relationship, establish that Claimant was free from direction and control in the performance of his services. Respondent-Employer did not require Claimant to work exclusively for Respondent-Employer. It is undisputed Claimant worked for various horse owners and stables across the country. In fact, Claimant was providing grooming services for others at the Summer in the Rockies horse show when he was then engaged to also provide services for Respondent-Employer. Respondent-Employer did not provide any training to Claimant. Claimant has more than 20 years of experience as a groomer and was providing services in line with such experience. Respondent-Employer did not instruct Claimant as to how to perform such services or oversee his work. Respondent-Employer did not establish a quality standard for Claimant. As an experienced groomer, Claimant was apprised of the general grooming standards and there is no evidence Respondent-Employer established specific quality standards for Claimant. Other than establishing mutually agreeable work hours based on the schedule of the horse show, Respondent-Employer did not dictate Claimant's time of performance.

Additionally, Respondent-Employer did not pay Claimant a salary or hourly rate. Claimant was paid based on a contract rate of $70.00/horse and $200.00 per setup, as determined by Respondent-Employer and JL[Redacted]. JL[Redacted] and Claimant then agreed between themselves to divide the payments. Respondent-Employer did not terminate Claimant's services during the time period upon which they agreed Claimant would provide work and there is no evidence Respondent-Employer combined its business operations with those of Claimant.

Regarding whether Claimant was customarily engaged in an independent business or trade, there is no evidence Claimant had a business or trade name, a business listing, employed others, or carried liability insurance. Nonetheless, the preponderant evidence establishes that Claimant was engaged in an independent trade. As credibly testified to by Claimant, JL[Redacted], and Owner, the nature of the work Claimant performed for Respondent-Employer involves providing grooming services at horse shows for specified periods of time. Typically the grooms travel to various horse shows across the country providing services to various owners and stables. As discussed, Claimant has 20 years prior experience working as a groom and travelling to different horse shows providing services for different stables and owners. Claimant was working at the Summer in the Rockies horse show as a groomer for others prior to being engaged to perform grooming services for Respondent-Employer. Upon completion of the agreed upon time period for providing services, Claimant travelled to Virginia to work for others at a different horse show. The nature of Claimant's work arrangement with Respondent-Employer was different than that of the stable hands that work at Respondent-Employers Stables. Claimant only provided services to Respondent-Employer at the Summer in the Rockies horse show and did not perform any services at the Stables nor at any other horse shows for Respondent-Employer. The evidence does not indicate there was any intent on behalf of either party to establish an arrangement that differed from the standard set-up for grooms at horse shows or to otherwise enter into an employer/employee relationship.

Furthermore, the evidence does not establish that Claimant's income was almost wholly dependent upon continued employment with Respondent-Employer. Respondent-Employer paid Claimant less than $2,000 in wages for his services. Claimant earned wages from multiple other owners and stables from his work at various horse shows, including work from other people separate from Respondent-Employer at the Summer in the Rockies horse show. While Owner paid Claimant additional money related to his injury, the money was not paid pursuant to any sort of employee benefit.

Here, the totality of the circumstances, including analysis of the nine factors in §8-40-202(2)(b)(II), as well as the nature of the working relationship between Claimant and Respondent-Employer, demonstrates that it is more probable than not Claimant was an independent contractor and not an employee.

As Claimant was an independent contractor and not an employee, the remaining issues are moot.

ORDER

1. Respondent-Employer proved by a preponderance of the evidence Claimant was an independent contractor, not an employee of Respondent-Employer.

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

3. 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: August 10, 2022

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-174-315-001

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement recommended by Dr. Mark Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 19, 2021 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer providing home health services to clients. The claimant's job duties included assisting clients with bathing, toileting, dressing, cooking, and medication administration.

2. On May 19, 2021, the claimant was transferring a client out of bed and into a wheelchair when the client slipped. The claimant felt pain in her back and left shoulder. The respondents have admitted liability for the May 19, 2021 injury.

3. The claimant testified that she first received treatment at an urgent care location. Thereafter, she began treatment with Dr. Craig Stagg as her authorized treating physician (ATP).

4. On July 16, 2021, magnetic resonance imaging (MRI) of the claimant's left shoulder showed severe atrophy of the infraspinatus tendon, tendinopathy and mild partial thickness intrasubstance tearing of the distal supraspinatus tendon, moderately severe acromioclavicular {AC) joint arthrosis, and mild glenohumeral degenerative joint disease.

5. Dr. Stagg referred the claimant to Dr. Mark Luker for an orthopedic consultation. On August 17, 2021, the claimant was seen in Dr. Luker's practice by Daryl Haan, PA-C. At that time, the claimant reported sharp pain in her left shoulder, with a constant underlying ache. PA Haan opined that the claimant's work injury caused an acute aggravation of her pre-existing left shoulder condition. PA Haan discussed surgical options with the claimant, including an arthroscopic subacromial decompression, distal clavicle excision, and biceps tenodesis. The claimant expressed a desire to pursue non-surgical treatment. As a result, PA Haan recommended injections.

6. Dr Sheldon Feit, Board Certified Radiologist, reviewed the July 16, 2021 MRI of the claimant's left shoulder. In a report dated August 11, 2021, Dr. Feit opined that the claimant has chronic and longstanding degenerative findings in her shoulder. Dr. Feit further opined that "[w]hile there may have been some kind of aggravation, these findings appear longstanding and not related to the injury of 05/ 19/2021."

7. In a letter dated August 17, 2022, PA Haan explained that the MRI findings were likely acute because of the presence of AC joint edema and fluid in the subdeltoid space.

8. On November 3, 2021, the claimant was seen by Dr. Luker. At that time, Dr. Luker opined that the claimant's symptoms of AC joint pain and arthrosis, subacromial bursitis.and rotator cuff tendinitis were related to the claimant's work injury. Dr. Luker recommended a left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement.

9. In the medical records entered into evidence, Dr. Stagg has repeatedly indicated his agreement with Dr. Luker that surgery is appropriate.

10. At the request of the respondents, Dr. William Ciccone reviewed the claimant's medical records. In a report dated November 11, 2021, Dr. Ciccone opined that the claimant suffered a mild sprain/strain of her left shoulder on May 19, 2021. Dr. Ciccone further opined that the infraspinatus tear is chronic, pre-existing, and unrelated to the claimant's work injury. In support of this opinion, Dr. Ciccone made reference to the marked atrophy of the infraspinatus. Dr. Ciccone also opined that the degenerative changes in the claimant's AC joint are pre-existing and not work-related.

11. The claimant returned to Dr. Luker on March 16, 2022. On that date, Dr. Luker administered an injection into the subacromial space. The claimant testified that injections Dr. Luker administered to her left shoulder helped for a period of time.

12. The claimant testified that she wants to undergo the recommended left shoulder surgery. The claimant testified that her current sy mptoms include constant pain in her left shoulder that increases when she moves her arm away from her body. The claimant further testified that prior to May 19, 2021, she had no issues with her left shoulder. Prior to that time the claimant was able to swim and play violin. Since her injury the claimant is unable to engage in these activities. The claimant is restricted to lifting no more than 20 pounds.

13. The ALJ credits the medical records and the opinions of PA Haan and Dr. Luker over the contrary opinions of Ors. Feit and Ciccone. The ALJ finds the claimant had demonstrated that it is more likely than not that she suffered an acute aggravation of her pre-existing left shoulder condition. That aggravation has resulted in the need for treatment of the claimant's left shoulder. The ALJ also finds that the claimant had demonstrated that it is more likely than not that the claimant's need for left shoulder surgery {as recommended by Dr. Luker) is related to that aggravation.

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.$. 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. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing 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. 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).

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder arthroscopy, subacromial decompression, bursectomy, and debridement recommended by Dr. Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 19, 2021 work injury. As found, the claimant suffered an acute aggravation of her pre-existing left shoulder condition, resulting in the need for treatment, including the recommended surgery. As found, the medical records and the opinions of PA Haan and Dr. Luker are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the left shoulder surgery recommended by Dr. Luker, pursuant to the Colorado Medical Fee Schedule.

Dated August 11, 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. 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-972-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer.

2. If Claimant suffered compensable injuries on February 9, 2022, whether he has proven by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits.

FINDINGS OF FACT

1. Claimant is employed as a Senior Sales Consultant for Employer. He has worked for Employer since November 5, 2018.

2. On July 15, 2022 the parties conducted the post-hearing evidentiary deposition of [Redacted, hereinafter NF]. NF[Redacted] is the Senior Manager in Employer's benefits department. She explained that Employer offers all full-time employees benefits including medical, dental, vision, basic life insurance, supplemental life insurance, and long term disability (LTD). As a full-time employee, Claimant is eligible for benefits. NF[Redacted] explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. Employer pays for basic life insurance policies for all employees. Notably, the basic life insurance policy never requires an Evidence of Insurability (EOI) examination. Employer does not receive any benefit, whether financial or otherwise, from the benefits employees receive. There is also no consequence if an employee waives a benefit.

3. NF[Redacted] explained that employees choose benefits through a website portal administered by a third-party entity known as "bswift." For plan year 2022 Claimant selected several voluntary benefits through Employer. He specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability and LTD benefits. Claimant waived several benefits including a Health Savings Account (HSA), Critical Illness Insurance, Hospital Indemnity Insurance and transit and parking.

4. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, benefits provider Prudential Life Insurance Company requested an EOI examination. Employer did not receive the answers to Claimant's medical questions or request the EOI examination. Employer only receives an approval or denial of benefits after the EOI is completed.

5. Claimant testified that he scheduled the EOI examination through third-party vendor APPS Portamedic to take place at his home on a day off from work. APPS is not affiliated with Employer. On January 25, 2022 Claimant contacted Employer's General Manager [Redacted, hereinafter LM] about the EOI examination. LM[Redacted] then contacted Employer's Regional Human Resources Manager [Redacted, hereinafter CG] to determine whether Claimant was required to undergo an EOI examination. CG[Redacted] explained that she then contacted Employer's benefits department and was informed that, if Prudential had requested an EOI examination, then Claimant was required to undergo the examination. CG[Redacted] acknowledged that she does not have experience implementing benefits for Employer, but noted that employees are not required to obtain benefits. Furthermore, CG[Redacted] would not receive any notification from Prudential about the results of Claimant's EOI examination.

6. Claimant commented that on February 3, 2022 he spoke to CG[Redacted] regarding the EOI examination. He disputed having to obtain an EOI examination because he was already receiving benefits through Prudential. CG[Redacted] referred Claimant to [Redacted, hereinafter MM]. MM[Redacted] operated Employer's day-to-day life insurance benefits in partnership with Prudential.

7. Claimant explained that on February 9, 2022 he underwent the EOI examination at his home on his day off from work. Employer did not obtain any of the results of the EOI examination. The results of the examination had no impact or consequence on Claimant's employment. During the process, Claimant had blood drawn from his left elbow. The blood draw caused severe pain in Claimant's left arm. Claimant reported his injury to Employer's Senior Manager of the Operations Department Eddie Colbert. Employer then directed Claimant to Concentra Medical Centers for treatment.

8. On February 14, 2022 Claimant visited Barry M. Nelson, D.O. at Concentra for an examination. Dr. Nelson noted tenderness in the antecubital fossa of the left elbow. The remainder of the physical examination was normal. Dr. Nelson suspected a medial nerve injury or deep hematoma and recommended conservative management. Claimant was discharged at Maximum Medical Improvement (MMI). He subsequently obtained treatment for his elbow injury through his primary care physician and Alpine Neurology. Claimant did not lose time from work except to attend doctors' appointments.

9. On March 18, 2022 MM[Redacted] authored an e-mail to Claimant regarding why an EOI examination had been requested. She explained that supplemental fife Insurance and LTD are optional benefits for employees. The EOI examination is also optional for employees. MM[Redacted] further provided detailed responses to Claimant's questions regarding the EOI examination.

10. The record includes subsequent e-mails between Claimant and MM[Redacted] during late March and early April 2022. MM[Redacted] explained that Claimant's request for benefits had erroneously been denied after the EOI examination, but was later reinstated. NF[Redacted] confirmed that Claimant's request for supplemental life insurance and LTD benefits was initially denied by Prudential. However, because Claimant had previously been insured, Prudential subsequently approved

Claimant's request for benefits. NF[Redacted] noted that the EOI examination through Prudential was thus unnecessary from the outset.

11. Claimant has failed to demonstrate it is more probably true than not that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer. NF[Redacted] credibly explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. For plan year 2022 Claimant specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability, and LTD benefits. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, Prudential requested an EOI examination. The EOI examination required by Prudential was for the sole benefit of Claimant and was devoid of any connection to his work duties as a Senior Sales Consultant for Employer.

12. The record reflects that Claimant's February 9, 2022 elbow injuries during the EOI did not occur in the course and scope of employment. Claimant acknowledged that he scheduled the EOI examination to take place on his day off from work. The examination took place at Claimant's home and not on Employer's premises. Claimant selected the day and time of the examination through third-party vendor APPS. Employer did not require, request, schedule or pay for the EOI examination. Claimant was not at work, not on duty, and not performing his job at the time of the injury. Claimant's injury on February 9, 2022 thus did not occur within the time and place limits of his employment or during an activity that had some connection with his work-related functions. Furthermore, Claimant was not taking a break from work, leaving Employer's premises, collecting pay, or retrieving materials within a reasonable time after termination of a work shift. Claimant was thus not engaging in normal activities incidental to the employment relationship. Therefore, Claimant's February 9, 2022 injuries did not occur within the course and scope of his employment with Employer.

13. The February 9, 2022 incident also did not arise out of Claimant's employment with Employer. Claimant was not performing any of his job functions at the time of the EOI examination. He voluntarily selected supplemental life insurance and LTD benefits that triggered the EOI examination from Prudential. Although the EOI examination was admittedly obtained in error, Prudential initially required the examination based on the nature of the voluntary benefits that Claimant selected. Employer did not require Claimant to obtain benefits. Furthermore, Claimant could have waived the benefits with no consequences to employment. The supplemental life insurance and LTD benefits that Claimant selected were completely voluntary.

14. Because Claimant voluntarily elected to obtain certain benefits, his elbow injuries during the EOI examination did not have its origin in his work-related functions. Specifically, the EOI examination was not sufficiently related to Claimant's job duties to be considered part of his service to employer. Furthermore, obtaining an EOI examination did not constitute a risk that was reasonably incidental to the conditions and circumstances of Claimant's job duties as a Senior Sales Consultant. The EOI

examination was not a common, customary and accepted part of Claimant's employment but was an isolated incident in an attempt to obtain benefits. Therefore, Claimant's February 9, 2022 elbow injuries during the EOI examination did not arise out of his employment with Employer.

15. Claimant has failed to demonstrate that the injuries he suffered during a February 9, 2022 blood draw as part of his EOI examination arose out of the course and scope of his employment with Employer. He voluntarily sought to obtain various benefits with Prudential and underwent an EOI examination through third-party vendor APPS that caused injuries. The EOI examination was not a work-related function and lacked any connection to Claimant's work duties as a Senior Sales Consultant for Employer. Accordingly, Claimant's request for Workers' Compensation 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).

4. 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 "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAO, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

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

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

6. 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). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAO, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715 (Colo. App. 1995).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that his February 9, 2022 injuries arose out of the course and scope of his employment with Employer. NF[Redacted] credibly explained that benefits are voluntary and employees are permitted to waive any benefit except for the basic life insurance plan. For plan year 2022 Claimant specifically chose a medical plan, group accident insurance, dental insurance, vision insurance, basic life insurance, supplemental life insurance, spouse life insurance, child life insurance, voluntary accidental death and dismemberment, short term disability, and LTD benefits. Claimant's selection of supplemental life insurance and LTD benefits triggered a health history questionnaire. Based on Claimant's responses to the health history questionnaire, Prudential requested

an EOI examination. The EOI examination required by Prudential was for the sole benefit of Claimant and was devoid of any connection to his work duties as a Senior Sales Consultant for Employer.

8. As found, the record reflects that Claimant's February 9, 2022 elbow injuries during the EOI did not occur in the course and scope of employment. Claimant acknowledged that he scheduled the EOI examination to take place on his day off from work. The examination took place at Claimant's home and not on Employer's premises. Claimant selected the day and time of the examination through third-party vendor APPS. Employer did not require, request, schedule or pay for the EOI examination. Claimant was not at work, not on duty, and not performing his job at the time of the injury. Claimant's injury on February 9, 2022 thus did not occur within the time and place limits of his employment or during an activity that had some connection with his work-related functions. Furthermore, Claimant was not taking a break from work, leaving Employer's premises, collecting pay, or retrieving materials within a reasonable time after termination of a work shift. Claimant was thus not engaging in normal activities incidental to the employment relationship. Therefore, Claimant's February 9, 2022 injuries did not occur within the course and scope of his employment with Employer.

9. As found, the February 9, 2022 incident also did not arise out of Claimant's employment with Employer. Claimant was not performing any of his job functions at the time of the EOI examination. He voluntarily selected supplemental life insurance and LTD benefits that triggered the EOI examination from Prudential. Although the EOI examination was admittedly obtained in error, Prudential initially required the examination based on the nature of the voluntary benefits that Claimant selected. Employer did not require Claimant to obtain benefits. Furthermore, Claimant could have waived the benefits with no consequences to employment. The supplemental life insurance and LTD benefits that Claimant selected were completely voluntary.

10. As found, because Claimant voluntarily elected to obtain certain benefits, his elbow injuries during the EOI examination did not have its origin in his work-related functions. Specifically, the EOI examination was not sufficiently related to Claimant's job duties to be considered part of his service to employer. Furthermore, obtaining an EOI examination did not constitute a risk that was reasonably incidental to the conditions and circumstances of Claimant's job duties as a Senior Sales Consultant. The EOI examination was not a common, customary and accepted part of Claimant's employment but was an isolated incident in an attempt to obtain benefits. Therefore, Claimant's February 9, 2022 elbow injuries during the EOI examination did not arise out of his employment with Employer.

11. As found, Claimant has failed to demonstrate that the injuries he suffered during a February 9, 2022 blood draw as part of his EOI examination arose out of the course and scope of his employment with Employer. He voluntarily sought to obtain various benefits with Prudential and underwent an EOI examination through third-party vendor APPS that caused injuries. The EOI examination was not a work-related function and lacked any connection to Claimant's work duties as a Senior Sales Consultant for

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

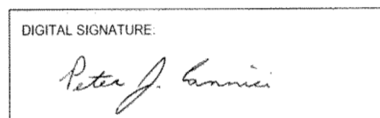
ORDER

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

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

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 http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 11, 2022.



Peter J. Cannici
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 5-190-470-001

ISSUES

- Did Claimant prove she suffered a compensable occupational disease caused by her work for Employer?

- If Claimant's injury is compensable, are Respondents liable for treatment Claimant received from Dr. Jeffry Watson and Colorado Springs Orthopedic Group physical therapy?

FINDINGS OF FACT

1. Claimant worked as a packer in Employer's fulfillment warehouse. The job involved pulling totes filled with small items from a conveyor belt, pulling the items from the totes, and placing them into bags for shipping. The incoming conveyor belt was to Claimant's left, so she primarily used her left arm to reach for the items. At hearing, she demonstrated extending her arm at the elbow to reach out and then flexing her elbow to place the items in front of her body. She performed this motion with her left arm several hundred times per hour. Claimant worked 10-hour shifts.

2. Claimant started working for Employer on August 4, 2021. In October 2021, the volume of product increased because of the approaching holiday season.

3. Claimant developed pain in her left elbow and arm on October 26, 2021. She was working in the "smalls" section, which involves packing small items into bags for shipping. She notified her supervisor but finished her shift. The pain returned the next day at the start of her shift, and she sought treatment from the on-site wellness center. Claimant applied heat and ice over the next several days without significant benefit.

4. Employer referred Claimant to Dr. Erik Ritch at Colorado Occupational Medicine Partners. At her initial appointment on November 11, 2021, Claimant described difficulty grasping, lifting, or carrying objects with her left hand because of severe pain in her left elbow radiating to the left shoulder and neck. She was also having compensatory right shoulder pain from favoring her left arm. She had no prior history of left upper extremity problems. Physical examination showed moderate tenderness to palpation over the left medial and lateral epicondyles and significant elbow pain with flexion, extension, pronation, and supination. She was also mildly tender in the upper left arm, shoulder, left trapezius, and cervical paraspinals. Dr. Ritch diagnosed acute lateral and medial epicondylitis with muscle spasms, and mild shoulder and neck strains. He opined, "These injuries were sustained within the normal course of her employment and should be considered work related." He prescribed muscle relaxers and referred Claimant to physical therapy. He also imposed work restrictions of no lifting over 10 pounds and no more than two hours of repetitive grasping with the left hand.

5. Claimant followed up with Dr. Ritch on December 1, 2021. She had improved significantly with therapy and work limitations, and estimated she was "about 90% better." She still had some left arm pain, mostly in the left extensors and around the lateral epicondyle. Physical examination showed full range of motion and good grip strength, although she had still had pain with gripping, resisted pronation, and resisted supination. Dr. Ritch stated, "The patient is showing some degree of improvement. Unfortunately, given the [way] that her job works, we will have to keep her on modified duty for a bit longer. She needs further work with physical therapy before we can safely have her return to large amount of lifting and carrying. Returning her to work too quickly has a potential to take an acute injury and turn it into a long-term/chronic condition."

6. Claimant next saw Dr. Ritch on December 15, 2021. Her left arm was "essentially 100% better." She had resumed normal daily activities and felt ready to return to full duty at work. Physical examination showed full elbow range of motion, no tenderness of the lateral epicondyle, normal grip strength, and no pain with resisted supination or pronation. Dr. Ritch released Claimant to full duty and asked her to follow up in three weeks.

7. Claimant returned to regular work and quickly experienced a recurrence of left arm and elbow pain.

8. Claimant next saw Dr. Ritch on January 14, 2022. She reported severe lateral forearm and elbow pain, "made worse by any using of the left hand." The examination findings were significantly worse than at the previous visit, particularly around the left lateral epicondyle. Grip strength was "very markedly reduced." Claimant had recently learned that Insurer had "closed her case." Dr. Ritch opined, "The functions of the patient's job are clearly in line with Rule 17 guidelines for a work-related medial and/or lateral epicondylitis. As such this is a work-related injury and I do not understand why insurance has closed the patient's case without consulting our office." Dr. Ritch reinstated work restrictions with "no use of the left arm." He gave Claimant a prescription for Voltaren gel, referred her for additional PT, and asked her to follow up in 2 weeks.

9. Claimant did not return to Dr. Ritch, but instead sought treatment on her own outside the workers' compensation system. On February 9, 2022, she saw Dr. Jeffry Watson at Colorado Springs Orthopedic Group ("CSOG"). Dr. Watson stated her examination findings were "certainly consistent with lateral epicondylitis with localized tenderness over the common extensor origin, stabbing pain at that level with resisted wrist extension." Claimant was frustrated about her lack of progress. Dr. Watson gave Claimant a steroid injection, which was not helpful. He also referred Claimant to PT, which was performed in-house at CSOG.

10. According to a Job Description and Physical Demands Summary provided by Employer, Claimant's work required "constant"[1] reaching and grasping. Pinch grip and

[1] The term "constant" is defined as 67%-100% of a shift.

simple grasping (< 15 pounds) were performed 7.5 to 10 hours per shift. Forceful grasp (>15 pounds) was performed from 0 to 2.5 hours per shift.

11. Dr. John Burris performed an IME for Respondents on April 19, 2022. He agreed with the diagnoses of lateral and medial epicondylitis but opined the conditions were not work-related. Dr. Burris primarily relied on the Cumulative Trauma Disorder ("CTD") MTGs to support his opinion. He opined Claimant's work did not expose her to any primary or secondary risk factors considered causative under the MTGs. He testified high repetition alone is insufficient under the MTGs to cause medial or lateral epicondylitis. Instead, he opined there must be a combination of repetition and forceful gripping or awkward postures to establish causation. He also noted Claimant had only worked for Employer approximately three months before the onset of symptoms, which is atypical for work-related cumulative trauma disorders. Finally, Dr. Burris pointed to non-occupational risk factors such as weightlifting, cycling, and boxing that involved forceful grasping and awkward wrist postures.

12. Claimant has been a fitness instructor most of her adult life. She continued working out regularly while working for Employer. Claimant had no problems with her left arm or elbow before October 2021 despite her regular participation in fitness activities.

13. Claimant was a credible witness.

14. Dr. Ritch's conclusion that Claimant suffered a work-related CTD to her left arm is more persuasive than the contrary opinions offered by Dr. Burris.

15. Claimant proved she suffered a compensable occupational disease involving her left arm.

16. Claimant failed to prove treatment she received from Dr. Watson and CSOG physical therapy was authorized. There is no persuasive evidence that Dr. Ritch referred Claimant to Dr. Watson or refused to treat Claimant for non-medical reasons. Therefore, Claimant did not have the right to select her own physicians.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is 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); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

The mere fact that 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 (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 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 § 8-40-201(14), 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 Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved she suffered a compensable occupational diseases involving her left arm proximately caused by her work. The following factors are the most persuasive:

- Claimant had no left elbow or arm issues before starting work for Employer.
- The work was highly repetitious, particularly with respect to left elbow flexion and extension.
- Claimant worked 10-hour shifts, which further concentrated her exposure to the injurious movements.
- The onset of symptoms occurred during repetitive work activities.
- Claimant perceived that the symptoms were directly associated with her work activity. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular stimuli.

- Claimant's symptoms improved dramatically after she was put on work restrictions and stopped performing the repetitive activity.
- Claimant's symptoms quickly recurred when she resumed regular work activities.
- Claimant has no problems with her right arm. Her symptoms are confined to the arm she flexed and extended thousands of times per day.
- Claimant's ATP opined the condition is work-related.

Admittedly, Dr. Ritch's opinion that Claimant "clearly" meets the causation standards in the CTD MTGs is inaccurate. But his initial causation assessment was primarily based on his personal expertise and evaluation of Claimant. The MTGs are primarily intended to facilitate quick determinations by insurers regarding requests for pre-authorization. They are not binding rules, and not intended to supplant a case-by-case evaluation of individual circumstances. *See* § 8-43-201(3). Moreover, the CTD MTGs recognize that "most studies were *unable to truly assess repetition alone*. Indirect evidence . . . supports the conclusion that task repetition *up to 6 hours per day* unaccompanied by other risk factors is not causally associated with cumulative trauma conditions." (Emphasis added). Despite conceding the limits of medical literature, the MTG causation matrix purports to establish firm guidelines for the duration of activity that can be considered causative. Such certainty does not appear warranted given the underlying data on which the MTGs are based. This consideration is particularly salient here, because Claimant's job required *substantially more than 6 hours per day* of repetitive flexion and extension of her elbow. Under the circumstances, slavish adherence to the MTGs is misplaced.

There is no credible evidence that Claimant was equally exposed to the injurious activity outside of work. Dr. Burris' argument that Claimant's epicondylitis may be related to physical fitness activities is unpersuasive. Claimant has been involved in fitness training for years, but had no problems with her upper extremities until she started working a highly repetitive job with 10-hour shifts.

B. Authorization of medical treatment

The respondents must cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of a compensable injury or occupational disease. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial*

Claim Appeals Office, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

The mere fact that respondents deny a claim does not automatically entitle the claimant to select their own physicians. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Unless the ATP refuses treat based on lack of authorization, or advises the claimant to follow up with their personal providers, the respondents are not liable for treatment the claimant pursues outside the chain of referral. *E.g.*, *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

As found, Claimant failed to prove the treatment she received from Dr. Watson and CSOG physical therapy was authorized. There is no persuasive evidence that Dr. Ritch referred Claimant to Dr. Watson or refused to treat for non-medical reasons. In fact, Dr. Ritch made additional referrals and scheduled a follow-up appointment on January 14, 2022, despite learning Insurer had "closed" the claim. Accordingly, Respondents are not liable for the treatment notwithstanding that it was otherwise reasonably necessary and causally related.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable occupational disease.

3. Claimant's request for medical benefits related to treatment she received from Dr. Watson and Colorado Springs Orthopedic Group physical therapy is denied and dismissed.

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: August 12, 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 5-182-968-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that he is entitled to temporary indemnity (wage replacement) benefits?

2. Did Claimant prove by a preponderance of the evidence that Respondents are responsible for paying a medical bill from Next Care Urgent Care?

FINDINGS OF FACT

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

1. Claimant is a 28-year old man who worked as a carpenter for Employer. Claimant was hired by Employer on or around September 14, 2020. (Ex. C).

2. Claimant sustained an admitted work-related injury on July 7, 2021. Claimant was diagnosed with a right wrist and forearm strain. (Ex. B).

3. John Raschbacher, M.D., Claimant's authorized treating physician (ATP), evaluated Claimant on November 11, 2021. Dr. Raschbacher noted that Claimant had an MRI that was negative for any findings. He opined that Claimant did not need any further restrictions on physical activity, and gave Claimant a full-duty release. (Ex. B).

4. On December 13, 2021, Dr. Raschbacher placed Claimant at Maximum Medical Improvement (MMI). Claimant had no restrictions, no impairment rating, and no need for further treatment. (Ex. A).

5. Respondents filed a Final Admission of Liability (FAL) on December 29, 2021. According to the FAL this was a "[m]ed only claim with no lost time." Respondents paid $3,401.41 for medical expenses. (Ex. A).

6. Claimant signed his acknowledgment of Employer's Absenteeism Policy on September 14, 2020. The Policy specifically provides "[e]xcessive absenteeism, unexcused absence, continual lateness, early quits, failures to call or falsifying your reasons for being absent or late will result in disciplinary action, up to and including termination." (Ex. C).

7. Claimant regularly texted his direct supervisor, [Redacted, hereinafter AC]. Between March 5, 2021 and May 19, 2021, there are multiple texts from Claimant telling AC[Redacted] that he was either going to be late to work, or was not able to come in that day. (Ex. D). On June 26, 2021, Claimant was a no-call/no-show, so AC[Redacted] wrote him up. (Ex. C).

8. Claimant testified that he was admitted for mental health treatment from August 21, 2021 to September 21, 2021. There was no evidence presented, however, that this treatment related to Claimant's industrial injury.

9. The ALJ finds that Claimant's mental health treatment was not related to his industrial injury.

10. [Redacted, hereinafter JF], the Project Supervisor, testified that Employer was aware that Claimant was inpatient, and he was expecting Claimant to return to work after his discharge. JF[Redacted] testified that Claimant never contacted Employer nor did he return to work following his release from treatment.

11. JF[Redacted] testified that their work is crew based, and if they are missing a crew member production goes down. Employer terminated Claimant on September 24, 2021 for excessive absenteeism. (Ex. C).

12. The ALJ finds that Claimant was responsible for his termination due to his history of excessive absenteeism.

13. Claimant obtained part-time employment at HRB[Redacted] following his termination. Claimant testified that he earned $17.00 per hour at this job. Claimant further testified that he lost wages because he missed time (17 ½ hours) to attend medical appointments related to his work injury. Claimant is seeking $297.50 in lost wages.

14. Claimant testified that he missed time on the following days: November 11, November 22, November 30, December 2, December 9, December 13, and December 16, 2021.

15. The ALJ finds that Claimant was released to full-duty work on November 11, 2021, so any potential temporary disability benefits terminated on November 11, 2021. The ALJ finds that Claimant is not entitled to any indemnity benefits to compensate Claimant for lost wages.

16. Claimant's Exhibit 1 was admitted into evidence. Exhibit 1 is a February 16, 2022 invoice from Next Care Urgent Care in the amount of $274.13. The invoice was addressed and sent to Claimant. The ALJ infers that Claimant is seeking payment of this invoice.

17. [Redacted, hereinafter KJ] is a claims adjuster with Insurer. KJ[Redacted] testified that she has attempted to contact the provider to verify that the invoice was for care related to Claimant's work-injury. KJ[Redacted] also testified that she requested Claimant contact the provider and have the records and itemized charges sent to Insurer to determine if the medical care could be reimbursed.

18. No evidence was presented to demonstrate that the February 16, 2022 invoice from Next Care Urgent Care is reasonable, necessary and related to Claimant's work-related injury.

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 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).

Disability Indemnity Payable as Wages

Claimant is seeking disability indemnity payable as wages for the time he was not working because he was attending doctor appointments. *See* §§ 8-42-103 and 8-42-105, C.R.S. To qualify for Temporary Total Disability (TTD) benefits under § 8-42-105 C.R.S., a claimant must establish three conditions: (1) the industrial injury caused the disability; (2) the injured employee left work as a result of the injury; and (3) the temporary disability is total and lasts for more than three working days. *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo.1995). Once a claimant establishes that the industrial injury is causing a temporary wage loss, that claimant is entitled to receive TTD benefits until: (1) the claimant reaches MMI; (2) the treating physician releases the claimant to return to regular employment; (3) the claimant actually returns to regular or modified employment; or (4) the treating physician authorizes a return to modified employment, the employer offers

such employment to the claimant, but the claimant fails to begin that employment. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637, 639 (Colo. App. 1997).

Here, Claimant is seeking reimbursement for the time he missed work to attend medical appointments. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." § 8-42-103(1)(g), C.R.S. As found, Claimant was responsible for the termination of his employment, and thus is not entitled to reimbursement of any lost wages after his termination on September 24, 2021.

Similarly, even though Claimant did not present evidence to prove an entitlement to TTD benefits, any TTD benefits ceased at the point Claimant was released to full-duty work on November 11, 2021. § 8-42-105(3)(c), C.R.S. All of the dates Claimant alleged to have not been able to work due to doctors' appointments occurred on or after Claimant was released to full-duty work on November 11, 2021. Accordingly, Claimant failed to prove by a preponderance of the evidence that he is entitled to any wage loss benefits.

As found, the ALJ infers that Claimant is seeking reimbursement of the February 16, 2022 invoice from Next Care Urgent Care. There was no evidence presented, however, to demonstrate that this care was reasonable, necessary and related to Claimant's work-related injury.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to wage benefits for lost time, and this claim is dismissed.

2. Claimant failed to present evidence that the February 16, 2022 medical bill from Next Care Urgent Care is reasonable, necessary and related to his work-related injury. This claim is dismissed without prejudice.

3. 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: August 12, 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. 5-184-000-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant was injured in the course and scope of his employment.

II. If Claimant has shown he has a compensable claim, whether Employer A and/or Employer B was Claimant's employer on September 24, 2021.

III. If Claimant has shown he has a compensable claim, the parties stipulated that the medical treatment at Sinergy Health Partners and the associated bill were reasonably necessary and related to the incident of September 24, 2021.

PROCEDURAL HISTORY

Respondents A filed an Application for Hearing on December 2, 2021 on issues that include compensability, medical benefits that are reasonably necessary and related to the injury, average weekly wage, temporary disability, causation, relatedness, preexisting condition, whether Employer A lent employees to Employer B for the Utah project or whether Employer A was contracted by Employer B for the Utah project, whether Employer B is the proper employer. Also listed are the issues of equitable reimbursement of all advanced lost wages and medical benefits paid by Respondents A under the Notice of Contest (NOC), if Employer B is found to be the proper employer, including compensation to the family members providing 24/7 home health care since Claimant returned to Colorado from Utah.

Claimant filed an Application for Hearing on December 22, 2021. The issues include those stated above as well as change of physician to Dr. David Reinhard and the cost of home health care provided by Claimant's family members since Claimant's return to Aurora, Colorado.

Employer B filed a Response to Application on January 25, 2022 with issues that included some of those listed above but also the Employer/Employee relationship, whether Claimant was an independent contractor, credits, offsets, apportionment, causation, indemnification from Employer A pursuant to contract between Employer B and Employer A.

Respondents A submitted multiple Prehearing Conference Orders that need not be listed, issued by PALJs Phillips, Gallivan, and Eley, as well as ALJ Glen Goldman. Specifically, PALJ David Gallivan's order of February 17, 2022 which bifurcated the issues for hearing. PALJ Gallivan stated in his order that the parties were on the verge of an agreement to stipulate to the compensable nature of the injury and the only issue that should be heard at hearing was "who was the employer of injury," therefore, PALJ Gallivan found good cause for the bifurcation.

The parties disclose that Insurer A has been paying for indemnity benefits, attendant care benefits to the family members that are caring for Claimant, who requires 24/7 supervision and care, and medical benefits without admitting liability in this matter. Respondents A argue that there was no prejudice to Claimant to continue to hold the issue of compensability in abeyance until the subsequent hearing. This ALJ finds it otherwise. Compensability is an integral and essential part of the issues that must be addressed before reaching the issue of who is the employer. The identity of the employer is moot unless a determination of compensability is made. Therefore this ALJ determines that the issue of compensability must be heard. The remaining issues shall be heard at the hearing on October 3, 2022 scheduled pursuant to Claimant's Application for Hearing dated June 7, 2022 and Respondents A Response to AFH as well as Respondents B Response to AFH both dated July 7, 2022.

The parties entered into a joint stipulation, which was approved and ordered on July 5, 2022 by ALJ Victoria E. Lovato and stated in pertinent part as follows:

1. Insurer A's policy issued to Employer A will cover any compensable injuries sustained by Claimant if it is determined that Employer A was Claimant's employer on the date of the alleged injury.

2. Employer B and Insurer B have no obligation to prove Insurer A's coverage at hearing.

3. Insurer A's policy will only be utilized for purposes to determine the appropriate employer on the date in question.

4. The parties agreed that if Employer B and Employer A are both found to be employers via a joint or shared employment relationship, the ALJ will determine the parties' share in the liability.

Further, at hearing the parties stipulated that the issue of medical benefits provided by Sinergy Health Partners and Dr. Wallace were reasonably necessary and related to the injury, if the claim was found compensable.

FINDINGS OF FACT

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

1. Claimant was 20 years old at the time of the accident on September 24, 2021 and is currently 21 years of age. Claimant has an 8th grade education in El Salvador. Claimant testified that he lived in Aurora Colorado with his sister (MdeD) and could not speak, understand, read, or write English.

2. Claimant worked as a painter generally earning $20 to $22 per hour. He was hired by Employer A on approximately May 11, 2020 and continued working for Employer A through the date of the accident on September 24, 2021.

3. Employer A was in the business of painting and repair work for both commercial and residential projects. Claimant was trained by JSC (DSC's brother) as well as by DSC himself and Claimant's brother, BSQ. Claimant began earning $24.50 per hour, working full time while on the Utah project. He was paid more for the Utah job because they were out of town and this amount covered his meals.

4. DSC, Employer A's sole owner, stated that they usually worked in Colorado but did occasionally work in other states like Utah and Kansas. Employer B had a Master Agreement with Employer A and Employer B would contact Employer A for multiple jobs, as well as warranty work, throughout Colorado, and in other states.

5. Employer A was subcontracted to repair exterior, preparing it for painting and painting an apartment complex, of 7 buildings, in the Salt Lake City, Utah area in August of 2021 by Employer B. DSC worked alongside Claimant during this project. Claimant was paid from January 2021 through September 16, 2021 by checks directly from Employer A. Claimant did not receive any checks from Employer B.

6. DSC travelled with his brother, JSC, as well as Claimant to Salt Lake City in Employer A's vehicle. JSC drove the vehicle. The three of them stayed at a hotel for the first week or so, which was paid for by Employer B, then Employer B leased a two-bedroom apartment for Employer A, for the workers to stay in while they completed the job in Utah. Claimant's brother, BSQ and another painter (CA) joined them in Salt Lake City a little after the job had begun.

7. On September 24, 2021 they had been working for approximately three weeks when DSC asked Claimant to clear some branches from a tree that were touching the apartment building to be painted. DSC saw Claimant on the ladder that was extended to approximately 16 feet and belonged to Employer A. He then left Claimant to fill the paint machine and was away for a few minutes. He was not present when Claimant fell off the ladder. It was only a minute or two when he returned, finding Claimant on the ground, unconscious but breathing. DSC immediately called 911. Claimant sustained very serious injuries, including a traumatic brain injury.

8. Before the emergency personnel arrived on the scene, they were advised the patient was a 20 year old male that had fallen from a ladder and was unconscious. EMS first responders arrived on the scene of the accident at approximately 1:45 p.m. on September 24, 2021. EMS noted that Claimant was injured from the fall, possibly 20 ft. high, causing blunt trauma, though coworkers did not know exactly how high he was on the ladder. Co-workers had placed a pillow under his head for comfort, but Claimant was unresponsive. Upon assessment, they determined that Claimant had a GCS[1] of 3 and should be immediately stabilized. Claimant was placed in a full body splint and, after detecting an obvious right arm deformity, and unequal pupils following rapid assessment. The paramedics performed a needle decompression due to diminished left side lung sound and unequal chest rise/fall. He was transported to Davis Hospital and Medical Center.

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[1] Glasgow coma scale is used to objectively describe the extent of impaired consciousness for eye, verbal and motor responses. A 3 is the lowest possible score of non-responsive to visual, verbal and motor stimuli and often associated with an extremely high mortality rate.

9. Claimant was seen by Neurosurgeon Sara Menacho, M.D. at University of Utah Hospital as a transfer trauma 1 patient on September 25, 2021 at approximately 9 a.m., with a report of falling from a ladder 30 feet to the ground at a construction site. Dr. Menacho noted that Claimant was found to have multiple supratentorial and infratentorial intraparenchymal hemorrhages including in the brainstem compatible with a severe, Grade 3 DAI[2] as well as scattered traumatic subarachnoid hemorrhage and intraventricular hemorrhage. She documented that, upon arriving at the hospital, the patient was noted to be a GCS of 3. Claimant was noted to have a left fixed and dilated pupil and a sluggish right pupil. He had no motor response, no verbal response, eyes closed, no corneal reflex but intact cough and gag reflex. He was taken for a CT scan, where repeat CT head demonstrated interval increase in diffuse intraparenchymal hemorrhages. During the CT scan, Claimant was both bradycardic and hypertensive and they were concerned of impending cerebral herniation. In addition, the providers noted a right distal radius fracture and a trace right pneumothorax. Dr. Menacho noted that Claimant did not open his eyes, make noise or respond to pain. Following x-rays of the forearm Claimant was noted to have acute displaced fractures of the distal radius, ulnar styloid process and scaphoid. X-rays of the right wrist showed comminuted fracture of the distal radius. More detailed x-rays showed a possible triquetral fracture. Dr. Menacho stated that "Unfortunately, this patient has suffered a severe closed head injury and currently is GCS 3T off sedation. As such, there are no plans for placement of an ICP monitor[3] or operative intervention given the likelihood that it would not change the patient's poor prognosis."

10. The Division's Moderate/Severe Traumatic Brain Injury Medical Treatment Guideline, W.C.R.P. Rule 17, Exhibit 2B, CCR 1101-3 addresses a moderate/severe TBI as follow:

C.1.c Moderate/severe TBI (M/S TBI)

M/S TBI is a traumatically induced physiological and/or anatomic disruption of brain function as manifested by at least one of the following:

- altered state of consciousness or loss of consciousness for greater than 30 minutes,
- an initial GCS of 12 or less, and/or standardized structural neuro-imaging evidence of trauma, and/or
- post-traumatic amnesia (PTA) greater than 24 hours.
  If the GCS is not available, the closest approximation to the patient's state at 30 minutes post injury should be used.

11. Respondents A filed a First Report of Injury (FROI) on September 28, 2021, noting that Claimant had fallen from a ladder on September 24, 2021, injuring multiple body parts, including a right hand fracture and a concussion while on the job in Layton,[4] Utah. The FROI stated that Employer A's representative, DSC, was notified on the date of the accident and that Claimant had been unable to return to work. It also documented that Claimant's mailing address was in Aurora, Colorado.

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[2] Diffuse axonal injury, a severe traumatic brain injury (TBI) which includes gross focal lesion of the corpus collosum and focal lesion of in the brainstem.
[3] IPC monitor is an intracranial pressure monitor.
[4] Suburb just north of Salt Lake City, Utah.

12. Employer A's Insurer filed a Notice of Contest on October 18, 2021 for further investigation.

13. Claimant was initially evaluated by Bethany Wallace, D.O. at Sinergy Medical Services on December 21, 2021. Dr. Wallace also documented a fall of indeterminate height from a ladder at a construction site in Utah. She noted Claimant was taken to the U of U Hospital. He was noted to have multiple areas of bleeding seen in his brain imaging as well as a fractured right arm and blood in his right chest. He was placed on life support. His family were told his injuries were incompatible with life, but Claimant did improve, surviving the injuries. He was discharged from the U of U on November 23, 2021 to his family's care in Colorado. He requires 24/7 care, which his siblings have been providing, and while he continued to improve, he continued with multiple pain complaints and neurologic deficits. Dr. Wallace made referrals to Craig Hospital, for medications and an ankle brace.

14. Dr. Wallace performed a limited record review which states as follows:

> On 10/01/21, he went to the operating room for a tracheostomy and PEG (feeding tube) placement. He was stable and then transferred to neuro acute care. He started to make progress, and the trach was downsized on 11/06. He was tolerating capping trials and was decannulated on 11/01. He progressed with SLP[5], and PEG[6] was removed on 11/22. He was able to tolerate a regular diet. He made significant improvements in PT and OT. They were able to do family training since he had no funding. The family wished to take him back to Colorado where he has family support. He was given orders for outpatient PT, OT, and SLP (speech and language) therapy. It was recommended that he follow up with primary care in his area, attend therapy as able, and follow up with the University of Utah neurosurgery and orthopedics over telehealth until he can find providers in his area.

15. Dr. Wallace documented the following lists of complaints through Claimant's sister, who acted as an interpreter:

- Neck, upper back, and lower back pain: Moderate and aching.
- Bilateral hip pain, knee pain, ankle pain, and shoulder pain: Aching.
- Bilateral elbow pain: Aching.
- Left wrist and hand pain: Moderate and aching.
- Right wrist and hand pain: Severe. This is where he has the three fractures.
- Dizziness and lightheadedness: Moderate and comes and goes.
- Vision changes: He has blurred vision in his left eye.
- Right leg: His right leg feels numb. This is severe.

Dr. Wallace further noted that Claimant needed to wear protection at night for loss of continence, had numbness of the right calf and leg, a locking right ankle that interfered with walking, a tremor in his head and neck, and blurry vision. She noted that Claimant reported memory loss, difficulty with problem-solving, and getting lost or confused easily, had problems with bathing, showering, and dressing, cannot perform any of complex self-

[5] SLP stands for "speech-language pathologist" who works in health care and diagnoses and treats a wide range of speech, language, cognitive, and swallowing disorders.

[6] Percutaneous gastrostomy tubes for feeding patient that are in a coma or are unable to feed themselves.

care or household duties such as cleaning, financial management, vacuuming, sweeping, mopping, managing his own medications, yard work or play soccer. Claimant reported he had difficulty lifting above his shoulders, climbing stairs, and getting up from lying down, basic communication including with speaking, writing, typing, computer use, and texting.

14. On Exam, Dr. Wallace remarked Claimant had some spasticity with motion, a tremor, hypertonicity to palpation of the muscles in the cervical, thoracic and lumbar areas, mildly decreased range of motion of the shoulders bilaterally, right elbow tenderness to palpation, decreased motion of the right wrist and hand, tenderness in the right ankle, tremor in the head and upper body, his gait was antalgic with difficulty moving the right leg with abnormal reflexes bilaterally. Dr. Wallace diagnosed severe traumatic brain injury (TBI) with diffuse axonal injury and loss of consciousness, fracture of right wrist, resolved hemothorax, neck pain, back pain, bilateral shoulder pain, bilateral hip pain, bilateral ankle injuries, history of tracheostomy and history of gastric feeding tube.

15. Dr. Wallace made a causation analysis and determined that, within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries listed. Dr. Wallace recommended a multidisciplinary team approach for recovery from the severe traumatic brain injuries. She recommended University of Colorado or Craig Hospital. She stated Claimant required ongoing neurology and neurosurgery consults, physical therapy, occupational therapy, speech therapy, orthopedic consultation for the right hand wrist fractures. She also recommended care for his lower extremity mobility and coordination, visual distortions related to an eye injury or the brain injury, CT of the spine, MRIs of the cervical and lumbar spine, and acupuncture.

16. Claimant returned to see Dr. Wallace on January 11, 2022. At this time, Claimant was not complaining of pain, and she cancelled the referrals for the MRIs of the cervical and lumbar spine, despite ongoing spasticity. She again emphasized that the best course of care for Claimant was a multidisciplinary program to address Claimant's ongoing TBI sequelae, including neurologic evaluations due to ongoing tremors.

17. Craig Hospital documented multiple injuries. On March 9, 2022 the medical providers documented a fall from a ladder from 15 to 30 feet while working. They noted a brain stem injury, significant cognitive impairments, hemorrhage to the right posterior midbrain and splenium of the corpus callosum, right cerebellum, dystonic posturing of the left arm, rhythmic torticollis of the cervical spine, and spasticity of the right upper extremity and lower extremities with non-sustained clonus of the right ankle. They noted Claimant continued to have blurred vision in the left eye and oculomotor dysfunction, dysconjugate gaze, diplopia on the left. He was evaluated for problems related to his vision, finding that the corrected vision was still lacking. They recommended he wear a patch over his left eye secondary to difficulties with prism correction for diplopia. They also noted that Claimant would walk short distances with his arm over a family member's shoulders, which was very unsafe. They documented that Claimant had cognitive impairments as shown by agitation, irritation, and was referred for psychological care with Dr. Torres. They noted his difficulty with balance, a right displaced ulnar styloid fracture, problems swallowing, right shoulder injury and right ankle sprains. Claimant continued to treat at Craig Hospital at least through July 2022 for physical therapy.

18. DSC testified that he was interviewed by Insurer A's investigator and tried to be honest about what happened to Claimant when he fell from the ladder, as well as about his sole ownership interest in Employer A. His brother, JSC, is only an employee of the company and not an owner. DSC testified that Employer A is in the business of residential and commercial painting, and he confirmed that Claimant was working for Employer A in the Salt Lake City area the summer of 2021. He confirmed that Claimant had worked many jobs in Colorado for Employer A prior to the Utah job and that Claimant's brother, BSQ, also worked for Employer A. He stated that Claimant was on the Utah project approximately three weeks before the fall from the ladder.

19. DSC stated that Employer A was contracted by Employer B to paint seven buildings in an apartment complex in Utah but that they have had a Master Subcontractor Agreement from Employer B since June, 2016 subcontracting work to Employer A. DSC signed the contract himself. The Master Subcontractor Agreement (MSA) dated June 1, 2016 laid out the terms under which Employer A was to complete any subcontractor work for Employer B. Since DSC did not read English, Employer B had someone explain the Contract in Spanish to the owner of Employer A and then DSC signed the contract. It reflected that Employer B was the general contractor and Employer A a subcontractor. In pertinent part it stated that

> Subcontractor shall indemnify and gold[7] [sic.] harmless General Contractor from all suits, actions or claims of any character, name of description for or on account of:
>
> a. Any injuries or damages received or sustained by any person, persons or property, by or from subcontractor or its employees or its sub- subcontractors or their employees during construction at the premises, or by/in consequence of any neglect in safeguarding the work
>
> …
>
> Subcontractor shall maintain in force at Subcontractor's own cost an insurance policy covering worker's compensation in an amount required by state statute, [sic.] Furthermore insurance policy against all risks of damage of destruction of property or persons resulting from Subcontractor's performance of this contract, …

20. DSC generally was contacted by Employer B and offered different jobs. DSC and Employer A could reject any job offers made. He was the one in charge of obtaining the people to perform the painting jobs. He confirmed that Employer A agreed to perform the work in the Salt Lake City area for Employer B. He recalled reviewing the "Statement of Work – Subs" for the Utah job but not the specific document entered into evidence. He believed they were working under that Statement of Work for the Utah project. The Statement of Work clearly identifies Employer B as the General Contractor and Employer A as the subcontractor. DSC confirmed that he, on behalf of his own company, invoiced the work performed and Employer B would pay Employer A for the work. Then Employer A would p ay the painters, his employees.

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[7] This ALJ infers that the correct word is "hold."

21. DSC also stated that he is the one that hired Claimant, as well as the other painters, on behalf of Employer A for the Utah project. He was the one to keep track of the hours each of them worked, writing the hours in a notebook and he calculated what each painter would be paid, including Claimant. He was the one to decide what each worker would be paid per hour, and he wrote and signed the checks to Claimant. He acknowledged that he carried workers compensation insurance, and that the policy was valid and in effect on the date of the injury.

22. DSC noted that the Utah job was not the only project Employer A had performed outside of Colorado, but it was the first one Employer B had contracted with Employer A to perform outside of Colorado, except for a limited warranty project in Kansas. DSC gave Claimant the Employer A credit card to book flights back home (Aurora, Colorado) for the weekends, which Claimant sometimes reimbursed and sometimes not. DSC organized who would be on the team to work in Utah and assigned job tasks at the beginning of the day and at mid-day. They were in Utah approximately four weeks to complete the project and he had four other workers with them.

23. Employer B paid for Employer A to travel from Colorado to Utah, provided all the materials to be used for the project including paint, wood and other materials to make repairs in preparation for painting the buildings, including the caulk, nails, plastic, paper, dumpsters, a storage trailer, even hard hats if needed, though Employer A generally purchased the hard hats. Employer B paid Employer A for the transportation as well as the living arrangements, electricity, and other utilities, the first week or so in a hotel and then an apartment where all five Employer A employees lived for the remainder of the project.

24. DSC would sometimes wear Employer B t-shirts that he obtained when visiting Employer B's offices. DSC also had Employer A t-shirts, which Employer B requested he have. However, he had forgotten his t-shirt in Colorado and did not wear it during the Utah job. Employer B's superintendent would inspect the Utah job to make sure it was being done correctly and, if the superintendent asked DSC to correct something, he would perform the work but normally he just did what the contract between Employer B and Employer A required. Employer B's superintendent was the one to sign off on the job when it was completed at each stage. DSC brought the painting and repair equipment such as brushes, rollers, paint sprayers, ladders, caulking guns and other tools needed to perform the repairs and painting job.

25. DSC stated he worked alongside Claimant on the day of the accident of September 24, 2021. He, JSC and BSQ all three trained Claimant how to use a ladder and paint utilizing all the tools required for the painting projects, including the paint sprayer. DSC would supervise Claimant and would check every day to make sure the work was done well.

26. DSC was the one that found Claimant laying on the ground on September 24, 2021, but he did not see Claimant fall and no other workers were in the immediate area. When he discovered Claimant, he called to the other workers and then called 911 himself.

27. DSC testified that a video was taken by his brother, JSC, of Claimant spray painting while on the ladder and confirmed that it was taken during the Utah project. The

video showed Claimant high up on a ladder demonstrating how he utilized the paint sprayer.

28. Claimant stated that he worked for Employer A. He was hired by Employer A to perform the Utah job. He had worked over a year for Employer A by the time he was injured. JSC is the one that taught Claimant how to paint with a sprayer. Claimant is the one that requested that JSC take the video of himself while spraying because he wanted to see how he was doing it. He was hurt in Utah.

29. Mr. BSQ testified that he had been working primarily in Colorado with Employer A for approximately 3 years and was hired by DSC. He further stated that both brothers would give him assignments, but that JSC was the one to tell him about the Utah Job. He was in Utah for approximately one- and one-half months. He did not know who Employer B was.

30. The controller of accounting for Employer B testified that she oversaw the day to day accounting tasks, completing paperwork, making sure subcontractors were properly entered into the system. They had over one hundred subcontractors at the time of the hearing. She explained that superintendents checked on the jobs and job progress of the subcontractors, then they would be entered into a master spreadsheet in order to approve the progress (which was done by first the superintendent and then the president of the company) and the payments, then they are sent to her and she would cut the checks. The checks generally would be cut to the subcontractor's company, not to individuals. The companies were required to fill out a W-9 with the business name and the EIN.[8] Employer B does not pay the individual workers and has no information about the individual workers including Claimant. She further stated that, as a subcontractor, Employer A provided services to Employer B that Employer B could not have offered without Employer A or without hiring its own painters. (This ALJ infers from this statement that Employer B was a general contractor of projects.) While she occasionally created receipts, that was a task generally completed by the superintendents. Once she received the invoice, she would cut the checks to the subcontractor's business.

31. The controller also looked at a summary of costs against the Utah job, which included payment for materials, labor, rentals like dumpsters and storage, paint from Sherwin Williams, Specialty Wood products for replacement when needed, Hardy Manufacturing for siding, and other costs including the contracted work by Employer A. Employer B also paid for an apartment for Employer A.

32. The superintended for Employer B also testified in this matter. He stated that superintendents run the jobs, making sure that they are running smoothly, and do not get complaints from the property managements, as well as get all the materials for the jobs. He knew the owner of Employer A for some time and thought Employer A had subcontracted with Employer B for approximately a 12 or so projects.

33. The superintendent stated that he was the one that offered the Utah job to Employer A. He stated that they generally offered the jobs to several subcontractors and whoever accept first would get the job. In this case Employer A accepted the job in Utah. He stated that Employer A had to supply the painters to perform the job and that Employer

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[8] Federal Employer Identification Number, or Federal Tax Identification Number, also abbreviated FEIN.

B does not have any workers on the projects. He would visit the project every two weeks to make sure that everything was progressing as needed (the percentage of completion) in order to pay the subcontractor company every two weeks. He explained that the subcontractor issued the invoice and once he had determined the percentage of the work invoiced was completed, he would report it so that the "sub" could get paid. He did not know Claimant. Employer B only paid Employer A for the work, not any of the workers directly. The subcontractor was responsible for paying their own workers.

34. The superintendent was also responsible for pricing of a project, but not the contracts themselves. He knew about the Statement of Work-Subs, which is in essence the contract between Employer B and Employer A for the Utah job. It spelt out the terms of service, including a description of work, the payment schedule, and the costs of painting and repairs to the buildings before painting. Employer B wanted to keep control of the quality of products used on the projects so they supplied all the materials needed, pursuant to the contract with the management company that contracted the work with Employer B, which were not addressed in the contract with Employer, with the exception of the labor, paint brushes, rollers, sprayers and other materials needed to carry out a painting job. The superintendent would point out items that needed to be done again and expected the sub to comply with his requests. He also stated that Employer B paid for housing for all of Employer A's employees and sometimes would take the crew out for a meal. However, Employer A was not obliged to take the Utah job, it was optional and under the owners' control. He agreed that without the work of the subcontractors, Employer B would not be able to fulfill their contracts.

35. As found, Claimant sustained a compensable work-related injury in the course and scope of his employment. He was on the job, at the Utah project when he fell off of a ladder on September 24, 2022, falling from a height of approximately 20 feet. He was performing work activities, including trimming of branches or tips of branches, as ordered by his supervisor, DSC. The Claimant was unconscious and unable to provide a history of how he had fallen. Claimant remained unconscious for a significant period of time. DSC is the one that communicated with the 911 operator and the EMTs were provided with the information of the approximate height from which Claimant fell before reaching the Claimant. EMTs found Claimant on the ground with a pillow under his head. They determined that he had a GSC of 3, non responsive to verbal, eye movement or to pain sensations, despite the fractures of his upper extremity. He was taken first to Davis Hospital and Medical Center, then transferred to the University of Utah Hospital, where he remained until released in November 2022 to his family care in Colorado.

36. As found, Claimant's employer was Employer A. Employer A controlled how Claimant travelled to the Utah project, as he was transported by Employer A's vehicle (truck), which was driven by JSC, DSC's brother, an employee of Employer A. Claimant performed the tasks as assigned by DSC each day in the morning and at midday. He utilized Employer A's equipment to perform his job, including paint brushes, rollers, sprayers and ladders. Despite Employer B supplying the materials required by the contracts between the management company and Employer B, Employer B is found not to be Claimant's employer in whole or in part.

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 seek 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

It is important to note that a determination of the issue of compensability in this case is an essential question and prerequisite before the issue of who the employer is can be addressed. The reason for this is that if the claim is not compensable, then the issue of who the employer was at the time of the injury would be a moot issue. Therefore compensability should be addressed first.

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. Indus. 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. Indus. 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.

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).

Claimant was within course of his employment as he was engaged in performing painting for Employer. This job required Claimant to perform various tasks including prepping the building to be painted. This involved trimming branches off trees that would

interfere with the painting of the building. Claimant's direct supervisor, DSC, ordered him to trim the tips of the branches and DSC saw Claimant on the ladder a few minutes before he found Claimant unconscious on the ground. DSC was the one to call 911. Claimant and owner of Employer A are credible and persuasive in this matter. Claimant's injuries arose out of his employment as he fell from a ladder, an indeterminate height which was documented as approximately 20 feet though the records document a height of anything from 16 feet (DSC) to 30 feet (report to medical providers by third parties). Claimant sustained very significant injuries, including traumatic brain injuries as well as lower extremity strains and upper extremity fractures. Drs. Wallace, Dr. Menacho and the providers at Craig Hospital are persuasive in this matter. Dr. Wallace specifically stated that "within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries listed." These injuries included traumatic brain injury, vision issues, upper extremity, and lower extremity injuries as well as other issues caused by the TBI. There is no doubt that Claimant's injuries, caused by the fall, were work related as Claimant was performing the duties of his job when he fell from the ladder. He sustained the injuries within a time, place, and circumstances of his job functions. In this case, while he was trimming the branches as ordered by his supervisor. While the fall was not witnessed by any other person or employee, the supervisor last saw Claimant on the ladder, before he left for a few minutes to fill the paint machine, after which he found Claimant on the ground, unconscious. As found, Claimant has proven by a preponderance of the evidence that the fall off the ladder arose within the course and scope of his employment as a painter.

C. Who was Claimant's employer on September 24, 2021

An "employer" is defined as "Every person, association of persons, firm, and private corporation, …, who has one or more persons engaged in the same business or employment, …, in service under any contract of hire, express or implied. Sec. 8-40-203(1)(b), C.R.S. An "employee" is harder to define as the statutory definition encompasses many more requirements. But generally, an employee is "Every person in the service of [another]… under any appointment or contract of hire, express or implied. Sec. 8-40-202(1)(a)(I)(A), C.R.S.

To be entitled to workers' compensation benefits, a person must qualify as an employee under the statutory definition. *Denver Truck Exch. v. Perryman*, 134 Colo. 586, 595, 307 P.2d 805, 811 (1957); Section 8-40-202(1)(b) C.R.S. 2008. The burden is on the claimant to prove that he was an employee when he was injured. See *Hall v. State Compensation Ins. Fund*, 154 Colo. 47, 50, 387 P.2d 899, 901 (1963); *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991).

Section 8-40-202(2)(a), C.R.S. 2022, provides that "any individual who performs services for pay for another shall be deemed to be an employee ..., unless such individual is free from control and direction in the performance of the service." For purposes of the Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S. 2000; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991); *Benjamin Mendez v. Interstate Van Lines and/or Scott Pennell and/or Manitou Express*, W.C. No. 4-330-270 (Jan. 19, 2001).

Respondents A argue that Claimant entered into a contract of hire with both Employer A and Employer B and that both should be held liable for benefits to Claimant if the claim is found compensable. However, to enter into a contract, there has to be an agreement or meeting of the minds. For purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, *supra*. It is the contract of hire with the respondent employer that triggers coverage under the Act, and the reciprocal benefits and duties of the workers' compensation system flow to each party because of their entry into that contract of hire. *In re Claim of Ritthaler*, 050714 COWC, 4-905-362-02 (Colorado Workers' Compensation Decisions, 2014)

A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v Apostolou*, 866 P.2d 1384 (Colo. 1994). A "contract of hire" is created when there is a "*meeting of the minds*" which creates a mutual obligation between the worker and the employer. *Id.* A contract of hire may be formed even though not every formality attending commercial contracts is found to exist. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 220, 422 P.2d 630, 632 (1966). But, whether a contract exists between the parties is a question to be determined by the trier of fact. *Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972 (Colo.App.1987). *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991).

The statutory scheme was designed to grant an injured employee compensation from his or her employer without regard to negligence and, in return, the responsible employer would be granted immunity from common-law negligence liability. *Finlay v. Storage Tech. Corp., 764 P.2d 62 at 63 (Colo.1989); Monell v. Cherokee River, Inc., 2015 COA 21, 347 P.3d 1179 (Colo. App. 2015)*. This jurisdiction has long provided an extra layer of protection for the employees of subcontractors by imposing employer liability for their injury or death not only on the subcontractors by whom they are directly employed, but also on the companies contracting out work to those subcontractors. See San Isabel Electric Assoc. v. Bramer, 182 Colo. 15, 19, 510 P.2d 438, 440 (1973), if the subcontractor is uninsured.

Section 8-41-401(1) specified that except for certain enumerated exceptions, any person, company, or corporation leasing or contracting out any part of its work would be construed to be an employer and liable to compensate the lessee, sublessee, contractor, or subcontractor, as well as its employees (or their dependents), for injuries or death resulting from that work. See Sec. 8-41-401(1)(a)(I). In the next two, closely related subsections, the statute also made express that if such a subcontractor were itself an employer and insured its liability as required by the act, neither the subcontractor nor any of its employees would have any right of action against the person or company contracting out the work. Sec. 8-41-401(2); and that recovery for death or injuries according to the provisions of the act would not be available to designated individuals who maintained their independence from another by whom they were engaged to perform a service. See

Sec. 8-41-401(3), C.R.S. *Frank M. Hall & Co., Inc. v. Newsom,* 125 P.3d 444 (Colo. 2005).

While the reference in the body of section 8-41-401(1)(a) to the recipient of leased or contracted-out work is clearly intended to include business entities having employees of their own, the exception applies, by its own terms, only to a subset of such recipients, which is limited to those who can establish that they perform their service independently within the meaning of subsection 8-40-202(2)(b), so as to be excluded from the broader definition of "employee" altogether. See § 8-41-401(1)(a)(I) (incorporating by reference § 8-40-202(2)(b)). *Frank M. Hall & Co., supra*.

The persuasive evidence shows that Claimant was hired by DSC, the owner of Employer A, who acknowledged that Claimant was his employee and that he hired him. DSC hired, trained, supervised, determined the hourly pay, kept records of hours worked and paid Claimant. Claimant's paychecks were issued by Employer A and signed by DSC himself. DSC never stated that Claimant was an employee of another on the date of injury. DSC is persuasive in this matter.

Employer B did not enter into a contract of hire with Claimant. Employer B did not know Claimant was working for Employer A and did not pay Claimant wages. There was no mutuality of agreement between Claimant and Employer B, nor did Claimant have any expectation of remuneration from the Employer B. The elements of a contract of hire could not exist because there was no employer-employee relationship between Claimant and Employer B. Therefore, under the statute there can be no workers' compensation liability. See *In re Claim of Ritthaler*, *supra.* Had Claimant acknowledged Employer B and reported to Employer B in some manner, this may have been a different situation. But it is clear from both Claimant's testimony as well as BSQ's testimony that they were not aware of any relationship with Employer B and BSQ stated he did not even know who Employer B was. Employer B did not know who worked for Employer A and kept no records of their names, did not pay wages or any other benefit. Employer A exercised control of Claimant and Claimant's work for Employer A, performing repair, preparation of the surfaces and the painting of the buildings.

Respondents A repeatedly state that Employer B provided construction/project materials such as paint, wood, plastic, paper, storage sheds, dumpsters, as well as transportation, housing and utilities. However, none of those items were provided to Claimant directly. These are items that Employer B required Employer A to use on the project and were provided to Employer A as part of the subcontractor agreement or an implied agreement with Employer A. There is not any implied co-employment arrangement here. Neither was there an agreement either explicit or implied between Employer A and Employer B that Employer B was responsible for Employer A's employees, including for workers compensation coverage. This case is distinguished from the example supplied by Respondents B in citing *Bigby v. Big 3 Supply Co.*, 937 P.2d 794 (Colo. App. 1996). Employer B did not exercise sufficient control over Claimant's compensation, terms, or conditions of employment and cannot be considered Claimant's employer. Employer B was not engaged closely to Employer A as a joint enterprise or joint venture. There was no persuasive evidence of comingled tasks, projects or ventures.

The testimony of Employer B's controller as well as the superintendent was persuasive that Employer B provided certain benefits to Employer A but did not perform the same work. Employer B was the general contractor that arranged contracts with third parties for the performance of work, which they then subcontracted with other skilled corporation or companies, such as Employer A, to actually perform the work. They had no employees that performed the same kind of work as those employees of Employer A. It is true that Employer B is likely a statutory employer for Claimant, however, since Employer A is insured, Employer B cannot be found to be liable for Claimant's injuries. See Sec. 8-41-401(2), C.R.S. (Cum. Supp. 2022)

Respondents A also argue that Claimant's testimony that he worked for Employer A and not Employer B was self-serving. However, this ALJ finds nothing self-serving in the testimony as Claimant, if the claim is compensable, would receive the same benefit from either Insurer A or Insurer B as workers compensation benefits are dictated by the Workers' Compensation Act. The argument that Employer B aided or assisted Employer A in performing their job by providing materials is unpersuasive. General contractors in the construction industry commonly provide the building materials so that they are consistent, of a certain quality and are not over ordered and do inspections of the projects as the superintendent explained. Respondents A failed to show that Employer B hired, controlled, supervised, or borrowed Claimant for the painting project in Utah, or that they even knew who Claimant was. Employer B was not a lending employer, concurrent employer or a co-employer. There are no persuasive facts or legal theory which would make Employer B an employer in this case.

Claimant proved by a preponderance of the evidence that Employer A was his employer at the time of the injuries sustained following the fall from the ladder on September 24, 2021. Respondents A have failed to show that Claimant was an employee of Employer B. As found, from the totality of the evidence, Claimant was an employee of Employer A and that Employer A was Claimant's sole employer, who was insured at the time of the accident of September 24, 2021.

D. 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 related to the fall on September 24, 2021. The parties have stipulated that the medical treatment at Sinergy Health Partners and the associated bill were reasonably necessary and related to the accident of September 24, 2021. Therefore, as found, Claimant is entitled to medical benefits that are reasonably necessary and related to the September 24, 2021 injuries including the Dr. Wallace's charges.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for date of injury of September 24, 2021 is compensable.

2. Employer A is Claimant's employer on the date of the compensable injuries.

3. Respondents A shall pay the reasonably necessary and related medical costs in this matter, specifically for those charges by Bethany Wallace, M.D. at Sinergy Health Partners.

4. Any medical treatment payments are limited to the Colorado Fee Schedule.

5. 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 15th day of August, 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. WC 5-181-640-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable work injury during the course of and arising out of her employment with Employer on August 2, 2021.

II. Whether Claimant has proved by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related care for her left shoulder and neck.

III. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits beginning August 2, 2021 and continuing until otherwise terminated by operation of law.

IV. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for her termination from employment and thus not entitled to TTD benefits pursuant to §§8-42-105(4) & 8-42-103(1)(g) C.R.S.

FINDINGS OF FACT

1. Claimant is a 36-year-old former senior monitor for Employer. Claimant worked at a treatment center that houses criminal offenders referred to as "residents." As part of her job duties, Claimant performed house counts and walk-throughs to ensure all residents were in the facilities and that there was no contraband.

2. On August 2, 2021 at approximately 10:15 a.m., Claimant was conducting a house count and entered a room containing residents [Redacted, hereinafter RW], [Redacted, hereinafter SM], [Redacted, hereinafter JL], and [Redacted, hereinafter DT]. Claimant saw RW[Redacted] in possession of what appeared to be drugs and asked him to surrender the contraband. RW[Redacted] refused and became aggressive toward Claimant. Claimant radioed her co-workers for assistance multiple times to no avail.

3. Claimant testified that she began to walk backwards out of the room when RW[Redacted] stood up and began walking towards her. Claimant stated she was not comfortable turning her back to RW[Redacted] in order to face the door, so she continued to walk backwards. Claimant reached the closed door with her back facing the door. Claimant testified that, at that time, RW[Redacted] pushed her against the closed door frame. She testified that it was a "pretty significant shove" that caused her to fall backwards into the door frame. Claimant stated that RW[Redacted] pushed her with both hands at collarbone level. She testified that she had immediate pain in her neck and shoulder but no tingling. Claimant testified that at the time of the incident she experienced a lot of adrenaline and was upset and in shock.

4. Claimant testified that she instructed RW[Redacted] to not put his hands on her again. Claimant testified JL[Redacted] then jumped down from his top bunkbed, positioned himself between her and RW[Redacted], and told RW[Redacted] not to put his hands on Claimant again. She testified that during the incident SM[Redacted] appeared to be asleep with his back facing her. RW[Redacted] then jumped out of a window in the first floor room.

5. Claimant further testified that after RW[Redacted] jumped out of the window she exited the room and went to the recreation yard to see if she could see RW[Redacted] attempting to leave the premises. She observed RW[Redacted] heading back towards the room. RW[Redacted] entered the room a second time, grabbed his belongings, and again exited through the window.

6. At 11:00 a.m. that same day, Claimant submitted a written statement to Employer regarding the incident stating,

> Resident shoved this writer [Claimant] into the room door and was advised to back up and not put his hands on me again. Resident maintained his aggressive posture and stated he was going to leave the room. This writer had my back to the door and could not move from the position due to resident blocking me from turning or moving forward.

(R. Ex. B, p. 8).

7. JL[Redacted] completed a written statement on August 2, 2021. He stated,

> Was asleep in room woke up to [Claimant] and RW[Redacted] arguing, she asked him what he had and do not leave, he crowded her at the door so I got up to make sure she was gonna be good told him cool off he tried to push up on her again, then he ran out of the damn window, came back through window, then back out window again, don't know why.

(Id. at p. 13).

8. DT[Redacted] completed a written statement on August 2, 2021. DT[Redacted] stated, "I was sleeping and heard [Claimant] arguing with a resident. He was trying to get out of door. Then he jumped out window. Sorta aggressive towards [Claimant]." (Id. at p. 14).

9. SM[Redacted] completed a written statement on August 2, 2021 which read: "I was sleeping and heard [Claimant] having an argument with resident and he jumped out the window." (Id. at p. 12).

10. Claimant spoke to [Redacted, hereinafter LB], Case Manager, shortly after the incident occurred. Claimant testified that she informed LB[Redacted] that she was

"pissed" that RW[Redacted] touched her and put his hands on her. She testified that she never told LB[Redacted] that RW[Redacted] did not touch her.

11. LB[Redacted] completed a written statement for Employer on September 8, 2021. Per LB's[Redacted] written statement, shortly after the incident she asked Claimant if she was okay, and Claimant stated that RW[Redacted] had "almost put his hands on her while she was doing a walk through." (Id. at p. 9). LB[Redacted] wrote that Claimant stated she was okay but "it would have been different if the client RW[Redacted] had put his hands on her." (Id.) LB[Redacted] wrote that she asked Claimant if RW[Redacted] had touched her and she said "No." (Id.) LB[Redacted] further wrote that there were three other residents in the room who stated that they were ready to jump up and protect Claimant if RW[Redacted] would have put his hands on her, but it did not appear that RW[Redacted] touched Claimant.

12. LB[Redacted] testified at hearing on behalf of Respondents. She testified that at the time of the incident, she heard Claimant yelling and approached Claimant. She testified consistent with her September 8, 2021 written statement. LB[Redacted] testified that she asked Claimant if she had been hurt and that Claimant did not indicate any sort of pain or arm or neck symptoms. She stated that Claimant did not say she was shoved or assaulted. LB[Redacted] further testified that, the week following the incident, Claimant informed her of arm soreness and numbness in her fingers. She testified that a few weeks after the incident Claimant made a comment to her about suing Employer for the injuries, at which time LB[Redacted] notified Employer and wrote her September 8, 2021 statement.

13. [Redacted, hereinafter RG], Facility Director, completed a written statement for Employer on October 21, 2021. RG[Redacted] stated, in relevant part,

> [Claimant] reported that resident RW[Redacted] got closer to her and put his hands on her shoulders to get to the door. [Claimant] was asked if she was hurt or feeling pain and she reported she was not hurt and was not in any pain. [Claimant] reported that she was fine and could go back to work. I met with the three residents who were in the room no residents reported that they saw the physical altercation or saw resident RW[Redacted] put his hands on her. Two reported that they were sleeping and heard the voices of both. Another resident reported that he saw the whole thing and reported he saw them argue but no physical altercation. That resident was SM[Redacted].

(Id. at p. 11).

14. RG[Redacted] testified at hearing on behalf of Respondents. RG[Redacted] also testified consistent with his written statement. He testified that, on the day of the incident, Claimant said she was not hurt and that she could return to work. RG[Redacted] testified that Claimant did not tell him she was shoved by RW[Redacted] and that she did not indicate that she was in pain or that she sustained any injury.

15. SM[Redacted] testified at hearing on behalf of Respondents. He testified that, contrary to his August 2, 2021 written statement, he was not sleeping and his back was not turned to Claimant and RW[Redacted] at the time of the incident. SM[Redacted] testified that he wrote that he submitted a written statement saying he was asleep during the incident because he did not want to "snitch" and did not want to be involved. SM[Redacted] testified that he observed the entire incident during which Claimant attempted to block RW[Redacted] from exiting the door. SM[Redacted] testified that RW[Redacted] did not put his hands on or shove Claimant. He stated that RW[Redacted] pushed against Claimant in an attempt to get around Claimant to exit the room.

16. Claimant completed her work shift on August 2, 2021 and continued working as scheduled for the next few days, including attending a work training during which she participated in physical training. Claimant testified she continued to experience pain and developed tingling in her arm and decided to notify Human Resources that she needed to see a doctor as a result of the incident on August 2, 2021. Employer sent Claimant for medical evaluation and had her report the incident to the police.

17. Claimant presented to Barry M. Nelson, D.O. at Concentra on August 6, 2021. She reported that a resident pushed her against a closed door and the next day she began feeling tingling down her left arm into her fingertips. Claimant reported having no pain but limited range of motion. On examination, Dr. Nelson noted normal appearance of the left shoulder with tenderness and limited range of motion in all planes. There was cervical spine tenderness with muscle spasms but full range of motion. Dr. Nelson diagnosed Claimant with a left shoulder contusion, brachial plexus injury and cervical strain. He prescribed Claimant medication and physical therapy and placed her on work restrictions releasing her to modified duty.

18. Claimant testified that she returned to work performing modified duty. She testified that she was restricted from reaching overhead and out in front; that she could not lift anything over five pounds; and that she could not perform twisting maneuvers.

19. On August 25, 2021 Dr. Nelson referred Claimant for MRIs of the cervical spine and left shoulder. He also referred Claimant for evaluations by a physiatrist and neurosurgeon.

20. At a follow-up evaluation with Dr. Nelson on September 10, 2021, Claimant reported that she was not taking her prescribed muscle relaxers as they made her groggy. She reported that because of this, she was having issues sleeping and had been late to work.

21. On September 28, 2021 Claimant presented to Michael Rauzzino, M.D. at Concentra for a neurosurgery evaluation. Dr. Rauzzino noted that a cervical MRI obtained on 9/21/2021 showed C5-6 left foraminal disc herniation compressing the left-sided C6 nerve root with moderate-to-severe left foraminal narrowing. The remainder level showed mild degenerative changes consistent with age. He felt that the left focal disc protrusion is the root cause of Claimant's left-sided radiculopathy. He noted that there is no prior

documentation of any cervical radiculopathy symptoms prior to her work injury. Dr. Rauzzino opined that Claimant's symptoms were confirmed with the imaging. He discussed treatment options for Claimant, including epidural steroid injections and surgery.

22. Claimant presented to physiatrist Frederic Zimmerman, M.D. on October 7, 2021. On examination, Dr. Zimmerman noted Claimant exhibited no pain behaviors. Dr. Zimmerman assessed Claimant with a cervical strain and left sided C5-6 disc herniation with left C6 radiculitis. He prescribed Claimant medication and referred Claimant for physical therapy and trigger point injections.

23. Dr. Zimmerman performed trigger point injections on Claimant on October 28 2021, December 2, 2021 and January 13, 2022. He noted that the trigger point injections provided Claimant significant relief for 24-48 hours then partial relief for up to one week.

24. On January 28, 2022, Anant Kumar, M.D., M.S., performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported to Dr. Kumar that after the work incident she immediately developed tingling in her left hand, pain over the left posterior shoulder and that her left arm felt cold. She reported that she also experienced throbbing at the back of her skull and subsequent difficulty lifting her left arm. She reported 10/10 neck pain, 6/10 arm pain, and 9/10 posterior occipital headaches. He noted Claimant had not experienced any significant improvement despite four months of conservative treatment. On examination, Dr. Kumar noted no obvious neurological deficits. He further noted subjective loss of sensation over the left entire upper extremity with a non-dermatomal distribution of numbness with no clinical evidence of thoracic outlet syndrome, brachial plexus irritability, motor deficits but subjective complaints with absence of muscle spasms and Waddell's tests were positive. Neck and shoulder range of motion were painless. Dr. Kumar noted that the cervical MRI showed C5-6 left foraminal disc herniation compressing the left nerve root with moderate to severe left foraminal narrowing.

25. Dr. Kumar reviewed the written statements of LB[Redacted], RG[Redacted] and SM[Redacted], noting that their accounts of the incident contradicted the reports of Claimant. He opined that the findings on his IME and other examinations did not match the radiological findings. Dr. Kumar concluded that Claimant had no objective neurological deficits or clinical findings and only subjective symptoms that he could not explain. He opined that Claimant had reached maximum medical improvement ("MMI") with no need for restrictions or further medical treatment.

26. Dr. Kumar testified by post-hearing deposition as a Level II accredited expert in orthopedic surgery. Dr. Kumar testified consistent with his IME report. He testified that Claimant told him she was pushed backwards but was inches from the door, did not twist her body, and at that point developed numbness and tingling involving all of her fingers, her entire arm, with throbbing in the back of her skull. Dr. Kumar testified twisting is more likely to injure than simply bending backwards. Dr. Kumar testified that Claimant's Spurling test was negative on his exam and other exams by multiple providers, indicating

no clinical evidence of nerve root irritation. Dr. Kumar testified that Claimant tested positive for four out of five Waddell's signs, which indicate subjective complaints unverified by objective findings. Dr. Kumar testified that Claimant's complaints were worsened by a specific test designed to relax the nerve, which is expected to relieve symptoms, and he was unable to explain these symptoms.

27. Dr. Kumar further testified that he reviewed MRI studies of the neck from September 21, 2021 and opined that there was no evidence of acute injury, no fracture, no dislocation and no evidence of acute trauma. Dr. Kumar opined that there were multilevel degenerative changes with no acute findings. He testified that the MRI study did not indicate any condition which would have caused complete arm numbness or any condition matching Claimant's subjective symptoms. Dr. Kumar credibly opined the conditions seen on the MRI preexisted the alleged work injury and would not have been aggravated by the alleged event given that it was a low velocity, minor injury from Claimant's own description. Dr. Kumar indicated the initial diagnosis of brachial plexus injury by Dr. Nelson was differential, reflecting the most likely match to Claimant's symptoms in the absence of definitive objective findings. Dr. Kumar opined he did not see any injury resulting from the described mechanism, which he characterized as "barely benign."

28. Claimant testified she did not have any prior injuries to her neck, shoulder or back. Claimant was working full duty prior to August 2, 2022 and subsequently worked modified duty until being placed on a paid administrative leave of absence by Employer on December 17, 2021. Claimant remained on the leave of absence until she was terminated by Employer on January 31, 2022. Claimant received her regular wages through January 28, 2022.

29. Employer alleges Claimant was placed on the leave of absence and subsequently terminated due to performance issues, including attendance and attitude. On September 3, 2021, Claimant received a written warning regarding her tardiness. Employer placed Claimant on a written performance improvement plan ("PIP") on October 6, 2021, indicating issues with tardiness, negative attitude, communication, and leadership issues. Claimant met with her supervisors on multiple subsequent occasions to discuss Claimant's progress, as noted in the PIP. Supervisors noted improvement in all areas on the date of each follow-up meeting (October 14, October 21, November 2, and November 17, 2021). Additional notes were attached to the PIP. Neither party identified the author of the additional notes, which appear to contain additional observations from each follow-up meeting. The additional note dated November 17, 2021 documents that although Claimant had improved in many areas, there are concerns regarding what other staff and residents were seeing. It notes that Claimant continued to "bring others in the picture vs. really looking at herself and what is needed. This will be an area that will need to be addressed in upcoming sessions." (R. Ex. C, p. 24). The notes state that there was no close out meeting on December 1, 2021, and that Claimant was told they would close it out when she returned to the office.

30. There is no evidence of any additional meetings, verbal warnings, or written warnings that took place until Claimant was terminated. There is no documentation of any specific interaction or incident that led to Claimant being placed on a leave of absence and ultimately terminated.

31. Respondents terminated Claimant on January 26, 2022. The termination document dated January 31, 2022 notes an incident date of January 26, 2022. The document states that Claimant was terminated due to a failure to foster a respectful environment. It specifically notes that Claimant's behavior had not improved to the level expected of a Senior Monitor and as described in her PIP. It noted that Employer continued to see issues with residents and employees in regards to fostering a respectful environment and ongoing issues with behavior in regards to treating others with respect. No specific incidents or examples were detailed in the termination document.

32. RG[Redacted] testified that Claimant had performance issues prior to the work injury, which continued after the work injury, ultimately resulting in her termination. He specifically referred to a February 2021 incident in which Claimant "called out" a staff member in front of others. He met with Claimant about the incident. RG[Redacted] testified that Employer made the decision to terminate Claimant on January 26, 2022. He was unable to identify any specific incidents that resulted in the termination, solely referring to general issues with Claimant's attitude regarding being rude and demeaning to residents and staff. He testified that Claimant was terminated for a violation of the Code of Ethics and Business Conduct for fostering a respectful environment in the workplace.

33. Claimant testified that she did not receive any written warnings prior to the work injury. She testified that after the work injury she received a written warning for tardiness and then the October 2021 PIP. Claimant acknowledged that she was tardy for a time period after the work injury due to issues with her medication making her groggy. Claimant testified that she was no longer tardy once she ceased taking the medication. Claimant testified that in December 2021 Employer informed her she was being placed under investigation but was not told the reason. On January 31, 2022 she met with Employer and was informed she was being terminated for being disrespectful. She notes that the termination document indicates an incident date of January 26, 2022, a date on which she was not working. Claimant testified that she asked Employer to identify a specific example of her being disrespectful that led to her termination, which Employer did not do. Instead, Employer informed Claimant that her tone was an issue. Claimant testified to her belief that some individuals believed her tone to be curt and "less gentle" than others. Claimant does not perceive an issue with her tone. Claimant testified that, after being placed on the PIP, her understanding was that she was making huge improvements and that she believed she was doing well. Claimant was aware of Employer's Code of Ethics and Business Conduct.

34. Claimant has not obtained other employment within her work restrictions and not earned any wages since being terminated by Employer.

35. The ALJ finds the testimony of Claimant, as supported by records, more credible and persuasive than the testimony of RG[Redacted], LB[Redacted], and SM[Redacted].

36. The ALJ finds the opinion of Drs. Nelson, Rauzzino and Zimmerman more credible and persuasive than the opinion of Dr. Kumar.

37. Claimant proved it is more probable than not she sustained an industrial injury arising out of and in the course of her employment for Employer on August 2, 2021.

38. Claimant failed to prove by a preponderance of the evidence she is entitled to temporary disability benefits from August 2, 2021 through January 28, 2021, as Claimant did not sustain any wage loss during such time period.

39. Claimant proved by a preponderance of the evidence she is entitled to TTD benefits from January 29, 2021 and ongoing, as Claimant was temporarily disabled and sustained wage loss as of such time.

40. Respondents failed to prove it is more probable than not Claimant was at fault for her termination from employment.

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).

Compensability

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 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, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

Respondents contend that Claimant was not shoved and thus did not sustain any work injury, noting that Claimant's account of the incident is rebutted by LB[Redacted], RG[Redacted] and SM[Redacted]. As found, Claimant's report of the incident was more credible and persuasive than the contradictory reports of the aforementioned individuals.

Claimant submitted a written statement to Employer approximately 45 minutes after the incident occurred in which she specifically stated that RW[Redacted] shoved her.

JL's[Redacted] written statement from the day of the incident indicates that RW[Redacted] at one point "pushed up on" Claimant. DT[Redacted] written statement from the day of the incident also indicated RW[Redacted] was attempting to get out of the door in an aggressive manner. RG[Redacted] written statement documents that Claimant reported to him that RW[Redacted] put his hands on her shoulders to get to the door.

The testimony and written statements of LB[Redacted] and RG[Redacted] were less credible and persuasive, as the statements were written several weeks after the incident occurred and were written in response to being informed that Claimant would be pursuing some legal action or workers' compensation claim related to the incident. SM's[Redacted] testimony was also less credible and persuasive, as he acknowledged that he lied about being asleep in his initial written statement. Claimant's report regarding the work incident has generally been consistent in her written statement, testimony and the medical records. The ALJ does not deem any discrepancy in the reported onset of symptoms so significant that it discredits Claimant's case in light of the totality of the evidence.

There is no indication Claimant sustained an injury during her work training. Claimant credibly testified, and there is no evidence to the contrary, that she did not have any neck, arm or back issues leading up to the work injury. Dr. Kumar's opinion that Claimant's subjective symptoms are not based on any objective findings on imaging or exam is contradicted by the credible opinion of ATP Dr. Nelson, who opined that the MRI confirmed cervical disc herniation and nerve compression, causing radiculopathy. He credibly noted that Claimant did not have a prior history of cervical radiculopathy symptoms. Dr. Rauzzino also opined that Claimant's symptoms were consistent with the findings on MRI. Moreover, Dr. Kumar's opinion appears to be heavily based on the written reports of residents and Claimant's co-workers regarding the incident, which the ALJ found to be less credible and persuasive than that of Claimant.

Based on the totality of the evidence, Claimant proved that it is more probable than not she sustained a compensable work injury arising out of and in the scope of her employment on August 2, 2021. Claimant was performing her regular work duties during a regularly scheduled shift when a resident pushed her into a door. This incident resulted in Claimant requiring medical treatment and being placed on work restrictions, constituting a compensable work injury.

Medical Treatment

A respondent 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. *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).

As Claimant proved she sustained a compensable work injury, Claimant is entitled to reasonable, necessary and related treatment to cure and relieve the effects of work injury.

Temporary Indemnity Benefits and Responsibility for Termination

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *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), C.R.S. 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). 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).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Claimant failed to prove she is entitled to temporary disability benefits from August 2, 2021 through January 28, 2022. Subsequent to the work injury, Claimant worked modified duty and continued to earn her regular wages. Claimant was then placed on a paid leave of absence during which she continued to earn her regular wages through January 28, 2022. The preponderant evidence does not establish that Claimant left work and sustained actual wage loss as a result of the work injury from August 2, 2021 through January 28, 2022.

Claimant did prove by a preponderance of the evidence she is entitled to TTD benefits from January 29, 2022 and ongoing. Due to the work injury, Claimant was placed

on work restrictions that impaired her ability to resume her regular work. Thus, Claimant suffered temporary disability as a result of the work injury. *See In re Claim of Salgado*, WC 4-975-288-02 (ICAO, Aug. 23, 2016) ("A temporarily 'disabled' employee has a restricted bodily function coupled with an inability to resume his prior work"); *Culver, supra*. Claimant suffered wage loss subsequent to January 29, 2022 after being terminated from employment. §8-42-105(4)(a) does not require that a claimant first be shown to have wage loss prior to the job termination in order for that section to apply. *In re Claim of Salgado, supra*. As Claimant proved she was temporarily disabled, it is Respondents' burden to prove Claimant was responsible for her termination from employment.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly 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. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Respondents failed to prove it is more probable than not Claimant was responsible for her termination. Respondents allege Claimant was terminated due to ongoing performance issues. Claimant was placed on a PIP in October 2021 for various

concerns, including tardiness and attitude/behavior. The notes included in the actual PIP document that Claimant was making improvement in each specified area and there were no continued concerns as of the follow-up meeting on November 17, 2021. Despite these notes, an additional document written by an unidentified individual indicated that concerns remained regarding what other staff and residents were seeing with respect to Claimant's attitude, behavior and ability to self-reflect. The November 17, 2021 note states that such area would be addressed in upcoming sessions. There is no indication any subsequent follow-up meetings occurred with Claimant prior to placing Claimant on an administrative leave and then terminating Claimant.

Claimant's understanding was that, after being placed on the PIP, she had made significant improvements and was in compliance with Employer's policies and expectations. Claimant's understanding is corroborated by the notes in the actual PIP that reflect improvement and do not document continued issues. To the extent the separate notes indicate continued concerns with Claimant's behavior, there is insufficient evidence this was actually communicated to Claimant such that she was aware there continued to be a perceived issue. Respondents did not specify any particular incident or interaction that ultimately led to the decision to terminate Claimant. Based on the totality of the evidence here, a general allegation of continued issues with Claimant's behavior absent more specifics fails to establish Claimant committed a volitional act that she would reasonably expect to cause the loss of employment. Accordingly, the preponderant evidence does not establish Claimant was at fault for her termination.

ORDER

1. Claimant sustained a compensable work injury on August 2, 2021.

2. Respondents shall pay for reasonable and necessary medical treatment related to Claimant's August 2, 2021 work injury.

3. Claimant failed to prove she is entitled to temporary indemnity benefits from August 2, 2021 through January 28, 2022.

4. Respondents shall pay Claimant TTD benefits from January 29, 2022 and ongoing, until terminated by operation of law.

5. 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: August 15, 2022

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-275-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence bilateral hip arthroplasty surgeries were reasonable, necessary and related to his admitted January 30, 2020 industrial injury.

II. Whether Respondents proved by a preponderance of the evidence that temporary total disability ("TTD") should be terminated due to an intervening disability.

FINDINGS OF FACT

1. Claimant is a 58-year-old male who works for Employer as a truck driver.

Prior History

2. Claimant underwent a lumbar spinal fusion in 2005.

3. Claimant has a prior history of a left hip injury and bilateral hip pain. On March 3, 2019, Claimant was involved in a motor vehicle accident ("MVA") and sought treatment at the emergency department at Craig Memorial Hospital. Claimant complained of left hip and groin pain. A left hip x-ray revealed moderate degenerative arthrosis of the hip joint, evidenced by subchondral sclerosis, subchondral cyst formations and small marginal osteophytes. Claimant was diagnosed with a left hip contusion, prescribed naproxen and tramadol, and discharged.

4. Claimant was released to full duty work on March 26, 2019.

5. On September 16, 2019, Claimant participated in a telehealth visit with Kathleen Havrilla, R.N. at Claimant's primary care clinic, the Veterans Administration Medical Center ("VAMC"). Claimant reported bilateral hip pain, right worse than left. He reported driving a truck all day and that by the end of the day he could hardly walk. He noted the ibuprofen and gabapentin he was taking was not working. Claimant endorsed pain at level 8/10.

6. On September 24, 2019, Claimant presented to his primary care physician ("PCP") Renee Dunn, M.D. at the VAMC with complaints of bilateral hip pain, worse with movement or walking, subjective weakness of his legs when climbing, and constant tingling. Dr. Dunn opined that Claimant's bilateral hip pain was likely due to lumbar radiculopathy. She referred Claimant for a lumbar MRI, increased his gabapentin dosage, and prescribed Claimant meloxicam and omeprazole.

7. Claimant underwent a lumbar MRI on October 4, 2019, which revealed probable left and mild right foraminal narrowing at L5-S1; mild degenerative disc disease with mild/moderate bilateral foraminal narrowing at L4-5 related to shallow disc bulge, endplate proliferation, moderate facet arthrosis, and ligamentum flavum thickening. No canal stenosis was present at any level.

January 30, 2020 Industrial Injury

8. Claimant sustained an admitted industrial injury while working for Employer on January 30, 2020. Claimant fell to the ground when his foot became entangled in plastic shrink wrap. Claimant presented to the emergency room at Yampa Valley Medical Center. The medical record from this evaluation notes Claimant got caught in plastic wrap, landed on his right side, but stuck his left wrist out. Claimant denied other complaints or injuries. On examination, the physician noted obvious deformity of the left wrist. Bilateral lower extremities had full range of motion without pain or problems. Claimant's gait and station were documented as normal. Patrick Johnston, M.D. diagnosed Claimant with a distal radius fracture and performed left wrist surgery that same day.

9. Claimant subsequently treated with authorized treating physician ("ATP") Larry Kipe, M.D. at Workwell. Claimant first presented to Dr. Kipe on February 4, 2020, the soonest date available for Dr. Kipe to evaluate Claimant. Dr. Kipe noted Claimant was progressing after the wrist surgery. Claimant reported experiencing some left hip area pain without issues walking or any bruising. On physical examination, Dr. Kipe noted Claimant was ambulating normally. Left hip area was normal to inspection. Dr. Kipe restricted Claimant from use of his left arm and recommended continued follow-up for the wrist with Dr. Johnston.

10. On April 10, 2020 Claimant's PCP Dr. Dunn, authored a letter remarking that the October 2019 lumbar MRI results were available. She stated that the lumbar MRI revealed postsurgical changes but no obviously pinched nerves or new areas of herniated discs. Dr. Dunn opined that Claimant's pain as most likely due to postsurgical changes and not any new issues that needed to be addressed surgically.

11. On April 20, 2020, Claimant returned to Dr. Kipe with continued complaints of left hip pain. Dr. Kipe noted Claimant was doing well with the left wrist recovery and had been released to full duty work. On examination of the left hip, Dr. Kipe noted inspection was normal and Claimant ambulated well. Claimant reported pain in the groin area with internal rotation and hip flexion. Dr. Kipe referred Claimant for a left hip x-ray and continued Claimant at full duty work. Bilateral hip x-rays obtained on April 21, 2020 revealed moderate to severe degenerative changes; bony remodeling within the femoral head with extensive subchondral cystic change and sclerosis.; no definite acute fractures; and postsurgical changes in the lumbosacral spine. Claimant was referred for chiropractic treatment.

12. At a follow-up evaluation with Dr. Kipe on May 21, 2020, Dr. Kipe noted that the chiropractor felt Claimant's pain was more from the back. Claimant felt he had a hip

problem and not a back problem, and related his left hip pain to the January 30, 2020 work injury. Claimant was ambulating with a limp. Dr. Kipe referred Claimant for evaluation by an orthopedic specialist and spine surgeon.

13. On May 28, 2020, Claimant saw Jessica Nyquist PA-C for an orthopedic consultation. Claimant reported experiencing increasing pain in his legs and hips since returning to work. He complained of pain in the anterior bilateral thighs radiating down the front of his legs, as well as groin pain. Claimant reported that he did not experience any improvement from medications or chiropractic treatment. On examination, PA-C Nyquist noted pain with passive internal rotation of both hips and decreased range of motion. PA-C Nyquist noted a 10/2/2019 lumbar MRI showed moderate left L5 foraminal narrowing and bilateral hip x-rays from 4/20/2020 showed moderate to severe bilateral hip osteoarthritis. PA-C Nyquist diagnosed Claimant with bilateral hip osteoarthritis. She opined that Claimant's pain was coming from his hips, not his spine, and recommended Claimant undergo hip injections. She referred Claimant for a surgical evaluation for the bilateral hips.

14. On June 4, 2020, Jon M. Erickson, M.D. performed a physician advisor review regarding the recommendation for hip injections. Dr. Erickson noted the lack of hip complaints at the initial hospital visit on the date of injury, remarking that the physician did a very careful examination of Claimant's gait pattern which was normal. Claimant had no apparent range of motion difficulties with either lower extremity at that visit. He further noted Claimant has advanced arthrosis in both hips and that the imaging findings were degenerative in nature. Dr. Erickson concluded that Claimant sustained a left distal radius fracture in the work fall but suffered no additional injuries. Dr. Erickson recommended denial of hip treatment on the basis that Claimant's pain was a progression of his pre-existing pathology which was not caused, aggravated or worsened by the work injury.

15. At a return visit to Dr. Kipe on June 8, 2020, Dr. Kipe removed Claimant from all work due to hip pain.

16. Claimant attended a telehealth visit with his PCP Dr. Dunn on June 17, 2020. He recounted the history of his workplace fall and noted that his wrist was feeling better. Claimant noted that he had developed severe left worse than right hip pain after his workplace fall. Claimant told Dr. Dunn that he was in need of hip replacement on the left side and that the right was "not far behind." In her assessment she wrote "hip pain not due to lumbar radiculopathy: would like referral to Dr. Meininger which was placed today." She did not assign Claimant any diagnosis for his back or recommend treatment for his back.

17. On June 20, 2020, Claimant sought treatment at the emergency department at Memorial Regional Hospital requesting medication for bilateral hip pain. Michael Melton, M.D. gave an assessment of bilateral hip osteoarthritis, prescribed medication, and placed Claimant on lifting, walking and standing restrictions.

18. On July 6, 2020, Dr. Kipe noted Claimant could barely get up out of the chair and walk. He continued Claimant's restrictions.

19. Claimant presented to Dr. Meininger on July 7, 2020. Claimant reported undergoing a prior spinal fusion. He described his current symptoms as being more "groin-based" in comparison to his prior symptoms that were more radicular. Dr. Meininger diagnosed Claimant with progressive secondary arthritis, including osteonecrosis, of bilateral hip joints. Dr. Meininger wrote,

> I discussed with [Claimant] that his hips have deteriorated likely due to reduced circulation or integrity of the femoral heads. I discussed this is likely avascular necrosis or dead bone disease that has allowed for the collapse of the femoral head and contributed to his chronic, severe hip pain. (Ex. J, p. 170).

He noted Claimant had failed conservative treatment and recommended Claimant undergo a staged bilateral total hip arthroplasty.

20. On July 31, 2020, Insurer sent Dr. Kipe a letter inquiring about Claimant's status for the left wrist injury. In a response faxed August 4, 2020, Dr. Kipe opined that Claimant reached maximum medical improvement ("MMI") for his left wrist injury without impairment or the need for maintenance care. Dr. Kipe did not otherwise specify a MMI date.

21. Claimant underwent a direct supine total left hip arthroplasty on August 18, 2020, performed by Dr. Meininger. Postoperative diagnoses were chronic left hip pain and left hip osteoarthritis.

22. On September 22, 2020, James P. Lindberg, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Lindberg conducted a telephone interview with Claimant and reviewed medical records dated 3/3/2019 – 8/3/2020. Claimant reported falling on his left side during the work incident and experiencing hip pain the day of the fall and a severe increase in hip pain after returning to work. Dr. Lindberg noted that, although Claimant denied prior hip problems to him, the records documented that Claimant sustained a left hip injury in March 2019. Dr. Lindberg further noted that Claimant reported to him falling on his left side, when the initial hospital record reflected Claimant fell on his right side. He noted that x-rays revealed advanced pre-existing degenerative arthritis in both hips and non-traumatic probable avascular necrosis, with no evidence of any acute changes. Dr. Lindberg opined that Claimant's condition was due to the natural progression of his significant underlying osteoarthritis and was not secondary to the workplace fall.

23. Claimant continued to see Dr. Kipe, who maintained Claimant's restrictions of being completely off of work.

24. On October 13, 2020, Claimant underwent a direct anterior supine total right hip arthroplasty, performed by Dr. Meininger. Postoperative diagnoses included right hip osteoarthritis. Dr. Meininger wrote that the surgery was requested "for unrelated right hip surgery within the global postoperative period of contralateral, left-sided total hip replacement performed 8 weeks ago to summarily treat his bilateral hip joint osteoarthritis." (Ex. L, p. 190).

25. Claimant testified at hearing that he experienced 3/10 left hip pain as a result of the March 2019 MVA and that the hip pain subsequently resolved and he did not undergo further evaluation or treatment for the left hip. Claimant testified he did not have any issues with left hip in the days, weeks and months leading up to the January 30, 2020 work injury. Claimant stated that the March 2019 MVA did not result in any right hip complaints and he did not have right hip symptoms prior to the work injury. Claimant also initially testified that he did not have any back problems leading up to the work injury, but later stated he sought treatment in September 2019 for what he believed was back pain, not hip pain. Claimant testified that what he believed were low back symptoms subsided after September 2019, but returned after the work injury.

26. Claimant further testified that he fell on his left side on January 30, 2020, and was unaware why the initial hospital record refers to him falling on his right side. Claimant testified that although he noticed hip pain on the date of the injury, his primary concern at the time was his left wrist, which was broken and deformed. Claimant testified that when he saw Dr. Kipe on February 4, 2020, his left hip pain was 8/10 and he was limping severely. Claimant stated that when he returned to working his normal job duties after the wrist surgery, he experienced pain walking and bending over. Claimant stated his recovery from wrist surgery went well. He testified that he was placed on work restrictions in June 2020 due to his hip complaints. Claimant has been receiving $450.89/week in temporary disability benefits since that time. Claimant believes that his right hip worsened due to overcompensating for his left hip. Claimant's pain significantly decreased after undergoing the bilateral hip surgeries.

27. Dr. Lindberg testified at hearing as a Level II accredited expert in orthopedic surgery. He testified that since authoring his initial report, he had received additional medical records, including all of the records in Respondents' exhibit packet. Dr. Lindberg testified consistent with his IME report and continued to opine that the need for bilateral hip surgery was due to Claimant's longstanding, pre-existing, severe degenerative arthritis, which was not aggravated by the work fall. He explained that the medical literature did not support the position that Claimant's right hip symptoms were secondary to compensation for the left side. Dr. Lindberg noted that the medical records reflect Claimant had significant symptomatic pre-existing bilateral hip pain prior to the work injury. He explained that it was not uncommon for patients or practitioners to struggle in differentiating back pain from hip pain, and opined that Dr. Dunn's conclusion that Claimant's issues were related to postsurgical changes in the lumbar spine was incorrect. He opined that Claimant was, more than likely, complaining of pain in hips secondary to his underlying osteoarthritis at the time. Dr. Lindberg acknowledged that it is possible Claimant did not have symptoms between late March 2019 and September 2019, as

osteoarthritis of the hips waxes and wanes. Dr. Lindberg testified that, regardless of whether Claimant fell on his left or right side, the work fall did not cause or aggravate Claimant's hip condition and the need for treatment. He explained that Claimant's symptoms and need for treatment represented the natural progression of his pre-existing condition.

28. The ALJ finds the testimony of Dr. Lindberg, as supported by the medical records and the opinion of Dr. Kipe, more credible and persuasive than Claimant's testimony.

29. Claimant failed to prove by a preponderance of the evidence the bilateral total hip arthroplasties are reasonable, necessary and related to the January 30, 2020 work injury.

30. Respondents proved by a preponderance of the evidence the bilateral hip surgeries constitute intervening events which severed the causal connection between the work injury and Claimant's disability. Accordingly, Claimant's entitlement to TTD benefits should terminate as of the date of the first hip surgery, August 18, 2021.

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

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).

Medical Treatment

Respondents are liable to provide medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. 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). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Regardless of the filing of a GAL for medical benefits or an order containing a general award of medical benefits, insurers retain the right to dispute whether the need for medical treatment was caused by the compensable injury. *Hardesty v. FCI Constructors, Inc.*, W.C. No. 4-611-326 (ICAO, July 7, 2005), citing *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (concerning Grover medical benefits); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997) (concerning GAL for medical benefits); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986). This 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. *Hardesty, supra*.

As found, Claimant failed to prove it is more probable than not the bilateral total hip arthroplasties performed by Dr. Meininger were reasonable, necessary, and related to the January 30, 2020 work injury. The medical records document Claimant was reporting 8/10 bilateral hip pain in September 2019, just four months prior to the work injury. The reported pain was so severe Claimant reported having difficulties walking by the end of the day, and worsening pain with movement. Dr. Dunn focused her evaluation

and treatment of Claimant's reported symptoms on the low back. Dr. Lindberg credibly explained that Dr. Dunn's initial conclusion that Claimant's issues were related to postsurgical changes in the lumbar spine was incorrect. Dr. Dunn herself later opined that Claimant's symptoms were not the result of lumbar radiculopathy. Assuming Claimant is credible in his testimony that he was not experiencing issues between late September 2019 and the work injury, such absence of symptoms could reasonably be attributed to the nature of Claimant's arthritic condition, which Dr. Lindberg credibly opined waxes and wanes. Claimant testified that his complaints of "back pain" resolved after September 2019 and returned after the work injury, which contradicts Claimant's contention that his pre-existing symptoms were different in nature than the post-injury symptoms. Although Claimant did report hip pain to Dr. Kipe at his initial evaluation, Dr. Kipe noted that Claimant had no issues walking, that he observed Claimant ambulating normally, and normal inspection of the left hip. This is contrary to Claimant's testimony that he was suffering 8/10 pain and limping severely at the time. Dr. Kipe again noted Claimant was ambulating well and a normal inspection at his April 20, 2020 evaluation. Dr. Kipe did not note any issues with Claimant's gait until May 21, 2020.

Claimant's imaging revealed significant bilateral hip osteoarthritis. Drs. Lindberg and Erickson credibly opined that Claimant's hip condition and any further need for treatment is due to the natural progression of Claimant's significant, pre-existing bilateral hip osteoarthritis. Dr. Meininger diagnosed Claimant with progressive secondary arthritis, including osteonecrosis, which he opined had likely allowed the collapse of Claimant's femoral head and contributed to his chronic, severe hip pain. The evidence indicates Dr. Meininger recommended and performed bilateral hip surgeries due to Claimant's severe pre-existing, chronic condition. The ALJ is not persuaded the work injury caused or contributed to the need for the bilateral hip surgeries performed by Dr. Meininger. The preponderant evidence establishes it is more likely Claimant's need for hip surgery was the result of the natural progression of his pre-existing condition, which was symptomatic prior to the work injury.

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *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), C.R.S. 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). 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).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

The respondents are only liable for the "direct and natural" consequences of the work related injury. *Reynal v. Home Depot USA, Inc.*, WC 4-585-674-05 (ICAO, Dec. 10, 2012). An intervening injury may sever the causal connection between the injury and the claimant's temporary disability if the claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

There is no dispute that Claimant's wrist injury has healed, and that his ongoing disabilities and limitations are related to his bilateral hips. Claimant has not alleged any ongoing dysfunction or limitation concerning his wrist. Claimant returned to work following resolution of the wrist injury and was subsequently placed on restrictions due to his hip complaints. Claimant's ATP, Dr. Kipe, opined that Claimant reached MMI for his left wrist injury as of August 4, 2020. As discussed, Claimant's bilateral surgeries were unrelated to the work injury. The need for hip surgery was the result of the natural progression of Claimant's severe, chronic and pre-existing degenerative hip condition and not the direct and natural consequence of the work injury. Claimant's disability after undergoing the bilateral hip surgeries was solely due to his bilateral hip condition and not the work injury to his left wrist. As such, the unrelated hip surgeries constitute an intervening event that severed the causal connection between the work injury and Claimant's disability. Accordingly, Claimant's entitlement to TTD benefits shall terminate as of the date of the first hip surgery, August 18, 2020.

ORDER

1. Claimant failed to prove the bilateral hip arthroplasty surgeries were reasonable, necessary and related to his admitted January 30, 2020 industrial injury. Respondents are not liable for the costs of the bilateral hip surgeries.

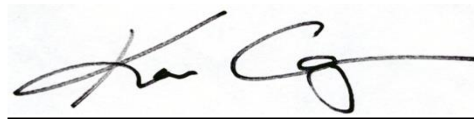
2. Respondents proved that the bilateral hip surgeries constitute intervening events that severed the casual connection between Claimant's work injury and disability.

3. Claimant's entitlement to TTD benefits is terminated as of August 18, 2021 due to the intervening events of Claimant's unrelated hip surgeries and subsequent disability.

4. 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: August 15, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-181-210-001

ISSUES

1. Whether the respondent has demonstrated, by a preponderance of the evidence, that on April 9, 2021, the claimant was an independent contractor and not an employee of the company/employer.

2. If the claimant is found to be an employee. whether the claimant has demonstrated, by a preponderance of the evidence, that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the company/employer.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Grand River Medical Center and UC Health Burn Unit was reasonable and necessary to cure and relieve him from the effects of the injury.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

5. If the claimant is found to be entitled to TT☐ benefits, whether the respondent has demonstrated, by a preponderance of the evidence, that the claimant committed a volitional act that led to his termination of employment.

6. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The company operates a heating and cooling business. As part of the company's operations, fabrication of ductwork and other items is performed. This involves the need for individuals with welding experience.

2. The claimant has provided services to the company off and on for several years. At times, [Redacted, hereinafter MB] would contact the claimant when he had work available. At other times, the claimant could contact MB[Redacted] to ask if work was available. When he accepted work from the company, the claimant typically performed welding work.

3. In performing his welding services for the company, the claimant did so at the company shop or at specific locations. MB[Redacted] communicated where the work was to be performed. The claimant performed work for the company using the company's tools and equipment.

4. When the claimant was not performing services for the company, he has worked as a handyman and as a car detailer.

5. In 2021, the claimant began working on a ventilation project for the company in approximately January 2021. Between January 2021 and April 9, 2021, the company paid the claimant $18.00 per hour. The claimant worked 40 hours per week and his work day began at 8:00 a.m. The claimant was paid via company check. These checks were issued to the claimant in his name. The claimant did not work for any other company or individuals while working for the company.

6. On April 9, 2021, the claimant was fabricating an item for the company. The specifications of this item was communicated to the claimant by MB[Redacted]. On April 9, 2021, the claimant was working in the company shop. While fabricating the item in question on that date, the claimant was operating a grinder. A spark from the grinder started a fire in the shop.

7. The claimant attempted to extinguish the fire by using blankets and papers that were present in the shop. In doing so, the claimant sustained burns to his right arm, right hand, and face.

8. There were individuals[1] that came to the claimant's assistance in extinguishing the fire. One of these individuals immediately transported the claimant to the emergency department (ED) at Grand River Medical Center in Rifle, Colorado.

9. In the ED the claimant was seen by Dr. Ronald Lawton. The medical record of that date states that the claimant "was grinding metal when the sparks ignited a fire on cardboard in the bed of his truck. He reached with his bare hands to pull a cardboard out sustaining burns to his right hand, forearm and face." Specifically, the claimant was diagnosed with a first degree burn to his face, and second degree burns on his right arm and hand. The claimant's burns were cleaned and bandaged. The claimant was referred to UC Health Burn Center. The claimant was transported by a family member to the UC Health Burn Center, (which is located at the Anschutz Medical Campus in Aurora, Colorado).

10. The claimant was admitted to the burn center on April 9, 2021. At that time, the claimant reported that he "was grinding metal with a machine when sparks flew and caught some nearby paper." The claimant's diagnoses included burns to 4.25 percent of his total body surface area (TBSA), and third degree bums to his right hand and right forearm.

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[1] It is unclear to the ALJ whether these individuals were employees of the company or unaffiliated bystanders.

11. While hospitalized, the claimant's burns were cleaned and debrided. In addition, skin grafts were performed, utilizing skin from the claimant's right thigh. The claimant was released from the burn center on April 25, 2021.

12. While the claimant was hospitalized, the company continued to pay him at a rate of $18.00 per hour for 40 hours per week. In addition, the company has paid for the treatment the claimant received at Grand River Medical Center.

13. After the claimant was released from the hospital on April 25, 2021, he returned to the company and worked on a full-time basis with no work restrictions. The claimant worked in this capacity for approximately one month.

14. The claimant testified that after one month, MB[Redacted] fired him because his production had diminished since the fire. MB[Redacted] testified that the claimant quit working for the company because his duties changed after the fire. MB[Redacted] further testified that when the claimant was released from the hospital, MB[Redacted] did not want the claimant welding. He assigned the claimant other duties such as picking up debris at job sites, or driving to pick up materials. It is MB's[Redacted] understanding that the claimant did not like this change and quit as a result.

15. In July 2021, the claimant began other employment. The claimant now works as a handyman for a party rental company. The claimant works in his new position on a full-time basis with no work restrictions.

16. The company asserts that the claimant worked for the company as an independent contractor. MB[Redacted] testified he asked the claimant for proof of liability insurance, but the claimant did not provide that information to the company.

17. The ALJ has considered the facts presented at hearing and finds that the respondents have failed to demonstrate that the claimant was an independent contractor on April 9, 2021. In reaching this conclusion, the ALJ considered the following: the claimant did not provide services for any other individual or entity while working for the company; the claimant was paid an hourly rate and had consistent hours; the claimant continued to be paid these same wages while he was hospitalized; MB[Redacted] directed the claimant as to where work would be performed and what was to be done; the claimant used the company's tools when performing his work; the claimant performed work at the company shop; and the claimant was paid in his own name. The ALJ finds that the claimant was an employee of the company on April 9, 2021.

18. The ALJ credits the medical records and finds that the claimant has demonstrated that it is more likely than not that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer/company. The claimant was working within the scope of his job duties fabricating an item (as directed by MB[Redacted]) at the company's shop when he was burned.

19. The ALJ credits the medical records and finds that the claimant has demonstrated that it is more likely than not that the treatment the claimant received at Grand River Medical Center and the UC Health Burn Unit was reasonable, necessary, and related to the claimant's work injury.

20. The ALJ credits the testimony of the claimant and MB[Redacted] and finds that for the period of April 10, 2021 through April 25, 2021, the claimant did not suffer a wage loss as the employer continued to pay the claimant his normal wages during that period of time. After his release from the hospital, the claimant returned to work for the employer for approximately one month. The ALJ finds that the claimant suffered no wage loss during that time.

21. The period beginning on approximately May 25, 2021[2] the claimant's employment with the employer ended. The ALJ has considered the testimony presented by both parties regarding the claimant's job separation. The ALJ credits' MBs[Redacted] testimony and finds that after the claimant returned to work for the company, the claimant was not given any additional welding responsibilities, but was provided with full-time work. The claimant was dissatisfied with this change to his job duties and he quit his employment. The ALJ finds that the respondents have demonstrated that it is more likely than not that the claimant was responsible for the termination of his employment. Therefore, the claimant is not entitled to temporary total disability (TTD) benefits beginning on May 25, 2021 and thereafter.

22. Based on the testimony presented at the hearing, the ALJ finds that the claimant's average weekly wage (AWW) at the time of his injury was $720.00 ($18.00 per hour, and 40 hours per week).

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

[2] Which is one month after the claimant's return to work.

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. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation... under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

6. As found, the claimant provided services to the respondent and was paid for his services. Therefore, the claimant is presumed to be an employee of respondent.

7. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

> a. required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);
>
> b. established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed)
>
> c. paid a salary or hourly rate but rather a fixed or contract rate;
>
> d. may terminate the work during the contract period unless the individual violates the terms of the contract or fails

to produce results that meet the specifications of the contract;

e. provided more than minimal training for the individual;

f. provided tools or benefits to the individual; (except that materials and equipment may be supplied);

g. dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

h. paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

i. combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. In *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014) the Colorado Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows* & *Doors,* W.C. No. 4-950-181, May 4, 2015.

9. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose

benefit liability on the employer. See *Pierce v. Pella Windows* & *Doors,* W.C. No. 4-950-181, May 4, 2015.

10. Section 8-40-202(b }(IV}, C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b}(II}, C.R.S. and includes language in bold faced font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

11. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant did not provide services for any other individual or entity while working for the company; the claimant was paid an hourly rate and had consistent hours; the claimant continued to be paid these same wages while he was hospitalized; MB[Redacted] directed the claimant as to where work would be performed and what was to be done; the claimant used the company's tools when performing his work; the claimant performed work at the company shop; and the claimant was paid in his own name. The ALJ concludes that the claimant was not free from the direction and control of the company when performing his duties. The ALJ further concludes that the claimant was not engaged in an independent trade or business.

12. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing 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.*

13. As found, the claimant has demonstrated, by a preponderance of the evidence, that on April 9, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the medical records and the testimony of the claimant and MB[Redacted] are credible and persuasive on this issue.

14. 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).

15. As found, the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Grand River Medical and UC Health Burn Unit was reasonable, necessary, and related to the work injury. As found, the medical records are credible and persuasive.

16. The ALJ must determine an employee's AWW by calculating the monetary 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).

17. As found, the claimant's AWW at the time of his injury was $720.00 ($18.00 per hour, and 40 hours per week).

18. 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. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a 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 the 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).

19. As found, the claimant did not suffer a wage loss between April 10, 2021, and April 25, 2021 as the employer continued to pay his normal wages during his hospitalization. As found, beginning April 26, 2021 and until his final day of employment, the claimant continued to work on a full-time basis for the employer. Therefore, he did not suffer any wage loss during that time.

20. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of ''fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance

context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

21. As found, the respondents have demonstrated, by a preponderance of the evidence, that the claimant is responsible for the termination of his employment with the employer. The claimant exercised a volitional act when he quit his employment because he was dissatisfied with changes to his job duties (no longer welding). Ongoing full-time work was available to the claimant if he had not quit. Therefore, any wage loss the claimant experienced as a result of his job separation was due to his own actions, and not due to any work restrictions or limitations caused by the work injury. As found, the testimony of MB[Redacted] is credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant was an employee of the employer on April 9, 2021.

2. The claimant suffered a compensable injury while working on April 9, 2021.

3. The respondents are responsible for the medical treatment the claimant has received as a result of the April 9, 2021 work injury.

4. The claimant is not entitled to temporary total disability (TTD) benefits.

5. The claimant's average weekly wage (AWW) is $720.00.

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

Dated August 16, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6[1h] 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. 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-968-001

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1.Respondent did not own or operate the [Redacted, hereinafter PF] facility in Colorado Springs where Claimant was working out on July 20, 2021.

2. Claimant did not report his back injury until October 29, 2021.

3.Claimant's medical treatment on and after October 29, 2021 through UC Health and James M. Bee, M.D. was authorized, reasonable and necessary.

4.Claimant earned an Average Weekly Wage (AWW) of $1089.80.

FINDINGS OF FACT

1.Claimant is a resident of Colorado Springs, CO. During October 2020 he purchased a basic gym membership from PF[Redacted] in Colorado Springs. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his fees.

2.Employer hired Claimant as a Firefighter Cadet on February 1, 2021. Claimant testified that, as part of the hiring process, he underwent a physical examination and was cleared as a Cadet. Because Claimant was expected to maintain adequate physical fitness, he was permitted to choose the facility where he worked out. Claimant continued to exercise at PF[Redacted] in Colorado Springs.

3.Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

4.At hearing, Claimant introduced §10.29 of Respondent's Manual of Procedures (MOP) for firefighters. Section 10.29 specifically addressed the Cadet program. Section 10.29 provides that Cadets would participate in all fitness assessments during their first week. Cadets were "allowed" to work out for three hours during their 40-hour work weeks. Cadets electing to participate in fitness activities during their work day were supposed to

coordinate workout times with a "designated point of contact in the division they are assigned." Section 10.29 specified certain facilities where Cadets could and could not work out. In the alternative, Cadets could work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

5.On July 20, 2021 Claimant began his work day at 6:00 a.m. and concluded his day at 4:00 p.m. He was paid for his ten-hour shift. Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period with the exception of holiday pay.

6.After Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant did not go to the gym at the direction of Respondent. When Claimant was performing squats/lunge squats with 270 pounds, he felt immediate pain in his lower back. Claimant remarked that he was injured at 5:30 p.m. or approximately 90 minutes after his work day concluded. He was not paid for any of the time spent at PF[Redacted] on July 20, 2021.

7.In contravention of §10.29 Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Respondent. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Respondent's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021.

8.Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant alone decided his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up.

9.Claimant's first documented medical visit following the July 20, 2021 incident occurred on September 9, 2021 when he visited Amelia Anne Martin, NP at Lake Plaza Primary Care within UCHealth (Lake Plaza Primary). The reason for the visit was a reported testicular lump. Claimant specifically reported a lump on his left testicle that had grown in size, generating intermittent tenderness and scrotal swelling. He "sometimes" experienced pain that radiated into his right groin and lower back. The clinical notes do not mention a specific incident arising from the lifting of weights or any other fitness activities on July 20, 2021.

10.On October 28, 2021 Crystal Michealson, PAC at UCHealth Urgent Care-Powers authored a "to whom it may concern" note. The document stated Claimant had been evaluated and could return to work with restrictions limiting repetitive bending and lifting not to exceed ten pounds for two weeks. The note was accompanied by an "After Visit Summary." The Summary stated that the October 28, 2021 visit was for "acute left-sided low back pain with left-sided sciatica."

11.On October 28, 2021 Claimant reported his July 20, 2021 injury to Employer. He completed a First Report of Injury (FROI) on the following day at 7:00 a.m. Claimant remarked that his injury occurred at PF[Redacted] in Colorado Springs. His work day on July 20, 2021 began at 6:00 a.m. and ended at 4:00 p.m. Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. He noted the injury occurred when he was "[w]orking out during [his] daily allotted physical training time." Accompanying the FROI was a Notice of Claim on the Job Injury (Notice of Claim). The Notice of Claim repeated the date, time and location of Claimant's injury as stated in the FROI. Claimant reiterated that the injury occurred "while doing lunge squats." He specified "work out was done for my allotted physical training time."

12.Claimant returned to Lake Plaza Primary on November 5, 2021 and was diagnosed with epididymitis and "chronic left-sided low back pain with left sided sciatica." NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." On physical examination of Claimant's lower back NP Martin found normal range of motion, negative straight leg raise tests bilaterally, and no swelling, edema, deformity, lacerations, spasms, tenderness or bony tenderness. Although Claimant had no SI joint pain, he experienced symptoms while performing the left-sided straight leg raise.

13.Claimant began treating at Powers Adult Rehab within the UCHealth system on November 19, 2021. Providers initiated a physical therapy plan to alleviate Claimant's reported symptoms. The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training.

14.On January 10, 2022 Claimant visited James M. Bee, M.D. of the Colorado Springs Orthopaedic Group. Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." On physical examination, Claimant displayed normal muscle tone, normal thoracic range of motion, and no tenderness of the thoracic or lumbar spine. He exhibited some limited lumbar flexion and extension with tightening at the extremes. X-rays revealed an L5 pars fracture and a grade 1 spondylolisthesis. MRI films reflected bilateral pars defects at L5 and posterior disc bulging combined with L5-S1 spondylolisthesis that caused compression of the exiting L5 nerve roots bilaterally. Dr. Bee diagnosed an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis and intermittent left leg radiculopathy.

15.On May 17, 2022 Claimant returned to NP Martin at Lake Plaza Primary for an evaluation. She noted that Claimant continued to suffer lower back pain and activity restrictions. Claimant had been attending physical therapy and visiting Dr. Bee on a regular basis. Dr. Bee recommended an ESI and possible surgery if Claimant failed to improve. NP Martin remarked that Claimant has been on light duty work with Employer. She assessed Claimant with spondylolisthesis and foraminal stenosis of the lumbar

region. NP recommended continued treatment with Dr. Bee and possible surgical intervention in the absence of improvement.

16.Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer. Initially, when Employer hired Claimant as a Cadet he was expected to maintain adequate physical fitness. Claimant chose to continue to exercise at PF[Redacted] in Colorado Springs. Claimant explained that on July 20, 2021 he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. While performing squats/lunge squats with 270 pounds, he experienced pain in his lower back. Claimant did not immediately report his symptoms because he was concerned he may have suffered a testicular injury. He ultimately reported his lower back injury to Employer on October 28, 2021. In the FROI Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. Dr. Bee ultimately diagnosed Claimant with an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis, and intermittent left leg radiculopathy.

17.Although medical providers did not specifically articulate a causal connection between Claimant's workout activities on July 20, 2021 and his lower back injuries, the bulk of the medical evidence reflects a likely causal relationship. Claimant consistently attributed his lower back symptoms to performing squats while weight-training. Specifically, on November 5, 2021 NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training. Finally, at a January 10, 2022 visit with Dr. Bee, Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." The record thus reveals that medical providers evaluated Claimant's symptoms and diagnosed his condition based on symptoms that he developed while performing squats. However, despite a causal connection between Claimant's lower back condition and weight-training, the critical issue is whether Claimant's injuries arose during the course and scope of his employment while performing squats on July 20, 2021. Based on the factors detailed in *Price,* Claimant has failed to meet his burden.

18.The first *Price* factor is whether the injury occurred during working hours. The preceding factor receives substantial weight in the analysis. The record reflects that Claimant's July 20, 2021 lower back injuries did not occur during working hours. The FROI prepared by Claimant stated that his work day began at 6:00 a.m. and concluded at 4:00 p.m. During the hearing, Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period, with the exception of holiday pay.

19.After Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant stated in both the FROI and Notice of Claim that his injury occurred at 5:30 p.m. on July 20, 2021. He was not paid for any of the time spent at PF[Redacted] on the day of his accident. In contrast, Employer's MOP §10.29 only provided an opportunity for Claimant to engage in physical fitness activities for up to three hours per week while being paid. Because Claimant's lower back injuries occurred approximately ninety minutes after the conclusion of his work day, he was not injured during working hours.

20.The second *Price* factor considers whether the injury occurred on the employer's premises. The reporting documents prepared by Claimant state that he was engaged in a fitness program at a PF[Redacted] facility in Colorado Springs. The parties stipulated that Respondent did not own or operate the facility. The injury thus did not occur on Employer's premises. Nevertheless, Claimant has emphasized that Respondent permitted him to work out at a gym of his choice. Specifically, §10.29 of Respondent's MOP permitted Cadets to work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

21.Although Claimant was permitted to choose his own workout facility pursuant to Employer's policy, PF[Redacted] did not constitute Employer's premises. The determination of whether a facility or gym is on the employer's premises is based on whether it is owned by the employer or the employer exercises a degree of control over the operation of the facility. Employer's "control" over Claimant's workout at PF[Redacted] on July 20, 2021 was so limited that it negated a finding that the off-premises injury occurred in the course of employment. Employer simply did not exercise control over the risks associated with off-premises workouts. Accordingly, the record reveals that Claimant's lower back injuries on July 20, 2021 did not occur on Employer's premises.

22.The third *Price* factor is whether the employer initiated the employee's exercise program. The record regarding the third factor is somewhat mixed. Weighing in favor of initiation is that Employer encouraged Claimant and other Cadets to maintain adequate physical fitness. However, Claimant, on his own accord, had entered into a contract with PF[Redacted] to avail himself of the exercise equipment and other amenities conducive to maintaining physical fitness in October 2020, or several months before he was hired by Employer. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his membership fees. Claimant's fitness program at PF[Redacted] was self-directed without the involvement of a personal trainer. While Claimant's fitness program was "influenced" by Employer, his program predated his employment and was not initiated by Respondent. Moreover, Claimant was not directed to engage in a specific program. The record thus reveals that, although Employer encouraged Claimant to maintain physical fitness as a Cadet, Employer did not initiate Claimant's fitness program at PF[Redacted].

23.The fourth *Price* factor is whether the employer "exerted any control or direction over the employee's exercise program." Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of

certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

24.However, Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Employer. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Employer's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021. Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant determined his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up. Furthermore, Claimant purchased the basic customer or client plan at PF[Redacted] before he worked for Employer. The basic plan necessarily dictated the amenities to which he had access while implementing his fitness program. The record thus reveals that Employer did not exert control or direction over Claimant's fitness program during July 2021.

25.The final *Price* factor is whether the employer "stood to benefit from the employee's exercise program." Employer expected Claimant to maintain adequate physical fitness as a Cadet. His improved fitness level through working out would enhance his abilities as a Cadet and ultimately as a firefighter for Employer. Similarly, in *Price*, the Supreme Court noted the employer stood to benefit from the claimant's exercise program because it would provide the employer with a physically fit employee.

26.However, the Supreme Court in *Price* observed that fitness was a qualification of employment in the first place. The Court thus placed very little weight on the fifth factor. The Supreme Court noted that where fitness was a condition or qualification for employment but did not specify what the employee had to do to satisfy the criteria, the employee assumed responsibility for and any attendant risk of meeting the job qualifications. Similarly, here, Employer generally encouraged fitness but did not detail the criteria for Claimant's fitness level as a Cadet. Therefore, any benefit to Employer was negligible.

27.Considering all of the *Price* factors reveals that Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 lower back injuries arose out of the course and scope of his employment with Employer. Notably, because Claimant failed to satisfy the first two *Price* criteria, he was required to "make an extremely strong showing on the other factors in order to prevail on his claim." *Id*. at 211. However, the record reveals that only the fifth factor, to a negligible degree, clearly favored compensability for Claimant's workout activities at PF[Redacted] on July 20, 2021. Accordingly, Claimant's request for Worker's Compensation 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).

4.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 a “work-related function 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). Whether an injury arises out of and in the course and scope of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Indus. Claim Appeals Off.,* 961 P.2d 1141 (Colo. App. 1998).

5.In *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207 (Colo. 1996) the Colorado Supreme Court detailed the factors relevant to determining whether an injury suffered by an employee engaged in an exercise program is compensable. The Court enumerated the following factors: (1) whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction

over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. *Id.* at 210-11. The first two factors receive the greatest weight "because these indicia of time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment." *Id.* at 211.

6.As found, Claimant has failed to demonstrate by a preponderance of the evidence that his July 20, 2021 injuries arose out of the course and scope of his employment with Employer. Initially, when Employer hired Claimant as a Cadet he was expected to maintain adequate physical fitness. Claimant chose to continue to exercise at PF[Redacted] in Colorado Springs. Claimant explained that on July 20, 2021 he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. While performing squats/lunge squats with 270 pounds, he experienced pain in his lower back. Claimant did not immediately report his symptoms because he was concerned he may have suffered a testicular injury. He ultimately reported his lower back injury to Employer on October 28, 2021. In the FROI Claimant explained he felt a sharp pain in his lower back "while coming up from a squat with weight at the gym" on July 20, 2021 at 5:30 p.m. Dr. Bee ultimately diagnosed Claimant with an L5 pars fracture, L5-S1 spondylolisthesis, degenerative changes, spinal stenosis, and intermittent left leg radiculopathy.

7.As found, although medical providers did not specifically articulate a causal connection between Claimant's workout activities on July 20, 2021 and his lower back injuries, the bulk of the medical evidence reflects a likely causal relationship. Claimant consistently attributed his lower back symptoms to performing squats while weight-training. Specifically, on November 5, 2021 NP Martin noted improvement of persistent testicular pain with three episodes of "UTI symptoms" and "ongoing back pain" that began after lifting weights "about three months ago." The medical records from Powers Adult Rehab for the period November 19, 2021 through December 18, 2021 contain a diagnosis of chronic left-sided lower back pain with sciatica. The records also include a three-month history of left-sided lower back pain with intermittent left lower extremity symptoms subsequent to squatting while weight training. Finally, at a January 10, 2022 visit with Dr. Bee, Claimant reported that he had "low back pain of the left side with sciatica for a couple of months possibly from squatting in the gym." The record thus reveals that medical providers evaluated Claimant's symptoms and diagnosed his condition based on symptoms that he developed while performing squats. However, despite a causal connection between Claimant's lower back condition and weight-training, the critical issue is whether Claimant's injuries arose during the course and scope of his employment while performing squats on July 20, 2021. Based on the factors detailed in *Price,* Claimant has failed to meet his burden.

8. As found, the first *Price* factor is whether the injury occurred during working hours. The preceding factor receives substantial weight in the analysis. The record reflects that Claimant's July 20, 2021 lower back injuries did not occur during working hours. The FROI prepared by Claimant stated that his work day began at 6:00 a.m. and concluded at 4:00 p.m. During the hearing, Claimant testified that he worked four days per week, ten hours each day during July 2021. The documentary evidence submitted by

the parties confirmed that Claimant worked and was paid for 80 hours during each two-week pay period, with the exception of holiday pay.

9.As found, after Claimant's work day ended on July 20, 2021, he returned to Colorado Springs and went to PF[Redacted]. He explained that he went to PF[Redacted] to improve his physical capacity to participate in "combat challenge" activities. Claimant stated in both the FROI and Notice of Claim that his injury occurred at 5:30 p.m. on July 20, 2021. He was not paid for any of the time spent at PF[Redacted] on the day of his accident. In contrast, Employer's MOP §10.29 only provided an opportunity for Claimant to engage in physical fitness activities for up to three hours per week while being paid. Because Claimant's lower back injuries occurred approximately ninety minutes after the conclusion of his work day, he was not injured during working hours.

10.As found, the second *Price* factor considers whether the injury occurred on the employer's premises. The reporting documents prepared by Claimant state that he was engaged in a fitness program at a PF[Redacted] facility in Colorado Springs. The parties stipulated that Respondent did not own or operate the facility. The injury thus did not occur on Employer's premises. Nevertheless, Claimant has emphasized that Respondent permitted him to work out at a gym of his choice. Specifically, §10.29 of Respondent's MOP permitted Cadets to work out "at their facility of choice." Claimant's right to select a facility of his choice was confirmed by his supervisor on December 20, 2021.

11.As found, although Claimant was permitted to choose his own workout facility pursuant to Employer's policy, PF[Redacted] did not constitute Employer's premises. The determination of whether a facility or gym is on the employer's premises is based on whether it is owned by the employer or the employer exercises a degree of control over the operation of the facility. *See Price,* 919 P.2d at 211. Employer's "control" over Claimant's workout at PF[Redacted] on July 20, 2021 was so limited that it negated a finding that the off-premises injury occurred in the course of employment. *See In Re Pargas,* W.C. No. 4-397-537 (ICAO, Feb. 17, 1999). Employer simply did not exercise control over the risks associated with off-premises workouts. Accordingly, the record reveals that Claimant's lower back injuries on July 20, 2021 did not occur on Employer's premises.

12.As found, the third *Price* factor is whether the employer initiated the employee's exercise program. The record regarding the third factor is somewhat mixed. Weighing in favor of initiation is that Employer encouraged Claimant and other Cadets to maintain adequate physical fitness. However, Claimant, on his own accord, had entered into a contract with PF[Redacted] to avail himself of the exercise equipment and other amenities conducive to maintaining physical fitness in October 2020, or several months before he was hired by Employer. Claimant personally paid for the membership. Employer never directly paid for the membership or reimbursed Claimant for his membership fees. Claimant's fitness program at PF[Redacted] was self-directed without the involvement of a personal trainer. While Claimant's fitness program was "influenced" by Employer, his program predated his employment and was not initiated by Respondent. Moreover, Claimant was not directed to engage in a specific program. The record thus reveals that,

although Employer encouraged Claimant to maintain physical fitness as a Cadet, Employer did not initiate Claimant's fitness program at PF[Redacted].

13. As found, the fourth *Price* factor is whether the employer "exerted any control or direction over the employee's exercise program." Claimant testified that he met with personnel within Employer's fire department who instructed him regarding the performance of certain unspecified exercises to meet the department's fitness goals. He performed the exercises during his initial two weeks of employment in February 2021.

14. As found, however, Claimant did not coordinate his workout on July 20, 2021 with a "designated point of contact" for Employer. He instead stated that he did not seek permission from Employer regarding his activities at PF[Redacted] during July 2021. While Employer's fitness assessments influenced Claimant's workout routine, his individual fitness program was self-directed and structured as of July 20, 2021. Employer did not provide any of the equipment Claimant used during his workout on July 20, 2021. Claimant determined his workout activities, the order in which he completed his workout, the time spent on his activities, the method of warming up and the time spent warming up. Furthermore, Claimant purchased the basic customer or client plan at PF[Redacted] before he worked for Employer. The basic plan necessarily dictated the amenities to which he had access while implementing his fitness program. The record thus reveals that Employer did not exert control or direction over Claimant's fitness program during July 2021. *See Price*, 919 P.2d at 211 (employer exercised no control over employee's home exercise program because it did not furnish equipment or dictate the type of equipment to be used).

15. As found, the final *Price* factor is whether the employer "stood to benefit from the employee's exercise program." Employer expected Claimant to maintain adequate physical fitness as a Cadet. His improved fitness level through working out would enhance his abilities as a Cadet and ultimately as a firefighter for Employer. Similarly, in *Price*, the Supreme Court noted the employer stood to benefit from the claimant's exercise program because it would provide the employer with a physically fit employee.

16. As found, however, the Supreme Court in *Price* observed that fitness was a qualification of employment in the first place. *Price*, 919 P.2d at 211. The Court thus placed very little weight on the fifth factor. The Supreme Court noted that where fitness was a condition or qualification for employment but did not specify what the employee had to do to satisfy the criteria, the employee assumed responsibility for and any attendant risk of meeting the job qualifications. Similarly, here, Employer generally encouraged fitness but did not detail the criteria for Claimant's fitness level as a Cadet. Therefore, any benefit to Employer was negligible.

17. As found, considering all of the *Price* factors reveals that Claimant has failed to demonstrate that it is more probably true than not that his July 20, 2021 lower back injuries arose out of the course and scope of his employment with Employer. Notably, because Claimant failed to satisfy the first two *Price* criteria, he was required to "make an extremely strong showing on the other factors in order to prevail on his claim." *Id*. at 211.

However, the record reveals that only the fifth factor, to a negligible degree, clearly favored compensability for Claimant's workout activities at PF[Redacted] on July 20, 2021. Accordingly, Claimant's request for Worker's Compensation benefits is denied and dismissed.

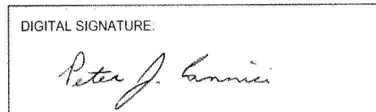
ORDER

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

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

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 http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 16, 2022.



Peter J. Cannici
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. 5-121-928-002

ISSUES

The issues set for determination included:

- Is Claimant's claim is barred by the statute of limitations?
- If Claimant's claim is not barred by the statute of limitations, did Claimant sustain a compensable injury?
- Is Claimant's right knee arthroscopy recommended by Dr. Phillip Stull reasonable, necessary and related to the work injury of September 18, 2017?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on June 28, 2022. Respondent requested a full Order on July 15, 202, which was received on July 16, 2022. Claimant filed amended proposed Findings of Fact, Conclusions of Law and Order. This Order follows.

FINDINGS OF FACT

1. Claimant was employed as a teacher and coach by Respondent.

2. Claimant's medical history was significant in that he had three previous work injuries while working for Employer, including one in which he hurt his ankle on February 12, 2009. He treated with J. Raschbacher, M.D. as well as Yusuke Wakeshima, M.D. for the 2009 injury.

3. Claimant's treatment for the 2009 ankle injury included an ankle fusion surgery performed in 2016 and rehabilitation treatment following the surgery. Claimant also required treatment for his low back as a result of that injury. Claimant was continuing that treatment in 2017, which was being overseen by Dr. Wakeshima.

4. On September 18, 2017, Claimant injured his knee at work while walking across the field. Claimant testified this was near the ground was uneven and he felt pain in his knee when he stepped into a hole. Claimant thought he told Dr. Wakeshima that he stepped into hole when his knee popped.[1] Claimant was a credible witness and his testimony established he was working at the time.

[1] Hearing Transcript ("Hrg. Tr.") pp. 45:16-46:8.

5. On September 19, 2017, Claimant was evaluated by Dr. Wakeshima, who noted Claimant presented sooner than originally scheduled due to increased right knee pain and reported that something "popped" in his right knee. On the progress form, Claimant referenced pain in his right knee in the written description, as well as on the pain diagram.

6. The medical report said Claimant wasn't doing it anything out of the ordinary, except coaching high school football practice and to get out on the practice field, he had to go through uneven terrain with many holes.[2] Dr. Wakeshima also noted Claimant denied "any new trauma… As regards work-relatedness, since he does wear a high ankle brace… he may have additional stress to his knee region, especially if he has to pick or go up and down on his knees or push off when on the field and therefore I would opine that the knee issue is related to his current work injury of his ankle…"

7. The ALJ found that, while these entries were not completely clear, it was more probable than not that a traumatic event causing injury to the knee occurred on that day, as evidenced by the "pop".

8. The ALJ noted that Dr. Wakeshima listed the date of injury as February 12, 2009 and said Claimant was being seen for right ankle issues today. Dr. Wakeshima recorded that Claimant's right knee was swollen and ordered an ultrasound for the right lower extremity, which showed no evidence of DVT. With respect to the right knee, Dr. Wakeshima listed the diagnosis of "acute" pain of right knee and ordered an MRI.[3] The ALJ inferred Respondent-Employer was provided a copy of the medical September 19, 2017 report.

9. The ALJ concluded Claimant's injury on September 18, 2017 arose out of and was in the course of his employment.

10. Claimant testified that he reported the injury to [Redacted, hereinafter AK], who is an assistant principal/athletic director. Claimant said he also talked to BS[Redacted] who was the secretary in AK's[Redacted] office. AK[Redacted] sent Claimant to Dr. Wakeshima.[4] Claimant said he spoke to the adjuster on the claim following the injury in the presence of Dr. Wakeshima's assistant.

11. There was no written document that corroborated Claimant's report of injury to AK[Redacted].

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[2] Exhibit 2, second page (no Bates number).

[3] The report also contained the diagnoses related to the ankle injury, which included DJD, pain in right ankle and joints of right foot; other chronic pain; lumbar facet arthropathy; low back pain; pain in left hip; pain in right hip.

[4] Hrg. Tr. p. 24:22-25:7.

12. On cross-examination, Claimant admitted he knew the process for reporting an injury to Employer.

13. On September 25, 2017, Claimant underwent an MRI of the right knee and the films were read by Matthew Chanin, M.D. Dr. Chanin's conclusion was: age-indeterminate medial meniscus tear; chronic tri-compartment chondromalacia, including a large osteochondral erosion along the patellar median ridge; effusion. The ALJ inferred that the presence of effusion was some evidence Claimant suffered a trauma to the right knee. The ALJ inferred Respondent-Employer was provided a copy of the medical September 25, 2017 MRI report.

14. Claimant was evaluated by William Ciccone, II, M.D. on October 16, 2017. Claimant testified Dr. Wakeshima referred him to Dr. Ciccone. Dr. Ciccone's assessment was: right knee pain with degenerative changes; traumatic tear of medial meniscus of right knee. This assessment was evidence that supported the conclusion that Claimant suffered a knee injury as alleged in September 2017.

15. Physical therapy ("PT") was ordered to strengthen the knee. Dr. Ciccone noted that if Claimant had persistent mechanical symptoms, the possibilities for arthroscopic intervention existed, however, given his degenerative changes this would be his last resort to help with mechanical-type symptoms. The ALJ inferred Respondent-Employer was provided a copy of the medical October 16, 2017 report.

16. On November 6, 2017, Claimant was evaluated by Dr. Raschbacher. The treatment note that stated this was a recheck of the ankle, but referenced the fact that Dr. Ciccone ordered eight visits of PT for Claimant's knee. Dr. Raschbacher also said "it appears this is covered under his ankle claim rather than being a new claim". Claimant was awaiting ankle surgery. The ALJ inferred Respondent-Employer was provided a copy of the medical November 6, 2017 report and was aware that the knee treatment was being provided under the September 18, 2017 claim.

17. When Claimant returned to Dr. Raschbacher on February 22, 2018, the treatment note recorded the fact that Claimant was going to get PT on the right knee, but this was delayed for ankle surgery. Therapy was to start on the right knee.

18. Claimant was evaluated by James Johnson, M.D. on February 20, 2019. Claimant testified Dr. Wakeshima referred him to Dr. Johnson. At that time, Claimant reported pain and discomfort in the right knee. Dr. Johnson reviewed a repeat MRI of the knee and noted that it showed a complex tear of the horn of the medial meniscus, along with end stage arthritis. He opined that Claimant's knee condition was secondary to a change in gait mechanics from the ankle injury. Dr. Johnson recommended Claimant for arthroscopic medial meniscectomy and chondroplasty.

19. Timothy O'Brien, M.D. performed an IME on April 30, 2019, at Respondent's request. Dr. O'Brien opined that the requested knee surgery was not reasonable or necessary to repair Claimant's torn meniscus and further that it was not related to

Claimant's ankle injury. Dr. O'Brien noted that Claimant's right lower extremity was actually receiving much less use due to his frequent ankle surgeries and as such was being rested. He did not believe Claimant's brace altered the biomechanics of his right lower extremity. Dr. O'Brien stated Claimant's right knee condition was the result of his personal health, his genetic makeup and of his age. Dr. O'Brien further stated that arthroscopic surgery on arthritic knees was contraindicated by scientific studies, as well as the American Academy of Orthopedic Surgeons. Based upon Dr. O'Brien's report, Respondent denied authorization for the requested surgery.

20. Dr. O'Brien testified as an expert in Orthopedic Surgery at hearing, and was board certified by the American Academy of Orthopedic Surgeons ("AAOS"). He is Level-II accredited pursuant to the W.C.R.P. Dr. O'Brien said he reviewed the extensive records as part of the IME process. He agreed the case was complex and he questioned whether the incident in September 2017 caused the meniscal tear. There was a question regarding whether there was an acute injury or trauma to the right knee. Dr. O'Brien said Clamant had advanced degeneration of the patellofemoral joint and deterioration of the cartilage.

21. Dr. O'Brien stated that, regardless of whether or not there was an injury, surgery in this case was contraindicated by the medical literature as well as by the AAOS' treatment guidelines. He specifically noted that the science and research concerning arthroscopic surgeries on arthritic patients all concluded that surgery was not recommended.[5]

22. Dr. O'Brien disagreed with Dr. Stull that surgery was supported in this case, but felt Dr. Stull's opinion was unsupported. He did not believe Dr. Stull had reviewed all of Claimant's medical records, although he noted Dr. Stull was board-certified by the AAOS. Dr. O'Brien testified that Claimant's right knee condition was not related to the work injury.

23. Claimant returned to Dr. Wakeshima on June 17, 2019. At that time, right knee pain issues, with swelling and sensation of a pop were noted. The question arose whether he may have injured his knee with chronic use of high ankle foot orthotics and the MRI study of September 25, 2017 was referenced. Dr. Wakeshima discussed Claimant's case with Dr. Johnson, who opined that an arthroscopic surgery to address the meniscal tear of the right knee would be medically appropriate and indicated. Dr. Johnson said this was the standard of care for a meniscal tear. The ALJ credited Dr. Johnson's opinion that the proposed arthroscopic surgery was reasonable and necessary.

24. Both Dr. Wakeshima and Dr. Johnson agreed that the case should have a second orthopedic opinion offered by an orthopedic surgeon who specialized in arthroscopy and was fellowship trained in sports medicine and knee arthroscopy.

[5] Hrg. Tr. p. 63:24-65:15.

25. The ALJ found medical records from Dr. Wakeshima consistently referenced the February 12, 2009 date of injury (See reports from evaluations on March 13, 2018, March 4, 2019, April 25, 2019, May 10, 2019 and July 1, 2019). There was evidence of right knee complaints in these records.

26. On July 9, 2019, Claimant was evaluated by Philip Stull, M.D. to whom he was referred by Dr. Wakeshima. Dr. Stull noted Claimant was injured while working in September 2017 when he stepped in a hole and twisted his right knee. Claimant had no prior right knee problems, although he had chronic right ankle issues and multiple surgeries. Dr. Stull noted Claimant's persistent knee symptoms got pushed to the back burner as he tried to recover from his ankle surgery.

27. On examination, the alignment of Claimant's right knee was normal and the range of motion was full on extension and flexion. The medial joint space was tender and there was a positive McMurray's test medially. Dr. Stull stated the medial meniscus tear was "clearly and unequivocally related to the work–related trauma in September 2017". Dr. Stull recommended a right knee arthroscopy. Dr. Stull disagreed with the opinions expressed by Dr. O'Brien with respect to the proposed arthroscopy. Dr. Stull's opinions were persuasive to the ALJ.

28. Claimant returned to Dr. Stull on July 17, 2019 after the proposed surgery was denied. Dr. Stull reiterated his opinion that arthroscopy was the best option for Claimant.

29. Claimant testified that he thought the adjuster for Respondent authorized his prescriptions, which he took as part of the treatment for his knee. He said he did not have to pay for the prescriptions.

30. The evidence in the record led the ALJ to conclude that Respondent provided medical benefits which included Claimant's treatment of the right knee under the ankle work injury.

31. Claimant filed a Workers' Claim for Compensation on October 28, 2019, which was the first time Claimant filed a separate claim for the right knee.[6]

32. Claimant's Workers' Claim for Compensation was filed two years and forty days after his injury. The ALJ found Claimant did not file a written claim before the Workers' Claim for Compensation was filed. Claimant demonstrated there was a reasonable excuse for the delay in filing the Workers' Claim, given that medical benefits were provided under the prior claim.

33. The ALJ concluded Respondent had notice of Claimant's September 18, 2017 injury by virtue of the medical reports prepared by Dr. Wakeshima and Dr. Raschbacher, who were ATP-s on the Claimant's prior work injury.

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[6] Exhibit A.

34. Respondent was not prejudiced by the failure of Claimant to file the Worker's Claim for Compensation before October 28, 2019.

35. Claimant proved that the surgery proposed by Drs. Johnson and Stull was reasonable, necessary and related to his work injury.

36. 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). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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).

Statute of Limitations Defense

As a starting point, this case arose out of a complex set of facts, including a complex injury history on the part of Claimant. Claimant sustained an admitted industrial injury to his ankle on February 12, 2009 and received extensive treatment for this injury. (Finding of Fact 2). This included multiple surgeries and the treatment for that injury overlapped the time in which Claimant injured his right knee on September 18, 2017. *Id.*

Claimant testified he was injured while he was working on September 18, 2017. As found, Claimant first treated for that injury on September 19, 2017 with ATP, Dr. Wakeshima and specifically scheduled an earlier appointment due to the knee injury. Claimant argued that the injury was compensable and he had a reasonable excuse for the delay in filing the Worker's Claim for Compensation.

Respondent contended Claimant's claim was barred by the statute of limitations found in § 8-43-103(2), C.R.S. Claimant contended a reasonable excuse existed to excuse the failure to report the injury within two years and that the Worker's Claim for Compensation was filed within three years. § 8-43-103(2), C.R.S. provides in pertinent part:

> "The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title….. the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby..."

Jones v. Adolph Coors Co., 689 P.2d 681, 684 (Colo. App. 1984) is apposite to the considerations here. The Court stated: "An employer is deemed notified of an injury when he has 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim', [citing] 3 A. Larson, Workmen's Compensation Law § 78.31(a) at 15-105 (1983)". After reviewing the evidence admitted in the case at bench, the ALJ concluded Respondent had notice of Claimant's right knee injury. (Finding of Fact 33).

The ALJ found that the medical evidence in the record established Respondent was provided medical reports that detailed the circumstances of the September 18, 2017 injury. (Findings of Fact 8, 13,15-16). These records showed that Claimant's ATP's were treating his right knee complaints under the admitted February 12, 2009 injury. There were multiple references to this fact in Dr. Wakeshima's records. (Finding of Fact 25). Dr. Ciccone also referenced this fact. (Findings of Fact 14-15). The ALJ concluded Respondent was on notice of this injury. In addition, there was evidence in the record to indicate that the medical benefits were paid by Respondent. (Finding of Fact 29). Specifically, Claimant testified the prescriptions for the knee claim were paid by Respondent's adjuster. *Id.*

Under the facts of this case, the ALJ found Respondent had information regarding the knee claim and was not prejudiced by Claimant's delay in filing a Worker's Claim for

Compensation. (Finding of Fact 34). In addition, under the circumstances where Claimant's medical benefits were being provided under the prior claim and treatment was delayed for the knee, Claimant established a reasonable excuse for the delay in filing the worker's claim for compensation. (Finding of Fact 32).

When coming to this conclusion, the ALJ considered Respondent's contention that Claimant was aware that his knee injury was a separate, distinct claim and he had knowledge of how to file a workers' compensation claim. (Claimant testified that he had filed separate claims previously.) Respondent averred Claimant did not establish a reasonable excuse for the failure to file the Worker's Claim for Compensation within two years. However, the ALJ was persuaded that under these facts, where the ATP-s treated Claimant under the prior claim and the ATP-s had differing explanations for the etiology of the knee pain, Claimant established a reasonable excuse for the delay. Accordingly, the statute of limitations does not bar the claim.

Compensability of Right Knee Injury

Claimant was 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 that the injury was proximately caused by the performance of such service. § 8-41-301(1)(a) through (c), C.R.S. The question of whether Claimant met the burden of proof 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).

As determined in Findings of Fact 4-8, Claimant was working as a coach for Employer on September 18, 2017 when he walked across a field and injured his right knee. The evidence established he was working at the time. *Id.* While noting that the medical record for the evaluation on September 19, 2017 was not completely clear, the ALJ found Dr. Wakeshima described a potential cause as the ankle brace and initially opined the issue was related to the work injury. Dr. Wakeshima also described right knee pain as "acute". (Findings of Fact 6-8). The ALJ also found there was evidence of an acute condition in the right knee, as evidenced by the presence of effusion on the MRI. (Finding of Fact 13).

The finding that Claimant suffered a compensable knee injury was also supported by the later medical records admitted into evidence. Dr. Johnson offered the opinion that Claimant's knee condition was secondary to a change in gait mechanics in the report, dated February 20, 2019. (Finding of Fact 18). This opinion was confirmed in a discussion Dr. Johnson had with Dr. Wakeshima on June 17, 2019. (Finding of Fact 23). As found, Dr. Stull opined that the medial meniscus tear was clearly and unequivocally related to Claimant's work related trauma. (Finding of Fact 27).

Accordingly, the ALJ concluded Claimant established by a preponderance of the evidence that it was more probable than not that he injured his right knee and this necessitated the surgery. (Finding of Fact 7). Respondent, therefore, is required to provide medical benefits to Claimant.

Medical Benefits

In the case at bench, Claimant had the burden of proof to show that the surgery proposed by Dr. Johnson was reasonable, necessary and related to the industrial injury. Claimant asserted the injuries sustained on September 18, 2017 aggravated the underlying degenerative changes in his knee and necessitated the surgery. Claimant relied upon the expert opinions of Dr. Johnson and Dr. Stullto support his claim that the work injury caused the need for surgery. Respondent averred Claimant's need for surgery was because of the degenerative changes in his knee. Respondent cited the opinions of Dr. O'Brien in support of their contentions.

Respondent is 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. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The ALJ concluded Claimant met his burden of proof that the proposed surgery was reasonable, necessary and related to the injury. (Finding of Fact 35). This was based upon the opinions of Dr. Johnson and Dr. Stull, whom the ALJ found more credible than Dr. O'Brien. (Findings of Fact 18, 27-28, 35). Claimant proved the proposed arthroscopic medial meniscectomy and chondroplasty would cure and relieve the effects of the September 18, 2017 injury. *Id.* Respondent will be ordered to provide those benefits.

ORDER

It is, therefore, ordered that:

1. The ALJ finds that the Claimant demonstrated that he suffered a compensable injury to his right knee at work on September 18, 2017.

2. The September 18, 2017 injury is not barred by the statute of limitations, as Respondent had notice of the injury.

3. Respondent is liable for medical treatment provided to Claimant by authorized providers, which is reasonable and necessary to cure and relieve the effects of the injury occurring on September 18, 2017, including right knee surgery recommended by Drs. Johnson and Stull. Medical benefits shall be paid pursuant the Colorado Workers' Compensation Fee Schedule.

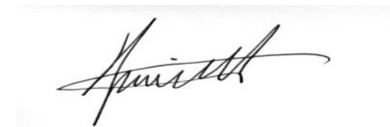
4. All matters not determined herein are reserved for future determination.

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: August 16, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $718.70. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

II. If Claimant established that she suffered a compensable left knee injury, whether she also established, that she is entitled to all reasonable, necessary and related medical care to cure and relieve her of the effects of her compensable left knee injury, including but not limited to the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged June 18, 2021 Left Knee Injury

1. Employer operates a medical device assembly and sales business. Claimant works as an assembler for the company. She started working for the Employer roughly one year prior to her alleged June 17-18, 2021, left knee injury. She began her tenure as a "temp" worker around May of 2020 and became a full-time employee in January of 2021.

2. As an assembler, Claimant's job duties required her to stand at a table and "side step" from one end to the other, moving left to right and back repeatedly, at least every minute or so, in order to assemble medical catheters". Claimant began her shift on the evening of June 17, 2021 and had worked into the early hours of June 18, 2021 when she claimed she injured her left knee. Claimant testified that her injury occurred shortly after midnight, so while she reported to work on June 17, 2021 her asserted injury occurred on June 18, 2021.

3. According to Claimant, while she was preparing to close the jacket on a catheter under assembly, she pivoted slightly to side step to the left at which time she felt a "pop" and experienced immediate pain on the inside aspect of the left knee.

4. Claimant testified that she was working a graveyard shift as part of a skeletal crew on the date of injury. According to Claimant, no onsite supervisor was present in the building when she was injured. Consequently, there was no one to whom she could report her injury. Thus, she did not report her injury on the day it occurred. Claimant testified that she did not feel her injury was a "big deal" at the time it happened because she was used to having soreness in many parts of her body after working an 8-10 hour shift, which required prolonged standing/walking, outside of occasional breaks and lunch.

5. Claimant completed her June 17-18, 2021 graveyard shift and was not scheduled to return to work until the following Monday, June 21, 2021. Claimant returned to work as scheduled on Monday and reported the incident/injury. A first report of injury, completed by an individual named [Redacted, hereinafter KD], states that Claimant, "felt a snap on [the] inside of [her] left knee when stepping from right to left at the workstation." (Resp. Ex. F, p. 94). This document further states she was "stepping to the left" just before the incident occurred. *Id.* Claimant was then provided with a list of doctors to choose from to attend to her alleged injury. She selected Dr. Eric Ritch with Occupational Medical Partners.

The Job Tasks Video

6. Claimant's precise mechanism of injury is in dispute. Respondents prepared a video, which demonstrates the tasks associated with assembly of the type of catheters Claimant was building on June 17-18, 2021. The steps in fabricating these catheters was demonstrated by [Redacted, hereinafter LL]. (Resp. Ex. E, p. 93). Claimant viewed the video and agreed that it revealed, "Pretty much what we do all day." However, she explained the video does not show the body mechanics of the lower half of the body, i.e., the hips, legs, knees, and feet. Indeed, Claimant testified: "[B]ut you can't really see underneath the table, what's going on with the feet. . . . You can see some twisting, but you can't really see the footwork of what's going on under the table." (Tr. 14:17 – 15:1).

7. Careful review of the video largely supports Claimant's contention. The ALJ agrees that during the majority of the video you cannot see the lower half of LL[Redacted] body or her feet as she moves along the length of the assembly table. However, at 3:13 of the video LL[Redacted] is observed to pivot on her left leg and walk the length of the table to unclamp the end of a fully assembled catheter.

The Medical Record Evidence

8. Claimant described the mechanism of injury (MOI) to Dr. Ritch during her initial appointment on June 24, 2021. (Resp. Ex. D, pp. 30-36). Dr. Ritch documented that Claimant reported an injury while at work assembling catheters. *Id.* at 32. She explained to Dr. Ritch that her job required her to stand at a table and to "side step from one side of the table to the other repeatedly, at least every minute or so, in order to assemble the catheter." *Id.* Dr. Ritch documented mild, i.e. a "small amount" of swelling in Claimant's left knee during this appointment. (Resp. Ex. D, p. 33). Physical examination also revealed "some" tenderness to palpation of the medial collateral ligament with mild laxity

of the MCL. *Id.* Per Dr. Ritch, "This is most likely a direct consequence of doing large amounts of stepping side to side while working. As such, Dr. Ritch noted, "*this injury would almost certainly be considered work related*." *Id.* (emphasis added). Dr. Ritch noted that Claimant had been involved in a motor vehicle accident 30 years prior to her June 17-18, 2021 incident in which she injured her knees but she fully recovered from that accident without any "significant knee problems." Claimant was provided a hinged knee brace and assigned work restrictions for her condition. *Id.*

9. Claimant testified that she was not suffering from any significant left knee condition prior to the June 18, 2021 incident. She was not treating for her left knee, nor was her ability to perform her job impacted by her left knee prior to June 18, 2021. (Tr. 24:16-25). She testified that she has required modified duty in a mostly seated capacity since the incident. (Tr. 26:4-14). Claimant reported that she continued to have persistent, daily knee pain and what she described as visible swelling of the knee through the time of her testimony at hearing. (Tr. 25:5-13).

10. Dr. Ritch observed Claimant to be walking with a limp at her next visit a week later on July 1, 2021. *Id.* at 38. During this appointment, Claimant reported that she had not improved and the brace she was provided would not stay on her knee properly. *Id.* at 37. Dr. Ritch advised her to stop wearing the brace given how poorly it fit. He recommended that Claimant undergo a few weeks of physical therapy (PT) and then consider an MRI if she failed to improve. *Id.* at 39.

11. Claimant reported the same MOI when she was seen by the physical therapist for the first time. Indeed, the initial PT note indicates: "Patient reports [she] was side stepping at work and felt a snap in the L medial knee. After this [she] felt a burning sensation and noticed swelling." *Id.* at 41.

12. Claimant reported to Dr. Ritch on July 14, 2021, that the physical therapy was not providing any relief and, if anything, she was having more pain in her right knee and hip from compensation for her left knee injury. (Resp. Ex. D, p. 45). She continued to have ongoing left medial knee pain made worse by standing or working. *Id.* at 46. Dr. Ritch examined Claimant's knee for swelling; however, her body habitus made that near impossible. Regarding this swelling, Dr. Ritch noted, "The patient's left knee is not obviously swollen, although the patient's body habitus makes it almost impossible to determine if she has a small joint effusion." *Id.* at 47. He recommended an MRI. *Id.*

13. A left knee MRI was performed on July 30, 2021 at Colorado Springs Imaging. (Resp. Ex. C, pp. 26-27). The MRI revealed a horizontal tear in the body and posterior horn of the medial meniscus. *Id.* at 26. The MRI also demonstrated some mild to moderate chondral fibrillation. *Id.* at 27. Dr. Ritch referred Claimant to Dr. David Walden to evaluate her for treatment based on the MRI findings. He also asked Dr. Walden to comment on causation of the torn medial meniscus observed on MRI. (Resp. Ex. D, p. 55). Dr. Ritch stated that Claimant's MOI was not "classic" for a torn meniscus. *Id.* at 59. It is noted, however, that none of Claimant's providers to this point appreciated the fact that her job required her to turn and pivot to some degree to walk back and forth from

each end of the table. Rather, the records simply refer to Claimant having to side step repeatedly to complete her job duties.

14. Dr. Walden first examined Claimant on August 31, 2021. (Resp. Ex. B, pp. 18-21). He was also the first provider to appreciate the pivoting associated with Claimant's need to turn and walk the length of the assembly table to complete her job duties. Claimant informed Dr. Walden that she was working on the assembly line with her feet planted, moving things from a right to left position prompting Dr. Walden to note: "Some pivoting is involved in this". *Id.* at 18. Dr. Walden noted that Claimant's meniscal tear was continuing to cause medially based pain. Regarding causation, Dr. Walden noted:

> "[Claimant] is having a significant increase in pain compared to her preinjury status, however the findings on her x-rays and MRI scan do indicate some underlying osteoarthritis of the medial femoral condyle and patellofemoral joint. There is also a horizontal tear without significant effusion. This could result from an acute irritation of underlying osteoarthritis, and acute irritation of a chronic meniscus tear, or a new tear. [It] is difficult to know.

15. Claimant's ongoing pain in combination with the presence of both osteoarthritis and a horizontal tear of the medial meniscus prompted Dr. Walden to recommend the administration of a steroid injection, which he concluded, "might be beneficial for diagnostic and potentially therapeutic purposes". (Resp. Ex. B, p. 18). The ALJ interprets the recommendation for a steroid injection to constitute Dr. Walden's attempt to treat and delineate the cause of Claimant's pain, i.e. whether the pain was emanating from her osteoarthritis, which would respond to a corticosteroid injection or whether her pain was related to the meniscal tear, which would not respond to such an injection.

16. Claimant testified the injection performed by Dr. Walden reduced the swelling in her knee, but did not do anything for her pain.

17. Claimant returned to Dr. Walden on September 28, 2021. (Resp. Ex. B., pp. 22-25). She reported that her pain was not relieved by the injection administered during her prior visit. *Id.* at 22. It was also noted during this appointment, that Claimant had undergone a couple of sessions of physical therapy before she stopped because her knee felt like it was "sticking." *Id.* Dr. Walden recommended an arthroscopy of the knee with a probable partial medial meniscectomy versus repair. *Id.* He put in a request for prior authorization on September 29, 2021. (Clmt. Ex. 5, p. 71). It was Claimant's understanding the surgery was necessary because the meniscal tear caused a "flap" of torn tissue that needed to be removed in order for her condition to improve. The request was denied and Claimant has not been afforded ongoing care. (Tr. 23:2-6).

The Independent Medical Examination of Dr. Farber

18. Dr. Adam Farber performed an independent medical examination (IME) of

Claimant at Respondents request on October 27, 2021. (Resp. Ex. A., pp. 1-17). Dr. Farber described the same "sidestepping" MOI as other providers, failing to document any of the turning/pivoting motion involved in completion of Claimant's job duties as documented by Dr. Walden. *Id.* at 3. Dr. Farber's report specifically states, "She does not report a twisting injury to her left knee either." *Id.* At the time of her IME, Claimant reported ongoing left knee pain and swelling to Dr. Farber. *Id.* at 9. Despite Dr. Walden eliciting a positive medial McMurray's test, Dr. Farber's examination did not document any medial knee pain. *Id.* at 13. Indeed, Dr. Farber noted that his "physical exam findings do not demonstrate any objective abnormalities related to the industrial injury in question." He went on to indicate that "[Claimant] has diffuse multifocal non-localizing tenderness but no localizing joint line tenderness" and "no visible swelling, reproducible mechanical symptoms, or medial sided knee pain with McMurray's testing, although this maneuver does result in lateral sided knee pain". (Resp. Ex. A, p. 15).

19. Although Claimant's MRI did show radiographic evidence of a horizontal tear of the medial meniscus, Dr. Farber, concluded that the tear appeared degenerative in nature. He noted that the tearing pattern visualized was also an incidental finding frequently seen in association with underlying osteoarthritis, which was also present on the MRI. (Resp. Ex. A, p. 16). Accordingly, Dr. Farber opined: "[G]iven the video footage provided for my review demonstrating the nature of her occupational activities, it is unlikely that this mechanism resulted in an acute meniscal tear." *Id.* at 15.

20. Dr. Farber opined that Claimant's subjective left knee complaints were "grossly" out of proportion to the objective findings on physical examination and imaging study. Consequently, Dr. Farber concluded that Claimant's physical exam/MRI findings "do not support any diagnosis or diagnoses that would explain her subjective symptoms especially as it relates to the industrial injury in question". *Id.* Dr. Farber ultimately concluded, that given the "nature of [Claimant's] work activities, the documented medical records . . . outlining her initial clinical symptoms and exam findings, the objective x-ray and MRI findings, her current symptoms, and [his] physical examination findings, there is no evidence to support a causal relationship between the industrial injury and her current left knee pain or her diffuse right lower extremity symptoms". (Resp. Ex. A, p. 14).

21. In support of his opinions, Dr. Farber explicitly relied upon his review of the job demands video prepared by Respondents in this case. (Resp. Ex. A, p. 15). As noted above, review of the video shows LL[Redacted] performing tasks that require her to repeatedly walk from one end of the table to the other. With each return to the previous end, or to the middle of the table, LL[Redacted] is observed to turn and pivot her body as she starts walking sideways, approximately at a 45-degree angle to the table. The ALJ credits the video as an accurate representation of Claimant's work duties to find that she does not rely solely on "sidestepping" from one end of the table to the other to complete the tasks associated with catheter assembly. Indeed, the notion that Claimant completes the steps necessary to assemble the catheters by sidestepping only is inconsistent with the content of the video. Despite it being evident Claimant would/does not purely sidestep for her entire shift, Dr. Farber concludes the following: "[T]he described mechanism of injury, *simply sidestepping*, cannot reasonably be expected" to cause Claimant's left knee condition and need for treatment. *Id.* at 16 (emphasis added).

The Independent Medical Examination of Dr. Rook

22. Claimant subsequently underwent an IME with Dr. Jack Rook at the request of Claimant's counsel. (Clmt. Ex. 6, pp. 72-90). Dr. Rook examined Claimant on December 2, 2021 and authored a report in conjunction with that examination. *Id.* at 72-85. Dr. Rook documented that Claimant works as an assembler, requiring her to be on her feet from 7 to 9 hours per day, working at the 12-foot table seen in the submitted video. *Id.* at 72. He documented that she is either standing or moving laterally from side to side for the duration of her shift. *Id.* Similar to Dr. Walden, Dr. Rook focuses on the critical fact of Claimant's turning, i.e. pivoting while performing her work duties. Dr. Rook documented that as Claimant would travel along each side of the table, there is a degree of trunk rotation "with her feet planted as she manipulates the clamps." *Id.* 72. As noted, the aforementioned video captures LL[Redacted] engaging in a degree of trunk rotation as she travels the length of the assembly table. Although the video does not capture the movement of LL[Redacted] legs/feet repeatedly, she is seen turning her body while pivoting on her left foot in order to walk to the left end of the assembly table to unclamp the end of the catheter she is constructing on one occasion. According to the history obtained by Dr. Rook, Claimant makes 20 to 25 catheters per hour, requiring her to move back and forth 2 to 3 times per catheter. Thus, the ALJ finds it reasonable to infer that while assembling catheters, Claimant is probably pivoting to the left and right multiple times every hour and perhaps hundreds of times per shift.

23. Claimant was asked about why she consistently reported that her injury occurred while "sidestepping." Claimant testified that she reported the injury as occurring during sidestepping because she herself did not appreciate the significance of any twisting/pivoting motion involved with her work. She demonstrated to Dr. Rook exactly how she was injured. Dr. Rook then observed that she was in fact pivoting during her demonstration, which LL[Redacted] also performed during the aforementioned video replicating the job duties associated with assembling catheters. (Tr. 40:2-11; Resp. Ex. E).

24. Dr. Rook notes that Dr. Ritch stopped physical therapy after Claimant reported catching in her left knee. (Clmt. Ex. 6, p. 74). He also documented Claimant's ongoing left knee pain, "primarily along the medial knee joint," although she did have some discomfort along the lateral side as well. *Id.* at 74. His physical examination documented severe medial tenderness with minimal lateral tenderness. *Id.* at 80. Based upon the history provided, his medical records review and his physical examination, Dr. Rook opined that Claimant probably tore her medial meniscus at work while performing the work duties associated with catheter assembly. *Id.* at 81-82. Regarding causation, Dr. Rook noted that the "combination of the lateral movement, the planted foot, and the [Claimant's] weight (she is morbidly obese) created enough stress to damage her medial meniscus". *Id.* at 82. Moreover, Dr. Rook noted that Claimant was not "involved in any traumatic events around the time outside of work to account for this condition". *Id.*

25. Dr. Rook explained that he was in disagreement with most of Dr. Farber's conclusions. (Clmt. Ex. 6, pp. 83-85). Dr. Rook summarizes that Dr. Farber was of the

opinion that there was no medical evidence to support a causal relationship between Claimant's reported injury and her current left knee symptoms. *Id.* at 83. Dr. Rook disagrees, noting that the content of Claimant's medical records belie this conclusion. Indeed, Dr. Rook notes that the first report of injury documents that Claimant felt a snap on the inside/medial side of her left knee. *Id.* Furthermore, Dr. Rook notes that the initial medical report of Dr. Ritch documents that Claimant felt a "sudden" pain in the medial aspect of the left knee. *Id.* According to Dr. Rook, this early post-injury documentation is consistent with an acute injury to the medial meniscus. *Id.* Dr. Rook next addressed Dr. Farber's contention that Claimant's symptoms are more consistent with symptomatic osteoarthritis versus the meniscal tear. Dr. Rook rebuts Dr. Farber by noting that while there is a presence of osteoarthritis, there is no evidence in the medical record to suggest the arthritis was limiting or requiring any form of treatment. *Id.* at 84. Based upon the entirety of the medical record, Dr. Rook opined that Claimant sustained an acute tearing of the medial meniscus along with aggravation of her underlying osteoarthritis, which he concluded constituted a compensable injury. *Id.* at 85.

The Deposition Testimony of Dr. Walden

26. Dr. David Walden testified via evidentiary deposition on January 4, 2022 in his capacity as Claimant's treating surgeon. Dr. Walden testified as a Level II accredited expert in orthopedic surgery and sports medicine. (Depo. 5:2 – 6:12). Dr. Walden reviewed his medical records; Claimant's imaging studies and Dr. Farber's IME report before testifying. (Depo. 6:14-21). Dr. Walden testified that he met with Claimant on two occasions, those being the documented visits on August 31, 2021 and September 28, 2021. Dr. Walden was asked his understanding of Claimant's mechanism of injury to which he responded: "She reported to me that she was—she had to take items from the right and move them to the left, *which required her to move her feet, do a little bit of twisting*. And that on one of those occasions, she felt a pop in her knee with pain immediately." (Depo. 7:16 – 8:1)(emphasis added). Dr. Walden explained that Claimant's mechanism of injury, which involved a degree of twisting, and the associated popping/snapping described by Claimant along with the examination finding of medial joint line tenderness were indicative of a meniscal injury. It was his opinion that the meniscus tear was either an acute tear, or a condition made worse by Claimant's work activity. He did not believe that the osteoarthritis visualized on MRI was caused by Claimant's work related injury. He testified that because he did not know whether Claimant's pain was "coming primarily from arthritis or the meniscal tear, he directed a steroid shot into the knee. As noted at paragraph 14 above, Dr. Walden elected to administer the steroid injection for both diagnostic and therapeutic purposes. Because the steroid injection was not overly helpful in reducing Claimant's pain, Dr. Walden felt there was a mechanical issue, i.e. a meniscal tear within the knee that was driving Claimant's persistent symptoms. (Depo. 9:5 – 10:11). Simply stated, the results of Claimant's injection were diagnostic for internal disruption of the left knee rather than just arthritis.

27. Dr. Walden was asked about Dr. Farber's commentary that Claimant's meniscal tear was a degenerative in nature. Dr. Walden explained that with any tear, there is going to be a day that it was not torn, followed by the day it tears. "So calling

something degenerative when you really don't have any idea whether or not that's the case, is just a cop out", according to Dr. Walden. Dr. Walden explained the tear needs to be looked at in conjunction with other factors, such as whether there was some sort of precipitating event associated with the onset of symptoms, i.e., a twist with a pop in the knee, in order to determine whether an injury and need for treatment is "degenerative" or acute. According to Dr. Walden, there is really no way to tell simply from an MRI whether a tear is degenerative. Based on all the different factors/information he was provided in this case, Dr. Walden opined that Claimant sustained an acute injury requiring treatment. (Depo. 10:23 – 12:17).

28. Dr. Walden further supported his diagnosis and need for surgery for the meniscal tear by explaining the steroid shot has been shown to have beneficial effects for the treatment of arthritic sources of pain, but is not really a treatment option for meniscal tears. (Depo. 13:1-24). Dr. Farber stated in his report and his subsequent testimony that Claimant's lack of a pain reduction response to the steroid injection argued against the meniscus tear being Claimant's current pain generator. (Resp. Ex. A, p. 106; Tr. 75:23-25; 76:1-22).

29. As noted, Dr. Walden testified that he performed the steroid injection, which may have helped some with swelling and maybe a little with pain, but her condition overall did not improve much. He also explained the steroid shot would not be expected to help with a meniscal tear. This led Dr. Walden to believe there was both an arthritic and a structural, i.e. meniscal tear component to Claimant's ongoing pain. (Depo. 9:12 – 10:11). Regardless, it was his opinion the arthritis was aggravated by Claimant's work activities, as he previously stated in his report. He testified on cross-examination that there are in fact patients who have irritation of arthritis from nothing more than regular activities, "But I don't think that's what happened here." (Depo. 27:6-17). Dr. Walden was asked why he recommended/requested authorization for an arthroscopic evaluation of the knee with likely partial medial meniscectomy versus repair, to which he replied succinctly, "Because that's the treatment recommended for a meniscal tear that has mechanical symptoms." (Depo. 15:22 – 16:6).

The Testimony of LL[Redacted]

30. LL[Redacted] testified at hearing on behalf of Respondents in her capacity as a "line lead" for Employer. (Tr. 44:13-25). LL[Redacted] is responsible for making sure those on the "line" perform their jobs properly to ensure smooth business operations. She is familiar with how to fabricate the catheters that Claimant assembles on a daily basis. As noted above, LL[Redacted] is the individual seen in the video demonstrating how to assemble the catheters Claimant was constructing at the time of her alleged injury. (Tr. 45:1-25). LL[Redacted] confirmed the essential job duties of assembling catheters as testified to by Claimant. (Tr. 46:1-12). She testified it was her opinion there was no "forceful" twisting of the knee involved with performing that job task, not that there was no twisting. (Tr. 47:2-5). In fact, LL[Redacted] admitted that she has to "turn [her] entire body" to walk alongside the table. (Tr. 47:20-25). She does not merely "sidestep" when performing the job duties associated with catheter fabrication.

The Testimony of Dr. Farber

31. Dr. Farber testified at hearing on behalf of Respondents. Dr. Farber testified that Claimant did not explain to him any kind of rotation or pivot at the time of injury. (Tr. 52:8-18). Dr. Farber testified that, during his IME examination, Claimant denied twisting the knee. (Tr. 52:15-18; 53:19-25; 54:1-7). Additionally, he testified that Claimant's complaints were inconsistent with the MRI findings. (Tr. 61:9-19). Dr. Farber explained that the classic cause of a meniscus tear is an acute, sudden, *forceful* pivoting activity – a "dramatic" twist or pivot, not just a slight turn while walking along a table. (Tr. 61:23-25; 62:1-3). While Dr. Farber explained that a "forceful" twisting/pivoting activity is often the cause of acute meniscal tears, he also testified Claimant was predisposed to susceptibility to meniscal tears given her "morbid obesity." (Tr. 58:3-25).

32. Dr. Farber also testified that Claimant's severely morbid obesity results in a higher incidence of knee pain, knee arthritis and degenerative meniscus tears. (Tr. 58:10-25). Further, he explained that a "snap" is a "very non-specific symptom" and people with arthritis get snaps and pops all the time in their knee". (Tr. 68:20-25). Nonetheless, he testified that a snap is "by no means, indicative of one specific diagnosis. (Tr. 68:23-25; 69:1-2). Rather, it (snap) is a piece of the puzzle, which is not exclusively diagnostic, in and of itself, of a meniscus tear. Because a snap is not indicative of any specific diagnosis, the ALJ finds from Dr. Farber's testimony that it could be associated with arthritis or a meniscus tear.

33. Dr. Farber's testified that "given the nature of her injury, her described mechanism, her weight, the presence of arthritis on her X-rays and MRI scan, and the symptoms that she presented with when I evaluated her, and the – the exam findings that I documented when I evaluated her, I don't think surgery is appropriate, would benefit her at all." (Tr. 71:13-20).

34. During cross-examination, Dr. Farber admitted that there is no evidence to support a finding that Claimant was having any difficulties (symptoms) or required treatment for any left knee condition leading up to the June 18, 2021 incident. (Tr. 73:1-7). He noted further that Claimant's symptoms at the time she first presented to Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). He testified, "A lot of different things can aggravate arthritis" including repetitive standing and walking, ten-hour shifts or Claimant's routine day-to-day activities. (Tr. 73:13-20). He reiterated his position that the aggravation did not have to come from the "slight twist from working on her catheters". *Id.* Nonetheless, he did not eliminate that MOI (twisting/pivoting) as the potential cause surrounding the aggravation of Claimant's underlying arthritis.

35. Concerning the meniscal tear, Dr. Farber admitted that a degenerated meniscus could be torn more readily than one that is not compromised. (Tr. 74:23-25). He testified that he did not believe that a "slight pivot" could have caused the meniscal tear, but later agreed that prolonged walking or standing in combination with Claimant's age and weight could cause a tear. (Tr. 75:1-11). Indeed, Dr. Farber admitted that just

about “anything could cause it” before adding that he would not attribute the tear to that one activity of pivoting while assembling catheters. (Tr. 75:12-22).

36. Based upon the entirety of the evidence presented, the ALJ finds the opinions and analyses of Drs. Rook and Walden to be more reliable and persuasive than those of Dr. Farber.

37. The ALJ credits the opinions of Drs. Rook and Walden and Claimant’s testimony to find that she has established, by a preponderance of the evidence, that she sustained a compensable injury to her left knee on June 18, 2021.

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, §§ 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. The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The 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).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of 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'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*, 57 P.2d 1205 (Colo. 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,* 441 P.2d 21 (Colo. 1968). In this case, Claimant’s reporting concerning the MOI has been consistent as simply as sidestepping to the left. The evidence presented supports a conclusion that Claimant’s actions on June 18, 2021 were

consistent with the actions seen on the video. The video unequivocally demonstrates the twisting/pivoting motion necessary for LL[Redacted] to turn from one end to walk toward the other. This is the same observation made by Dr. Rook during his independent medical examination that largely formed his opinion. Dr. Rook saw the pivot/twisting involved with Claimant's feet when he asked her to demonstrate how she was injured. It is also the same understanding regarding the MOI held by Dr. Walden. Dr. Farber's opinion was based largely on Claimant's described mechanism of injury being "sidestepping." The video evidence refutes this assumption. Claimant does not deny that she has described her actions as "sidestepping." Based upon the evidence presented, the ALJ is persuaded that Claimant did not appreciate the role that twisting/pivoting to the left on her planted leg played in causing her injury as she moved toward the end of the assembly table. Consequently, she simply described the MOI as sidestepping. While Claimant did not provide a detailed description of all the movements involved in the MOI in this case, the ALJ is persuaded that Claimant was injured while moving from one end of the assembly table to the other on June 18, 2021. Accordingly, the ALJ finds Claimant's current reports of pain and dysfunction reliable and persuasive. Based on this and the totality of the evidence presented, the expert medical opinions of Drs. Rook and Walden are more persuasive than the contrary opinions of Dr. Farber.

C. 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).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *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.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of her employment relationship with Employer, i.e. at a catheter assembly table during her regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely catheter assembly, which the ALJ concludes is expected of Claimant in her position as an assembler. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" her employment must be resolved before the injury can be deemed compensable.

E. The “arising out of” element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term “arising out of” calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant’s injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which 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).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant’s left knee was symptomatic or required treatment before June 18, 2021. The evidence presented supports a conclusion that Claimant sought care following the June 18, 2021 incident, for symptoms she attributed to repetitive sidestepping involving slight twisting/pivoting while moving along the catheter assembly table. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working her job despite the onset of symptoms. As found, the ALJ credits the opinions of Dr. Rook and Dr. Walden to conclude that Claimant either suffered an acute irritation/aggravation of an underlying chronic meniscus tear, or a new meniscal tear as she twisted/pivoted in preparation to move toward the end of catheter assembly table.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing left knee osteoarthritis, the presence of a pre-existing condition “does not disqualify a claimant from receiving workers compensation benefits.” *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment “aggravates, accelerates, or “combines with” a pre-existing infirmity or disease “to produce the disability and/or need for treatment for which workers’ compensation is sought”. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties 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, as asserted by Respondents in this case, the 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); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the onset of symptoms and disability Claimant experienced on June 18, 2021 arose as a consequence of an industrially based aggravation of her underlying left knee osteoarthritis, chronic underlying meniscal tear or a new left meniscal tear. Even Dr. Farber noted that Claimant's symptoms at the time of her initial appointment with Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). Moreover, he agreed that Claimant's repetitive walking, standing and ten-hour shifts could be causative in the onset of her left knee symptoms.

I. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, the discrete injury to Claimant's left knee in this case arose out of her involvement in work activity rather than being precipitated by an idiopathic condition she imported to the work place. Accordingly, the ALJ concludes that Claimant was not required to establish that the concurrence of a pre-existing weakness and a hazard of employment lead to her injury in this case.

J. Analogous to the MOI asserted in *Bastian* and *Fisher*, *supra* the MOI claimed to have caused injury in this case arose from activities that, per Dr. Farber, are the type which should not lead to a finding of compensability because the forces involved are "minimal" and are activities performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically sidestepping, twisting and pivoting, which are performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Respondents. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965).

Contrary to Dr. Farber's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the left medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the MOI in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/pivoting activities at work, her left knee symptoms and her need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

K. 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*.

L. 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). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Ritch and his referrals, including the orthopedic evaluation and surgery recommended by Dr. Walden was/is reasonable, necessary and related to Claimant's June 18, 2021 injury. The aforementioned care provided by Dr. Ritch was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referral to Dr. Walden was reasonable and necessary to determine the extent of injury in light of Claimant's ongoing pain and disability surrounding the function of the left knee. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left knee surgery is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including the recommended arthroscopic evaluation and any definitive treatment directed to the left knee therefrom.

ORDER

It is therefore ordered that:

1. Per the parties' stipulation, Claimant's average weekly wage is $718.70.

2. Claimant has established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

3. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee injury including, but not limited to, the arthroscopic evaluation and medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

4. All matters not determined herein 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: August 17, 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

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $718.70. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

II. If Claimant established that she suffered a compensable left knee injury, whether she also established, that she is entitled to all reasonable, necessary and related medical care to cure and relieve her of the effects of her compensable left knee injury, including but not limited to the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged June 18, 2021 Left Knee Injury

1. Employer operates a medical device assembly and sales business. Claimant works as an assembler for the company. She started working for the Employer roughly one year prior to her alleged June 17-18, 2021, left knee injury. She began her tenure as a "temp" worker around May of 2020 and became a full-time employee in January of 2021.

2. As an assembler, Claimant's job duties required her to stand at a table and "side step" from one end to the other, moving left to right and back repeatedly, at least every minute or so, in order to assemble medical catheters". Claimant began her shift on the evening of June 17, 2021 and had worked into the early hours of June 18, 2021 when she claimed she injured her left knee. Claimant testified that her injury occurred shortly after midnight, so while she reported to work on June 17, 2021 her asserted injury occurred on June 18, 2021.

3. According to Claimant, while she was preparing to close the jacket on a catheter under assembly, she pivoted slightly to side step to the left at which time she felt a "pop" and experienced immediate pain on the inside aspect of the left knee.

4. Claimant testified that she was working a graveyard shift as part of a skeletal crew on the date of injury. According to Claimant, no onsite supervisor was present in the building when she was injured. Consequently, there was no one to whom she could report her injury. Thus, she did not report her injury on the day it occurred. Claimant testified that she did not feel her injury was a "big deal" at the time it happened because she was used to having soreness in many parts of her body after working an 8-10 hour shift, which required prolonged standing/walking, outside of occasional breaks and lunch.

5. Claimant completed her June 17-18, 2021 graveyard shift and was not scheduled to return to work until the following Monday, June 21, 2021. Claimant returned to work as scheduled on Monday and reported the incident/injury. A first report of injury, completed by an individual named Kelly Derusha, states that Claimant, "felt a snap on [the] inside of [her] left knee when stepping from right to left at the workstation." (Resp. Ex. F, p. 94). This document further states she was "stepping to the left" just before the incident occurred. *Id.* Claimant was then provided with a list of doctors to choose from to attend to her alleged injury. She selected Dr. Eric Ritch with Occupational Medical Partners.

The Job Tasks Video

6. Claimant's precise mechanism of injury is in dispute. Respondents prepared a video, which demonstrates the tasks associated with assembly of the type of catheters Claimant was building on June 17-18, 2021. The steps in fabricating these catheters was demonstrated by [Redacted, hereinafter LL]. (Resp. Ex. E, p. 93). Claimant viewed the video and agreed that it revealed, "Pretty much what we do all day." However, she explained the video does not show the body mechanics of the lower half of the body, i.e., the hips, legs, knees, and feet. Indeed, Claimant testified: "[B]ut you can't really see underneath the table, what's going on with the feet. . . . You can see some twisting, but you can't really see the footwork of what's going on under the table." (Tr. 14:17 – 15:1).

7. Careful review of the video largely supports Claimant's contention. The ALJ agrees that during the majority of the video you cannot see the lower half of Ms. LL[Redated]' body or her feet as she moves along the length of the assembly table. However, at 3:13 of the video Ms. LL[Redated] is observed to pivot on her left leg and walk the length of the table to unclamp the end of a fully assembled catheter.

The Medical Record Evidence

8. Claimant described the mechanism of injury (MOI) to Dr. Ritch during her initial appointment on June 24, 2021. (Resp. Ex. D, pp. 30-36). Dr. Ritch documented that Claimant reported an injury while at work assembling catheters. *Id.* at 32. She explained to Dr. Ritch that her job required her to stand at a table and to "side step from one side of the table to the other repeatedly, at least every minute or so, in order to assemble the catheter." *Id.* Dr. Ritch documented mild, i.e. a "small amount" of swelling

in Claimant's left knee during this appointment. (Resp. Ex. D, p. 33). Physical examination also revealed "some" tenderness to palpation of the medial collateral ligament with mild laxity of the MCL. *Id.* Per Dr. Ritch, "This is most likely a direct consequence of doing large amounts of stepping side to side while working. As such, Dr. Ritch noted, "*this injury would almost certainly be considered work related*." *Id.* (emphasis added). Dr. Ritch noted that Claimant had been involved in a motor vehicle accident 30 years prior to her June 17-18, 2021 incident in which she injured her knees but she fully recovered from that accident without any "significant knee problems." Claimant was provided a hinged knee brace and assigned work restrictions for her condition. *Id.*

9. Claimant testified that she was not suffering from any significant left knee condition prior to the June 18, 2021 incident. She was not treating for her left knee, nor was her ability to perform her job impacted by her left knee prior to June 18, 2021. (Tr. 24:16-25). She testified that she has required modified duty in a mostly seated capacity since the incident. (Tr. 26:4-14). Claimant reported that she continued to have persistent, daily knee pain and what she described as visible swelling of the knee through the time of her testimony at hearing. (Tr. 25:5-13).

10. Dr. Ritch observed Claimant to be walking with a limp at her next visit a week later on July 1, 2021. *Id.* at 38. During this appointment, Claimant reported that she had not improved and the brace she was provided would not stay on her knee properly. *Id.* at 37. Dr. Ritch advised her to stop wearing the brace given how poorly it fit. He recommended that Claimant undergo a few weeks of physical therapy (PT) and then consider an MRI if she failed to improve. *Id.* at 39.

11. Claimant reported the same MOI when she was seen by the physical therapist for the first time. Indeed, the initial PT note indicates: "Patient reports [she] was side stepping at work and felt a snap in the L medial knee. After this [she] felt a burning sensation and noticed swelling." *Id.* at 41.

12. Claimant reported to Dr. Ritch on July 14, 2021, that the physical therapy was not providing any relief and, if anything, she was having more pain in her right knee and hip from compensation for her left knee injury. (Resp. Ex. D, p. 45). She continued to have ongoing left medial knee pain made worse by standing or working. *Id.* at 46. Dr. Ritch examined Claimant's knee for swelling; however, her body habitus made that near impossible. Regarding this swelling, Dr. Ritch noted, "The patient's left knee is not obviously swollen, although the patient's body habitus makes it almost impossible to determine if she has a small joint effusion." *Id.* at 47. He recommended an MRI. *Id.*

13. A left knee MRI was performed on July 30, 2021 at Colorado Springs Imaging. (Resp. Ex. C, pp. 26-27). The MRI revealed a horizontal tear in the body and posterior horn of the medial meniscus. *Id.* at 26. The MRI also demonstrated some mild to moderate chondral fibrillation. *Id.* at 27. Dr. Ritch referred Claimant to Dr. David Walden to evaluate her for treatment based on the MRI findings. He also asked Dr. Walden to comment on causation of the torn medial meniscus observed on MRI. (Resp.

Ex. D, p. 55). Dr. Ritch stated that Claimant's MOI was not "classic" for a torn meniscus. *Id.* at 59. It is noted, however, that none of Claimant's providers to this point appreciated the fact that her job required her to turn and pivot to some degree to walk back and forth from each end of the table. Rather, the records simply refer to Claimant having to side step repeatedly to complete her job duties.

14. Dr. Walden first examined Claimant on August 31, 2021. (Resp. Ex. B, pp. 18-21). He was also the first provider to appreciate the pivoting associated with Claimant's need to turn and walk the length of the assembly table to complete her job duties. Claimant informed Dr. Walden that she was working on the assembly line with her feet planted, moving things from a right to left position prompting Dr. Walden to note: "Some pivoting is involved in this". *Id.* at 18. Dr. Walden noted that Claimant's meniscal tear was continuing to cause medially based pain. Regarding causation, Dr. Walden noted:

> "[Claimant] is having a significant increase in pain compared to her preinjury status, however the findings on her x-rays and MRI scan do indicate some underlying osteoarthritis of the medial femoral condyle and patellofemoral joint. There is also a horizontal tear without significant effusion. This could result from an acute irritation of underlying osteoarthritis, and acute irritation of a chronic meniscus tear, or a new tear. [It] is difficult to know.

15. Claimant's ongoing pain in combination with the presence of both osteoarthritis and a horizontal tear of the medial meniscus prompted Dr. Walden to recommend the administration of a steroid injection, which he concluded, "might be beneficial for diagnostic and potentially therapeutic purposes". (Resp. Ex. B, p. 18). The ALJ interprets the recommendation for a steroid injection to constitute Dr. Walden's attempt to treat and delineate the cause of Claimant's pain, i.e. whether the pain was emanating from her osteoarthritis, which would respond to a corticosteroid injection or whether her pain was related to the meniscal tear, which would not respond to such an injection.

16. Claimant testified the injection performed by Dr. Walden reduced the swelling in her knee, but did not do anything for her pain.

17. Claimant returned to Dr. Walden on September 28, 2021. (Resp. Ex. B., pp. 22-25). She reported that her pain was not relieved by the injection administered during her prior visit. *Id.* at 22. It was also noted during this appointment, that Claimant had undergone a couple of sessions of physical therapy before she stopped because her knee felt like it was "sticking." *Id.* Dr. Walden recommended an arthroscopy of the knee with a probable partial medial meniscectomy versus repair. *Id.* He put in a request for prior authorization on September 29, 2021. (Clmt. Ex. 5, p. 71). It was Claimant's understanding the surgery was necessary because the meniscal tear caused a "flap" of torn tissue that needed to be removed in order for her condition to improve. The request was denied and Claimant has not been afforded ongoing care. (Tr. 23:2-6).

The Independent Medical Examination of Dr. Farber

18. Dr. Adam Farber performed an independent medical examination (IME) of Claimant at Respondents request on October 27, 2021. (Resp. Ex. A., pp. 1-17). Dr. Farber described the same "sidestepping" MOI as other providers, failing to document any of the turning/pivoting motion involved in completion of Claimant's job duties as documented by Dr. Walden. *Id.* at 3. Dr. Farber's report specifically states, "She does not report a twisting injury to her left knee either." *Id.* At the time of her IME, Claimant reported ongoing left knee pain and swelling to Dr. Farber. *Id.* at 9. Despite Dr. Walden eliciting a positive medial McMurray's test, Dr. Farber's examination did not document any medial knee pain. *Id.* at 13. Indeed, Dr. Farber noted that his "physical exam findings do not demonstrate any objective abnormalities related to the industrial injury in question." He went on to indicate that "[Claimant] has diffuse multifocal non-localizing tenderness but no localizing joint line tenderness" and "no visible swelling, reproducible mechanical symptoms, or medial sided knee pain with McMurray's testing, although this maneuver does result in lateral sided knee pain". (Resp. Ex. A, p. 15).

19. Although Claimant's MRI did show radiographic evidence of a horizontal tear of the medial meniscus, Dr. Farber, concluded that the tear appeared degenerative in nature. He noted that the tearing pattern visualized was also an incidental finding frequently seen in association with underlying osteoarthritis, which was also present on the MRI. (Resp. Ex. A, p. 16). Accordingly, Dr. Farber opined: "[G]iven the video footage provided for my review demonstrating the nature of her occupational activities, it is unlikely that this mechanism resulted in an acute meniscal tear." *Id.* at 15.

20. Dr. Farber opined that Claimant's subjective left knee complaints were "grossly" out of proportion to the objective findings on physical examination and imaging study. Consequently, Dr. Farber concluded that Claimant's physical exam/MRI findings "do not support any diagnosis or diagnoses that would explain her subjective symptoms especially as it relates to the industrial injury in question". *Id.* Dr. Farber ultimately concluded, that given the "nature of [Claimant's] work activities, the documented medical records . . . outlining her initial clinical symptoms and exam findings, the objective x-ray and MRI findings, her current symptoms, and [his] physical examination findings, there is no evidence to support a causal relationship between the industrial injury and her current left knee pain or her diffuse right lower extremity symptoms". (Resp. Ex. A, p. 14).

21. In support of his opinions, Dr. Farber explicitly relied upon his review of the job demands video prepared by Respondents in this case. (Resp. Ex. A, p. 15). As noted above, review of the video shows Ms. LL[Redated] performing tasks that require her to repeatedly walk from one end of the table to the other. With each return to the previous end, or to the middle of the table, Ms. LL[Redated] is observed to turn and pivot her body as she starts walking sideways, approximately at a 45-degree angle to the table. The ALJ credits the video as an accurate representation of Claimant's work duties to find that she does not rely solely on "sidestepping" from one end of the table to

the other to complete the tasks associated with catheter assembly. Indeed, the notion that Claimant completes the steps necessary to assemble the catheters by sidestepping only is inconsistent with the content of the video. Despite it being evident Claimant would/does not purely sidestep for her entire shift, Dr. Farber concludes the following: "[T]he described mechanism of injury, *simply sidestepping*, cannot reasonably be expected" to cause Claimant's left knee condition and need for treatment. *Id.* at 16 (emphasis added).

The Independent Medical Examination of Dr. Rook

22. Claimant subsequently underwent an IME with Dr. Jack Rook at the request of Claimant's counsel. (Clmt. Ex. 6, pp. 72-90). Dr. Rook examined Claimant on December 2, 2021 and authored a report in conjunction with that examination. *Id.* at 72-85. Dr. Rook documented that Claimant works as an assembler, requiring her to be on her feet from 7 to 9 hours per day, working at the 12-foot table seen in the submitted video. *Id.* at 72. He documented that she is either standing or moving laterally from side to side for the duration of her shift. *Id.* Similar to Dr. Walden, Dr. Rook focuses on the critical fact of Claimant's turning, i.e. pivoting while performing her work duties. Dr. Rook documented that as Claimant would travel along each side of the table, there is a degree of trunk rotation "with her feet planted as she manipulates the clamps." *Id.* 72. As noted, the aforementioned video captures Ms. LL[Redated] engaging in a degree of trunk rotation as she travels the length of the assembly table. Although the video does not capture the movement of Ms. LL[Redated]' legs/feet repeatedly, she is seen turning her body while pivoting on her left foot in order to walk to the left end of the assembly table to unclamp the end of the catheter she is constructing on one occasion. According to the history obtained by Dr. Rook, Claimant makes 20 to 25 catheters per hour, requiring her to move back and forth 2 to 3 times per catheter. Thus, the ALJ finds it reasonable to infer that while assembling catheters, Claimant is probably pivoting to the left and right multiple times every hour and perhaps hundreds of times per shift.

23. Claimant was asked about why she consistently reported that her injury occurred while "sidestepping." Claimant testified that she reported the injury as occurring during sidestepping because she herself did not appreciate the significance of any twisting/pivoting motion involved with her work. She demonstrated to Dr. Rook exactly how she was injured. Dr. Rook then observed that she was in fact pivoting during her demonstration, which Ms. LL[Redated] also performed during the aforementioned video replicating the job duties associated with assembling catheters. (Tr. 40:2-11; Resp. Ex. E).

24. Dr. Rook notes that Dr. Ritch stopped physical therapy after Claimant reported catching in her left knee. (Clmt. Ex. 6, p. 74). He also documented Claimant's ongoing left knee pain, "primarily along the medial knee joint," although she did have some discomfort along the lateral side as well. *Id.* at 74. His physical examination documented severe medial tenderness with minimal lateral tenderness. *Id.* at 80. Based upon the history provided, his medical records review and his physical examination, Dr. Rook opined that Claimant probably tore her medial meniscus at work while performing

the work duties associated with catheter assembly. *Id.* at 81-82. Regarding causation, Dr. Rook noted that the "combination of the lateral movement, the planted foot, and the [Claimant's] weight (she is morbidly obese) created enough stress to damage her medial meniscus". *Id.* at 82. Moreover, Dr. Rook noted that Claimant was not "involved in any traumatic events around the time outside of work to account for this condition". *Id.*

25. Dr. Rook explained that he was in disagreement with most of Dr. Farber's conclusions. (Clmt. Ex. 6, pp. 83-85). Dr. Rook summarizes that Dr. Farber was of the opinion that there was no medical evidence to support a causal relationship between Claimant's reported injury and her current left knee symptoms. *Id.* at 83. Dr. Rook disagrees, noting that the content of Claimant's medical records belie this conclusion. Indeed, Dr. Rook notes that the first report of injury documents that Claimant felt a snap on the inside/medial side of her left knee. *Id.* Furthermore, Dr. Rook notes that the initial medical report of Dr. Ritch documents that Claimant felt a "sudden" pain in the medial aspect of the left knee. *Id.* According to Dr. Rook, this early post-injury documentation is consistent with an acute injury to the medial meniscus. *Id.* Dr. Rook next addressed Dr. Farber's contention that Claimant's symptoms are more consistent with symptomatic osteoarthritis versus the meniscal tear. Dr. Rook rebuts Dr. Farber by noting that while there is a presence of osteoarthritis, there is no evidence in the medical record to suggest the arthritis was limiting or requiring any form of treatment. *Id.* at 84. Based upon the entirety of the medical record, Dr. Rook opined that Claimant sustained an acute tearing of the medial meniscus along with aggravation of her underlying osteoarthritis, which he concluded constituted a compensable injury. *Id.* at 85.

The Deposition Testimony of Dr. Walden

26. Dr. David Walden testified via evidentiary deposition on January 4, 2022 in his capacity as Claimant's treating surgeon. Dr. Walden testified as a Level II accredited expert in orthopedic surgery and sports medicine. (Depo. 5:2 – 6:12). Dr. Walden reviewed his medical records; Claimant's imaging studies and Dr. Farber's IME report before testifying. (Depo. 6:14-21). Dr. Walden testified that he met with Claimant on two occasions, those being the documented visits on August 31, 2021 and September 28, 2021. Dr. Walden was asked his understanding of Claimant's mechanism of injury to which he responded: "She reported to me that she was—she had to take items from the right and move them to the left, *which required her to move her feet, do a little bit of twisting*. And that on one of those occasions, she felt a pop in her knee with pain immediately." (Depo. 7:16 – 8:1)(emphasis added). Dr. Walden explained that Claimant's mechanism of injury, which involved a degree of twisting, and the associated popping/snapping described by Claimant along with the examination finding of medial joint line tenderness were indicative of a meniscal injury. It was his opinion that the meniscus tear was either an acute tear, or a condition made worse by Claimant's work activity. He did not believe that the osteoarthritis visualized on MRI was caused by Claimant's work related injury. He testified that because he did not know whether Claimant's pain was "coming primarily from arthritis or the meniscal tear, he directed a

steroid shot into the knee. As noted at paragraph 14 above, Dr. Walden elected to administer the steroid injection for both diagnostic and therapeutic purposes. Because the steroid injection was not overly helpful in reducing Claimant's pain, Dr. Walden felt there was a mechanical issue, i.e. a meniscal tear within the knee that was driving Claimant's persistent symptoms. (Depo. 9:5 – 10:11). Simply stated, the results of Claimant's injection were diagnostic for internal disruption of the left knee rather than just arthritis.

27. Dr. Walden was asked about Dr. Farber's commentary that Claimant's meniscal tear was a degenerative in nature. Dr. Walden explained that with any tear, there is going to be a day that it was not torn, followed by the day it tears. "So calling something degenerative when you really don't have any idea whether or not that's the case, is just a cop out", according to Dr. Walden. Dr. Walden explained the tear needs to be looked at in conjunction with other factors, such as whether there was some sort of precipitating event associated with the onset of symptoms, i.e., a twist with a pop in the knee, in order to determine whether an injury and need for treatment is "degenerative" or acute. According to Dr. Walden, there is really no way to tell simply from an MRI whether a tear is degenerative. Based on all the different factors/information he was provided in this case, Dr. Walden opined that Claimant sustained an acute injury requiring treatment. (Depo. 10:23 – 12:17).

28. Dr. Walden further supported his diagnosis and need for surgery for the meniscal tear by explaining the steroid shot has been shown to have beneficial effects for the treatment of arthritic sources of pain, but is not really a treatment option for meniscal tears. (Depo. 13:1-24). Dr. Farber stated in his report and his subsequent testimony that Claimant's lack of a pain reduction response to the steroid injection argued against the meniscus tear being Claimant's current pain generator. (Resp. Ex. A, p. 106; Tr. 75:23-25; 76:1-22).

29. As noted, Dr. Walden testified that he performed the steroid injection, which may have helped some with swelling and maybe a little with pain, but her condition overall did not improve much. He also explained the steroid shot would not be expected to help with a meniscal tear. This led Dr. Walden to believe there was both an arthritic and a structural, i.e. meniscal tear component to Claimant's ongoing pain. (Depo. 9:12 – 10:11). Regardless, it was his opinion the arthritis was aggravated by Claimant's work activities, as he previously stated in his report. He testified on cross-examination that there are in fact patients who have irritation of arthritis from nothing more than regular activities, "But I don't think that's what happened here." (Depo. 27:6-17). Dr. Walden was asked why he recommended/requested authorization for an arthroscopic evaluation of the knee with likely partial medial meniscectomy versus repair, to which he replied succinctly, "Because that's the treatment recommended for a meniscal tear that has mechanical symptoms." (Depo. 15:22 – 16:6).

The Testimony of Lizbeth LL[Redated]

30. Ms. Lizbeth LL[Redated] testified at hearing on behalf of Respondents in her
capacity as a “line lead” for Employer. (Tr. 44:13-25). Ms. LL[Redated] is responsible for making sure those on the “line” perform their jobs properly to ensure smooth business operations. She is familiar with how to fabricate the catheters that Claimant assembles on a daily basis. As noted above, Ms. LL[Redated] is the individual seen in the video demonstrating how to assemble the catheters Claimant was constructing at the time of her alleged injury. (Tr. 45:1-25). Ms. LL[Redated] confirmed the essential job duties of assembling catheters as testified to by Claimant. (Tr. 46:1-12). She testified it was her opinion there was no “forceful” twisting of the knee involved with performing that job task, not that there was no twisting. (Tr. 47:2-5). In fact, Ms. LL[Redated] admitted that she has to “turn [her] entire body” to walk alongside the table. (Tr. 47:20-25). She does not merely “sidestep” when performing the job duties associated with catheter fabrication.

The Testimony of Dr. Farber

31. Dr. Farber testified at hearing on behalf of Respondents. Dr. Farber testified that Claimant did not explain to him any kind of rotation or pivot at the time of injury. (Tr. 52:8-18). Dr. Farber testified that, during his IME examination, Claimant denied twisting the knee. (Tr. 52:15-18; 53:19-25; 54:1-7). Additionally, he testified that Claimant’s complaints were inconsistent with the MRI findings. (Tr. 61:9-19). Dr. Farber explained that the classic cause of a meniscus tear is an acute, sudden, *forceful* pivoting activity – a “dramatic” twist or pivot, not just a slight turn while walking along a table. (Tr. 61:23-25; 62:1-3). While Dr. Farber explained that a “forceful” twisting/pivoting activity is often the cause of acute meniscal tears, he also testified Claimant was predisposed to susceptibility to meniscal tears given her “morbid obesity.” (Tr. 58:3-25).

32. Dr. Farber also testified that Claimant’s severely morbid obesity results in a higher incidence of knee pain, knee arthritis and degenerative meniscus tears. (Tr. 58:10-25). Further, he explained that a “snap” is a “very non-specific symptom” and people with arthritis get snaps and pops all the time in their knee”. (Tr. 68:20-25). Nonetheless, he testified that a snap is “by no means, indicative of one specific diagnosis. (Tr. 68:23-25; 69:1-2). Rather, it (snap) is a piece of the puzzle, which is not exclusively diagnostic, in and of itself, of a meniscus tear. Because a snap is not indicative of any specific diagnosis, the ALJ finds from Dr. Farber’s testimony that it could be associated with arthritis or a meniscus tear.

33. Dr. Farber’s testified that “given the nature of her injury, her described mechanism, her weight, the presence of arthritis on her X-rays and MRI scan, and the symptoms that she presented with when I evaluated her, and the – the exam findings that I documented when I evaluated her, I don’t think surgery is appropriate, would benefit her at all.” (Tr. 71:13-20).

34. During cross-examination, Dr. Farber admitted that there is no evidence to support a finding that Claimant was having any difficulties (symptoms) or required treatment for any left knee condition leading up to the June 18, 2021 incident. (Tr. 73:1-7). He noted further that Claimant's symptoms at the time she first presented to Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). He testified, "A lot of different things can aggravate arthritis" including repetitive standing and walking, ten-hour shifts or Claimant's routine day-to-day activities. (Tr. 73:13-20). He reiterated his position that the aggravation did not have to come from the "slight twist from working on her catheters". *Id.* Nonetheless, he did not eliminate that MOI (twisting/pivoting) as the potential cause surrounding the aggravation of Claimant's underlying arthritis.

35. Concerning the meniscal tear, Dr. Farber admitted that a degenerated meniscus could be torn more readily than one that is not compromised. (Tr. 74:23-25). He testified that he did not believe that a "slight pivot" could have caused the meniscal tear, but later agreed that prolonged walking or standing in combination with Claimant's age and weight could cause a tear. (Tr. 75:1-11). Indeed, Dr. Farber admitted that just about "anything could cause it" before adding that he would not attribute the tear to that one activity of pivoting while assembling catheters. (Tr. 75:12-22).

36. Based upon the entirety of the evidence presented, the ALJ finds the opinions and analyses of Drs. Rook and Walden to be more reliable and persuasive than those of Dr. Farber.

37. The ALJ credits the opinions of Drs. Rook and Walden and Claimant's testimony to find that she has established, by a preponderance of the evidence, that she sustained a compensable injury to her left knee on June 18, 2021.

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, §§ 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. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. The 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).

B. Assessing weight, credibility, and sufficiency of evidence in Workers'

Compensation proceeding is exclusive domain of 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'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*, 57 P.2d 1205 (Colo. 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,* 441 P.2d 21 (Colo. 1968). In this case, Claimant's reporting concerning the MOI has been consistent as simply as sidestepping to the left. The evidence presented supports a conclusion that Claimant's actions on June 18, 2021 were consistent with the actions seen on the video. The video unequivocally demonstrates the twisting/pivoting motion necessary for Ms. LL[Redated] to turn from one end to walk toward the other. This is the same observation made by Dr. Rook during his independent medical examination that largely formed his opinion. Dr. Rook saw the pivot/twisting involved with Claimant's feet when he asked her to demonstrate how she was injured. It is also the same understanding regarding the MOI held by Dr. Walden. Dr. Farber's opinion was based largely on Claimant's described mechanism of injury being "sidestepping." The video evidence refutes this assumption. Claimant does not deny that she has described her actions as "sidestepping." Based upon the evidence presented, the ALJ is persuaded that Claimant did not appreciate the role that twisting/pivoting to the left on her planted leg played in causing her injury as she moved toward the end of the assembly table. Consequently, she simply described the MOI as sidestepping. While Claimant did not provide a detailed description of all the movements involved in the MOI in this case, the ALJ is persuaded that Claimant was injured while moving from one end of the assembly table to the other on June 18, 2021. Accordingly, the ALJ finds Claimant's current reports of pain and dysfunction reliable and persuasive. Based on this and the totality of the evidence presented, the expert medical opinions of Drs. Rook and Walden are more persuasive than the contrary opinions of Dr. Farber.

C. 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).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *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.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of her employment relationship with Employer, i.e. at a catheter assembly table during her regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely catheter assembly, which the ALJ concludes is expected of Claimant in her position as an assembler. While there is substantial evidence to support a conclusion that Claimant's alleged injury occurred in the course of his employment, the question of whether the injury "arose out of" her employment must be resolved before the injury can be deemed compensable.

E. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which 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).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the medical record evidence is devoid of any indication that Claimant's left knee was symptomatic or required treatment before June 18, 2021. The evidence presented supports a

conclusion that Claimant sought care following the June 18, 2021 incident, for symptoms she attributed to repetitive sidestepping involving slight twisting/pivoting while moving along the catheter assembly table. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working her job despite the onset of symptoms. As found, the ALJ credits the opinions of Dr. Rook and Dr. Walden to conclude that Claimant either suffered an acute irritation/aggravation of an underlying chronic meniscus tear, or a new meniscal tear as she twisted/pivoted in preparation to move toward the end of catheter assembly table.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing left knee osteoarthritis, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties 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, as asserted by Respondents in this case, the 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); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the onset of symptoms and disability Claimant experienced on June 18, 2021 arose as a consequence of an industrially based aggravation of her underlying left knee osteoarthritis, chronic underlying meniscal tear or a new left meniscal tear. Even Dr. Farber noted that Claimant's symptoms at the time of her initial appointment with Dr. Ritch were "likely" emanating from an exacerbation of her "underlying arthritic problem". (Tr. 73:8-12). Moreover, he agreed that Claimant's repetitive walking, standing and ten-hour shifts could be causative in the onset of her left knee symptoms.

I. In concluding that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her

employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. She did not "slip, fall, or trip." Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal, the respondents contended that the ALJ erred, in part, on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, the discrete injury to Claimant's left knee in this case arose out of her involvement in work activity rather than being precipitated by an idiopathic condition she imported to the work place. Accordingly, the ALJ concludes that Claimant was not required to establish that the concurrence of a pre-existing weakness and a hazard of employment lead to her injury in this case.

J. Analogous to the MOI asserted in *Bastian* and *Fisher*, *supra* the MOI claimed to have caused injury in this case arose from activities that, per Dr. Farber, are the type which should not lead to a finding of compensability because the forces involved are "minimal" and are activities performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically sidestepping, twisting and pivoting, which are performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Respondents. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Contrary to Dr. Farber's opinions, the persuasive evidence supports a conclusion that Claimant either suffered an acute tearing of the left medial meniscus or an aggravation of a previously asymptomatic pre-existing condition. While the MOI in this case is unusual, the ALJ is convinced that a logical connection exists between Claimant's stepping/pivoting activities at work, her left knee symptoms and her need for treatment. Consequently, the claimed injury is compensable.

Medical Benefits

K. 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*.

L. 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). In this case, the evidence demonstrates that Claimant's medical care, as provided by Dr. Ritch and his referrals, including the orthopedic evaluation and surgery recommended by Dr. Walden was/is reasonable, necessary and related to Claimant's June 18, 2021 injury. The aforementioned care provided by Dr. Ritch was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referral to Dr. Walden was reasonable and necessary to determine the extent of injury in light of Claimant's ongoing pain and disability surrounding the function of the left knee. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left knee surgery is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including the recommended arthroscopic evaluation and any definitive treatment directed to the left knee therefrom.

ORDER

It is therefore ordered that:

1. Per the parties' stipulation, Claimant's average weekly wage is $718.70.

2. Claimant has established, by a preponderance of the evidence, that she sustained a work related injury to her left knee on June 18, 2021.

3. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee injury including, but not limited to, the arthroscopic evaluation and medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden.

4. All matters not determined herein 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: August 17, 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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he was injured in the course and scope of his employment on March 2, 2022.

II. If the claim is found compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to additional medical benefits that are reasonably necessary and related to the March 2, 2022 accident.

STIPULATION

Respondents stipulated that they have paid both Advanced Urgent Care and North Colorado Medical Center for the March 3, 2022 and March 8, 2022 visits, respectively.

FINDINGS OF FACT

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

1. Claimant was a 37 year old male at the time of the hearing and was hired by Employer on approximately January 27, 2022. Claimant worked for Employer on March 2, 2022. He was a machine operator performing work excavating ditches. On that day, Claimant had completed his ditch work and went to assist a coworkers with changing a valve on a machine. He was working with a pipe wrench, leaning over and exerting force, when he stood up from the bent position he felt a pull and stabbing pain in his low back and left shoulder. The pain was so severe that he laid down on another piece of equipment for a minute before he could straighten up.

2. He reported the back and shoulder strain to his supervisor but stated he would check out and go home to see if the problem resolved. When he checked out, the Employer had a policy that workers had to note if they were injured on the job that day and Claimant indicated that he had not.

3. On March 3, 2022 Claimant returned to work and requested medical attention from the Safety Manager. The Safety Manager took Claimant to Urgent Care, based on Axis' direction. He advised Claimant that Axis was a third party management company that assisted Employer and workers in finding a provider and appropriate medical care when they were injured.

4. Claimant was seen at Advanced Urgent Care Occupational Medicine on March 3, 2022 by Erin Layman, PA-C. She noted as the chief complaint that "[T]he patient presents with a chief complaint of constant joint pain of the left shoulder, scapular region, left scapular region, and central lower back since Wed. Mar 02, 2022." Claimant provided a history that Claimant was leaning over operating a pipe wrench when he stood up and felt sudden stiffness and pain in his low back. She also noted some left posterior shoulder pain. Claimant reported he used icy hot and Tylenol.

5. On exam, Ms. Layman found Claimant had an abnormal posture as he had his torso hunched forward and had pain with back extension as well as difficulty standing upright. Ms. Layman noted Claimant had left shoulder tenderness and tightness over the left trapezius and the superior shoulder blade. She also noted spasms and tenderness to palpation bilaterally in the lumbar muscles extending to the sacrum, L1-S1.

6. Ms. Layman proceeded to provide an injection of Ketorolac.[1] The final diagnosis was muscle, fascia and tendon strain of the low back with muscle spasms, which noted an acute injury. He was provided with instructions to go to his primary care physician (PCP), or their clinic if he did not have a PCP, within three days if the pain did not abate. He was prescribed ibuprofen and Tylenol as well as lidocaine patches for ongoing discomfort and to continue stretches and avoid long periods of inactivity. He was advised to return to work as tolerate by pain and discussed proper body mechanics. It is noted that Ms. Layman did not provide a diagnosis for the left shoulder complaints.

7. On March 5, 2022 the Safety Director filed a First Report of Injury, noting that Claimant injured himself while assisting mechanical finish bolting up, while leaning over to torque the bolt. He noted Claimant used improper movement to perform the task and that the injury occurred on the Employer's premises. However, it noted that the injury occurred on March 3 (not March 2) and that Employer was notified on March 4. It also stated that Claimant continued work and had no restrictions. This report is incongruent with the Safety Manager's testimony and Claimant's testimony that the incident occurred on March 2, 2022, especially in light of the fact that the Safety Manager took Claimant to the clinic on March 3, 2022, clearly Claimant notified his employer by that date.

8. Claimant was attended by Banner Health North Colorado Medical Center on March 8, 2022 by Charles Nemejc, PA at the emergency Department. The Nursing Triage lists a chief complaint that Claimant had kneeled down at work the prior Thursday[2] and had sudden onset of lower back pain. The nurse noted he was seen at a work clinic, who gave Claimant pills that did not help much, but could not state the name of the medication. History taken by PA Nemejc was as follows:

> The patient presents with back pain and Continued [sic.] low back pain after bending over while at work to fix a pipe *3 weeks* ago.[3] He has been taking over-the-counter medications without relief. No bowel or bladder changes and no weakness or distal numbness or paresthesias. No decrease in discomfort after over-the-counter medications. Patient states that this is a work comp injury. He has no chronic medical conditions and takes no chronic medications. No other medical complaints. The pain is throbbing and aching and mild to moderate intensity and only over the lumbar spine. (*Emphasis added.*)

9. PA Nemejc prescribed valium, anaprox, Phenergan and prednisone as well as ordered x-rays of the lumbar spine. The diagnostic testing showed moderate disc space narrowing at L2-3 and a very mild disc space narrowing at L4·L5 and L5-S1, with

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[1] A nonsteroidal antiinflamatory often used for short-term treatment of moderate to severe pain.
[2] Thursday was March 3, 2022, not March 2, 2022.
[3] The mention of three weeks is disregarded since the same report stated that Claimant had been injured on March 3, 2022, which is also found to be incorrect.

small marginal osteophytes, most apparent anteriorly at L2·3 (degenerative changes) as read by Dr. Phillip Gunther. Claimant was discharged with a diagnosis of lumbosacral spine strain, low back pain, and degenerative arthritis of the lumbar spine and prescribed naproxen for the pain and cyclobenzaprine for the muscle spasms. Claimant was released to go home and directed to follow up with Banner Occupational Health within 1-2 days or his company's work comp clinic.

10. On April 13, 2022 the Insurer's adjuster interviewed Claimant.[4] The interview transcription is riddled with "INAUDIBLES." From inferences made from the transcript Claimant stated that Claimant was not sure whether the accident date was March 2, 2022. Claimant noted that the accident happened in Aurora but could not recall the exact address where they were working but could locate it if necessary. Claimant stated that the accident happened at approximately 2:00 or 2:30 p.m. He advised he is a heavy machine operator and on that day he had finished his work so he went to help some coworkers with a pipe wrench to fix a valve. Claimant stated that he was bent over for approximately a minute, giving the wrench several tugs. He then went to grab the electric gun to tighten the screws and flange on the valve when he felt a pull in his back. He went to get up but could not straighten up due to a back strain. He also was having left shoulder pain. He explained that he told his immediate supervisor about his back pain that day and the supervisor laughed at Claimant. He explained when he came back the following day, barely able to walk standing straight. Claimant demanded that his supervisor report the injury to the Safety Manager and do something for him because he could not walk properly due to his back pain. He stated that after the accident he did stop working for approximately a week and two days but when he did not get paid for his time off he returned to work in pain due to financial hardship. He stated that he was let go from his employment on April 1st, 2022 because his work permit was expired.

11. Insurer filed a Notice of Contest on April 14, 2022 for further investigation and that the injury/illness was not work related.

12. On May 12, 2022 Dr. Brian McCrary performed a medical record review of the March 8, 2022 emergency room visit. He opined that, if Claimant did not seek any further treatment that he was likely at maximum medical improvement.

13. On June 21, 2022 Dr. McCrary wrote an addendum to review an interview where Claimant could recall little regarding the date of injury or the actual dates or places of treatment. Dr. McCrary stated as follows:

> … there is no evidence provided, other than the claimant's statement on 3/8/22 that any work related injury ever occurred on 3/2/22 except for [Claimant]'s statement that this occurred 6 days later. His described mechanism of injury is consistent with, at most, a minor soft tissue strain which would be expected to resolve with or without treatment in a short period of time. There is no actual evidence presented that any occupational injury occurred on 3/2/22, although the given mechanism of injury could conceivably have resulted in a short term soft tissue strain to the lumbar musculature. For this to have occurred, it would have required a pre-existing

[4] This ALJ infers from the April 13, 2022 transcript (Exh. I) that Q is the adjuster, INT is the interpreter, A is Claimant and A2 is Claimant's attorney.

lumbar condition to be present, and this would represent a short term exacerbation to a pre-existing lumbar condition (unspecified).

14. Dr. McCrary wrote a second addendum on July 12, 2022 noting he review the medical records from March 3, 2022, which did not change his opinion.

15. Claimant stated that he continues to have intermittent pain in his low back when he stands, but requires no further medical treatment.

16. Claimant's supervisor testified that Claimant did report a wrenching of his back when he was helping coworkers with a pipe wrench, a tool used to thread pipe. Claimant told him that he felt discomfort but did not ask for care the same day. He also stated that upon leaving the worksite, Claimant stated on his check out form that he had not incurred any injuries. It was not until the following day that Claimant asked to see a provider. He went to the provider and then returned to work. He continued working the full shift. He also continued working until March 11, 2022 his full 10 hour shifts. Claimant then stopped working from March 12, 2022 through March 21, 2022, when he returned to work his full schedule. The supervisor stated that he did not know why, since Claimant did not have restrictions. He was terminated at the end of March.

17. The Safety Manager (SM) also testified in his matter. He stated he knew Claimant as he was under the Safety Manager's supervision. He was aware of the termination, but was not involved in terminating Claimant. He was knew Claimant reported a work accident on March 2, 2022. Claimant's supervisor advised him of the claim the following morning. He engaged Axium medical and took Claimant to the nearest Advanced Urgent Care then returned to the job site with Claimant. He was aware that Claimant was released to return to work with a note that he may return to work as tolerated by pain, but with no specific restrictions.

18. The SM discussed Claimant's refusal to communicate with Axium, a third party administrator. Claimant reported that he was not happy with Axium. He was upset because SM advised Claimant that he was obliged to discuss his care with Axium and not go to an emergency room, but Claimant ended up going anyway. He stated that if Claimant took time off from work, it was not due to any medical report provided to the company as Claimant had no restrictions. Claimant sent a message that he would not return to work until he was 100%. Claimant returned and worked from March 21, 2022 through March 31, 2022. The SM had a conversation with Claimant after the ER visit on March 8, 2022 to let Claimant know that he had to follow up with Axium. Claimant did not refuse to return to Advanced Urgent Care, a provider on the designated provider list, only they had referred Claimant to his PCP.

19. The pay logs for March 2 and March 3, 2022 both state that Claimant was not claiming any injuries for those dates. Further, the payroll log confirms both the supervisor's and the SM's testimony that Claimant was paid for full 10 hours on March 2 and March 3, 2022. He continued working full time from March 4 through March 11, 2022, did not work from March 12, 2022 through March 20, 2022, and returned to work from March 21, 2022 through March 31, 2022.

20. On April 1, 2022 Claimant was terminated due to a "Tentative conconfirmation" (TNC) from either the U.S. Department of Homeland Security (DHS) and/or Social Security Administration (SSA). Once they receive a TNC, the employee

must receive notice within 10 days. Then the employee has 10 days to correct the status if they are contesting the TNC obtained through the E-Verify system.

21. This ALJ finds that Claimant has failed to show that it is more likely than not that he was injured in the course and scope of his employment with Employer on March 2, 2022 or March 3, 2022. At most he had a temporary strain which resolved. Dr. McCrary is persuasive in this matter. Respondents paid for the Urgent Care visit of March 3, 2022 and the emergency room visit on March 8, 2022 and Claimant is persuasive that he does not require any further medical care. As found, Claimant has not proved by a preponderance that any care beyond what has been provided is proximately caused by the March 2, 2022 accident. In fact, if Claimant has any further need for medical care, that care would be related to the underlying pathology and not an aggravation of the underlying pathology.

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. 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); *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. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory, supra.* 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, 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. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008).

As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's alleged injury and work activities.

There is a difference between an accident and an injury at work. *Wherry v. City & County of Denver*, W.C. No. 4-475-818 (ICAO March 7, 2002). Just because an accident may have occurred at work, does not necessarily mean Claimant suffered a compensable injury. *Id.* The Workers' Compensation Act creates a distinction between the terms

"accident" and "injury." The term "accident" refers to an "unexpected, unusual, or un-designed occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury."

In *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO 2020), the Industrial Claim Appeals Office upheld the ALJ's order denying and dismissing Claimant's claim for compensation where Claimant had proven an accident occurred, but where Claimant failed to prove the injury was causally related to the accident. In *Washburn*, Claimant had video evidence of a slip and fall at work, and it was clear there was an accident or incident at work. *Id*. However, the ALJ found Claimant failed to prove she sustained a work-related injury as a result of the fall, and dismissed the claim. *Id.*

The court examined a similar case in *Kelly v. Insta Flap*, W.C. 5-120-413 (ICAO March 30, 2022). In *Kelly*, Claimant alleged an injury at work while moving a rolling rack, when the pipe rack began to fall off the hook and Claimant reached for the pipe to catch it and hurt his back. Claimant described the pain as instant and shocking. Claimant went home after the incident and sought medical treatment the next day. Claimant had a history of longstanding back complaints. The ALJ allowed respondents to withdraw their admission, and found that Claimant did not sustain a work injury that necessitated treatment, and that the Claimant's pre-existing or chronic low back condition was not aggravated or accelerated by the incident at work.

Here, Claimant has failed to prove by a preponderance of the evidence that Claimant's back condition was proximately caused by the accident at work or that it was more probably true than not that he sustained a compensable injury. Claimant did not establish that his symptoms were a product of the work activity but the symptoms appear to be from a preexisting condition.

As found, to the extent the symptoms were a result of the work activity, they were temporary in nature and Claimant, through his own testimony, acknowledge that he did not require any further care beyond the two urgent care visits, which were paid for by Respondents, despite their filing a Notice of Contest.

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).

Respondents have paid for the two emergency visits of March 3, 2021 and March 8, 2021. Claimant agreed he did not require any further care. This ALJ finds that Claimant had an incident that was only temporary and requires no further care. Claimant has failed to prove he requires any additional medical care related to the accident of March 2, 2022. While there may have been an accident, there are no injuries proximately caused by the work related incident.

ORDER

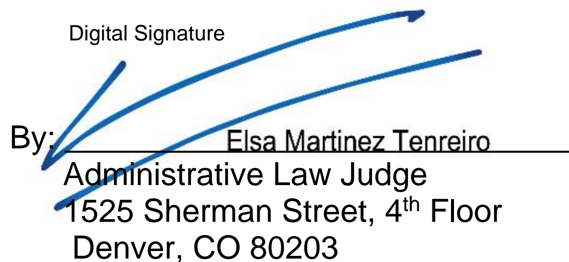
IT IS THEREFORE ORDERED:

1. Claimant's claim for benefits related to the accident of March 2, 2021 are *denied* and *dismissed*.

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 22nd day of August, 2022.



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. 5-131-725-004

ISSUES

I. Whether the doctrine of issue preclusion applies to Judge Kabler's determination that Claimant's January 30, 2020, injury was a shoulder strain and that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery performed in August 2020 was not reasonably necessary to cure or relieve Claimant from the effects of her work injury.

II. Whether Respondents have overcome the opinion of the DIME physician regarding the date of maximum medical improvement by clear and convincing evidence.

III. Whether Claimant has proven by a preponderance of the evidence that the scheduled rating should be converted to a whole-person rating.

IV. If Claimant has proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Respondents have overcome the opinion of the DIME physician regarding causation and permanent impairment by clear and convincing evidence.

V. If Claimant has not proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Claimant has established a scheduled impairment rating by a preponderance of the evidence.

FINDINGS OF FACT

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

1. Claimant, who speaks Spanish, suffered a compensable right shoulder injury on January 30, 2020.
2. While obtaining medical treatment and undergoing independent medical examinations, Claimant has required the use of a translator – unless the medical provider speaks Spanish.
3. The issue of compensability went to hearing before ALJ Kabler on May 18, 2021. ALJ Kabler found and concluded that Claimant sustained an injury on January 30, 2020, to her right shoulder. He also found and concluded that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery she had undergone was

reasonably necessary and related to her January 30, 2020, work injury. (See ALJ Kabler's SFFCLO Respondents' Exhibit B.)

4. Claimant was injured on January 30, 2020, when she was on a ladder and tried to pull a box out and down from a shelf. While trying to get the box, and while reaching, she felt a pop and her right arm/shoulder started hurting. (Hrg. trans. 28:1–6; Polanco 32:22-25, 33:1-2.)
5. On February 18, 2020, Claimant presented to Concentra for her right shoulder injury. The record notes that Claimant had right arm pain and limited range of motion. The authorized treating provider (ATP), Jonathan Joslyn, PA-C, diagnosed Claimant with a right shoulder strain and placed her on 10-pound work restrictions.
6. On February 20, 2020, Claimant returned to PA-C Joslyn. At this visit Claimant was having pain with overhead lifting.
7. On February 25, 2020, physical therapist, Jessica McAlee noted that Claimant had intermittent right shoulder pain. Claimant also reported pain when lifting, reaching overhead, and behind her back. Ms. McAlee further noted that Claimant showed symptoms of right shoulder impingement of the supraspinatus with limited range of motion.
8. On March 3, 2020, Claimant presented to Dr. Darla Draper. At this appointment, Claimant complained of increased pain in her right shoulder and right upper back. Dr. Draper's assessment included a shoulder and thoracic strain. (Ex. 4, pp. 86-89.)
9. On March 18, 2020, Claimant returned to PA-C Joslyn. At this appointment, Claimant continued to experience right arm pain as well as pain radiating to her neck and shoulder. (Ex. 4, p. 91.)
10. On April 1, 2020, Claimant saw PA-C Joslyn. At this appointment, Claimant continued to experience shoulder pain. As of April 1, 2020, the diagnosis included a shoulder strain as well as a strain of a muscle and tendon of the wall of Claimant's thorax. (Ex. 4, p. 99.)
11. On April 10, 2020, Claimant underwent physical therapy at Concentra. At this visit, Claimant had pain that was located along the posterior portion of her upper shoulder to the midline of her back. (Ex. 5, p. 120.)
12. On May 11, 2020, Claimant presented to the emergency department at UC Health. For at least part of this appointment, Claimant's daughter translated for Claimant and the medical providers. The medical records show that Claimant provided a history of injuring her shoulder at work in January while moving something heavy. The medical records also indicate that while moving something at work, Claimant felt a "pop." (Ex. 7, p. 151.) In addition, several portions of the medical record from this visit indicate Claimant has not fallen within the last 6 months. (Ex. 7, p. 151.) On the other hand, a section of the medical record from this visit indicates Claimant fell in January 2020. (Ex. 7, p. 134.) The ALJ resolves this conflict in the evidence by finding that the reference to a fall in January 2020 is a mistake and that Claimant did not injure her shoulder due to a fall. In the end, Dr. Daniel Willner, diagnosed Claimant with "acute pain of right shoulder," which he thought was most consistent with arthritis, adhesive capsulitis, or rotator cuff pathology. (Ex. 7, Bates, 133.)

13. On June 17, 2020, Claimant underwent an MRI of her right shoulder. The MRI findings showed a large full-thickness tear involving the majority of Claimant's supraspinatus tendon. The MRI further revealed that there was "mild rotator cuff degeneration" and "mild muscular atrophy" as well as a degenerative appearing labral tear. (Cl. Ex. 6, p. 123.)

14. On August 27, 2020, Claimant underwent right shoulder surgery. (Ex. C, p. 15.)

15. On February 25, 2021, Dr. Failinger performed an IME for Respondents and issued a report. In his report, Dr. Failinger noted that Claimant said she injured her right shoulder while grabbing and pulling a box above her head that weighed about 5-10 pounds. He also noted that Claimant said she felt a pop in her right shoulder while pulling the box and developed pain that progressively got worse as she kept working that day – which included moving a pallet jack full of boxes. Based on his assessment, Dr. Failinger concluded that merely grabbing and pulling a 5–10 pound box, which was above her head, was insufficient to cause Claimant's rotator cuff tear and was insufficient to permanently aggravate her preexisting shoulder pathology. (Ex. C.)

16. Dr. Failinger also addressed whether Claimant's actions of pushing or pulling the pallet jack – where Claimant was placing the boxes – might have caused her rotator cuff tear or caused an aggravation of her preexisting rotator cuff pathology. Based on the information available to him, he could not determine whether those actions injured Claimant's rotator cuff. (Ex. C.)

17. In the end, Dr. Failinger concluded that Claimant was such a poor historian that he could not conclude that she suffered an injury at work based on the medical records and the history she provided to him during the IME. (Ex. C.)

18. On July 2, 2021, ALJ Kabler issued his order in which he found Claimant failed to establish by a preponderance of the evidence that the shoulder surgery she had was reasonably necessary to cure or relieve Claimant from the effects of her January 30, 2020, work accident. (Ex. B.)

19. On August 6, 2021, Respondents wrote a letter to Dr. Cava and advised her of ALJ Kabler's order. In the letter, Dr. Cava was advised that ALJ Kabler found that Claimant sustained a compensable injury to her right shoulder in the nature of a shoulder strain on or about January 30, 2020. The letter added that the ALJ found that Claimant failed to establish that the August 2020 shoulder surgery was reasonably necessary to cure or relieve Claimant from the effects of her January 30, 2020, work injury. (Ex. F, p. 63.)

20. On August 30, 2021, Claimant was seen by Dr. Cava. Claimant reported sharp pain in her right shoulder that "comes and goes." Dr. Cava stated that if surgery is "accepted under work comp." then Claimant is eligible for an impairment rating. Regarding maximum medical improvement (MMI), Dr. Cava stated that if the surgery is not "accepted under work comp." Claimant's MMI date is April 1, 2020. (Ex. 2, pp. 41-45.)

21. On October 15, 2021, in response to Respondents' August 6, 2021, letter, Dr. Cava stated that Claimant reached MMI on April 1, 2020. On permanent impairment, Dr.

Cava checked the box indicating that she did not believe Claimant sustained any permanent impairment for the January 30, 2020, work injury. (Ex. F, pp. 63-66.)

22. On December 1, 2021, the adjuster filed a Final Admission of Liability (FAL), admitting to an MMI date of April 1, 2020, with no impairment based on Dr. Cava's report. (Ex. A.)

23. Claimant, being dissatisfied with the FAL objected and requested a Division Independent Medical Examination (DIME).

24. On January 6, 2022, Dr. Cava was deposed. In her deposition, Dr. Cava stated that had Judge Kabler found the surgery to be related to the work injury, her determination on MMI would have been "after the completion of treatment from the surgery and any post-surgery physical therapy or other treatment." (Ex. 2, p. 55.) Regarding Claimant's impairment rating, Dr. Cava again relied on Judge Kabler's Order explaining that – because the order states that Claimant sustained a shoulder strain – she could not assign an impairment rating. Dr. Cava's opinion regarding MMI and permanent impairment appear to depend solely on Judge Kabler's prior ruling. (Ex. 2, pp. 50-59.)

25. Frank Polanco, M.D. was selected as the DIME physician.

26. On February 8, 2022, Claimant saw Dr. Frank Polanco for a DIME. In his report, Dr. Polanco noted Claimant having shoulder pain and limited range of motion in her shoulder. After reviewed the medical records and meeting with Claimant, Dr. Polanco determined that Claimant suffered a compensable shoulder injury on January 30, 2020, and reached MMI on August 30, 2021. In support of his determination, Dr. Polanco explained:

> The findings within the medical records reflect that the claimant sustained an injury on 1/30/2020. As a result of this injury, she was diagnosed with a rotator cuff and labral tear. While it appears that she had pre-existing degenerative/tear changes, she was not symptomatic nor limited in her work activities prior to the reported work injury. Thus, while she may have had pre-existing degenerative findings, it would appear that the least that she permanently aggravated her condition requiring surgical treatment. (Ex. 1, p. 5.)

27. As to permanent impairment, Dr. Polanco assigned a 3% extremity rating – converting to a 2% whole person rating. (Ex. 1, p. 5.)

28. On May 16, 2022, Respondents deposed Dr. Polanco. Respondents thoroughly questioned Dr. Polanco regarding his reasoning for MMI and permanent impairment. Even in light of ALJ Kabler's Order, Dr. Polanco disagreed with ALJ Kabler's finding that the surgery was not reasonably necessary to cure and relieve Claimant from the effects of her January 30, 2020, work injury. Dr. Polanco credibly defended his opinions and provided additional support for his reasoning regarding the date of MMI and Claimant's permanent impairment. His deposition testimony was consistent with Claimant's testimony and consistent with the majority of Claimant's medical records. As a result, the ALJ finds Dr. Polanco's opinions to be credible, highly persuasive, and well supported.

29. On June 8, 2022, Claimant saw Dr. Sander Orent for an independent medical examination (IME). Dr. Orent's report notes that Claimant stated she injured her right shoulder while grabbing a box that was well over her head. Although the weight of the box she lifted when she got injured was not specifically described, Claimant did note that the boxes in general weighed between 20 and 40 pounds. Dr. Orent noted that Claimant had pain in her right shoulder and neck. After meeting with Claimant and reviewing the medical records, Dr. Orent determined that the right shoulder surgery was related to Claimant's work injury. Although Dr. Orent did not believe Claimant had reached MMI, he assigned a 10% extremity rating based on Claimant's range of motion - translating to a 6% whole person rating. (Ex. 3, pp. 65-72.)

30. On July 8, 2022, Dr. Failinger was deposed regarding his opinions. Dr. Failinger testified consistent with his report regarding his opinion that the need for surgery was not caused by anything Claimant might have done at work. In essence, he concluded that the surgery was reasonable and necessary, but that it was not related to Claimant's work activities. For example, Dr. Failinger agreed that the surgery on Claimant's right shoulder was reasonable and necessary explaining that Claimant "had a rotator cuff tear that appeared to be symptomatic and was ongoing. That was a reasonable surgery." (Failinger Depo, 51-52: 25-5.) There were some different accounts during Dr. Failinger's IME regarding how Claimant injured her shoulder at work. But Dr. Failinger admitted that it was possible that there were misunderstandings with the interpreter when he met with Claimant. When probing more into his opinion that Claimant was a poor historian, Dr. Failinger ultimately acknowledged that the issue may have been related to misunderstandings surrounding the interpreter, not Claimant's inability to remember the details of her injury. Dr. Failinger agreed that no other treating provider noted problems with Claimant's ability to remember the details of her injury.

31. Dr. Failinger agreed that a "high majority" of individuals have asymptomatic arthritis as well as rotator cuff tears that are often asymptomatic. He then agreed that there can be an accelerating event that causes the arthritis or the rotator cuff tear to become symptomatic. Dr. Failinger also agreed that a person with a rotator cuff tear will have symptoms and limitations that wax and wane explaining "[t]hat's exactly the classic history of a person's rotator cuff, the symptoms wax and wane with time, yes." (Failinger Depo, 49: 3-5.)

32. Dr. Failinger agreed that it is not uncommon for a rotator cuff tear and a surgery to repair the tear to cause symptoms in the muscles surrounding the shoulder including the neck. (Failinger Depo, 52: 7-17.)

33. Dr. Failinger agreed that he could find no medical records showing Claimant had any history of right shoulder problems before January 30, 2020. He also agreed that there was no evidence of Claimant having any work restrictions before January 30, 2020. Dr. Failinger agreed that, since meeting with Claimant in February 2021, he has seen over a thousand patients. He also agreed that he may not have a clear recollection of his visit with Claimant. (Failinger Depo, 40-54: 11-19).

34. Dr. Failinger also concluded that because the shoulder surgery is unrelated, that he would also not assign an impairment rating because the range of motion deficits probably relate to the surgery. (Failinger Depo., pp. 17-18.)
35. Claimant developed symptoms in her neck and upper back after the work injury and these symptoms continued after Claimant had shoulder surgery. Thus, Claimant's neck and upper back symptoms have been consistent throughout her claim.
36. Claimant's shoulder injury caused pain and functional impairment of her neck and upper back. As a result, the ALJ finds that Claimant's shoulder injury has caused symptoms and functional impairment that extends beyond her arm at the shoulder and into her neck and upper back.
37. During the DIME, Dr. Polanco measured Claimant's shoulder range of motion and found ratable impairment pursuant to the AMA Guides. Based on the record, the ALJ finds that Dr. Polanco properly rated Claimant's impairment under the AMA Guides.

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 the doctrine of issue preclusion applies to Judge Kabler's determination that Claimant's January 30, 2020, injury was a shoulder strain and that Claimant failed to establish by a preponderance of the evidence that the shoulder surgery performed in August 2020 was not reasonably necessary to cure or relieve Claimant from the effects of her work injury.

Issue preclusion bars relitigating of an issue that has been finally decided by a court in a prior hearing. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The Colorado Court of Appeals previously held that issue preclusion may not apply where the burdens of proof involved in the two adjudications are not the same. *Holnam v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2007). This scenario often arises when a DIME doctor's determinations on MMI and permanent impairment conflict with an ALJ's prior order. Nonetheless, ICAO and the Court of Appeals have made clear the DIME physician's findings on MMI and permanent impairment are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), (c), C.R.S. 2008; *Montoya v. Industrial Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008).

In *Sharpton*, the fist ALJ ruled that the claimant sustained a compensable injury to the right finger, but also found that the claimant's carpel tunnel in the left finger was not compensable. The claimant later sought a DIME in which the DIME physician determined that the claimant was not at MMI because she required treatment for the carpel tunnel syndrome in the left finger. The Respondents challenged the DIME's findings arguing that the DIME physician was precluded from addressing the left upper extremity condition because of the ALJ's prior order. The Panel explained that, while the issue before first ALJ was based on a preponderance of the evidence, the second ALJ was asked to review a determination of a DIME physician regarding whether the claimant's left upper extremity condition was at MMI using the clear and convincing evidence standard. From this, the Panel concluded that "the issue determined by [the first ALJ] is not identical to the later issue decided by [the second ALJ]. Consequently, issue preclusion does not prevent either the DIME physician or the decision of the second ALJ. Rather, consistent with our prior decisions in both *Braun* and *Ortega*, issue preclusion is inapplicable because the issue decided by [the first] ALJ is not identical to the issue determined by [the second] ALJ." *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (November 29, 2016).

The Panel addressed a similar factual scenario in *Madrid* but provided another rational clarifying why a DIME's determination on MMI and permanent impairment is not restricted by an ALJ's prior order. The panel explained that:

> "Consistent with our prior decisions in both *Braun* and *Ortega*, we conclude that issue preclusion does not apply in this matter because the issue

> decided by ALJ Allegretti was not identical to the issue determined by ALJ Felter. ALJ Allegretti made a decision pertinent to the compensability of a body part in the context of a request for medical treatment of that body part. Her decision was predicated on a preponderance of the evidence standard. However, ALJ Felter was asked to review a determination of a DIME physician that the claimant was not at MMI because the claimant did require treatment for the same body part found not compensable by ALJ Allegretti." *Madrid v. Trinet Group, Inc.,* W.C. No. 4-851-315-03 (April 1, 2014).

The *Yeutter* decision addressed a comparable situation in which respondents admitted liability for permanent impairment related to a condition (assigned by a DIME) then later argued such condition was unrelated to the work injury at a hearing on permanent total disability (PTD). The claimant in that case argued that the DIME opinions regarding relatedness of the condition carried presumptive weight and that the parties were bound by those opinions at the hearing on PTD. The Court of Appeals held that the presumptive effect of a DIME's opinion is limited to MMI and impairment and does not extend to a subsequent proceeding on other issues such as PTD. *Yeutter v. Industrial Claim Appeals Office*, 487 P.3d 1007 (Colo. App. 2019).

Additionally, Section 8-42-107(8)(b)(II) explains that the fundamental purpose of a DIME is to assess MMI and permanent impairment. In making these two determinations, WCRP 11-3 (c) states that the DIME shall be conducted in an objective and impartial manner; and that a DIME should be based on medical evidence, not legal records, or video. (§ 8-42-107(8)(b)(II), C.R.S. 2008).

Here, Respondents argued that ALJ Kabler's prior ruling precluded the DIME physician from determining that the right shoulder surgery was work related for purposes of determining Claimant's MMI date. At the hearing before ALJ Kabler, Claimant had to prove by a preponderance of the evidence that Claimant sustained a compensable injury and that the right shoulder surgery was work related. Akin to the Panel's explanation in *Madrid*, ALJ Kabler decided on the relatedness of a medical benefit, for purposes of Claimant receiving the medical benefit. At this hearing, however, Respondents have the burden to prove by clear and convincing evidence that the surgery is not work related for purposes of the DIME doctor's determination on MMI (thus, in addition to the two different standards of proof, the burden also shifts to Respondents). In making his MMI determination, Dr. Polanco properly relied on his review of the medical records, Claimant's physical examination, and the history she provided. The issue before ALJ Kabler and the issue before the ALJ now are separate thus making issue preclusion inapplicable. The ALJ also finds that the same rational from *Yeutter* applies to this claim such that the ALJ's opinions on the extent of Claimant's injury and the relatedness of the shoulder surgery is not binding as it applies to the DIME.

In summary, the ALJ finds that the prior order from ALJ Kabler does not preclude Dr. Polanco from deciding that the right shoulder surgery was work related for purposes of determining Claimant's MMI date and permanent impairment.

II. Whether Respondents have overcome the opinion of the DIME physician regarding the date of maximum medical improvement by clear and convincing evidence.

Overcoming the DIME on 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. 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); *Monforte 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). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof 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).

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. Gusset*, 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. 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*, WC 4-712- 812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gusset, supra*.

Here, Dr. Polanco determined Claimant reached MMI on August 8, 2021, after he determined that Claimant's right shoulder surgery was related to her work injury. To overcome the DIME, Respondents must prove that it is highly probably that Dr. Polanco erred in his determination regarding the date Claimant reached MMI based on the relatedness on the shoulder surgery. To accomplish this, Respondents rely primarily on the IME from Dr. Failinger. Dr. Failinger concluded that, while the surgery was reasonable and necessary to cure Claimant from the effects of her rotator cuff tear, it was unrelated to the January 30, 2020, work injury. In forming this opinion, Dr. Failinger stated that Claimant lacked credibility because she was a poor historian. He also stated that there was no objective evidence of a right shoulder tear due to the work injury. Ultimately, the ALJ finds Dr. Failinger's opinions not persuasive. Dr. Failinger admitted that there may have been issues with the interpreter when he performed his IME. This alone casts doubt on his opinion that Claimant was a poor historian. Furthermore, no other treating provider or evaluator mentioned Claimant being a poor historian or not remembering the details of her injury.

Dr. Failinger also concluded that there was no objective evidence that the work injury caused an acute rotator cuff tear. At the same time, Dr. Polanco and Dr. Orent reviewed the same medical records as Dr. Failinger and both determined that there was enough objective evidence to find that the January 30, 2020, work injury either tore her rotator cuff or aggravated Claimant's preexisting asymptomatic rotator cuff pathology. The evidence to support Dr. Polanco's and Orent's opinions includes Claimant's loss of function after the work injury and the MRI report. Plus, after meeting with Claimant, Dr. Wilner also noted that Claimant showed symptoms of an acute tear. In summary, the ALJ credits the opinions from Dr. Polanco and Dr. Orent over the opinions of Dr. Failinger.

Dr. Failinger concluded that Claimant's mechanism of injury would not cause Claimant's symptoms. However, for purposes of overcoming the DIME, the ALJ finds that Claimant reported the same mechanism of injury to the ATPs, Dr. Polanco, and Dr. Orent – all of whom found that the work injury caused Claimant's symptoms and need for treatment. Although the ATP records note that Claimant sustained a shoulder strain, this was only determined after the initial encounter with Claimant. Thus, the ALJ is unsure if the shoulder strain is what the ATPs ultimately determined was Claimant's diagnosis to be from the work related incident. Thus, for purposes of overcoming the DIME, the ALJ finds Dr. Failinger's opinion on Claimant's mechanism of injury insufficient and unpersuasive.

In viewing the totality of the evidence, Respondents failed to produce sufficient credible evidence to meet the clear and convincing standard. Dr. Failinger's opinion stands alone in that no other treating provider agrees with him. In addition, the ALJ credits the opinions from Dr. Polanco and Dr. Orent that the work injury caused the symptoms in Claimant's shoulder and the need for shoulder surgery. All evidence and inferences to the contrary are deemed unpersuasive.

III. Whether Claimant has proven by a preponderance of the evidence that the scheduled rating should be converted to a whole-person rating.

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. The threshold issue is application of the schedule. This is a determination of fact based on a preponderance of the evidence. 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. However, a claimant may establish that his injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

"Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines. As noted above, the site of functional impairment is not necessarily the

site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. Functional impairment need not take any particular form. *Nichols v. LaFarge Construction*, W.C. No. 4-743-367 (October 7, 2009*); Aligaze v. Colorado Cab Co.*, W.C. No. 4-705-940 (April 29, 2009); *Martinez v. Alberston's LLC*, W.C. No. 4-692- 947 (June 30, 2008). "Referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc.*, W.C. No. 4-390-943 (July 8, 2005).

Here, in reviewing the Claimant's medical records, it is found that Claimant consistently reported having pain in her neck and right upper back. Dr. Failinger agreed that a rotator cuff tear and rotator cuff surgery can lead to symptoms in an individual's neck. In weighing the totality of the evidence, the ALJ finds that Claimant's work injury caused the symptoms and functional impairment in Claimant's neck and upper back. The ALJ relies on the Claimant's testimony and the medical records in making this finding. The ALJ also credits the portion of Dr. Failinger testimony in which he stated that it is not uncommon for rotator cuff tears and rotator cuff surgery to cause symptoms in the muscles surrounding the shoulder including the neck. In weighing the totality of the evidence, the ALJ finds that Claimant sustained functional impairment beyond the arm at the shoulder and into her neck and upper back because of the work injury. Therefore, Claimant qualifies for the 2% whole person rating assigned by Dr. Polanco.

IV. If Claimant has proven by a preponderance of the evidence that her scheduled rating should be converted to a whole-person rating, whether Respondents have overcome the opinion of the DIME physician regarding causation and permanent impairment by clear and convincing evidence.

Claimant has established by a preponderance of the evidence that her scheduled rating should be converted to a whole person. Therefore, the DIME provisions apply to her medical 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).

As found, there is a lack of credible and persuasive evidence that Claimant had range of motion deficits of her right shoulder before her work injury. Moreover, after her work injury and subsequent surgery, Dr. Polanco measured Claimant's shoulder range of motion and found ratable impairment pursuant to the AMA Guides. The ALJ has credited the opinions and conclusions of Dr. Polanco and finds that the 3% extremity rating, which converts to a 2% whole person impairment rating, to be well supported by the medical record and Claimant's testimony.

Respondents have provided the opinions of Dr. Failinger to support their contention that Claimant's work injury did not result in any permanent impairment. As found and concluded above, the ALJ has not found Dr. Failinger's opinions to be persuasive. As a result, the ALJ concludes that Respondents have failed to overcome Dr. Polanco's opinion by clear and convincing evidence.

The ALJ has also considered the opinion of Dr. Orent. Dr. Orent concluded Claimant incurred a 10% scheduled impairment, which converts to a 6% whole person impairment. However, this is merely a difference of opinion between Dr. Orent and Dr. Polanco, the DIME physician. The report of Dr. Orent fails to demonstrate Dr. Polanco erred in assessing Claimant's impairment.

Therefore, the ALJ finds that Claimant has suffered a 2% whole person impairment of her right upper extremity.

ORDER

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

1. Respondents failed to establish that issue preclusion applies to the DIME physician's determination of MMI and permanent impairment.

2. Claimant established by a preponderance of the evidence that her 3% scheduled rating should be converted to a 2% whole person rating.
3. Respondents failed to overcome by clear and convincing evidence the DIME physician's determination of MMI and permanent impairment.
4. 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: August 22, 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 5-182-216-001

ISSUE

1. What is Claimant's AWW?

2. Did Claimant prove by a preponderance of the evidence that she is entitled to TPD benefits?

3. Did Claimant prove by a preponderance of the evidence that she is entitled to TTD benefits?

FINDINGS OF FACT

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

1. Claimant is a 53 year-old woman who worked as a hotel housekeeper. Claimant testified that she also worked in the laundry and kitchen areas.

2. Claimant was hired on June 11, 2021 and "rehired" on June 25, 2021. (Ex. B). Claimant testified that she took time between June 11 and June 25, 2021 to decide whether she would work for Employer permanently.

3. Claimant was rehired as a part-time, hourly employee. According to Claimant's "pay information" her "standard work day" was eight hours. (Ex. B). Claimant's first day of work after being rehired was June 29, 2021. (Ex. D).

4. Claimant sustained an admitted industrial injury on July 17, 2021.

5. Claimant's gross pay for the four weeks between June 25, 2021 and July 22, 2022[1] was $2,245.96. (Ex. C). The ALJ finds that $561.49 ($2,245.96/4) is a fair and accurate representation of Claimant's pre-injury AWW.

6. Authorized Treating Provided (ATP), Karen Larson, M.D., evaluated Claimant on July 23, 2021. Claimant reported that a guest pushed the cleaning cart towards her and the cart hit her left foot. Dr. Larson diagnosed Claimant with a left foot contusion. Claimant's initial x-rays were negative, but her examination was suspicious for a fracture. Dr. Larson referred Claimant for an MRI of her left foot. Claimant was given work restrictions. She was required to wear an ortho boot, could stand and walk for one hour per shift, but needed to be allowed to elevate her leg as needed. The restriction also noted "primarily seated work" and no squatting. (Ex. 4).

[1] Claimant worked on July 19, 20, 21, and 22, 2022. (Ex. D).

7. Claimant's MRI was scheduled for August 16, 2021. The August 13, 2021, WC164 Form continued the work restrictions previously recommended for Claimant. (Ex. 4).

8. Claimant testified that when she told her general manager about her work restrictions, he told her that "she had one way to work." Claimant testified that even though Employer told her she could lift her left leg every hour, this did not happen. The ALJ infers that the nature of Claimant's housekeeping work prevented her from elevating her leg every hour.

9. On August 27, 2021, ATP, Katherine Drapeau, D.O. evaluated Claimant. Dr. Drapeau noted that Claimant's MRI showed prominent bone marrow edema in her second distal phalanx. Claimant reported that her work restrictions were not being followed, and she cleaned rooms from 7:00 a.m. to 4:00 p.m. without any breaks. (Ex. 4).

10. According to the payroll records, Claimant took an approximately 30-minute break every day that she worked between August 16, 2021 and August 27, 2021. There is no evidence in the record that Employer accommodated Claimant's work restrictions. Her employment records show that Claimant consistently worked as a housekeeper. (Ex. D). The ALJ infers that as a housekeeper, Claimant was unable to be on her feet only one hour per shift.

11. Dr. Drapeau noted that Claimant's injured foot did not have a chance to heal because she was working full duty. Dr. Drapeau referred Claimant to physical therapy and for an orthopedic evaluation. On August 27, 2021, Dr. Drapeau changed Claimant's restrictions. Claimant was able to work her regular job, but only four hours per day. (Ex. 4). The ALJ finds that Claimant was restricted to only four hours of work per day.

12. On multiple days between August 27, 2021 and September 8, 2021, Claimant worked more than four hours per day. (Ex. D).

13. On September 20, 2021, Claimant had a follow-up appointment with ATP, Lynne Yancey, M.D. Claimant told Dr. Yancey that she was worried about her finances while working half time, and she felt her employer did not respect her restrictions. Dr. Yancey noted that Claimant was not improving. Claimant was to continue physical therapy, and Dr. Yancey referred her for stress management. Claimant was still restricted to only working four hours per day. (Ex. 4).

14. Claimant had a follow-up visit with ATP, Jacqueline Denning, M.D. on October 5, 2021. Dr. Denning noted that Claimant was not progressing as expected and Claimant's "[c]urrent work and activity restrictions are unchanged." Dr. Denning ordered additional physical therapy, and referred Claimant to a physiatrist. Claimant was still restricted to four hours of work per day. (Ex. 4).

15. Claimant's employment was terminated on October 12, 2021. (Ex. B). Employer's records indicate that Claimant voluntarily terminated her employment to relocate to California, and she was eligible for rehire. (Ex. E). [Redacted, hereinafter KN] oversees Employer's general managers. KN[Redacted] testified that if Claimant had been laid off or if there was no modified work for her, this would have been noted in Claimant's

employment file, and it was not. She further testified that Employer was short staffed, so there was plenty of work for Claimant.

16. Claimant testified that she lived in California in 2018 and 2019, and she moved to Colorado in either 2019 or 2020. Claimant currently lives in Colorado. She testified that even though she traveled frequently to California, she never had an intention to relocate to California.

17. Claimant's testimony as to why her employment was terminated was inconsistent. Claimant initially testified that after her shift on October 11, 2021, she clocked out and spoke with her supervisor, [Redacted, hereinafter VL]. Claimant told VL[Redacted] she had a medical appointment in California, and would be leaving work for a week. Claimant subsequently testified that her General Manager told her there was no more work for her, and that is why she did not return to work. Claimant testified that she never applied for unemployment.

18. The ALJ finds that Claimant's testimony regarding her termination is not credible. The ALJ finds that Respondents proved by a preponderance of the evidence that Claimant voluntarily terminated her employment on October 12, 2021.

19. Claimant did not attend the follow-up appointment with her ATP on October 19, 2021. She testified that during her previous appointment with the ATP, the doctor told her that the insurance company would no longer cover her medical expenses. The ALJ does not find this testimony credible. The medical records and the WC164 Form clearly outline Claimant's continued treatment and work restrictions. The Form notes a follow-up appointment scheduled for October 19, 2021 and referrals for physical therapy and a physiatry consult. (Ex. 4).

20. Claimant testified that she traveled to California in October 2021 for medical treatment unrelated to her work injury. Claimant's medical records from Clinica Sierra Vista in California are from visits in September 2021, January 2022 and February 2022. (Ex. I).

21. Claimant was evaluated by ATP, Dr. Denning, on December 23, 2021. Claimant told Dr. Denning that she was not working. Dr. Denning noted in the WC164 Form, under "Limitations/Restrictions," that Claimant "[m]ay work regular job but only 4 hours per day." She also noted that Claimant's MMI date was unknown because she was under treatment. (Ex. 4).

22. ATP, Dr. Yancey evaluated Claimant on February 28, 2022. Dr. Yancey continued Claimant's restriction of only working four hours per day. She also noted that Claimant's MMI date was unknown because she was under treatment. (Ex. H).

23. Respondents filed a General Admission of Liability (GAL) on September 22, 2021. Liability was admitted for medical benefits, TTD, and TPD beginning August 28, 2021. (Ex. 1). August 28, 2021 was the first day Claimant was restricted to working four hours a day.

24. Kathy McCranie, M.D., examined Claimant for a Respondents' IME on March 29, 2022. Based upon her review of the medical records and her physical examination of Claimant, Dr. McCranie opined that Claimant reached MMI as of March 29, 2022. Dr. McCranie noted that Claimant has not been placed at MMI by her own treating physicians. (Ex. G).

25. There is no evidence in the record that Claimant's ATP has placed her at MMI. The ALJ finds that Claimant has not reached MMI.

26. Claimant was restricted to four hours of work per day beginning August 28, 2021. There is no evidence in the record that this restriction has been lifted. Over the eight week period from August 20, 2021 to October 14, 2021, Claimant earned $3,497.74. The only pay period during this time when Claimant exceeded her AWW was the period between September 17, 2021 and September 30, 2021, when Claimant's AWW was $572.28 ($1,144.56/2).

27. The ALJ finds that Claimant proved by a preponderance of the evidence that she sustained a partial wage loss and she is entitled to TPD benefits from August 28, 2021 until terminated by statute. The ALJ further finds that Claimant's voluntary termination does not terminate her entitlement to TPD benefits.

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 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).

"In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." §§ 8-42-103(1)(g), 8-42-105(4) C.R.S. (termination statutes). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the respondents to establish the claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is responsible for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Id.*; *Padilla v. Digital Equip.,* 908 P.2d 1185 (Colo. App. 1995).

In this case, the ALJ finds and concludes that Claimant voluntarily terminated her employment. Claimant's testimony regarding the reason she did not return to work after her October 11, 2021 shift was inconsistent, and not credible. (Findings of Fact ¶ 7). Claimant's employment records indicate that she voluntarily terminated her employment. This evidence was supported by the testimony of KN[Redacted]. Further, Claimant never filed for unemployment, she was eligible for rehire. (Findings of Fact ¶ 15).

The termination statutes, however, do not automatically preclude Claimant from an award of TPD benefits. The TPD statute does ***not*** contain a termination provision such as those found in sections 8-42-103(1)(g) and 8-42-105(4) of the Colorado Revised Statutes. TPD payments continue until the employee reaches MMI, or until the attending physician gives the employee a written release to return to modified employment, the offer is given to the employee in writing and the employee fails to begin such employment. § 8-42-106(2) C.R.S.

The question here is whether Claimant's resulting wage loss from her voluntary termination includes any preexisting wage loss related to her injury. In *Sparks v. Mattas Marine & RV*, W.C. No. 4-982-976-01 (I.C.A.O. Sept. 26, 2016), the claimant suffered a work injury and subsequently worked a modified job. The claimant was terminated for negligence and found at fault for the termination. The ICAO found that the application of § 8-42-105(4) C.R.S. did not preclude the claimant from an award of TPD benefits after his date of termination. The ICAO reasoned "[t]he wage loss 'resulting' from claimant's termination does not include the preexisting wage loss represented by the difference between the claimant's AWW and the wages he would have been paid had he not been terminated from the modified job duty." *Id.* In other words, the claimant was still entitled to TPD benefits to compensate him for that portion of his wage loss that continued to result from the injury. *Id.* citing *Tarman v. U.S. Transport*, W.C. No. 4-981-955-01 (June

2, 2016); *see also Montoya v. Indus. Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2018) (claimant sustained a wage loss despite having full duty release to work).

Here, Respondents admitted to TPD benefits beginning August 28, 2021, the date Claimant was restricted to only four hours of work per day. The medical records and WC164 forms all clearly note that this is a restriction. As found, Claimant voluntarily terminated her employment on October 12, 2021, but she is still subject to restricted to modified duty and is not yet at MMI. (Findings of Fact ¶¶ 25 and 26). As found, Claimant is entitled to TPD benefits from August 28, 2021 until terminated by statute. (Findings of Fact ¶ 27).

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. §§ 8-42-103, 8-42-105 C.R.S.; *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). There is no evidence in the record to support Claimant's entitlement to TTD benefits. Regardless, even if Claimant proved by a preponderance of the evidence that she was entitled to TTD, any such benefits would have ceased on October 12, 2021, when Claimant voluntarily terminated her employment. §§ 8-42-103(1)(g), 8-42-105(4), C.R.S. The ALJ finds that Claimant is not entitled to TTD.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $561.49.

2. Claimant has proved by a preponderance of the evidence that she is entitled to TPD benefits from August 28, 2021 until terminated by statute.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to TTD benefits.

4. 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: August 24, 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. 5-071-543-001

ISSUES

I. Whether Claimant has proven by clear and convincing evidence that the Division Independent Medical Examining (DIME) physician's opinion with regard to maximum medical improvement (MMI) has been overcome by clear and convincing evidence.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and will cure and relieve of the compensable injuries.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing (AFH) on February 24, 2022 in this matter on the issue of challenging the DIME physician's determination of MMI, medical benefits, and permanent total disability benefits.

Respondents filed a Response to the AFH on multiple issues including affirmative defenses of offsets, apportionment, termination for cause and subsequent intervening disability.

Claimant filed an Unopposed Motion to Hold the Issue of Permanent Total Disability in Abeyance for a Determination at a Later Date, which was granted by OAC on April 21, 2022.

Claimant clarified that she did not dispute the admitted permanent partial impairment rating already admitted in this case and Respondents clarified that their affirmative defenses listed are those that relate to the issue of permanent total disability benefits and were withdrawn at this time but were reserved for when that issue was determined.

STIPULATIONS

The parties stipulated that a Final Admission of Liability (FAL) was filed on February 16, 2022 pursuant the DIME physician's second report. The FAL admitted to a general award for maintenance medical benefits after MMI that are reasonably necessary and related to the injury pursuant to an authorized treating physician's orders..

FINDINGS OF FACT

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

1. On March 8, 2018 Claimant was involved in a motor vehicle accident causing traumatic brain injury (TBI), double vision, cervical spine and lumbar spine injuries. Claimant continued to have active treatment since her injury to the present with San Luis Valley Medical Center and specifically with Kimberly Woodke, PA-C as supervised by Angel Castro, M.D. and Heidi Helgeson, M.D.

2. Claimant stated that Ms. Woodke had referred her for both trigger point injections and facet blocks but neither have taken place to date. Claimant was hoping that the treatment would provide her with further improvement to function and mobility as well as improved pain levels. If that were the case, she would not be as limited from or avoid social situations, especially activities with her daughter, like a normal mother would do. She would like the opportunity to have the treatment in order to have a fair chance of returning to as close to normal as possible, including playing with her child, lifting her, pushing her on a swing as long as she would like, or enjoy outdoor activities like she used to do. Claimant stated that if she was not in pain all the time, she would be a more pleasant person to be around and could go back to enjoying family gatherings and such.

3. Claimant testified that she continues to be limited to staying home, not able to engage in lifting, pushing her child on a swing, or engage in the same outdoor activities which she used to perform with family members without difficulty.

4. The Alamosa EMT paramedic found Claimant unconscious at the scene of the two motor vehicle accident under the purview of the fire department personnel. Claimant was noted to have a significant scalp laceration, was in a cervical collar, unconscious with a GCS[1] of 11. They stabilized her for transport.

5. On March 8, 2018 Claimant was admitted to San Luis Valley Health Regional Medical Center (RMC) by Dr. Julian Maendel as a 32 year old female, post motor vehicle accident (MVA), with a GCS 14 as assessed in the emergency room. Injuries included a large right scalp hematoma with initial bleeding from a scalp laceration, which was controlled with sutures, a small focus of the right frontal ICH[2] and C-spine precautions. Neurosurgery assessment by Dr. Gowriharan Thaiyananthan noted ICH and an L3 transverse process fracture but did not recommend any neurosurgical intervention.

6. The CT of the head, as read by Dr. Kristen Darden on March 8, 2018, showed a small focus intracranial hemorrhage withing the right frontal lobe. The CT of the lumbar spine showed a left-sided L3 transverse process fracture with minimal displacement. Claimant was stabilized at San Luis Valley Health and then the providers contacted Penrose Hospital, in Colorado Springs, to transfer the patient under the care of Dr. Beverly by flight for life as a Trauma 1 patient.

7. Dr. Katlyn Beverly noted that Claimant was involved in a MVA and transferred from Alamosa. The imaging showed an ICH and L2 transverse process fracture. Claimant was reporting nausea, vomiting, and mild headache but remained at a GCS of 17.

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[1] Glasgow coma scale is used to objectively describe the extent of impaired consciousness for eye, verbal and motor responses.

[2] Intracerebral brain hemorrhage.

8. On March 10, 2018 Dr. Andrew Fanous determined that Claimant had an active traumatic hemorrhage of the right cerebrum with loss of consciousness greater than 31 minutes due to the MVA, a scalp hematoma, a scalp laceration, acute pain due to trauma, was at risk of deep venous thrombosis but stated that the cervical and lumbar fractures did not confer instability. He prescribed Keppra for seizure prophylaxis.

9. Claimant was discharged from Penrose Hospital to Penrose Inpatient Rehabilitation in Colorado Springs on March 12, 2018 by Jamie Glen House, M.D. to participate in therapies as she still required significant assistance with mobility and activities of daily living and inpatient comprehensive rehabilitation for further therapies. Dr. House continued medical management, including physical therapy, occupational therapy, speech therapy and rehabilitation nursing.

10. Dr. House took a history stating Claimant had imaging that showed an anterior cerebral hemorrhage, as well as a fracture at L3 transverse process, and a GCS of 14 throughout her evaluation. She had a head CT on admission to Penrose Hospital that showed a tiny focus of hyperdensity in the right frontal cortex medially that was suspicious for a focal cortical contusion. There also was a large right frontal temporoparietal scalp hematoma with laceration. She had a follow up scan of her head that showed punctate high convexity parenchymal hemorrhages in the frontoparietal region. She had a CT scan of the cervical spine that showed an age indeterminate fracture versus congenital defect at the spinous process of C6. An MRI was then performed which showed diffuse posterior paraspinal edema that was concentrated around the spinous process of C6 and favored an acute C6 spinous process fracture. There also was intraspinous edema at C5-C6 and C6-C7 favoring intraspinous ligament tears. She was placed in a cervical collar and had non-surgical treatment. She was placed in a Miami J collar[3] and an LSO.[4] She also was placed on Keppra for seizure prophylaxis. She was seen in Neurosurgical consultation by Dr. Fanous.

11. Dr. House noted that relatives gave a history of her being a home care CNA in the Alamosa area and a "go getter." On exam Dr. House noted that her level of function was limited by her TBI, that she needed minimal assistance with toileting, total assistance with transfers, maximum assistance with ambulation, and needed maximum assistance with memory. Overall, he noted that Claimant did not fully participate in the exam as she was difficult to arouse and was very lethargic, though had intact muscle appearance of the upper extremities and intact motor exam in the lower extremities but had very little communication verbally. Despite the exam, he stated that she had a fairly good medical and functional prognosis. Dr. House continue to see Claimant throughout several years. He prescribed assistive devices, medications (except while Claimant was pregnant or nursing), physical therapy, a CT of Claimant's head and neck, labs, neuropsychological evaluation, speech therapy, ENT referral, and made recommendations with regard to her diet to promote better brain function.

12. On March 14, 2018 Dr. Thomas Wilson, a neuro-optometrist, evaluated Claimant due to ongoing vision difficulties as she complained of extreme hardship with focus and near vision acuity. Dr. Wilson noted that Claimant had significant

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[3] The Miami J collar is a hard cervical collar that immobilized the neck.
[4] Lumbar sacral orthosis.

accommodative insufficiency[5] and recommended near-far accommodative rocks with vision therapy.

13. Claimant was evaluated by neuropsychologist Michael Nunley, PhD. on March 20, 2018. He noted that Claimant's speech production was somewhat limited but expected to improve, as she did not show any obvious evidence of gross thought disorganization and was not easily distracted from the conversation. Dr. Nunley noted that Claimant did go through somewhat of a stage of agitation and restlessness and defined this as level IV on the rancho scale[6] (confused, agitated). They discussed that as one improves they climb higher on the scale and clearly at this point she likely is functioning around a level VII which is automatic, appropriate, and requiring minimal assistance for activities of daily living (ADLs). He diagnosed diffuse TBI with loss of consciousness and other specified mental disorders due to known physiological condition. Dr. Nunley followed up with Claimant on March 27, 2018, noting Claimant was doing well and had a good prognosis for good outcome recovery, but recommended further care. On May 16, 2018 Dr. Nunley explained the need for counselling, medications to assist with sleep and that she was working with a speech-language pathologist to assist with cognitive struggles. He recommended neuropsychological testing to assess the extent of her cognitive dysfunction.

14. Claimant was first seen by PA-C Kimberly Woodke Rio Grande Hospital Clinics on April 9, 2018, following discharge from the Penrose Inpatient Rehabilitation Center. Claimant had increased headaches, memory problems, tingling and weakness in her right upper extremity, vision problems and dizziness as well as cervical pain. She noted complaints of adjustment disorder, cervicalgia, diplopia, dorsalgia, hand numbness, headaches, insomnia, amnesia, and incomplete lesion at C6 level of cervical spinal. She diagnosed intracranial injury with loss of consciousness, incomplete lesion at the C6 cervical level, amnesia and visual disturbances. She prescribed medication, despite Claimant's resistance to taking any, stated Claimant would be seeing a vision specialist and Claimant would continue to require monitoring.

15. Claimant testified that, despite the fact that the medical records reflect that PA Woodke's clinical notes have been co-signed by either Dr. Castro or Dr. Helgeson, Claimant has never seen Dr. Castro, and she only saw Dr. Helgeson for a few times during the first year of her treatment. Claimant acknowledged that the last two years of her treatment, she has only saw PA Woodke.

16. Claimant was referred to occupational therapy, physical therapy and speech/language therapy by Dr. House to address multiple difficulties, with walking, unsteadiness on feet, abnormalities of gait and mobility as well as muscle weakness generally and stiffness of the right knee, word finding and cognitive issues. He was also to treat her cervical spine issues.

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[5] A vision anomaly that is characterized by an inability to focus or sustain focus for near vision.

[6] Rancho Los Amigos Levels of Cognitive Functioning Scale is a clinical tool used to rate how people with brain injury are recovering. (Level X is the highest level; purposeful, independent, appropriate multitasking with memory retention though may still demonstrate intermittent periods of depression and frustration under stress.)

17. Claimant first saw the outpatient therapist, Eric Schoer, DPT from SLVH Pro Therapy Alamosa, on April 19, 2018 who noted a clinical presentation consistent with a TBI and C6 fracture following a MVA on March 8, 2018. She demonstrated deviations in gait and balance which requires use of and assistive, slight decreases in sensation along the RUE, range of motion (ROM) restrictions at the cervical spine, and slight muscle weakness and guarding with left upper extremity ROM. Additionally, Claimant reported high degrees of cervical spine pain that radiates into her shoulders, which limit her ability to perform ADLs, ambulate without an assistive device, sleep, and perform transfers without pain or difficulty. Claimant also had swelling of the lower extremities, and was wearing compression hose. Mr. Schoer stated Claimant would benefit from skilled PT intervention to address the listed impairments to increase her independence so she could return to work and prior levels of function.

18. Claimant continued with occupational therapy with Pro Therapy until May 1, 2018, when she was discharged with recommendations for assistive devices, including grab bars, long handle shoe horn, long handle sponge, document holder, and sock aide. Claimant also saw the speech therapist, Kristin Ferris, on this date due to continued cognition problems, difficulty with word finding and memory as well as processing time, especially math functions, double vision and working memory deficits.

19. On May 11, 2018 Claimant was examined at Centura Spine Care. The medical records documented that Bryant William Reinking, PA-C stated Claimant was examined with a chief complaint of multiple spinal fractures as a result of a significant motor vehicle accident. Claimant required further management of her symptoms related to the development of an intracranial hemorrhage, a C6 spinous process fracture, interspinous ligament sprain, and L3 transverse process fracture. She continued to have neck pain that was relatively unchanged from when she was discharged from the hospital with a diffuse achy pain throughout her neck and a localize sharp pain in the middle of her lower cervical spine. She did report tingling in her right hand that included the small, fourth, and third digits as well as some weakness. Claimant was also reporting very poor balance unchanged since her discharge, though she would ambulate with the use of a cane for balance. Claimant was also reporting constant pain in her low back, which was sharp with movements. Claimant was frustrated with the slow progress of therapy, and was managing her symptoms with Norco and Tylenol as needed. X-rays revealed that Claimant had both an L3 and L4 transverse process fractures, and a C6 spinous process fracture, C5-6 showed a 1 mm anterolisthesis.

20. Mr. Reinking diagnosed a fracture of cervical spinous process, cervical sprain, lumbar transverse process fracture, acute midline low back pain, and provided several options for treatment, including interventional modalities such as injections. On exam he noted Claimant to have positive Hoffmann sign and clonus bilaterally. The patient had MRIs that ruled out spinal cord etiology and Mr. Reinking believe the clinical findings were related to her cranial injuries. He recommended Claimant be as active as tolerated and to especially increase her walking as well as to continue to have aggressive physical therapy to manage her balance deficits related to her cranial injuries as well as her cervical and lumbar spine symptoms.

21. CT of the cervical spine from May 18, 2018 showed Claimant had a resolution of the visible intracranial hemorrhage and near resolution of the right scalp hematoma, a grade I C5-6 spondylolisthesis with widening between C5 and C6 spinous processes, suggesting an intervening interspinous ligament injury and a chronic C6 spinous process fracture, as well as an abnormal C6-C7 facet alignment and additional ligamentous injury as read by Dr. Nicholas Moore.

22. On June 20, 2018 Claimant followed up with PA Woodke, who noted that Dr. House had to increase Claimant's medications on May 18, 2018 due to mood swings and short temper. PA Woodke continued to recommend therapies, and noted Claimant was still using a soft collar. She also made referrals to Avalan Wellness for neurofeedback, to Cynthia Tanaka for counselling and recommended Claimant start tapering from the cervical collar.

23. Radiographs from June 27, 2018 showed that the C6 spinous process fracture was stable but revealed kyphosis (a hunched curvature) of the C5-6 level and the anterolisthesis. The lumbar spine x-rays continued to suggest that the L3 and L4 transverse process fractures were stable throughout flexion and extension. While Mr. Reinking PA-C noted that interventional medicine, such as injections was a possible alternative for treatment, he did not make a referral or include it in the conservative plan for treatment options. Claimant reported that she was frustrated with the slow progress in physical therapy and was managing her pain with Tylenol and Norco prescribed by Dr. House. However, she continued to use a cervical collar and a cane for ambulation due to the unsteadiness of her gait.

24. Claimant was initially evaluated by Dr. Steven G. Gray, Ph.D. a doctor of behavioral medicine, board certified in neuropsychology, on August 30, 2018. He diagnosed major neurocognitive disorder due to TBI, personality change, adjustment disorder with mixed anxiety and depressed mood. On September 28, 2018 he took an extended history consistent with other medical records of the MVA and conducted neuropsychological testing. He noted that due to loss of consciousness and loss of memory of the accident, she had retrograde and antegrade amnesia. Dr. Gray noted that Claimant had cognitive markers for bilateral pre-frontal, right greater than left, which cause difficulty with cognitive flexibility, selective attention, working memory, planning and judgement as well as self-evaluation, gratification delay, spatial reasoning and emotional lability. He recommended medications, neurofeedback treatment, computerized cognitive rehabilitation, including addressing reasoning, reading comprehension, selective attention, working memory and both verbal and vision-special realms. On October 19, 2018 he noted that Claimant had an excellent prognosis for recovery. However, Claimant was unable to locate a psychotherapist near her and Dr. Gray recommended psychotherapy with him. Claimant continued to work with Dr. Gray once or twice a month through May 2022.

25. Claimant continued to follow up once or twice monthly with PA Woodke with regard to her TBI and ongoing neck and low back symptoms. PA Woodke indicated in multiple records that Claimant continued to make progress but had to stop medications due to her pregnancy. On September 18, 2018 she noted that Claimant continued to heal but could not predict when that healing process would be complete. On October 30, 2018

PA Woodke issued a referral to Dr. Gray for neurofeedback and psychotherapy; continued and refilled medications, and advised Claimant to continue with follow ups with Dr. House.

26. She continued to follow up with Colorado Orthopedic Specialists. On September 28, 2018 Mr. Reinking recommended Claimant wean off of narcotics, use Tylenol and antiinflamatories, once approved by neurosurgeon, but continued to state that Claimant was not a surgical candidate and made a pain management referral.

27. On February 1, 2019, Claimant reported to Mr. Reinking that she was 18 weeks pregnant. He recommended that Claimant continue with conservative care, such as walking, losing weight and physical therapy. In light of the pregnancy, there was nothing further from an orthopedic standpoint that he could offer.

28. On February 11, 2019 PA Woodke stated that Claimant continued to be unable to work but was continuing to make slow but steady progress with therapy. Claimant became pregnant and her treatment with Dr. House, the neurologist was interrupted. She recommended a return follow up visit with him once she had the baby. She was also supposed to continue with neurofeedback appointments. She recommended Claimant continue to work on cognition, noted that maximum medical improvement (MMI) was still not in sight and as Claimant's vision improves, she may want to consider post traumatic counselling focused on potentially driving. From the records submitted, none took place.

29. On March 7, 2019 Claimant maximized her physical therapy with Dr. Schoer, who stated Claimant had made significant progress since starting PT and was no longer having constant and consistent neck and low back pain. Claimant participated in 75 sessions of physical therapy. She was able to use exercises and self-mobilization techniques she had learned to either reduce or relieve her symptoms. Mr. Schoer noted that she had functional strength and range of motion in her extremities and spine to perform ADLs and recreational activities without symptoms while using good technique. Claimant completed a total of 78 physical therapy visits.

30. PA Woodke noted that Claimant had "graduated" from physical therapy and continued to perform her home exercise program but continued to have limited right rotation of her neck. She continued to have vision therapy, speech therapy and neurofeedback therapy, making progress.

31. On April 27, 2019 Charles Reich, MA, CC-SLP, discharged Claimant from speech therapy after 72 sessions. He noted that she had made significant progress and could now write formal papers with notation/references. Her verbal expression was considered within normal limits (WNL) with only the occasional pause to find a word. Her reasoning/judgment was considered WNL, memory, especially recent (24 hrs.) was actually very functional and she used her cell phone/calendar, lists, to support any memory deficit, she reported being stressed at times but overall she is functioning at a high level of cognition considering the personal situation she was in at that time (her pregnancy). He noted, however that she continued to require behavioral health counselling.

32. On May 28, 2019 PA Woodke noted that Claimant was awaiting her prism glasses to be authorized, continued her care with Dr. Gray and would be seeing Dr. House at the end of July 2019. Claimant continued unable to work at that time, but continued to make slow, steady progress with her remaining therapies.

33. Claimant returned to consult with Heidi Helgeson, M.D. on June 18, 2019 who noted that she prescribed lidocaine patches and discussed use of the TENS unit. Claimant continued to have complaints of constant cervical spine pain and vision problems.

34. After a hiatus due to being pregnant, Claimant returned to Dr. House for care related to her TBI on July 18, 2019. He documented that Claimant had ongoing problems with irritability and overstimulation, as well as concentration and memory. However, due to her breast feeding her baby, Dr. House was unable to recommend Claimant for medication therapy. Prior to her pregnancy Claimant was on Depakote for irritability, Nuedextafor for pseudobulbar effect, and Ritalin for cognition and speed of processing. He noted that all of those medications were providing a significant therapeutic effect. Dr. House recommended Claimant continue with her treatment with Dr. Gray at that time.

35. Claimant was attended by PA Woodke on August 20, 2019 who reported that Claimant had seen Dr. House who was holding meds secondary to breast feeding and would be working on diet changes and alternative treatments. She noted that treatment with Dr. Grey continued. She was able to change her prism on lenses to 3 from 6 and was noticing a difference. She was doing vision "therapy everyday" [sic.]. Claimant's neck was still bothering her but the lidocaine patches helped take the edge off. She had been doing physical therapy to increase range of motion with good success. She continued to diagnose diplopia, incomplete lesion at the C6 cervical level with ongoing sequelae, TBI, cervicalgia, visual disturbances and headaches. She recommended that Claimant return to physical therapy to see if she could get more pain relief. She noted that Claimant still had a long way to go to reach MMI. She recommended that Claimant continue to follow up with Drs. Gray and House as well as with vision therapy.

36. Claimant restarted physical therapy on August 28, 2019 with Tanaye Maez, PT, DPT at SLV Health Pro Therapy Monte Vista. Ms. Maez noted that Claimant had neck pain, stiffness, weakness, intermittent numbness in right hand and fingers, difficulty sleeping and finding a comfortable position. She assessed that Claimant presented with symptoms consistent with facet joint dysfunction of C4-C7, hypomobility, impaired AROM of cervical spine, impaired posture and postural control, generalized weakness in bilateral upper extremities and cervical spine.

37. Claimant returned to see Dr. House on October 18, 2019 but he was unable to restart medications as Claimant continued to breastfeed her child. Instead he recommended Claimant continue with neuropsychology and biofeedback. He showed Claimant how to do ischemic compression and applied pressure of trigger points.

38. On October 28, 2019 she was evaluated by PA Woodke noting that Claimant had seen Dr. House, continued with neck pain, which was being addressed in physical therapy and with vision therapy, neuropsych. counselling, and neurofeedback.

39. Mr. Maez noted on December 10, 2019 that Claimant continued to report and demonstrate a pinching and pain on the right side of her neck though felt better after treatment.

40. On February 5, 2020 PA Woodke noted that Claimant noticed improvement with physical therapy as they were working on her balance and knots in her neck as well as needling, traction and cupping. PA Woodke issued another physical therapy prescription and stated she was awaiting the EMG as Claimant continued to have hand numbness, which would lessen with the splints, though she noted that they may need to progress to another MRI of the cervical spine. On March 5, 2020 she again requested an EMG as Claimant continued to have tingling in her hands. Notes from PT noted that it increased with traction.

41. On May 6, 2020 Dr. Sheryl Belanger noted that Claimant had had the EMG by Dr. Cooper on April 8, 2020 which showed severe carpal tunnel syndrome on the right and mild to moderate on the left. She made comment that she would progress to an MRI of the cervical spine and may refer Claimant to an orthopedic specialist. On June 2, 2020 Ms. Woodke noted that the MRI had been obtained and would be sent to Dr. Trippi for evaluation. She noted that follow up appointments were difficult since COVID-19 was limiting availability.

42. Physical therapy continued through June 30, 2020, at which time Claimant was demonstrating continued tightness in cervical paraspinals but improving cervical spine ROM without dizziness. Her posture was slowly but consistently improving at that time. The records seem to indicate that PT stopped at this point after another 58 visits between August 28, 2019 through June 30, 2020.

43. Respondents scheduled an independent medical evaluation (IME) with Dr. Nicholas Olsen for July 23, 2020. He took a history and noted her list of concerns in order of priority for Claimant as vision complaints including double vision, brain injury, neck pain, CTS, psychological problems and depression. He reviewed a significant amount of medical records. On exam, Dr. Olsen found that Claimant had neutral low back mechanics, no tenderness with right or left lateral bending, negative SLR, negative Gaenslen's. With regard to the neck, Claimant had a forward head posture, but full range of motion except for mild loss in extension. Facet loading and Spurling's were negative, Lhermitte's phenomenon was absent. Dr. Olson's opinion was that Claimant was at MMI and stable. He opined that the CTS was not related to the motor vehicle accident, that Claimant had an impairment for the cervical and lumbar spine of 13% whole person impairment. However, he did not rate the TBI or the vision problems as he required further evaluations of Claimant. He recommended new neuropsychological testing to assess ongoing cognitive problems, if any, and an ophthalmology test to determine a rating for the diplopia, if any.

44. Dr. Dwight Caughfield performed a Division Independent Medical Examination on November 17, 2020 and issued a report the next day. He took a history consistent with the above testimony and reports. He emphasized that Claimant had had to stop prescribed medications due to her pregnancy, which produced significant problems with irritability and decreased concentration. He noted that claimant had continued issues with compulsivity, short term memory and impaired sleep. He also

documented in his record review that Claimant was deemed to have cognitive-communication difficulties secondary to the brain bleed and TBI. He observed that the nerve conduction study which was performed on April 8, 2020 did not include an EMG needle examination, which was considered substandard care because the NCS alone could not determine the absence of cervical pathology contributing to arm symptoms.

45. Dr. Caughfield noted on exam that Claimant had posterior tenderness at C6 to deep palpation that was intensified with cervical extension, all planes of motion produced a pulling sensation in her neck with some tightening of the upper traps and posterior neck musculature palpated on rotation and lateral flexion. He found that Hoffman's was positive bilaterally but greater on the right and that she had abnormal range of motion. Dr. Caughfield place Claimant in the Moderate/Severe TBI category in light of the Claimant's initial unconscious state 15 minutes after accident and subsequent GCS of 11 assessed by EMS, as well as post traumatic amnesia of several days. He also diagnosed as related the C6 spinous process fracture and subsequent chronic neck pain as well as the lumbar spine transverse process fractures (not addressed in the DIME report).

46. Dr. Caughfield found Claimant not to be at MMI at this stage since she required further correction of her prismatic lenses, further psychological care due to the TBI and treatment of her cervical spine pain. He recommended cervical facet blocks to address the Claimant's neck pain in light of his examination and the records from physical therapy suggesting facet syndrome. He specifically stated that first Claimant required "medial branch block and then assess as to whether she can perform a lift in an excess of 25 pounds. As increase in lifting tolerance would indicate a reasonable expectation of functional improvement with a medial branch ablation which can then be considered." He provided an impairment rating for specific disorder of the cervical spine as well as TBI for a 30% whole person impairment.

47. Kevin Reilly, Psy.D. evaluated Claimant upon Respondents' request on March 24, 2021. Dr. Reilly took a history and demographic information. He reviewed medical records tendered. Dr. Reilly opined that Claimant sustained a mild traumatic brain injury but that testing indicated she did not have a continuing cognitive disorder as the neuropsychometric testing was within normal limits. He opined that Claimant had an adjustment disorder with mixed anxious and depressed mood. He opined that Claimant was at maximum medical improvement.

48. On May 12, 2021, Ms. Woodke made a referral to a physiatrist for the possibility of cervical blocks as per the recommendation of the Division Independent Medical Examiner, Dr. Caughfield.

49. Claimant restarted physical therapy on June 8, 2021 due to continued complaints of neck and upper back pain. Claimant was having continued pinching pain in her right side neck and said she had more soft tissue damage on that side. Claimant stated that her low back pain had improved since her last bout of PT. She said sitting and standing greater than two hours bothered her neck and she had to get up and move. She advised that seeing the massage therapist for cupping on her upper back and neck helped her sleep better. She still struggled with diplopia, but had discontinued therapy. She was having tension headaches less often, but they lasted for hours and ran from her occipital

protuberance to her eye. She stated that she was still breastfeeding her two year old daughter and had not been doing the exercises previously discussed at termination of last the PT session. Therapy again continued through August 23, 2021 for an additional 17 sessions.

50. On August 11, 2021 Ms. Woodke noted that Claimant had regressed somewhat due to unavailable psychological and vision services related to COVID-19. Claimant was encouraged to keep trying to obtain follow up appointments with Dr. Gray and Dr. House. Ms. Woodke stated that Claimant "is still severely impacted by the traumatic brain injury, resulting in cognitive issues. She continues to have neck pain from the fracture sustained in mvc.[7]"

51. On August 24, 2021 Claimant was evaluated by Ronald Wise, M.D. at Respondents' behest. His clinical impression was that Claimant had a mild traumatic brain injury from the MVA and now had symptomatic diplopia in dextroversion, secondary to a left cranial nerve IV paresis. He diagnosed left-sided trochlear nerve paresis that required prismatic glasses to correct. He provided an impairment rating of 3% whole person impairment and stated that Claimant was at MMI.

52. Claimant participated in another session of PT beginning on January 11, 2022 as recommended by Ms. Woodke for the cervical spine as Claimant's neck was really bothering her. Ms. Maez noted that it was likely due to postural dysfunction, causing pain in the neck as well as into the levator scapula. She noted that Claimant would benefit from a series of manual therapy, integrative dry needling (IDN), cupping, breathing education, and strengthening and balance exercises. Therapy continued for 12 more visits.

53. Ms. Woodke noted that Claimant was status post carpal tunnel release of the bilateral wrists on January 20, 2021. Claimant continued with neck pain and headaches and Ms. Woodke recommended Claimant return to Dr. House for recommendation of reinitiating medications. On April 3, 2021 Ms. Woodke stated that Claimant was "still severely impacted by the traumatic brain injury, resulting in cognitive issues." She continued to have neck pain from the fracture sustained and was to continue with Dr. Gray, the eye specialist and establish a replacement neurologist for Dr. House, who was moving out of state. She was requesting copies of the IME reports noting that Claimant was getting increasingly frustrated with her lack of understanding regarding the workers' compensation system, likely due to the sequelae of the TBI.

54. On May 12, 2021 Ms. Woodke reviewed both the IME and the DIME reports noting that the DIME physician, Dr. Caughfield, recommended further work up regarding the cervical spine and vision issues, including possible medial branch blocks and/or facet injections at the C6 level where the fracture occurred, with blocks done with an eye towards functional improvements. He recommended further work up with regard to the psychological problems caused by the TBI. She also reviewed the IME by Dr. Olsen who stated Claimant was at MMI and that any further problems caused by the TBI could be addressed under maintenance. Pursuant to the DIME's recommendation, Claimant was referred to an interventional medicine physiatrist for injections. Review of the extensive

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[7] MCV is an abbreviation for motor vehicle collision.

medical records (over 1600 pages of exhibits) shows that Claimant never attended a physiatrist for consideration of injections.

55. Dr. Olson provided an addendum report on December 16, 2021, after he reviewed Dr. Wise's evaluation. He noted Claimant had a diagnosis of left trochlear nerve paresis caused by the MVA. As Dr. Wise provided an impairment rating of 3% of the visual system, converted to 3% of the whole person, Dr. Olson combined it with the rating he had previously provided for a total impairment of 16% whole person.

56. On December 29, 2021 Ms. Woodke noted that Claimant had anger issues and that medication had not stabilized her mood, including outbursts, anxiety and anger. Physical therapy was helping until it was terminated and the same goes regarding the vision therapy. Ms. Woodke noted that Claimant had slid backwards on vision and prism as well. She stated that Claimant continued to be unable to work due to the TBI. She ordered an MRI of the cervical spine as Claimant's neck problems continued to deteriorate without physical therapy. While Claimant had avoided taking pain medications she now requested some to relieve her of some of the pain. She put in another order for PT and prescribed a neuropathic pain medication as well as a muscle relaxer and submitted a new request for approval of prism lenses. Lastly, she ordered trigger point injections for the cervicalgia.

57. On January 5, 2022 Claimant had a new MRI of the cervical spine. Dr. Michael Kershen read the films as showing mild degenerative changes at the C5-C7, but no significant spinal or neural foraminal stenosis, with unchanged reversal of lordosis with trace anterolisthesis at the C5-C6 level.

58. Ms. Woodke performed trigger point injection on January 11, 2022. She also referred Claimant for another EMG and to physical therapy due to severe neck pain and radiating complaints.

59. On the same day, Claimant was seen by Ms. Maez of Pro Therapy with "signs and symptoms consistent with postural dysfunction, intense cervical pain, cervical and 1st rib hypomobility, headaches, vision problems, and postural abnormalities." Ms. Maez recommended manual therapy, IDN, cupping, breathing education, and strengthening and balance exercises to address cervical pain and other complaints.

60. Claimant returned for examination by the DIME physician, Dr. Caughfield, on January 19, 2022, who found Claimant to have reached MMI as of August 24, 2021. Following examination that showed that Claimant had improvements with physical therapy, psychological therapy and changes in prism glasses, Dr. Caughfield determined that Claimant did not require any active medical care. Claimant had a negative Hoffman's and negative Spurling's, negative facet load test other than some myofascial tension, with good short-term and long-term memory on casual conversation. He reviewed the neuropsychological testing and documented normal neurocognitive function with adjustment disorder and chronic pain. He continued to diagnose cervical pain with spinous process fracture, left cranial nerve IV paresis, adjustment disorder with chronic pain and history of moderate TBI with resolved neurocognitive defects.

61. Dr. Caughfield concluded that the date of MMI was based on the IME performed by Dr. Wise, who determined that Claimant's vision had been fully corrected

but the cranial nerve palsy was permanent. He no longer recommended cervical facet injection as Claimant's examination was consistent with myofascial pain, not facet pain, and would be unlikely to improve function with interventional medicine. He recommended follow up with the ophthalmologist for continued need for prism lenses assessment and adjustment, psychological follow up maintenance care for the adjustment disorder and chronic pain. He provided a 17% whole person impairment.

62. Ms. Woodke issued an MMI report on March 10, 2022. She specifically stated "MMI as determined by Level 2 physician 8/24/21. She has permanent medical impairment and will require maintenance care." She noted that Claimant required maintenance care, including physical therapy, psychological care, and vision evaluations. She also provided work restrictions of no lifting over 25 lbs., sit/stand for up to 1 hour with a 15 minute break. She continued to diagnose cervicalgia, C6 lesion and sequelae, diplopia, visual disturbance, TBI with loss of consciousness, and adjustment disorder.

63. Claimant was again examined by Dr. Olson on April 4, 2022 at Respondents' request, at which time he reviewed Dr. Kevin Reilly's neuropsychological evaluation. His physical examination is consistent with his prior exam of Claimant. He opined that Claimant had a 5% mental impairment which he stated should be combined with the 10% cervical spine rating and the 3% vision impairment for diplopia. Dr. Olsen disagreed with Ms. Woodke's recommendations for an EMG and spine consult. He specifically noted that Claimant had a benign MRI in January 2022 and has no significant findings of radicular symptoms related to the upper extremities. He recommended an FCE to determine work restrictions, and maintenance care in the form of follow up ophthalmologic evaluations to assess strength of the prism glasses as well as ongoing psychological follow-ups with Dr. Gray.

64. On May 4, 2022 Ms. Woodke noted that Claimant's

> … worsening of pain with change of medicine. merits further f/u. Start on low dose of gabapentin to see if helps with the neck pain that has worsened. I think it merits evaluation by pain management to determine if spinal injections, tens unit, or if there is another option to help with the cervical neck pain. I am not convinced that *we have met MMI in this area*.
>
> …
>
> Adjustment disorder, unspecified
>
> This has been present since beginning. She started on medications and then became pregnant. She just recently started medications again.
>
> Started on gabapentin and became sluggish and felt overmedicated. This was stopped and she was placed on duloxetine. This has been a game changer. She states she actually started conversation with someone in waiting room. She has been able to focus more clearly and tune out distractions. She has been more tolerant, less reactive to her family members and most importantly her daughter.
>
> *I think given the significant improvement we have not met MMI* in this area as well. I think titrating medication will be of great benefit to this woman's quality of life.

65. Claimant returned to Ms. Woodke on June 1, 2022 where she stated as follows:

> She has been making improvements with different therapies. She is requesting a letter stating why and where I see possible improvements on her case.
>
> She is in physical therapy and has been able to get and wear prism glasses. Both of which she is feeling better on.
>
> She was having relief of pain with the gabapentin just side effect of drowsiness. Switched to Cymbalta and seems to have helped with mood disorder. however neck pain has increased, making her realize that the gabapentin was doing something. We have since started on low dose of gabapentin. She has continued to see Dr. Grey and feels like she is making improvements.

66. Dr. Gray noted in May 2022 and June 2022 that Claimant continued to have ongoing struggles with anxiety and consternation regarding her future. She questioned her cognitive, physical and emotional capacity to re-enter the work force. Dr. Gray requested authorization for ongoing care at that time. Diagnosis continued to be mild neurocognitive disorder due to TBI which was improved, personality change due to a medical condition, which was resolved, adjustment disorder with mixed anxiety and depressed mood, improved, posttraumatic musculoskeletal injuries and posttraumatic vision changes.

67. Dr. Olsen testified at hearing as Respondents' board-certified expert in physical medicine and rehabilitation, interventional medicine and EMG/nerve conduction studies. He regularly treats patients with manipulations, spinal injections and other procedures. Dr. Olson stated he evaluated Claimant on July 2020 and April 4, 2022. He authored four reports in this matter as listed above. Dr. Olsen testified that he agreed with Dr. Caughfield's assessment that Claimant reached MMI for the vision component of her work injury. Dr. Olsen noted that when he initially saw Claimant, he had recommended that she obtain an ophthalmological consultation to determine the cause of her vision issues. Given the fact that Dr. Wise had performed this evaluation and diagnosed her with left-sided trochlear nerve paresis that was treatable by her prism lenses, she was at MMI for that vision component.

68. Dr. Olsen also agreed with Dr. Caughfield's assessment that Claimant reached MMI for her psychological condition related to the work injury. As Dr. Olsen explained, there was a concern to what extent Claimant's cognitive complaints were based on any kind of traumatic brain injury versus a psychological sequelae of the work injury. Given the fact that Dr. Reilly's evaluation determined that there was no cognitive impairment as a result of the work injury, and that Dr. Gray had been treating Claimant for quite some time, it was appropriate to place her at MMI for her psychological component.

69. Dr. Olsen agreed with Dr. Caughfield that Claimant had reached MMI for her cervical condition. Dr. Olsen noted that despite Dr. Caughfield, during his first evaluation, recommending that Claimant be considered for cervical facet blocks, he in essence changed his mind by the second evaluation. Dr. Olsen is an expert in the field of interventional medicines, including performing many epidural injections and facet blocks. As an expert in his field, Dr. Olsen did not believe that Claimant was a candidate for any

cervical facet blocks. In that regard, Dr. Olsen noted that Claimant had a CT scan and two MRIs of her cervical spine that showed no evidence of moderate or severe facet arthrosis. Dr. Olsen noted that, the Medical Treatment Guidelines requires that before facet blocks are considered, there must be evidence of moderate to severe facet joint disease, as well as a clinical examination that supports facet pain, to proceed with these kind of injections. During Dr. Olsen's April 4, 2022, evaluation, Dr. Olsen noted that the motion in Claimant's cervical spine was fluid, she did not have any crepitus, and her facet loading was considered negative. Dr. Olsen also noted that Dr. Caughfield's examination during the January 19, 2022, evaluation showed negative facet loading. As such, Dr. Olsen's opinion was that neither in diagnostic imaging nor in clinical examination did Claimant demonstrate that there was a facet component to her cervical complaints.

70. Dr. Olsen noted that PA Woodke had recommended a repeat EMG. It was Dr. Olsen's opinion that PA Woodke's recommendation for a repeat EMG would not change his mind that Claimant had reached MMI. Dr. Olsen noted that Claimant had previously undergone an EMG which demonstrated carpal tunnel syndrome. Inasmuch as Claimant's carpal tunnel problems were not a component of the claim, it would not make any sense to do a repeat the EMG.

71. This ALJ makes the following findings and inferences regarding the facts and issues in this matter:

a. Claimant has failed to overcome the DIME physician's finding that Claimant reached MMI based on the fact that the evidence does not show that Claimant has made any significant improvements in function over the last year. The treatment Claimant has received since August 2021, specifically the trigger point injections performed by PA Woodke, the physical therapy, the psychological care, and the prism lenses corrections have simply maintained Claimant from further worsening as documented by PA Woodke above. The same goes with psychological treatment from Dr. Gray. Claimant has reached a level of stability and has failed to advance and make any further functional gains, but has had to return for care to maintain her gains related to her ongoing adjustment disorder with anxiety and depressed mood. Also, Dr. Wise's opinion that Claimant is stable with regard to her permanent ocular nerve injury, which causes diplopia and is resolved by use of prism lenses is persuasive. Claimant reached MMI on August 24, 2021 as concluded by the DIME physician, Dr. Caughfield. PA Woodke's opinion that Claimant may not be at MMI because she assessed that Claimant was making "significant improvement" with regard to both the physical therapy and psychological care is merely a difference in opinion and does not show that the DIME physician has made any errors in his determination. PA Woodke's opinion is simply that, an opinion, and does not rise to the level of showing by clear and convincing evidence that Claimant is not at MMI.

b. Also, as found, Claimant has failed to show that Claimant's care since August 24, 2021 is anything other than appropriate maintenance care to keep Claimant at the point of stability that she achieved by August 24, 2021. Claimant symptoms may wax and wane over time. Therefore, maintenance care,

as admitted by the Final Admission of Liability of February 16, 2022 is appropriate and continuing.

c. Claimant has shown by a preponderance of the evidence that Claimant requires ongoing maintenance care for her vision diplopia, her cervical spine pain and for her adjustment disorder. Claimant will require rechecks of her prism lenses from time to time, to make sure they are appropriate for her ongoing condition and that the required strength has not changed. Dr. Wise and PA Woodke are persuasive in this matter. Claimant also continues to require follow up with PA Woodke or her other authorized treating providers for her cervical spine condition including occasional physical therapy. It is clear from both Dr. Woodke's records above and the physical therapy records from Pro Therapy reviewed in this matter, that Claimant has waxing and waning of her symptoms in her neck. This is demonstrated by loss of range of motion and function as documented by the therapist, Ms. Maez and by PA Woodke in their reports of December 29, 2021 through January 11, 2022. Claimant also had declining depressed mood which needed to be stabilized in order to prevent any further deterioration.

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

Claimant seeks to overcome Dr. Caughfield's determination of maximum medical improvement in this matter. Claimant must prove that the DIME physician's determination of MMI 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 MMI determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998). A fact or proposition is proven by clear and convincing evidence if, after considering all of the evidence, the trier of fact finds it to be highly probably and free from serious or substantial doubt. *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 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 determination, 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*. 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*.

Maximum Medial Improvement is defined at 8-40- 201(11.5), C.R.S. as: "a 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." When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. See, *Reynolds v. ICAO,* 794 P.2d 1080 (Colo. App.1990).

Here, Claimant has failed to overcome the DIME physician's opinion with regard to maximum medical improvement. As found, Claimant presented PA Woodke's opinion that Claimant required continuing treatment, including trigger point injections and facet blocks or interventional medicine in order to reach a point of stability. However, Claimant has had significant treatment, including over a hundred sessions of physical therapy, manual therapy, occupational therapy, speech therapy, psychological therapy and other modalities over the approximately three and a half years before she was placed at maximum medical improvement on August 24, 2021.

While the records show that Claimant continues to have waxing and waning symptoms, this does not mean she is not at maximum medical improvement. It is common for symptoms to wax and wane and require maintenance care in order not to deteriorate, especially when there was such a significant mechanism of injury as the motor vehicle accident in question. PA Woodke is not even certain whether Claimant is at MMI or is not at MMI according to her March 10, 2022 report and the May 4, 2022 report. PA Woodke could have, at any time prior to MMI, ordered the treatment for injections and trigger points. In fact, as early as May 11, 2018 PA Reinking suggested interventional medicine such as injections. PA Woodke also provided Claimant with trigger point injections on January 11, 2022 as part of Claimant's maintenance care program, which she could have performed at any time. PA Woodke's opinions are a mere difference of medical opinion and does not constitute, or rise to the level of, clear and convincing evidence that the DIME physician was incorrect.

Claimant has failed to provide any persuasive evidence that would show that Dr. Caughfield was incorrect in his assessment with regard to MMI. In the DIME physician's first report, when he stated Claimant was not at MMI, there were signs and symptoms present that were not present on the follow up visit, such as a negative Hoffman's and

negative Spurling's, negative facet load test, and only some myofascial tension. Further, Dr. Olsen was persuasive in regard to his opinion that Dr. Caughfield was correct in his opinion with regard to MMI. Claimant has failed to show that she is not at maximum medical improvement.

C. Medical benefits

As Claimant failed to overcome the DIME's opinion by clear and convincing evidence, Claimant has failed to show that medical care to cure and relieve Claimant's injuries in order to achieve MMI is reasonably necessary.

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).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, she is 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 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).

An injured employee must also establish 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 is entitled to all reasonable and necessary medical treatment to prevent deterioration of her conditions related to this March 8, 2018 work related injury, including treatment for the cervical spine injury, the TBI and adjustment disorder, and the diplopia. Respondents stipulated that the Final Admission of Liability dated February 16, 2022 admitted to ongoing reasonably necessary and related medical benefits provided by an authorized treating physician pursuant to Sec. 8-43-207(8)(f), C.R.S. Neither party indicated that there were any medical benefits in dispute in this matter. Therefore this issue is determined by the stipulation of the parties, which is approved.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has failed to overcome the DIME physician's determination of maximum medical improvement and Claimant was at MMI as of August 24, 2021.

2. Pursuant to the Stipulation of the parties, Respondents shall pay for all reasonably necessary and related medical care prescribed by the authorized treating physicians that are attributable to the admitted claim.

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 25th day of August, 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. WC 5-143-923-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to additional temporary partial disability (TPD) benefits in the amount of $665.95 for the period 4/22/2021 through 6/15/2021.

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from 6/16/2021 and ongoing.

III. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for her termination under §§8-42-105(4) & 8-42-103(1)(g) C.R.S., and thus not entitled to TTD benefits from 6/16/2021 and ongoing.

IV. Whether Respondents proved by a preponderance of the evidence Claimant is not entitled to TTD benefits from 9/14/2021 through 10/9/2021 due to an intervening event.

V. Whether Respondents are subject to penalties under to §8-43-304(1), C.R.S. for failure to pay admitted TPD benefits in accordance with the statutory formula set forth in §8-42-106(1), C.R.S.

VI. Whether Respondents are subject to penalties under §8-43-304(1), C.R.S. for failure to produce the claim file within 15 days of her request for the file, pursuant to §8-43-203(4), C.R.S.

FINDINGS OF FACT

1. Claimant has worked for Employer as a store manager since September 2018. Claimant worked approximately 50-70 hours per week.

2. Claimant sustained an admitted industrial injury on July 4, 2020 when she rolled her ankle on the edge of missing tile and fell.

3. Claimant underwent surgery on her left ankle on October 14, 2020. She subsequently developed CRPS in her left ankle and foot.

4. As of January 12, 2021, authorized treating physician (ATP) Hyeongdo Kim, D.O. restricted Claimant to 10 lbs. lifting; 5 lbs. repetitive lifting; 10 lbs. carrying; 5 lbs. pushing/pulling; walking and standing no more than 30 minutes/hour; minimal kneeling; and no squatting or climbing.

5. Claimant worked modified duty for Employer from January 18, 2021 to March 28, 2021. Claimant earned TPD benefits during this time period, during which time her wage loss varied. Insurer correctly calculated and paid TPD benefits for this time period.

6. Claimant continued to experience left foot pain and symptoms and her work restrictions were increased to no weight bearing more than 15 minutes/hour. She subsequently was unable to perform her modified job duties and TTD benefits were reinstated.

7. Employer utilizes [Redacted, hereinafter REA], a third party company, to arrange volunteer positions at nonprofits for employees who are on temporary modified duty. Neither [Redacted]REA nor the nonprofit employ the worker. The worker remains an employee of Employer and Employer is responsible for the payment of wages to the worker.

8. Employer, through [Redacted]REA, offered Claimant a written modified duty placement as a volunteer at [Redacted, hereinafter ATS], to begin on April 21, 2021. The offer was for 40 hours per week at $18.75 per hour ($750.00/week). The offer was within Claimant's current work restrictions of lifting/carrying up to 10 lbs.; repetitive lifting up to 5 lbs.; pushing/pulling up to 5 lbs.; walking/standing no more than 15 minutes/hour; minimal kneeling; and no squatting or climbing.

9. Claimant appeared at [Redacted]ATS on April 21, 2021 to work; however, she was sent home by Employer as [Redacted]ATS had not been notified of the arrangement. Claimant began the modified duty position at [Redacted]ATS the following day, April 22, 2021.

10. On April 22, 2021, Insurer filed a General Admission of Liability (GAL). The admitted average weekly wage (AWW) is noted as $1,583.32. Insurer terminated Claimant's TTD benefits as of April 21, 2021, noting Claimant returned to work earning full wages on April 22, 2021.

11. [Redacted, hereinafter BS] is the adjuster on Claimant's claim. [Redacted]BS testified at hearing that she filed the April 22, 2021 GAL terminating Claimant's TTD benefits as of April 21, 2021 because she did not notice there was a difference between Claimant's admitted AWW of $1,583.32 and the temporary modified volunteer offer for $750.00.

12. On May 10, 2021 DOWC issued a letter notifying Insurer that TPD benefits were owed to Claimant effective the date of her return to work, as Claimant's modified job offer weekly wage of $750.00 was less than the admitted AWW of $1,583.32.

13. Insurer filed an amended GAL on May 12, 2021 admitting for TPD from April 22, 2021 ongoing at $555.55 per week ($1,583.32 –$750.00 x 2/3).

14. Respondents failed to pay Claimant for lost time on May 5 and 6, and June 2 and 3, 2021 for authorized lumbar blocks, as well as lost time on May 7, 11-13, 21, and 24 and June 11, 2021 due to medical appointments.

15. Claimant notified Employer in advance of her scheduled medical procedures and appointments. Insurer authorized Claimant's medical treatment. As such, Respondents were aware of lost time that Claimant incurred as a result of the work injury.

16. [Redacted]BS testified that she paid TPD Claimant based on the modified offer at [Redacted]ATS of 40 hours per week and that, it was not her responsibility to request payroll or monitor Claimant's lost time, which was to be handled by Employer, Claimant, and [Redacted]REA. She further testified that there was no need for her to request payroll records during that time because she was paying a set rate based on the hours specified in the Rule 6 job offer. She stated that Claimant was expected to deal directly with Employer if there was a reason why she was not getting her full 40 hours at [Redacted]ATS. [Redacted]BS has been an adjuster since 2012 and is familiar with Section 8-42-106, C.R.S, which provides that in cases of TPD, the employee shall receive 66 and 2/3rds percent of the difference between the employee's AWW at the time of injury and the employee's AWW during the continuance of the TPD.

17. [Redacted]BS acknowledged that Claimant was due TPD for lost time due to the work injury, including related medical procedures and appointments. [Redacted]BS was aware that Claimant was attending authorized medical appointments, and that Insurer was responsible for that lost time. She testified that she, nonetheless, put Claimant on a "fixed" offer based on the number of hours of the placement at [Redacted]ATS.

18. [Redacted, hereinafter NA] works for Employer as a worker's compensation adjuster. [Redacted]NA handled Claimant's wages and worker's compensation claim for Employer. [Redacted]NA testified to her understanding that Insurer would have paid Claimant for the lost time due to work-related medical procedures. [Redacted]NA testified that Claimant sent her a list of dates of lost time, which included dates related to medical procedures and appointments, as well as missed time unrelated to the work injury, including time taken off to attend court dates, address plumbing issues at home, and non-work-related sick time. [Redacted]NA testified that, sometime in June 2021, she went through Claimant's list and reconciled everything. She testified she then forwarded the information to payroll to include wages on Claimant's next paycheck.

19. Claimant sent various emails to Respondents' counsel requesting TPD for lost time due to medical procedures and medical appointments. Claimant sent emails to Respondents' counsel on 5/19/2021, 6/3/2021 and 6/18/2021 regarding the missed time on 5/5/2021 and 5/6/2021. Emails dated 6/10/2021, 6/18/2021 and 7/1/2021 added requests for missed time on 6/2/2021 and 6/3/2021 as well as the lost time due to medical appointments. Notice of Claimant's claim for TPD was also provided to Respondents in a chart attached to Claimant's Applications for Hearing on 7/15/2021 and on 8/16/2021.

Claimant submitted her lost time again on 10/18/2021, including all supporting medical records and payroll.

20. On 5/14/2021 and 6/3/2021, Claimant submitted her lost time to Employer in the form of lists. Employer forwarded the lists to Insurer and Respondent's counsel. The first list included the first block as well as lost time due to medical appointments. Claimant also lost time for a doctor's appointment on 6/11/2021.

21. [Redacted]BS testified that she was in regular communication with Respondents' counsel and that she was aware Claimant had been requesting payment for time lost while volunteering at [Redacted]ATS. She testified that it was her belief Respondents' counsel was in communication with Claimant's counsel to reach an agreement to pay the additional TPD in one payment.

22. Claimant alleges that she is owed an additional $665.95 in TPD for the time period April 22, 2021 through June 15, 2021. As the date of the amended GAL was 5/12/2021, due dates for unpaid benefits were 5/12/2021, 6/9/2021, and 6/23/2021. The total of $665.95 was due as of 6/23/21.

23. Respondents do not dispute that Claimant is owed TPD in the amount of $665.95. Respondents counsel represented at hearing that Respondents would be issuing a check to Claimant to cover such amount.

24. Respondents issued a check for the TPD owed to Claimant on June 13, 2022.

25. Claimant testified that wage payments from Respondents had often been late or incomplete. She testified that the late and/or unpaid TPD payments caused her frustration and worry regarding paying her bills.

Termination of [Redacted]ATS Position

26. While working at [Redacted]ATS on June 11, 2021, Claimant's left foot struck the bottom of a clothing rack, causing Claimant to fall forward onto her left foot. Claimant experienced pain in her left ankle. She reported the incident to [Redacted]ATS' assistant manager as well as to store manager, [Redacted, hereinafter AJ].

27. Claimant sought treatment with Dr. Kim that same day. Dr. Kim noted that Claimant's exam findings were consistent with acute left foot contusion and placed Claimant on temporary restrictions of no lifting/carrying/pushing/pulling of more than 2 lbs. and no walking or standing for more than 15 minutes/hour.

28. Claimant returned to work at [Redacted]ATS on June 14, 2021 and provided the assistant manager a written copy of her June 11, 2021 work restrictions. Claimant performed seated tasks for the day. She returned to [Redacted]ATS the following day, June 15, 2021, and performed another seated task until store manager, [Redacted]AJ, called Claimant into her office. At that time, [Redacted]AJ notified Claimant that her

position at her [Redacted]ATS had ended because they could not accommodate Claimant's work restrictions for mostly seated duty.

29. [Redacted]AJ notified [Redacted, hereinafter JF], Director of Volunteers at [Redacted]ATC, of the decision. [Redacted, hereinafter MS] sent an email to [Redacted, hereinafter AH] at [Redacted]REA at 1:11 p.m. on June 15, 2021. [Redacted]JF that Claimant was on seated duty only restrictions due to the June 11, 2021 incident. She wrote, "At [t]his time we don't have seated work for her at [Redacted]ATS. We will be terminating her volunteer opportunity today based on her new restrictions." (Cl. Ex. 1, p. 1).

30. [Redacted]JF sent a second email to [Redacted]AH at 4:45 p.m. on June 15, 2021. She stated, "I would like to let you know [Claimant] came back to the store and asked the store manager for a written letter to give her lawyer. We do not give those out and explained to her she was released because of her new restrictions." (Id. at. p. 2).

31. On June 16, 2021, [Redacted, hereinafter AT] of [Redacted] REA sent an email to [Redacted]BS stating that [Redacted]ATS was in the process of accessing video surveillance of the June 11, 2021 incident. She stated, "No one witnessed what happened and [Claimant] has been vague with the details so they are reviewing to see if there is any further info on video. (R. Ex. D, p. 27). [Redacted]AT also noted that Claimant requested [Redacted]ATS complete a letter for her attorney stating they cannot accommodate her restrictions. She wrote, "At this point [Redacted]ATS no longer want to host, not due to restrictions but due to [Claimant's] behavior and concerns that she is not being truthful about the alleged incident in addition to trying to be flexible and putting her at 2 of their locations." (Id.)

32. [Redacted]AJ testified at hearing that Claimant's volunteer opportunity at her [Redacted]ATS ended because her store could not accommodate Claimant's new work restrictions. She testified that Claimant's placement did not end due to any purported vagueness regarding the June 11, 2021 incident, issues with behavior, or requests for transfers.

33. [Redacted]JF explained that [Redacted]ATS considers requiring a worker to be seated for all but 15 minutes/hour a mainly seated position. She testified that there were no such seated duty positions available for Claimant at [Redacted]ATS based on the work restrictions imposed on June 11, 2021. [Redacted]JF testified that it was her understanding Claimant requested a letter stating why she had been released. She further testified that Claimant's placement with [Redacted]ATS did not end due purported vagueness regarding the June 11, 2021 incident, issues with behavior, or requests for transfers.

34. [Redacted]BS requested that [Redacted]ATS provide a summary of the reasons for Claimant's termination of placement. An unidentified individual at [Redacted]REA drafted a discharge summary dated July 12, 2021. [Redacted]AJ nor [Redacted]JF made any changes to the content of the letter. [Redacted]AJ signed the letter. The letter states

that Claimant alleged she tripped and fell on the bottom of a rolling rack on June 11, 2021 and notified [Redacted]ATS. It further states that Claimant reported to [Redacted]ATS on June 15th claiming that she had seated restrictions and requested that [Redacted]ATS create and sign a document for her attorney stating that [Redacted]ATS could not accommodate her restrictions. The letter does not refer to any alleged issues with Claimant's behavior or requests for transfers.

35. Claimant testified that [Redacted]AJ informed her that her position with [Redacted]ATS ended due to her new work restrictions. Claimant testified she was never informed by [Redacted]ATS that she was vague about the June 11, 2021 work incident.

36. Regarding alleged issues with behavior, Respondents note that while working at the first [Redacted]ATS, a customer alleged that Claimant smelled like marijuana. Claimant does not use marijuana and underwent at least two drug tests at the start of her worker's compensation claim which were negative. Claimant was also accused of being confrontational with someone regarding a transfer request. Claimant acknowledges she did have a heated discussion with someone from [Redacted]REA regarding payment of wages. There is no evidence Claimant was given any warnings for the aforementioned behavior. Claimant was subsequently transferred to a second [Redacted]ATS location approximately six weeks prior to the end of her placement. There is no evidence of any purported behavioral issues during that time period.

37. Regarding Claimant's request for transfers, Claimant first requested to be transferred to an [Redacted]ATS location closer to her medical providers in an attempt to reduce travel time. [Redacted]ATS approved a transfer, but to a different location than the location Claimant specifically requested. Claimant again requested another transfer to the location she requested initially. Claimant addressed the second transfer request with [Redacted]REA, not [Redacted]ATS. Claimant was not informed by Employer, [Redacted]REA, or [Redacted]ATS regarding any policy prohibiting her from requesting transfers and was not informed that her transfer requests were an issue.

38. Claimant has not been terminated by Employer and remains on a workers' compensation leave of absence.

39. Respondents did not offer Claimant any other temporary placements or modified duty work after June 15, 2021. Claimant has not been released to full duty or been placed at maximum medical improvement (MMI).

<u>COVID-19 Event</u>

40. On September 14, 2021 Claimant was hospitalized with COVID-19. She was thereafter transferred to a rehabilitation facility at which she stayed until October 9, 2021.

41. At the time she was hospitalized, Claimant had been in active treatment for her work injury with ATPs Drs. Kim, Wakeshima, Chan, and DiSorbio. An appointment with ATP Dr. Barolat was also pending to evaluate Claimant for a stimulator implant. As of late

August and early September 2021, Claimant continued to report left ankle and foot pain and other symptoms. As of August 20, 2021, Dr. Kim placed Claimant on restrictions of 20 lbs. lifting/repetitive lifting/carrying/pushing/pulling, and walking and standing no more than 45 minutes/hour.

42. [Redacted]AJ testified that Employer was unable to accommodate these restrictions.

43. Claimant resumed treatment with her ATPs upon her release from the hospital on October 9, 2021. She saw Dr. Kim on 10/20/2021. CE p 249. On 11/19/2021 Dr. Wakeshima prescribed Claimant an electrical sock for her CRPS. Dr. Wakeshima recommended that Claimant consult with her personal physician to see if she needed to continue with a medication called Eliquis in anticipation of surgical implantation of a stimulator. needed to be off the Eliquis before she could be considered for a surgical procedure to implant a stimulator. On 12/15/2021 Dr. Barolat recommended a peripheral stimulator.

44. Dr. Wakeshima testified by deposition on behalf of Claimant as a Level II accredited expert in physical medicine and rehabilitation and chronic pain. He testified that at the time Claimant was hospitalized for COVID-19, there was no expectation or contemplation that she would be placed at MMI in the near future; there was no significant indication that her condition was resolving or abating; and no indication that she should be released to full duty with no restrictions. Dr. Wakeshima testified that Claimant remained impaired by her work injury during the time she was hospitalized for COVID-19. Dr. Wakeshima's testimony is found credible and persuasive.

Requests for Claim File

45. Claimant's counsel submitted a written request for Claimant's updated claim file to Respondents' counsel via email on July 15, 2021. Claimant's counsel repeated her requests on July 31, 2021, September 7, 2021, September 8, 2021, September 15, 2021 and October 18, 2021.

46. Claimant served interrogatories to Respondents on or around July 15, 2021, connected to a prior Application for Hearing, and on or around August 16, 2021 in connection with the current Application for Hearing. Respondents provided answers to the first set of interrogatories on September 8, 2021. Claimant requested that Respondents supplement their interrogatories and answer her replacement interrogatories.

47. On October 25, 2021, Claimant submitted Motion to Compel Answers to Discovery and to Produce the Updated Claims File. On October 26, 2021, Respondents requested a prehearing conference (PHC) to address Claimant's motion. Respondents did not file a written objection to Claimant's motion or produce the claim file at the time because they were waiting for a Prehearing Administrative Law Judge ("PALJ") to rule on the motion at

the PHC set for November 10, 2021. Respondents were of the understanding that the issues would be discussed and ruled on at the PHC.

48. PALJ Laura Broniak was unaware the parties had scheduled a PHC for November 10, 2021. As such, on November 5, 2021, PALJ Broniak issued an order ordering Respondents to, among other things, provide Claimant an updated claim file within seven days of the date of service of the order. She denied Claimant's motion to require the claim file to be produced without a privilege log. The order was served November 8, 2021.

49. The parties subsequently attended a PHC before PALJ Broniak on November 10, 2021 at which time the parties addressed, *inter alia*, Respondents' motion for an extension of time to comply with PALJ Broniak's order. PALJ Broniak issued an order dated November 10, 2021 ordering Respondents to provide an updated copy of the claim file on or before November 18, 2021.

50. Respondents attempted to produce the claim file on November 18, 2021, but were unable to do so due to technical issues with the electronic file. Respondents notified Claimant's counsel of the technical issue and Claimant's counsel agreed to accept the claims file on November 19, 2021. Respondents provided the claim file to Claimant on November 19, 2021.

<u>Ultimate Findings</u>

51. Regarding Claimant's termination from the [Redacted]ATS position, the ALJ finds the testimony of Claimant, [Redacted] AJ and [Redacted]JF more credible and persuasive than the testimony of [Redacted]NA and [Redacted]MS.

52. Claimant proved it is more probable than not she is entitled to additional TPD benefits in the amount of $665.95 for the 4/22/2021 through 6/15/2021.

53. Claimant proved it is more probable than not she is entitled to TTD benefits from 6/16/2021 and ongoing.

54. Respondents failed to prove it is more probable than not Claimant was responsible for termination from employment.

55. Respondents failed to prove it is more probable than not Claimant is not entitled to TTD benefits from 9/14/2021 through 10/9/2021 due to an intervening event.

56. Claimant proved that Respondents violated §§8-42-106(1) & 8-43-203(4), C.R.S. Respondents failed to prove their actions were objectively reasonable. Accordingly, Respondents are subject to penalties under §8-43-304(1), C.R.S.

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).

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC

4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly 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. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

The termination statutes are not applicable when there is no "employment" to terminate. In *Blocker v. Express Personnel*, WC 4-622-069 (ICAO, Nov. 27, 2006), the claimant was employed by a temporary agency who placed Claimant at a third party company for a temporary work assignment. The third party company alleged various infractions of their rules, for which they terminated the claimant's temporary work assignment. The ALJ determined that the termination statutes were inapplicable. The ALJ found that there was no contract of hire between the third party and the claimant and, thus, no employment by the third party within the meaning of the termination statutes. The

Panel affirmed the ALJ, noting that, because the claimant's employment with the respondent employer was not terminated, the ALJ correctly ruled that the termination statutes were not a bar to his receipt of temporary total disability benefits. *Id.*

Here, as in *Blocker,* the termination of Claimant's temporary volunteer placement at [Redacted]ATS did not constitute termination of employment within the meaning of the termination statutes. It is undisputed [Redacted]REA nor [Redacted]ATS were Claimant's employers. Employer utilized [Redacted]REA to place Claimant on a temporary volunteer assignment with [Redacted]ATS for Claimant's modified duty work. [Redacted]REA and [Redacted]ATS are third parties that did not have any contract of hire with Claimant. Employer continued to employ Claimant and remained responsible for payment of Claimant's wages. Although [Redacted]ATS terminated Claimant's temporary volunteer placement, it is undisputed that Claimant's employment has not been terminated by Employer. As of the date of hearing, Claimant remained employed by Employer and was on a worker's compensation leave of absence. It is also undisputed that after [Redacted]ATS terminated Claimant's temporary placement, Employer did not offer Claimant any further modified duty work at Employer or through [Redacted]REA. [Redacted]NA credibly testified that Employer has been unable to accommodate Claimant's work restrictions. There is no evidence indicating Claimant is at fault for Employer's failure to offer her modified work or another temporary volunteer position at another organization. As Claimant has not been terminated from her employment with Employer, the termination statutes do not preclude Claimant's entitlement to temporary indemnity benefits.

Even assuming, *arguendo*, that the termination statutes applied in this case, the preponderant evidence does not establish that Claimant was responsible for the termination of her temporary placement at [Redacted]ATS. Contrary to Respondents' contention that Claimant was terminated due to some behavior issues or requests for transfers, [Redacted]NA and [Redacted]JF credibly and persuasively testified that Claimant was terminated from her position with [Redacted]ATS because [Redacted]ATS could not accommodate work restrictions imposed on June 11, 2021. Claimant was not at fault for being placed on the work restrictions, which were imposed by her ATP due to sustaining a temporary increase in symptoms after striking her left foot while working.

TPD and TTD

To prove entitlement to temporary indemnity benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *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), C.R.S. 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). 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).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

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

<u>TPD</u>

As found, Claimant proved she is entitled to additional TPD benefits in the amount of $665.95 from April 22, 2021 through June 15, 2021. Claimant's work injury caused disability which resulted in Claimant being placed on modified duty and undergoing medical treatment. Claimant lost time and wages from work due to undergoing certain medical procedures recommended by her ATP. *See Boddy v. Sprint Express Inc.*, WC 4-408-729 (ICAO, Feb. 17, 2000) (noting that because the ATP required the claimant to undergo the specific medical treatment and the claimant could not be at work at the same time he was attending medical appointments, the ATP implicitly imposed "medical restrictions which precluded the claimant from performing his regular work on the days of the appointments.) Respondents do not argue that the medical treatment resulting in the missed time from work and wage loss was not reasonably necessary and related to Claimant's work injury. The preponderant evidence demonstrates that the medical treatment required for the industrial injury is the cause of Claimant's wage loss. Respondents do not dispute that Claimant is owed $665.95 in additional TPD from April 22, 2021 to June 15, 2021.

<u>TTD</u>

Claimant proved by a preponderance of the evidence she is entitled to TTD benefits beginning June 16, 2021 and ongoing. Claimant sustained a temporary aggravation of her left ankle and foot condition due to striking her left foot while performing her volunteer duties at [Redacted]ATS on June 11, 2021. As a result, Claimant's ATP increased Claimant's work restrictions, which impaired Claimant's ability to perform the duties of her volunteer position and her regular work for Employer. Both [Redacted]ATS and Employer have been unable to accommodate Claimant's restrictions since June 16, 2021, which has resulted in actual wage loss for Claimant. The work restrictions are the result of Claimant's industrial injury and temporary aggravation of that industrial injury. As of the date of hearing, Claimant had not yet been placed at MMI, returned to regular or modified employment, been given a written release by her ATP to return to regular employment, or been given a written offer of modified employment from Employer and failed to begin such employment. Accordingly, Claimant has proven it is more probable than not she is entitled to TTD benefits from June 16, 2021 and ongoing.

Intervening Event

Respondents argue that, if Claimant is found entitled to TTD benefits beginning June 16, 2021, she is not entitled to TTD benefits from September 14, 2021 to October 9, 2021 because her hospitalization for COVID-19 constitutes an independent intervening event.

An intervening injury or condition does not sever the causal connection between the industrial injury and the claimant's wage loss unless the claimant's disability is triggered by the intervening event. *See Travelers Insurance Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). This is true because the claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *See Horton v. ICAO*, 942 P. 2d 1209 (Colo. App. 1996). The existence of an "intervening event" is an affirmative defense to the respondent's liability. Consequently, it is the respondent's burden to prove that the claimant's wage loss is attributable to the intervening injury or condition and not the industrial injury. *See Atlantic and Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983).

In *Horton,* the claimant was receiving TTD benefits and awaiting surgery when she suffered a non-injury related fall. The injuries from the fall necessitated postponement of a work-related surgery. The ALJ concluded that the fall was an intervening event and suspended TTD benefits. ICAO reversed the ALJ, and the Court of Appeals affirmed ICAO, explaining:

> [P]etitioners admitted liability for temporary total disability benefits and they did not contend that the claimant's disability abated prior to the fall…Since the claimant was already totally disabled by the injury at the time of the alleged 'intervening event,' the subsequent wage loss was necessarily caused to some degree by the injury. Thus the ALJ's findings establish that claimant's injury contributed in part to the subsequent wage loss.

> Therefore, under *PDM Molding v. Stanberg, supra*, claimant was entitled to temporary disability benefits for the disputed period.

Horton, supra at 1211.

Leading up to Claimant's hospitalization, Claimant was on work restrictions preventing her from performing her regular job duties and Employer was unable to accommodate those restrictions. Thus, although her hospitalization for COVID-19 essentially precluded Claimant from working her regular employment, Claimant was already temporarily disabled and unable to perform her regular work duties as a result of the industrial injury. Had Claimant not been hospitalized for COVID-19, she still would have been temporarily disabled during such time period due to the industrial injury. No evidence was offered indicating that Employer was or would have been able to accommodate Claimant's work restrictions during her time of hospitalization. Here, because Claimant was already temporarily disabled as a result of the industrial injury, the hospitalization was not an intervening cause of her wage loss. *See Saenz-Rico v. Yellow Transportation, Inc*., WC 4-547-185 (ICAO Sept. 11, 2003) (Because the claimant was already temporarily totally disabled as a result of the industrial disability the claimant's resumption of insulin shots precluding him from performing his regular work was not an intervening cause of his wage loss). Throughout Claimant's hospitalization for COVID-19 the industrial injury contributed to a large degree to her wage loss. Accordingly, Respondents failed to prove Claimant's wage loss from September 14, 2021 to October 9, 2021 is attributable to an intervening injury or condition and not the industrial injury.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

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 insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim*

Appeals Office, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, WC 4-981-806 (ICAO, July 1, 2019).

<u>Failure to Pay TPD</u>

As found, Claimant established that she is entitled to additional TPD benefits from April 22, 2021 through June 15, 2021 due to lost time related to the work injury. Respondents do not dispute that Claimant is owed $665.95 in TPD from April 22, 2021 through June 15, 2021.

Nonetheless, Respondents argue that no violation occurred because benefits were paid in accordance with the GAL. Respondents further contend that they have a rational argument based in law or fact for paying TPD according to the GAL, as Claimant also took time off for various personal matters unrelated to the work injury, which contributed to the confusion over how much TPD may have been owed.

Section 8-42-106(1), C.R.S. provides:

> In case of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week. Temporary partial disability shall be paid at least once every two weeks.

Respondents payment of TPD to Claimant solely based on the [Redacted]ATS volunteer position of 40 hours per week without including other lost time due to the work injury was a failure to pay Claimant TPD benefits to which she was entitled, thus constituting a violation of the Act.

Respondents failed to prove that their actions were objectively reasonable under the circumstances. Here, Employer and Insurer failed to properly address the payment of wages and TPD to Claimant when utilizing a third party company. [Redacted]NA testified that she thought Insurer would pay Claimant, while [Redacted]BS testified that her understanding was that Employer would pay Claimant and that it was not her responsibility to collect payroll or attempt to reconcile any of that information. Both [Redacted] NA and [Redacted]BS were aware that Claimant was entitled to temporary indemnity benefits for lost time related to the work injury. As an experienced adjuster, [Redacted]BS was aware of the applicable rules and statutes. Employer and Insurer's indifference as to who was responsible for keeping track of and paying Claimant for her related lost time was objectively unreasonable.

Both Employer and Insurer were aware of Claimant's lost time due to medical procedures and appointments related to the work injury, as Insurer authorized such treatment, and Claimant gave prior notice to [Redacted]NA of the procedures and appointments. Claimant and Claimant's counsel sent multiple emails to [Redacted]NA and Respondents' counsel detailing the lost time and specifically requesting payment. While Respondents were not required to simply rely on Claimant's allegations and calculations, they were responsible for timely conducting their own investigation and reconciliation.

Respondents offered no explanation as to the significant delay in paying Claimant additional TPD to which they admit is owed to Claimant. [Redacted]NA's testimony that she reconciled the information in June 2021 does not explain why payment of TPD owed to Claimant was not made until June 2022. [Redacted]BS testified that she was in regular communication with Respondents' counsel and was aware that Claimant had been requesting payment of TPD but was under the impression an agreement between the parties would be reached. Respondents were notified of a discrepancy in TPD payments and were repeatedly asked to address the discrepancy. As of the date Claimant filed the Application for Hearing, Respondents had been given multiple opportunities over the course of several months to remedy the underpayment. Based on the totality of the evidence, Respondents failed to prove their actions were objectively reasonable.

In determining the appropriate amount of the penalty, the ALJ has considered the harm to Claimant, the significant length of the time period of the violation, and penalties awarded in comparable cases. Respondents offered no evidence or argument regarding their ability to pay any imposed penalties.

Accordingly, the ALJ concludes that Respondents are subject to a penalty of $10/day from May 12, 2021 to June 13, 2022. May 12, 2021 to June 13, 2022 is a period

of 395 days. As each day is a separate offense under the statute, Respondents shall pay a penalty of $10.00 per day, totaling $3,950.00 in penalties.

Failure to Produce the Claim File within 15 Days

Section 8-43-203(4), C.R.S. provides,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

Claimant submitted written requests for the claim file to Respondents on multiple occasions, beginning on July 15, 2021. Based on the date of the initial request, the deadline for production was August 1, 2021.[1] It is undisputed that Respondents did not produce the claims file to Claimant until November 19, 2021. Respondents' failure to produce the claims file within 15 days of the written request constitutes a violation of Section 8-43-203(4), C.R.S. As Claimant made a prima facie showing that Respondents failed to comply with the provisions of Section 8-43-203(4), C.R.S., Respondents bear the burden to prove their inaction was objectively reasonable.

Respondents argue that the claim file request was a discovery issue that was resolved by PALJ Broniak. Respondents note that they objected to Claimant's motion on October 26, 2021, attended a PHC and then received an order from PALJ Broniak permitting Respondents until November 18, 2021 to provide the updated claim file. Respondents made reasonable attempts to provide the claim file to Claimant as ordered on November 18, 2021, but was unable to do so until November 19, 2021 because of technical issues outside of their control. While Respondents failure to produce the claim file from October 26, 2021 through November 19, 2021 was reasonable, Respondents failure to do so prior was objectively unreasonable.

Claimant submitted repeated requests to Respondents for an updated claim file on 7/31/2021, 9/7/2021, 9/8/2021, 9/15/2021 and 10/18/2021. It was not until October 26, 2021 that Respondents filed an objection to Claimant's motion regarding discovery and requested a PHC. There is no evidence that, prior to October 26, 2021, Respondents filed any objections to producing the updated claim file or made any requests for a PHC to

[1] Fifteen days later was a Saturday, so the deadline for production would have been (Monday) August 1, 2021.

address production of the updated claim file. The email correspondence entered into the record does not show any attempts to provide the updated claims file to Claimant prior to November 18, 2021, nor do Respondents allege they attempted to do so. Reasonable respondents who received multiple requests for an updated claim file would either provide the claim file by the requisite deadline, come to an agreement with the claimant for additional time to provide the claim file, timely object to the request, or timely request a prehearing conference to address any perceived issues. Here, Respondents waited until October 26, 2021 to address Claimant's request, which was objectively unreasonable.

Respondents offered no evidence or argument regarding their ability to pay any imposed penalties. In determining the appropriate amount of the penalty, the ALJ has considered the harm to Claimant, the length of the time period of the violation, and penalties awarded in comparable cases.

Accordingly, the ALJ concludes that Respondents are subject to a penalty of $10/day from 8/2/2021 to 9/7/2021, a period of 37 days ($370); $20/day from 9/8/2021 through 10/18/2021, a period of 41 days ($820); and $25/day from 10/19/2021 to 10/26/2021, a period of 7 days ($175), totaling $1,365.00. The above penalties shall be apportioned 75% paid to Claimant and 25% to the Colorado Uninsured Employer Fund.

ORDER

1. Respondents failed to prove Claimant was responsible for termination from employment.

2. Respondents failed to prove an intervening event.

3. Respondents shall pay Claimant additional TPD benefits from April 22, 2021 through June 15, 2021 in the total sum of $665.95.

4. Respondents shall pay Claimant TTD benefits beginning June 16, 2021 and ongoing, until terminated by operation of law, subject to any applicable offsets or credits.

5. Respondents shall pay penalties of $3,950.00 and $1,365.00, apportioned 75% to Claimant and 25% to the Colorado Uninsured Employer Fund.

6. Respondents shall pay statutory interest of 8% per annum on all temporary disability benefits that were not paid when due.

7. 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: August 25, 2022

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable injury on January 21, 2022?

STIPULATIONS

If the claim is compensable, the parties stipulated that: (1) Claimant's average weekly wage is $721.52; (2) Claimant is entitled to TPD benefits from January 22, 2022 through February 16, 2022. The specific amount of TPD is reserved; (3) Claimant is entitled to TTD benefits commencing February 17, 2022; and (4) Concentra is the primary authorized provider.

FINDINGS OF FACT

1. Employer is a contractor for FedEx. Claimant worked for Employer as a package delivery driver. She began her employment in November 2021. Claimant's route served a mixture of residential and commercial addresses, using a small Penske box truck. It was the smallest of Employer's routes, having been created during the peak season to relieve pressure on other routes and drivers. Claimant typically delivered 40-60 packages each day, although she averaged 70-80 packages on busier days. Because of the structure of the route, "there's more driving than there is delivering." The vast majority of packages weighed 5 pounds or less. A small percentage of packages were heavier, and some weighed as much as 80 pounds. Very large packages were generally delivered with a "team" approach. She usually drove a.

2. On January 21, 2022, Claimant was delivering a small, one-pound package to a residential address. The residence had a front porch with four or five steps. When she stepped up to the first step, Claimant felt a painful pop in her right hip. She fell to the ground and lay there for several minutes. She then returned to her vehicle and texted her fiancée about the incident.

3. Shortly thereafter, Claimant coincidentally received a call from her manager, Mr. D[Redacted]. Claimant stated she had injured her hip. Mr. D[Redacted] asked if Claimant could finish her shift, and she replied in the affirmative. Mr. D[Redacted] was a relatively new manager at the time so he told Claimant he would discuss the matter with Mr. A[Redacted].

4. Claimant finished her deliveries and returned to Employer's home terminal. She spoke briefly with Mr. A[Redacted] about the injury. Mr. A[Redacted] asked how she injured herself and Claimant replied, "Which time?" Claimant stated, "something had happened" to her hip a couple of weeks ago outside of work, and she had "re-agitated" it that day on the customer's porch. Mr. A[Redacted] did not direct Claimant to seek medical treatment because she did not appear in obvious distress. Mr. A[Redacted] relayed the

information to Mr. D[Redacted] , but neither had the impression that Claimant's medical condition was serious.

5. Claimant's hip pain intensified that evening and she went to the Parkview Medical Center emergency room. Claimant reported "persistent" soreness and tingling in her right leg for "about three weeks," and was "having trouble moving her leg the past few days." Claimant further stated, "She is a FedEx driver and today as she was stepping up onto a porch she heard a pop in her right hip with pain on the right side of her groin." X-rays of the right hip were negative. The ER physician diagnosed a right hip "strain." He also suspected a labral tear and thought Claimant may require an MRI. She was advised to follow up with orthopedics and released.

6. Employer referred Claimant to Concentra. She saw Dr. Leah Johansen at her initial appointment on January 22, 2022. Claimant reported that she "took one step up on a porch and felt a pop in my thigh and it dropped me to my knees." Examination of the right hip showed very limited range of motion and tenderness to palpation of the inguinal area. Dr. Johansen ordered physical therapy and would consider an MRI if Claimant made no progress. Claimant was given crutches and put on work restrictions including five pounds maximum lifting, sitting 90% of the time, no driving, and no stairs.

7. Claimant worked intermittent modified duty over the next few weeks.

8. Claimant underwent a right hip MRI on February 12, 2022. It showed a stress fracture of the right femoral neck.

9. Claimant saw PA-C Mitchell Dawson at the Colorado Center for Orthopedic Excellence ("CCOE") on February 17, 2022. Mr. Dawson thought the stress fracture would not heal properly on its own and recommended immediate surgery. Claimant was taken off work pending surgery.

10. On February 22, 2022 Dr. Geoffrey Doner performed a right femoral neck open fixation with hardware placement. Dr. Doner opined, "I do believe this was a Workers' Compensation related injury due to overuse causing the femoral neck stress fracture and she did require urgent surgery to get this fixed."

11. The last record from a treating provider is Mr. Dawson's report dated May 24, 2022. Claimant described ongoing right groin pain with popping and catching. Labral impingement sign and FABER test were positive. X-rays showed the hardware is in good position with no evidence of loosening or failure. Mr. Dawson opined the stress fracture was healing well and Claimant's ongoing pain may be related to a right hip labral tear. He noted the prior hip MRI was done without contrast, and ordered a MR arthrogram for a more definitive look at the labrum.

12. Claimant had started having problems with her right leg a few weeks before the January 21, 2022 incident at work. Multiple coworkers and managers observed her limping and favoring the right leg before January 21. Claimant conceded she had been limping before the alleged injury.

13. Mr. T[Redacted] had noticed Claimant limping on the morning of the alleged injury before she left the terminal to start her route. He asked why she was limping, and she replied he did not need to be concerned about it because "it happened at home." Mr. D[Redacted] was also present during Mr. T[Redacted]' exchange with Claimant. Although he could not recall the exact conversation, he corroborated that "she said something along the lines of don't worry about it. And she might have said that she didn't hurt it at work."

14. Claimant had a history of using pain medication before January 21, 2022. She testified she started taking Tramadol in April 2021 for plantar fasciitis. She continued refilling the Tramadol monthly through January 2022. The prescription doubled from 60 pills per month to 120 pills per month on January 3, 2022, three weeks before the alleged injury. This coincides with the onset of right leg symptoms approximately three weeks before the incident at work.

15. Claimant testified she was filling the Tramadol prescriptions but not taking the medication. She testified her PCP continued to write the prescriptions even though she knew Claimant was "stockpiling" the medication. Respondents' expert, Dr. Lesnak, credibly testified that such a prescribing practice by the PCP would be unethical, and is therefore improbable.

16. Claimants' testimony regarding the Tramadol is not credible.

17. Claimant saw Dr. Lawrence Lesnak on May 11, 2022 for an IME at Respondents' request. Claimant confirmed to Dr. Lesnak that she had started limping 2-3 weeks before January 21, 2022 because of right groin and leg pain. Dr. Lesnak questioned Claimant in detail about the event on January 21. Claimant described no twisting or awkward hip motion. Rather, "she merely began to ascend 1 step on the stairs leading to the client's front porch when she developed an acute pop/click in her right proximal groin region." Dr. Lesnak opined Claimant's right femoral neck fracture was unrelated to her work. He noted Claimant is 5' 6" tall and weighs 255 pounds, and is therefore considered morbidly obese. He stated morbid obesity is a predisposing risk factor irrespective of Claimant's work activity. Dr. Lesnak opined Claimant was developing a right femoral stress fracture before January 21, 2022, as evidenced by progressive symptoms and limping. He opined that merely stepping up one step involved no trauma or other forces sufficient to cause or aggravate a stress fracture. Although the surgery was reasonably necessary, it was not causally related to Claimant's work.

18. Claimant attended an IME with Dr. Miguel Castrejon on May 24, 2022 at the request of her counsel. Claimant told Dr. Castrejon she typically delivered "100+" packages per day, which "usually" weighed between 50-80 pounds. Claimant also stated the job required "constant" walking. She described repeatedly stepping up into the rear of the delivery truck and into the driver's section using primarily her right leg. Claimant said she developed "very mild" right hip pain approximately three weeks before the alleged work injury, which progressively worsened with climbing in and out of her vehicle and walking. She described the January 21 incident in a manner generally consistent with her statements to Dr. Lesnak and at hearing. Crediting Claimant's account of her job

activities, Dr. Castrejon concluded the right femoral neck stress fracture was caused by cumulative exposure at work. He explained that stress fractures develop over a period of many days, weeks or even months," and are caused by "repetitive and excessive stress placed on a bone with limited rest." Dr. Castrejon thought the typical course of stress fractures fit the "timeline" of Claimant's progressive symptoms over several weeks. He opined the stress fracture was caused by "continuous trauma" to which Claimant was exposed "from the date of hire."

19. At hearing, Dr. Lesnak agreed that most stress fractures develop over a prolonged period. He stated that "traumatic" stress fractures are most common in long-distance runners, for example while training for or participating in a marathon. Non-traumatic stress fractures most often occur in elderly patients with osteoporosis. In non-geriatric patients such as Claimant, stress fractures are generally caused by poor conditioning and obesity. He noted both of those factors are at play here. Dr. Lesnak reiterated that merely stepping up one step on January 21, 2022 did not cause, aggravate, or accelerate Claimant's femoral neck stress fracture.

20. Employer's lay witnesses were generally credible. The ALJ credits Employer's witnesses over Claimant's testimony to the extent of any conflicts, particularly regarding the physical demands of Claimant's job work and her pre-existing right hip and leg issues.

21. Dr. Lesnak's opinions regarding causation are credible and more persuasive than any contrary opinions in the record.

22. Claimant failed to prove she suffered a compensable injury on January 21, 2022.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is 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 she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A pre-existing condition does not disqualify a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms during or after work activity 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). In

evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work 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).

The mere fact that 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 (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).

As found, Claimant failed to prove she suffered a compensable injury on January 21, 2022. As an initial matter, it bears repeating that the primary documented pathology in this case is a *stress* fracture, which by nature are not usually associated with a discrete, isolated activity. Claimant's stress fracture was probably present for at least several weeks before January 21, as evidenced by progressive right groin and leg pain, visible limping, and doubling her pain medication.[1] Multiple individuals heard Claimant say something happened at home involving her leg or hip a few weeks before the alleged injury, which is a more likely explanation for the pathology than the innocuous work activity on January 21, 2022. As for the opinion evidence, Dr. Lesnak's analysis and conclusions are persuasive. There is no credible evidence of any biologically plausible mechanism by which merely stepping up a single step while carrying a 1-pound package would cause or aggravate a stress fracture or a labral tear. Even Dr. Castrejon did not appear particularly impressed by the specific event on January 21, and his analysis is most consistent with an occupational disease theory of causation. Similarly, Dr. Doner considered the stress fracture an "overuse" injury, with no mention of any specific inciting event. Dr. Castrejon's opinion was influenced by Claimant's embellishment of the physical demands of the job. Dr. Doner performed no detailed evaluation of causation, and appears to have simply accepted Claimant's statement that "this happened due to the work she does." The fact that Claimant's pain became severe at work on January 21, 2022 was probably coincidental, with no causal nexus to her job beyond the fact that she just happened to be at work when the symptoms manifested. The development of severe groin and hip pain on January 21 reflected the natural progression of Claimant's underlying pre-existing condition without contribution from her 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

[1] The pre-existing right groin and leg pain would also be consistent with a torn labrum, should the MR arthrogram reveal a tear.

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: August 25, 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 5-154-681-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that surgery recommended by Dr. Rauzzino is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

2. Whether Claimant has established by a preponderance of the evidence that medical treatment rendered during a hospitalization from November 23, 2020 to December 2, 2020 was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and whether the treatment was authorized or exempt from authorization as "emergency" treatment.

3. Whether Claimant has established by a preponderance of the evidence that medical treatment rendered during a hospitalization from October 23, 2021 to October 28, 2021, was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and whether the treatment was authorized or exempt from authorization as "emergency" treatment.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from October 23, 2021 and continuing until terminated pursuant to § 8-42-105, C.R.S.

FINDINGS OF FACT

1. On July 8, 2020, Claimant sustained an admitted lower back injury arising out of the course of her employment with Employer while assisting a patient who had fallen in the shower at Employer's facility.

2. Following the injury, Claimant began conservative treatment at Colorado Occupational Medicine Partners ("COMP") under the care of authorized treating physician (ATP) Robert Broghammer, M.D. Dr. Broghammer diagnosed Claimant with lumbar and sacroiliac sprains, and iliotibial band syndrome. (Ex. H).

3. Claimant saw Dr. Broghammer, or others at his office, multiple times between the July 8, 2020 injury and November 23, 2020. During this time, Claimant reported left sided lower back pain, with some radiation into the gluteal musculature, weakness in the left leg, and difficulty walking due to pain and spasms. Claimant reported improvement in her symptoms with physical therapy, and chiropractic care. (Ex. H).

4. At Claimant's November 23, 2020, visit with Dr. Broghammer's physician assistant, Buddy Leckie, PA-C, Claimant presented disheveled and tachycardic, with a pulse rate of 161, and a low pulse oximetry score of 88 (*i.e.*, hypoxia). Mr. Leckie referred Claimant

to the Parker Adventist Emergency Room due to her tachycardia, hypoxia, and overall appearance. (Ex. H).

5. Claimant went to the Parker Adventist ER on November 23, 2020, where she was evaluated for alcohol intoxication; sinus tachycardia; lactic acidosis; hypoxia; and bilateral hip pain. After an evaluation in the ER, Claimant was admitted to Parker Adventist for monitoring due to tachycardia and the risk for severe alcohol withdrawal. The ER physician, Andrew Knaut, M.D., noted the "etiology of her tachycardia is unclear but given its persistence, she will need hospital admission for continued monitoring and evaluation of her hypoxia." (Ex. F).

6. Claimant remained hospitalized at Parker Adventist until December 2, 2020. Claimant was evaluated and treated for, among other things, bilateral hip pain and pain radiating into her feet with foot numbness. Claimant had right hip and pelvic MRIs for the evaluation of right hip pain. The MRI showed evidence of osteonecrosis of the right femoral head. Claimant had an orthopedic evaluation by Steven Arbour, PA-C, who indicated Claimant's symptoms could be treated nonoperatively, and she should schedule a follow up "in the coming weeks." Claimant was also evaluated by Derrick Winckler, PA-C, (physician assistant for neurosurgeon Michael Rauzzino, M.D.), after a November 24, 2020 MRI demonstrated a large L5-S1 disc hernia. For this, Claimant received an epidural steroid injection during the hospitalization. Claimant also had multiple other imaging studies during the hospitalization, including a CT of the abdomen and pelvis for evaluation of a possible abdominal infection; CT of the chest for chest pain; bilateral leg venous ultrasounds for leg swelling; echocardiogram for tachycardia; and an abdominal ultrasound. (Ex. F). The majority of treatment Claimant received during her hospitalization was unrelated to her work injury. No credible evidence was presented that Claimant's work-related treatment at Parker Adventist during the November 23, 2020 hospitalization was recommended by her ATP, Dr. Broghammer.

7. Following her December 2, 2020 discharge from Parker Adventist, Claimant saw Dr. Broghammer on December 8, 2020. Dr. Broghammer indicated the right hip issues identified at Parker Adventist were unrelated to her work injury. Dr. Broghammer referred Claimant to Dr. Rauzzino for evaluation of her left leg pain and radiculopathy. (Ex. H). After December 8, 2020, Dr. Rauzzino became an ATP within the chain of referral from Dr. Broghammer. Prior to December 8, 2020, Dr. Rauzzino was not an ATP.

8. Claimant followed up with Dr. Rauzzino on December 21, 2020, reporting pain in the low back radiating to the back of her left leg with numbness and tingling into her left foot. Dr. Rauzzino noted that Claimant's lumbar MRI showed a large, herniated disc at L5-S1 producing severe left foraminal narrowing and nerve root impingement. Dr. Rauzzino recommended an L5-S1 TLIF (transforaminal lumbar interbody fusion), and submitted a request for authorization to Insurer. (Ex. 3).

9. On January 21, 2021, Dr. Rauzzino performed the TLIF surgery. Over the following four to six months, Claimant reported improving lower back symptoms to Dr. Broghammer and Dr. Rauzzino. (Ex. G & 3).

10. On August 31, 2021, Claimant returned to Dr. Broghammer, and reported a return of her lower back pain, left leg radiating pain and numbness in her left foot over the previous few weeks not caused by any specific incident. Dr. Broghammer recommended a lumbar MRI to evaluate Claimant's condition. (Ex. G).

11. On September 14, 2021, Claimant had a lumbar MRI which showed a spinal lipomatosis located at the L4-L5 level with a narrowing of the thecal sac. (Ex. 6). After reviewing the MRI results, Dr. Broghammer referred Claimant to Dr. Rauzzino for evaluation for potential further surgery. (Ex. G).

12. Dr. Rauzzino evaluated Claimant on September 28, 2021. Claimant reported left lower back pain radiating into her left leg with numbness and weakness. Dr. Rauzzino recommended a lumbar CT scan and x-rays to evaluate Claimant's lumbar fusion, and referred Claimant to a pain management provider. (Ex. D).

13. On October 7, 2021, Claimant saw Dr. Broghammer reporting that her back pain had significantly increased. Dr. Broghammer referred Claimant to Scott Primack, D.O., for an EMG and indicated that Claimant should follow up in two weeks. As of October 7, 2021, Dr. Broghammer recommended that Claimant return to work in modified duty, with restriction including mostly seated sedentary work and to change positions as necessary. Dr. Broghammer also indicated Claimant was to follow up in two weeks. (Ex. G).

14. A lumbar CT was performed on October 12, 2021, which demonstrated "prominent dorsal epidural adipose tissue most pronounced at the L4-5 level," with mild canal narrowing. Lumbar x-rays demonstrated no abnormal motion and no evidence of pseudoarthrosis at the L5-S1 fusion. (Ex. I).

15. Over the two weeks following Claimant's October 7, 2021 visit with Dr. Broghammer, Claimant testified her leg weakness began to increase. No evidence was offered indicating that Claimant contacted Dr. Broghammer or Dr. Rauzzino to seek treatment or evaluation for the increasing pain. Claimant testified that on Friday, October 22, 2021, her leg weakness became severe. On the morning of Saturday, October 23, 2021, Claimant made the decision to go to the hospital for her leg weakness.

16. On October 23, 2021, Claimant self-presented at the Parker Adventist Emergency Room reporting increasing weakness in both legs. At the time of admission, Claimant reported she had developed sciatica one month earlier and her symptoms had progressed over the previous two weeks. Claimant reported that "she did not know what else to do," so she came to Parker Adventist. No credible evidence was admitted that Claimant contacted her ATPs any time between October 7, 2021 and October 23, 2021, or that an ATP referred Claimant to Parker Adventist or recommended she seek treatment at a hospital. (Ex. 8 & E).

17. Although the records in evidence indicate Dr. Rauzzino performed surgery in January 2021, the records do not mention that Claimant was under the active care of Dr. Broghammer for her workers' compensation claim. Instead, the hospital records indicate

Claimant "has filed for workman's comp, which is pending." (Ex. E, p. 0087). Claimant reported that she had no primary care provider.

18. After evaluation in the emergency department, Claimant was admitted to Parker Adventist for leg weakness, severe sepsis, and septic shock due to a urinary tract infection, and chronic tachycardia. Claimant remained hospitalized until October 28, 2021. The differential diagnosis provided in the ER was lumbosacral strain, herniated disc, radiculopathy, renal stone, pyelonephritis, epidural abscess, cancer, fracture, AAA, and cauda equina syndrome. (Ex. 8 & E).

19. During her hospitalization, Claimant was evaluated by neurosurgeon Kevin Boyer, M.D., who determined there was no findings suggesting a structural origin for her pain. Dr. Boyer's lower extremity examination, suggested "mild generalized weakness bilateral with symmetrical findings." He recommended a neurology evaluation and psychological evaluation, and an MRI of the head, cervical spine, and thoracic spine. While hospitalized, Claimant underwent numerous diagnostic tests (presumably to rule out potential differential diagnoses). These diagnostic tests included a brain MRI; abdominal/pelvic CT scan; right thigh MRI; cervical MRI; thoracic MRI; lumbar MRI; EKG; and lumbar puncture. Claimant was also provided pain medication which resulted in some improvement of her pain. (Ex. 8 & E).

20. On October 28, 2021, Claimant was discharged from Parker Adventist. The relevant discharge diagnosis included a primary diagnosis of leg weakness of both legs; severe sepsis with septic shock; essential hypertension; severe anxiety; chronic tachycardia; and acute bilateral low back pain with bilateral sciatica. (Ex. 8 & E). At discharge, Claimant's leg weakness and back pain were not resolved. Claimant testified at hearing that her symptoms today are unchanged.

21. Claimant testified that the week prior to October 23, 2021, her back pain rapidly increased, and was very intense on Friday, October 22, 2021. Claimant testified that the morning of October 23, 2021, she felt she needed to go to the hospital and chose Parker Adventist because she was experiencing the same symptoms as after her injury and before the November 2020 hospitalization, and she knew her surgeon (presumably Dr. Rauzzino) was at Parker Adventist. No testimony or evidence was presented to indicate whether Claimant attempted to contact either Dr. Broghammer's office of Dr. Rauzzino's office at any time between October 7, 2021 (the date of her last appointment with Dr. Broghammer) and her decision to go to Parker Adventist.

22. On November 1, 2021, Claimant returned to Dr. Rauzzino. Dr. Rauzzino noted that Claimant continued to have diffuse weakness in the lower legs, but he did not believe it to be a true motor deficit. He noted that the imaging studies demonstrated a significant epidural lipomatosis above the level of her fusion, and that the existing nerve roots were not well visualized on the imaging studies. He noted that while he was concerned about performing surgery, her bilateral leg radiculopathy could be related to the imaging findings of lipomatosis. He recommended a minimally invasive decompression to address the lipomatosis, with a partial laminectomy and removal of the epidural lipoma tissue. (Ex. 3).

23. On November 2, 2021, Claimant returned to COMP, and saw Matthew Lugliani, M.D., because Dr. Broghammer was no longer with the clinic. Dr. Lugliani noted that Claimant had undergone an EMG with Dr. Primack which was normal. He recommended that Claimant follow up with Dr. Rauzzino. Dr. Lugliani assigned a full work restriction (i.e., unable to work) from November 2, 2021 until November 16, 2021. (Ex. G).

24. Claimant returned to Dr. Lugliani on November 16, 2021, December 14, 2021, January 18, 2022, February 22, 2022, April 5, 2022, and May 24, 2022. During these visits, Claimant's full work restriction was consistently in place. At the most recent documented visit, on May 24, 2022, Dr. Lugliani extended Claimant's full work restriction to July 12, 2022. No credible evidence was admitted indicating Claimant's work restrictions have been changed. (Ex. G).

25. At hearing, Dr. Rauzzino was admitted as an expert in neurosurgery. Dr. Rauzzino compared Claimant's September 14, 2021 lumbar MRI to her November 24, 2020 lumbar MRI. Copies of relevant images are included in Exhibit 10. A comparison of the MRIs shows a clearly visible change at the L4-5 level on the September 14, 2021 MRI compared to the November 24, 2020 MRI. The September 14, 2021 MRI shows a narrowing of the spinal canal and the presence of a mass at the L4-L5 level compressing the nerves that was not present on the November 24, 2020 MRI. Dr. Rauzzino credibly opined that the MRI showed the development of a post-surgical lipomatosis at the L4-5 level. Although it is a rare complication, Dr. Rauzzino testified it is more likely than not that Claimant developed the lipomatosis as a result of the January 21, 2021 TLIF surgery he performed. Dr. Rauzzino testified it is unlikely the lipomatosis is congenital because the lipomatosis only exists at the L4-5 level, and was not present prior to the January 21, 2021 surgery. Dr. Rauzzino's opinion is credible and persuasive. Dr. Rauzzino further testified that Claimant's lipomatosis can be addressed through a minimally invasive surgery which would remove fatty tissue and release pressure on the spinal sac and nerves.

26. As part of its determination whether to authorize the surgery proposed by Dr. Rauzzino, Insurer submitted the request to Maya Babu, M.D. Dr. Babu reviewed Claimant's medical record and a letter from Dr. Rauzzino explaining the rationale for the surgery. In a letter dated January 13, 2022, Dr. Babu opined that "epidural lipomatosis is not considered a recognized, common sequelae of fusion surgery, thus the request cannot be supported." (Ex. C). Dr. Babu's opinion is unpersuasive, given Dr. Rauzzino's credible testimony that epidural lipomatosis is rare, but recognized sequelae of fusion surgery. The fact that it is not "common" does not render it unrelated or render treatment for the complication unreasonable or unnecessary.

27. Neurosurgeon Neil Brown, M.D., performed an independent medical examination of Claimant on May 5, 2022, at Respondents' request. Dr. Brown was admitted as an expert in neurosurgery and testified through a pre-hearing deposition. Dr. Brown testified he agrees Claimant has a lipomatosis at the L4-5 level, but does not believe the presence of the lipomatosis explains Claimant's symptoms. Consequently, he does not believe the surgery proposed by Dr. Rauzzino is reasonably necessary or causally related to Claimant's industrial injury. Dr. Brown's testimony is not persuasive.

28. Lawrence Lesnak, D.O., performed a record review of Claimant's treatment at Respondent's request on April 14, 2022. Dr. Lesnak was admitted as an expert in physical medicine and rehabilitation. Dr. Lesnak testified at hearing that the treatment Claimant received during her November 23, 2020 directed at her lower back (*i.e.*, MRI, injections), was not "emergency" treatment and could have been performed in an outpatient setting. Dr. Lesnak's opinion in this regard is credible. Dr. Lesnak further testified that Claimant's October 23, 2021 hospitalization was unrelated to her work injury. Dr. Lesnak's testimony in this regard was credible as it relates to Claimant's sepsis diagnosis, but his opinion that Claimant's leg weakness was "completely unrelated" to her work injury is not 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 an 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). 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).

In addition to being "reasonable and necessary," treatment must be "authorized." "'Authorization' and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 ("authorized medical benefits" refers to legal authority of provider to deliver care). All treatment provided by an "authorized treating physician" is "authorized." *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). "However, treatment is not compensable unless it is also 'reasonable and necessary' to cure or relieve the effects of the industrial injury." *Id.*

An employer is liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm'n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not "authorized," a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Standard For "Emergency" Care

"A claimant may obtain 'authorized treatment' without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency." *In re Claim of Baker*, W.C. No. 4-993-326-004 (ICAO Apr. 20, 2021), *citing Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* W.C.R.P. 8-3. The "emergency exception is not necessarily limited to situations where life is threatened."

Bunch v. Indus. Claim Appeals Office, 148 P.3d 381 (Colo App. 2006). But "[t]here is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case." *In re Claim of Delfosse*, W.C. No. 5-075-625-001 (ICAO Apr. 26, 2021); *Timko v. Cub Foods*, W. C. No. 3-969-031 (Jun. 29, 2005). The claimant, as the party seeking benefits, bears the burden of establishing the entitlement to benefits, including either authorization or the existence of a bona fide emergency by a preponderance of the evidence. § 8-43-201, C.R.S.

For the emergency exception to apply, a causal relationship must exist between the need for emergency treatment and the claimant's work-related injury or work incident. *See In re Claim of Madonna*, W.C. No. 4-997-641-02 (ICAO Aug. 21, 2017). The emergency exception does not apply where the emergency treatment is not reasonably needed to cure or relieve the claimant from the effects of a compensable injury. *See Hoffman v. Wal-Mart Stores, Inc.*, W.C. No. 4-774-720 (ICAO Jan. 12, 2010). Moreover, "when the 'emergency' has ended, the claimant must notify the employer of the need for continuing medical services so that the employer may then exercise its right of selection." *Delfosse, supra*; W.C.R.P. 8-3 (A).

November 2020 Hospitalization

Claimant has failed to establish by a preponderance of the evidence that the treatment she received during her November 23, 2020 Parker Adventist hospitalization was reasonably necessary to cure or relieve the effects of her industrial injury, or that work-related treatment received was authorized or subject to the "emergency" exception. As found, Claimant was referred to the Parker Adventist emergency department because of concerns related to tachycardia, low blood oxygen levels, and intoxication. Claimant was then admitted to monitor her tachycardia and hypoxia. No credible evidence was admitted establishing these conditions were caused by or related to Claimant's industrial injury, or that a causal nexus existed between Claimant's July 8, 2020 work injury and the need for emergency care. Consequently, the "emergency exception" is not applicable to Claimant's November 23, 2020 hospital admission. That PA Leckie referred Claimant to the emergency room out of concern for unrelated conditions does not render care for unrelated conditions "authorized" within the meaning of the Act.

Claimant did receive care related to her work-related back injury during her admission, including a lumbar MRI, evaluation by Dr. Rauzzino's physician assistant, and lumbar epidural injection. However, no credible evidence was admitted demonstrating the care directed toward Claimant's back injury was necessitated by a *bona fide* medical emergency. As a result, Claimant's work-related care required "authorization." Because Claimant's then-ATP, Dr. Broghammer, did not refer Claimant to Parker Adventist for evaluation or treatment for her work-injury, the care was not "authorized," and Respondents are not obligated to pay for the treatment or the hospital admission.

October 2021 Hospitalization

Claimant has failed to establish by a preponderance of the evidence that her admission to Parker Adventist Hospital on October 23, 2021 was authorized or the result of a *bona fide* medical emergency. While the ALJ finds that Claimant's leg weakness was, more likely than not, causally related to her work injury, Claimant failed to present sufficient evidence to establish that a *bona fide* medical emergency existed necessitating emergency treatment on October 23, 2021. Claimant leg weakness was not sudden, and gradually developed over a period of two weeks before October 23, 2021. The record contains no evidence that Claimant attempted to contact her ATPs or why she could not have contacted her ATPs during this two-week period to seek treatment or a referral for additional care. The evidence presented is insufficient to establish the existence of a true medical emergency related to Claimant's work injury necessitating emergency treatment without authorization from an ATP.

The evidence presented is also insufficient to establish which of the treatment Claimant received during this admission was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Numerous diagnostic tests were performed during Claimant's admission unrelated to her lower back issues, such as a brain MRI, cervical and thoracic MRIs, pelvic and abdominal scans, and EKGs. Based on the evidence presented at hearing, the physicians at Parker Adventist were not aware Claimant was actively treating for her work injury, and none of Claimant's ATPs were advised or consulted regarding her hospital admission. Consequently, the evidence is insufficient to determine if a subset of Claimant's treatment would have been foregone had Claimant's ATPs been consulted during her six-day hospitalization. The evidence is insufficient to establish which specific treatments rendered during Claimant's hospitalization were reasonable, necessary, and related to Claimant's industrial injury and which were to address unrelated conditions.

<u>Recommended Surgery</u>

Claimant has established by a preponderance of the evidence that the spinal surgery recommended by Dr. Rauzzino to address the lipomatosis at the L4-5 level is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. The ALJ credits Dr. Rauzzino's testimony that it is more likely than not that Claimant developed a lipomatosis at the L4-L5 level as the result of her January 2021 spinal surgery, and that the lipomatosis is, more likely than not, a cause of Claimant's ongoing lower extremity symptoms. Dr. Rauzzino's recommendation of surgery to correct this condition is reasonable and necessary to cure or relieve the effects of Claimant's July 8, 2020 work injury. Claimant's request for authorization of the recommended surgery is granted.

<u>Temporary Disability Benefits</u>

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 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,*

102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes 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). Impairment of wage-earning capacity 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. Indus. 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 an entitlement to temporary total disability benefits beginning October 23, 2021. The ALJ finds credible Claimant's testimony that her leg pain became severe on October 22, 2021. Hospital records from Parker Adventist support that Claimant had significant leg weakness. Moreover, Dr. Lugliani imposed a full work restriction on November 2, 2021, which continued through, at least, July 12, 2022. No credible evidence was presented establishing that Claimant's inability to work is the result of any medical issue other than her work-related injury. Claimant is entitled to temporary total disability benefits from October 23, 2021 until terminated pursuant to statute.

ORDER

It is therefore ordered that:

1. Claimant's request that Respondents pay for her November 23, 2020 hospitalization at Parker Adventist is denied and dismissed.

2. Claimant's request that Respondents pay for her October 23, 2020 hospitalization at Parker Adventist is denied and dismissed.

3. Claimant's request for authorization of surgery to correct the L4-L5 lipomatosis recommended by Dr. Rauzzino is granted.

4. Claimant's request for temporary total disability benefits is granted. Respondents shall pay Claimant temporary total disability benefits beginning October 23, 2022, until terminated pursuant to statute.

5. 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: August 26, 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. 5-195-228-001

ISSUES

The issues set for determination were:

- Did Claimant establish by a preponderance of the evidence that he is entitled to TTD or TPD benefits from his date of injury, November 6, 2021, until terminated by operation of law?

STIPULATION

Counsel for the parties stipulated that the General Admission of Liability ("GAL") filed on February 22, 2022 resolved the issue concerning compensability, as well as medical benefits issues (including authorized treating physician).

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the undersigned ALJ enters the following Findings of Fact:

1. Claimant is the owner of the [Redacted, hereinafter SE] franchise located at [Redacted] in Denver, Colorado, which he has owned since 2020. Claimant testified there is a franchise agreement which governs his ownership and he does business under KS[Redacted] d/b/a SE.

2. Claimant testified he receives one-half of the gross profits each month-generally 14%-16% of sales in a payment from the franchisor. SE[Redacted] receives the other half of the profits. Claimant said some of the money goes back into the business and is put in an escrow account. There was no evidence in the record whether Claimant received any portion of the profits as remuneration and how often he received such payments.

3. Claimant was also paid a weekly salary of $1,000.00 per week.

4. Claimant testified that he typically would come in to the store at 3:30 a.m. and worked every day. Prior to the injury, he performed various job duties at the store including the duties of cashier, as well as managerial duties and stocking merchandise. This last duty included stocking shelves, the cooler and restocking merchandise at various locations in the store. Claimant also ordered the merchandise for the store and was certified to issue money orders.

5. On November 6, 2021, Claimant suffered an admitted injury at work when he twisted his knee and ankle in the stockroom.

6. Claimant treated with Carrie Burns, M.D. at Concentra on November 9, 2021. Dr. Burns issued work restrictions including no lifting and carrying greater than 15 pounds, pushing/pulling limited to 20 pounds and no kneeling, crawling or bending.

7. The November 9, 2021 medical record was the only medical record admitted into evidence. This record did not establish Claimant was taken off work for any period of time.

8. A paycheck for the period of December 17-23, 2021 was admitted into evidence. This showed Claimant was paid $1,000.00 for this period and the pay date was December 30, 2021.[1]

9. No pay records after December 30, 2021 were admitted into evidence.

10. On February 22, 2022, a General Admission of Liability was filed on behalf of Respondent-Insurer. The GAL admitted for medical benefits only and noted that a Notice of Contest was previously filed.

11. Claimant underwent surgery on his ankle and was off work for a period of time. The exact date of the surgery was not in the record. Claimant testified that as a result of his surgery, he lost income. From March 18, 2022 until the middle of May 2022, Claimant did not come into work, as he couldn't drive. Claimant testified he had restrictions during this time.

12. The ALJ found there was no evidence in the record that an ATP took him off work in the March to May time frame. The ALJ was unable to conclude that Claimant's restrictions required him to be completely off work during this period of time.

13. Claimant testified he did not receive his salary of $1,000.00 per week when he was not working. On cross-examination, Claimant admitted that in his Interrogatory Responses, he stated he continued to receive his salary after the injury. The ALJ credited Claimant's testimony that he was not paid the $1,000.00 per week.

14. The record was unclear whether Claimant has resumed receiving weekly payments of the $1,000.00 salary.

15. Claimant testified that prior to the injury, there were seven or eight total employees in the store. Claimant said he hired employees in February or March. Claimant testified that when he returned to work he has not been doing heavier duties like stocking merchandise. The ALJ inferred that part of his claim for loss of earnings related to higher costs due to more employees and hence lower net monthly profits paid by the franchisor. The ALJ declines to find that a loss of profits constituted a wage loss.

16. No ATP has placed Claimant at MMI.

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[1] Exhibits A and 2.

17. Claimant sustained of loss of earnings attributable to the work injury.

18. Claimant did not prove he was entitled to TTD benefits.

19. Claimant proved he was entitled to TPD benefits.

20. The ALJ was unable to determine what Claimant's earnings were in 2022, as no payroll records after December 30, 2021 were admitted into evidence. There was insufficient evidence in the record to calculate Claimant's TPD benefits.

21. 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). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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). In this case, the question of Claimant's entitlement to benefits turned on his testimony, as well as the documentary evidence in the record.

Temporary Total Disability Benefits

Claimant is required to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. § 8-42-103(1)(a), C.R.S. 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 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*, 809 P.2d 1118 (Colo. App. 1991)]. In some circumstances, Claimant's testimony alone can be sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). See also *Sanchez v. Indus. Claim Appeals Office of Colo.*, *supra*, 411 P.3d at 249 (TTD/TPD denied where ALJ concluded Claimant's back pain was not related to work injury and he continued to work.)

In the case at bench, Claimant had the burden of proving he was entitled to temporary total disability benefits. Although there was evidence in the form of Claimant's testimony that he was off work after his surgery, no medical evidence was introduced to establish the Claimant was completely off work because of the surgery. (Finding of Fact 11). The sole medical record admitted into evidence did not show Claimant was taken off work. Claimant's testimony alone was insufficient in this instance to meet his burden of proof. (Finding of Fact 12). The other evidence in the record was insufficient to establish his entitlement to TTD benefits. (Finding of Fact 18). Therefore, ALJ concluded Claimant did not meet his burden of proof with regard to TTD benefits.

When coming to this conclusion, the ALJ considered Claimant's argument that he had work restrictions and because he could not do all of his job functions, he was entitled to TTD benefits. Given the state of the evidence, the ALJ determined Claimant was not entitled to TTD benefits.

Temporary Partial Disability Benefits

In order to receive TPD benefits, Claimant must establish that the injury has caused the disability and consequent partial wage loss. § 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

The recent case of *Montoya v. Indus. Claims Appeals Office of Colo.*, 488 P.3d 314, 318 (Colo. App. 2018) is apposite to the considerations here. In that case, Claimant suffered an admitted work injury and was returned to work with no restrictions by the ATP. Claimant's income was entirely based on commissions. While she was undergoing treatment for her work-related injuries, she was required to schedule some

medical appointments during her normal working hours. Because of the appointments, she was absent from the showroom floor and could not meet potential or current clients. The ALJ concluded Claimant sustained a wage loss attributable to her work injury (i.e. commissions) and awarded TPD benefits. The ICAO set aside the award of TPD benefits, which was then reversed by the Court of Appeals. The Court considered that was required to prove the disability claim when TPD benefits were sought. Writing for the majority, Judge Taubman stated:

> “[T]he "disability concept is a blend of two ingredients, whose recurrence in different proportions has received a great deal of legislative and judicial attention. The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is wage-earning incapacity evidenced by an employee's inability to resume his or her prior work. *Culver v. Ace Elec.* , 971 P.2d 641, 649 (Colo. 1999) [quoting 4 Arthur Larson, *Larson's Workers' Compensation Law* § 57.11, at 10-16 (1994)].
>
> Although the *Culver* court described "disability" as having both medical and wage loss components, it does not necessarily follow that both elements must be met to justify a disability award.”

With the holding that it was an error to require both medical incapacity and earning wage loss, the Court held that disability can be found with either the medical or wage loss component. In *Montoya*, the Court of Appeals found there was sufficient evidence to award TPD benefits to Claimant. *Montoya v. Indus. Claims Appeals Office of Colo.*, *supra*, 488 P.3d at 318.

As determined in Findings of Fact 2-3, Claimant was the franchise owner and was paid a weekly salary, well as a percentage of the gross profits. Claimant was paid a weekly salary of $1,000.00. (Finding of Fact 3). The ALJ found the record did not establish whether Claimant received any portion of the profits as remuneration (wages) before his work injury. *Id.* Although the evidence was not completely clear, the ALJ credited Claimant’s testimony that after his injury and during the time he was recovering from surgery, he did not receive his $1,000.00 per week salary. (Finding of Fact 13). Based upon Claimant‘s testimony, the ALJ found there was a period (in the March-May 2022 timeframe) that he did not work and had restrictions. No ATP placed him at MMI. (Finding of Fact 16). Accordingly, the ALJ concluded Claimant sustained a wage loss that was attributable to his work injury. (Finding of Fact 17). Claimant is therefore entitled to TPD benefits. (Finding of Fact 19).

However, from the evidence adduced at hearing, the ALJ was unable to conclude the precise amount of TPD benefits to which Claimant is entitled. Accordingly, counsel for the parties will be ordered to confer, as well as to exchange Claimant‘s payroll information in order to try to ascertain this amount and reach an agreement.

The ALJ further determined that Claimant’s loss of earnings is limited to wages paid. (Finding of Fact 15). There was no evidence Claimant’s wages included payment

for the profits of the business. Also, there is no authority which would allow Claimant to recover a loss of profits as part of his claim for temporary disability benefits and the ALJ declines to include same.

ORDER

It is therefore ordered:

1. Claimant's request for TTD benefits is denied and dismissed.

2. Respondent-Insurer shall pay Claimant TPD benefits.

3. Since the ALJ was unable to determine the amount of Claimant's wage loss after March 18, 2022 in order to calculate TPD benefits, counsel for Claimant and Respondent shall confer regarding the amount of TPD benefits. This conferral shall include the exchange of Claimant's payroll records and any other documentary evidence regarding his earnings in 2022. If the parties are unable to resolve this issue, either Claimant or Respondents may file an Application for Hearing.

4. 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: August 26, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-174-263-001

PROCEDURAL ISSUE

At hearing, Respondent indicated that they would be proceeding on the issue of compensability, requesting the Administrative Law Judge find that Claimant did not sustain an injury on June 7, 2021 – withdrawing their admission of liability. Respondent, however, withdrew that issue in its post-hearing position statement.

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the need for the total hip arthroplasty arose out of and in the course of Claimant's employment.

FINDINGS OF FACT

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

1. Claimant has worked for Employer as a mechanic welder for approximately 15 years. It is undisputed that prior to June 7, 2021, Claimant had no problems with his left hip.
2. At approximately 12:30 a.m. on June 7, 2021, Claimant was inspecting a clogged pipe as part of his job duties. The pipe was one of a set of four pipes which ran horizontal from one building to another building over a paved area, approximately 30 feet above the paving/ground. [Exhibit 12]. Claimant first donned a full-body harness and tied himself to a beam as a safety measure to prevent a fall from the beam [Transcript, p. 63:9-22]. Claimant then crawled through a handrail and continued to crawl and walk over two pipes, to get to the third pipe. [Transcript 65:19-21]. Thereafter, Claimant moved horizontally along the pipes in a "crouched over" position" to get to the area where part of clogged pipe had been removed to inspect the pipe. [Transcript, p. 71:12-16]. Upon reaching the area of the clogged pipe, Claimant then moved some tools and harnesses placed on the pipes by another work crew. [Transcript, p. 71:17-19]. Claimant then removed a "super sucker" hose which had been placed inside the clogged pipe. [Transcript, pp. 71:23 – 72:1].
3. Once Claimant moved everything out of the way, he was standing with both of his feet on a 4-inch beam in front of the area he needed to inspect, with the pipe directly in front of him in a position that he would have been straddling the pipe if that section of pipe had not been removed. [Transcript, p. 72:6-14]. Claimant "crouched down" in an "awkward position" to look into the pipe when he felt pain in his left leg. [Transcript, pp. 66:5-10, 72:20 – 73:1].
4. As soon as Claimant bent or crouched down to inspect the open end of the pipe, he felt a sharp, shooting pain down his left leg from his waist to his knee. [Transcript 67:7-8]. Immediately following the injury, Claimant had trouble walking – Claimant had a

bad limp. [Transcript 67:13-20]. Then, the next morning he could not get off the toilet because he had so much hip pain. [Transcript 67:7-16]. This is when he decided to go to the doctor.

5. On June 8, 2021, Claimant sought medical treatment from Memorial Regional Rapid Care the day after the incident at work, where he was examined by Patrick Machacek, PA-C. Claimant complained of "severe left lateral leg pain from his hip radiating down to his knee…tingling down into his lower leg and foot… no groin numbness." [Ex. 6, p. 17]. Thus, Claimant was complaining of pain in his left hip the day after the incident at work. Musculoskeletal examination showed "Left hip flexion, extension, abduction, adduction intact." Dr. O'Brien testified that "intact" range of motion means full range of motion of the hip. [Transcript, p. 30:5-6]. Mr. Machacek opined that since the "mechanism of injury was very low consequence and suggests root compression, possible disc herniation or nerve entrapment elsewhere . . ." Claimant was "better evaluated in the ER and consideration given to urgent imaging." [Ex. 6, p. 20]. An MRI of the lumbar spine in the emergency department showed "[m]ildly degenerated intervertebral discs at L2-3 through L4-5 and moderately degenerated LS-S1 intervertebral disc. There are no focal disc protrusions and there is no significant central or foraminal stenosis." [Ex B, p. 28].
6. Mr. Machacek documented that "Dr. G was called and given report." [Ex. B, p. 20]. Matthew Grzegozewski, M.D., completed a Physician's Report of Workers' Compensation Injury dated June 8, 2021, which diagnosed Claimant with a lumbar radiculopathy. [Ex. 6, p. 21].
7. On June 10, 2021, Claimant returned to Memorial Regional Hospital where he was examined by Jessica Nyquist, PA-C. Ms. Nyquist documented that Claimant was "unable to use his left leg. I am unable to explain these symptoms from a lumbar spine MRI; it is essentially normal today." [Ex. 6, p. 23]. Ms. Nyquist's report does not document that she examined the range of motion of Claimant's left hip. Ms. Nyquist's impression was "1. Diffuse left lower extremity weakness. 2. Cervical spondylosis with myelopathy. 3. Thoracic spondylosis with myelopathy." [*Id.*]. Ms. Nyquist referred Claimant for cervical and thoracic MRIs, and MRI of the brain, and various blood tests, clearly indicating that she could not determine the cause of Claimant's report of pain.
8. In an "ADDENDUM" dated June 11, 2021, Nurse Nyquist documented Claimant underwent MRI of the brain, cervical spine, and thoracic spine, all of which essentially were normal. [*Id.*].
9. On June 16, 2021, Claimant was seen by Natana E. Machacek, DO. Dr. Machacek documents that Claimant had "[f]ull active ROM" of the back but did not document examination of range of motion of Claimant's left hip. [Ex. 6, p. 26]. Dr. Machacek's assessment was "left leg pain". [*Id.*].
10. On June 21, 2021, Claimant was seen by Alexis Tracy, D.O., of Steamboat Orthopedics. Dr. Tracy described Claimant's position at the time he experienced pain as "[h]is left leg was outstretched with an extended knee and abducted hip in a splits like position." [Ex. 7, p. 40]. Thus, Dr. Tracy described Claimant being in an awkward position at the time of the incident. Dr. Tracy opined that Claimant "likely suffered a labral tear in this position…" and recommended left hip arthrogram for further

evaluation. [*Id.*] Dr. Tracy also performed a left intra-articular hip injection, stating that Claimant "will let us know how he responds over the next few days…" [Ex. 7, p. 41]. Dr. Tracy's note does not document that she examined the range of motion of Claimant's left hip.

11. On June 28, 2021, three weeks after his work incident, and due to ongoing pain, Claimant underwent an MRI of his left hip.

12. On July 2, 2021, Claimant returned to Steamboat Orthopedics and was examined by Michael Sisk, M.D. Dr. Sisk documented complaints of 8/10 pain but unequivocally stated that examination of the left hip revealed "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42]. Dr. Sisk reviewed the report of the MRI of the left hip taken on June 28, 2021, which revealed "mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change. Nondisplaced partially contrast-filled detachment of the anterior superior right [sic] acetabular labrum at 2:00 position. Incompletely evaluated lower lumbar degenerative disc disease. There is a 9 mm well-defined lesion in the meduallary bone of the left intertrochanteric femur without aggressive features which suggests a small enchondroma." [*Id.*]. Dr. Sisk opined that Claimant had an "acute labral tear in the left hip" and referred Claimant to Brian White, M.D. [Ex. 7, p. 43]. Dr. Sisk's report does not document the results of the left intra-articular hip injection performed by Dr. Tracy on June 21, 2021.

13. Respondent filed a General Admission of Liability dated July 13, 2021, attaching Dr. Grzegozewski's Physician's Report of Workers' Compensation Injury dated June 8, 2021, which diagnosed Claimant with a lumbar radiculopathy. [Ex. 2, p. 4].

14. Brian White, M.D., examined Claimant on August 4, 2021. Documentation of Dr. White's left hip examination is limited to four sentences (only three relating to the left hip): "On examination of his hip, he can barely move his hip. It is severely painful and quite uncomfortable. His right hip moves much better. He has significant pain with anterior impingement maneuver." [Ex 8, p. 47]. Dr. White did not document any groin pain. Dr. White's documentation of the MRI was even more cursory, limited to just three sentences: "[h]is MRI shows a labral tear. He does not have any significant bruising or edema in the bone or anything concerning for infection. The labrum Is torn." [*Id.*]. Significantly, Dr. White fails to mention the mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change seen on MRI on June 28, 2021. [Ex. B, p. 21]. Dr. White's report states that Claimant's hip showed underlying CAM-type femoroacetabular impingement with reasonable acetabular coverage, but this information comes from the x-ray taken on June 21, 2021, not the MRI of the same date. [Ex. B, p. 23].

15. Under plan, Dr. White stated "I think moving forward with hip arthroscopy is appropriate. He is in severe pain. I do not think there is any benefit to waiting. He cannot do physical therapy. He wants this fixed, and he wants it fixed as soon as possible. His MR was with an arthrogram, but even with that, I do not see significant concern for infection around this hip joint. I think he probably just has a displaced labral tear that has just become acutely quite symptomatic." [*Id.*]. Dr. White's report

does not document the results of the left intra-articular hip injection performed by Dr. Tracy on June 21, 2021. Dr. White requested prior authorization for left hip labral repair on August 5, 2021.

16. On August 19, 2021, Dr. White performed a left hip labral repair. [Ex. 8, pp. 49-50]. In his operative report, in the section labeled Presenting Problems/History of Present Illness, Dr. White documented "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Furthermore, Dr. White did not reference the MRI of June 28, 2021, showing mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic changes. Instead, Dr. White's "Presenting Problems/History of Present Illness states "Tonnis *grade zero for no significant radiographic osteoarthritis.*" [Ex. 8, p. 50]. Dr. O'Brien explained that Tonnis scale applies to plain radiographs, not MRI scans. [Transcript, p. 40:11-20]. This shows Dr. White was unaware of the significant chondromalacia of the hip joint seen on the MRI shortly after the accident.

17. In a telephone call with Claimant on October 24, 2021, Dr. White documented that Claimant "is not doing as well as I had hoped." [Ex. 8, p. 52]. Dr. White recommended additional time to see if Claimant's pain lessens, but "[u]ltimately, if this is not going in a good direction, he knows that the only surgery I have left for him is a total hip replacement" in order to address Claimant's hip pain.

18. On December 7, 2021, Claimant reported to Shawn Karns, MPA, PA-C that "overall he feels like the hip continues to regress. He just does not feel like he is making any progress with physical therapy... He does get a catching sensation in the joint, which is a very sharp pain that sometimes makes him feel like his hip wants to give way" [Ex. 8, p. 53]. X-rays taken that date showed "some mild narrowing over the lateral aspect of the joint, but his femoral and acetabular osteoplasties have healed in very nicely. No acute findings are appreciated. He did have an MRI performed earlier today, a non-arthrogram study, which shows the labral graft overall to be intact. He does have advanced grade 2/3 chondromalacia in the left hip without a focal chondral defect or loose body. He does have some capsular edema as well as some gluteal tendinosis. No other significant acute findings are appreciated." [Ex. 8, p. 53]. Mr. Karns options include an intra-articular steroid injection for diagnostic and therapeutic purposes (which previously had been performed by Dr. Tracy on June 21, 2021, apparently without Dr. White's knowledge).

19. A "Note for Chart" dated December 8, 2021, indicates that Mr. Karns reviewed the case and imaging with Dr. White, who believed that the labral repair "appears to be intact without any evidence of re-tear" but "overall, it does look like he has had some progression of some degenerative arthritis to the acetabulum with grade 2/3 chondromalacia changes to the cup." [Ex. 8, p. 55]. Dr. White recommended either a left hip intra-articular diagnostic injection or intra-articular steroid injection and that Claimant would be a candidate for total hip replacement if Claimant experienced "some temporary relief." Again, Dr. White appears to have been unaware that Dr. Tracy previously performed a left intra-articular hip injection on June 21, 2021.

20. In a telephone call on December 29, 2021, Claimant informed Mr. Karns that he did not notice a significant decrease in his overall pain and that his hip was "bothering him with everything he does." [Ex. 8, p. 56]. Despite previously opining that Claimant would be a candidate for total hip replacement with some temporary relief from the injection, Dr. White indicated Claimant is a candidate for total hip replacement - even though Claimant did not notice any pain relief from the injection.

21. In a note dated January 3, 2022, Dr. White documented that Claimant's condition has continued to deteriorate and "I do not know what else this could be….I think the only option for his hip now is to replace it." [Ex. 8, p. 57]. Thus, after a failed labral repair, Dr. White decided to perform a total hip replacement because he was at a loss as to what to do to treat Claimant's hip pain that was caused by the work accident. Thus, the failure of the labral repair made it more likely that Claimant's pain was coming from the arthritis in his hip and that it was aggravated by his work accident.

22. At the request of Respondent, Timothy O'Brien, M.D., performed an Independent Medical Examination of Claimant on February 18, 2022. Dr. O'Brien has been Board-certified in orthopedic surgery since 1994 and completed two fellowships (one in adult hip and knee reconstruction and the other in foot and ankle) and has performed approximately 1,500 total hip arthroplasties in his surgical career.

23. Dr. O'Brien authored a report dated February 18, 2022, in which he opined that (1) Claimant did not sustain an acute torn labrum in the incident on June 7, 2021, as the MRI established the labral tear was chronic and Claimant did not experience any pain relief from the labral repair; (2) Claimant's pain beginning on June 7, 2021, was caused by the grade 2 and grade 3 chondromalacia of his left femoral head and of the acetabular surfaces in the hip joint; (3) the condition of Claimant's hip joint was chronic and not aggravated or accelerated by the incident on June 7, 2021, because the multiple mechanisms described in the medical records were not sufficient to change the anatomy of Claimant's preexisting left hip osteoarthritis. [Ex. A, pp. 8-9].

24. In response to Dr. O'Brien's IME report, Dr. White authored a letter to Claimant's counsel dated April 27, 2022, in which he again stated that he "cannot state why" Claimant did not respond well to the labral reconstruction. In the letter, Dr. White opined that Claimant was referred to him for a "symptomatic labral tear that resulted from the work injury. We performed his hip arthroscopy. He had a little bit of wear of the cartilage, but it certainly was in no way, shape or form advanced arthritic change that required a total hip replacement. He had an absolutely shredded labrum." [Ex. 8, p. 58]. Dr. White's opinion as it relates to the labral tear being the pain generator is not found to be persuasive since it appears to be inconsistent with his own medical records and operative report for the labral reconstruction on August 19, 2021:

- As to the age of the labral tear, Dr. White's operative report specifically opines that Claimant had a "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Extensive tearing and shredding and an extremely degenerative labrum is not consistent with an injury caused by simply squatting down on June 7, 2021;

- As to the condition of Claimant's hip joint, Dr. O'Brien's statement that Claimant "had a little bit of wear of the cartilage" is inconsistent with the MRI dated June 28, 2021, objectively documenting mild to moderate grade 2/3 chondromalacia in the left acetabulum.

25. Dr. O'Brien testified that the medical records establish that Claimant did not sustain an acute labral tear on June 7, 2021. First, Dr. O'Brien testified that an acute labral tear "always localizes pain to the groin area." [Transcript, p. 26:5-6]. Moreover, the medical records establish that Claimant did not complain of groin pain following the incident on June 7, 2021:

    - Memorial Regional Rapid Care records dated June 8, 2021, document complaints of "severe left lateral leg pain from his hip radiating down to his knee…tingling down into his lower leg and foot… *no groin numbness*," indicating a specific focus on groin issues during the examination. [Ex. 6, p. 17] (emphasis added);

    - Return visits with Memorial Regional Hospital result in MRIs of the cervical, thoracic and lumbar spines to rule out disc injury, MRI of the brain, multiple blood tests, ultrasound and x-rays, consistent with Dr. O'Brien's testimony that "it is almost impossible to confuse the symptomatology and clinical presentation of a labral tear, an acute tear, if it has occurred, and they're incredibly rare, with an acute disk herniation. They are different animals. It is like comparing a zebra to a duck." [Transcript, p. 28:7-18];

    - Dr. Sisk's report dated July 2, 2021, documented "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42].

26. As further evidence that Claimant did not sustain an acute labral tear, Dr. O'Brien testified that the physical examinations performed by the treating providers were not consistent with an acute labral tear. Specifically, Dr. O'Brien testified that a person with an acute labral tear would not have full range of motion of the hip because that person would be in extreme pain, but in this case Claimant repeatedly was documented with full range of motion of his hip:

    - Dr. O'Brien testified that the statement in the medical records in the Emergency Department on June 8, 2021, document "hip flexion, extension, abduction, adduction intact" which "means that [Redacted, hereinafter MM] could bring his hip all the way up to his chest, extend it beyond – you know, more toward his buttock, and then he could rotate the hip inward and outward with ab and adduction. Intact meaning normal. That would be nearly impossible to do if there were a labral tear." [Transcript, p. 30:10-22].

    - Dr. Sisk's report dated July 2, 2021, documented "non-tender to palpation about the groin with full painless range of motion." [Ex. 7, p. 42].

27. Dr. O'Brien testified that the MRI was not consistent with an acute labral tear, because the MRI did not show any bleeding in the hip: "When tissue tears, blood vessels that keep that tissue alive also tear. And that is why an MRI scan when something is torn acutely always, always, always shows bleeding. And in this case, there was no bleeding." [Transcript, p. 32:8-12]. Dr. O'Brien testified that the MRI showed a

multiplanar labral tear, which is a classic degenerative labral tear over time and not an acute labral tear. [Transcript, pp. 31:18 – 32:18]. This testimony is consistent with Dr. White's operative report, which opined that had "extensive tearing and shredding of a poor quality acetabular labrum extensively torn on preoperative MRI and extremely degenerative." [Ex. 8, pp. 49-50]. Dr. White did not explain how the process of crouching down in an awkward position could result in an "absolutely shredded" acute labral tear or aggravate a preexisting asymptomatic labral tear.

28. Dr. O'Brien's testimony that Claimant's pain beginning on June 7, 2021, was not coming from the chronic, degenerative labral tear is supported by the fact that the labral reconstruction surgery did not alleviate Claimant's pain complaints. Dr. O'Brien testified that "if the torn labrum had been the factor generating pain and Dr. White took that pain generator out and replaced it with new -- you know, new tissue and tied all that new tissue down to bone, then that surgery should have worked. But in [Claimant's] case, very early on it was evident that this surgery had failed. So that is kind of proof positive that the labrum was not a pain generator." Any opinion from Dr. White to the contrary is not persuasive since Dr. White twice stated he did not know why the labral reconstruction surgery was not successful, which is not surprising given that Dr. White appears to have just addressed the labral tear and did not assess and address the grade 2/3 osteoarthritis of the left hip noted on the MRI.

29. As it relates to the labral tear not being the pain generator, the ALJ finds Dr. O'Brien's opinions to be persuasive. That being said, the labral tear surgery was still performed as an attempt to cure and relieve Claimant from his hip pain that was caused by the work accident.

30. Dr. O'Brien testified that, considering all of the evidence (most of which Dr. White was either unaware or failed to appreciate), the most likely pain generator was the osteoarthritis in Claimant's hip. Dr. O'Brien testified that the MRI dated June 28, 2021, showed grade 2, 3 chondromalacia "in both the cup, that is the socket, and then he had it in the ball. So if you look at the original MRI interpretation by the radiologist, grade 2 and 3 chondromalacia, and even more important is the presence of subchondral cysts. So there is enough pathoanatomy, enough altered anatomy in the cartilage, that it is not protecting that underlying bone. So the joint reactive forces are moving through incompetent cartilage into bone and actually resulting in bone death because the cyst is the loss of bone cells being replaced by fluid, typically synovial fluid, or necrotic on bone cells. So this is not insignificant arthritis as Dr. White would like everybody to believe when he talks about the Tönnis scale being zero. And it was. But that -- what gives you the true flavor of how bad the arthritis is, in this case isn't determined on a plain radiograph. We have much more elegant imaging study information based on the MRI scan, and it clearly shows moderately advanced arthritis, which Dr. White will ignore before his labral surgery and then use as a rationale to perform his total hip replacement. So it doesn't make sense. That inconsistency is unreconcilable." [Transcript, pp. 39:23 – 40:24].

31. Claimant testified that he crouched down in an awkward position to look into a pipe when he experienced pain. Dr. O'Brien testified that the act of crouching down on June 7, 2021, did not aggravate Claimant's preexisting degenerative osteoarthritis or accelerate the need for a total hip arthroplasty: " . . . the only injuries that can

aggravate and accelerate that arthritis and thus make a person a candidate for a hip replacement more prematurely than they otherwise would have been, are injuries that fracture into a joint, an arthritic joint, or injuries that tear multiple ligaments. We have already talked about the fact in this case that MM[Redacted] didn't sustain a hip injury of any variety on the date in question. So there is no way what MM[Redacted] was doing could aggravate or accelerate any labral pathology or aggravate or accelerate any underlying cartilage pathology. It couldn't happen. There just wasn't enough trauma." [Transcript, p. 45:24 – 46:12]. Dr. O'Brien testified that if there is preexisting arthritis, the only type of injuries that can aggravate and accelerate the arthritis and cause the need for a hip replacement – more prematurely than they otherwise would have needed one – if the injury fractured the arthritic joint or tore multiple ligaments of the joint. The ALJ does not, however, find Dr. O'Brien's testimony regarding the type of injury necessary to aggravate preexisting osteoarthritis and necessitate the need for medical treatment – including surgery – to be persuasive. Especially in this case, where Claimant did not have any hip pain before the work incident, and then due to the incident he developed unrelenting hip pain that continued until after Claimant underwent hip replacement surgery.

32. Dr. O'Brien testified that because Claimant experienced symptoms after crouching down at work does not mean that crouching down caused or aggravated Claimant's degenerative osteoarthritis, because the nature of osteoarthritis is such that people will experience pain simply from the surfaces of the joint rubbing together. Dr. O'Brien testified that it is not unusual for people with osteoarthritis to wake up from sleeping and complain of pain because "Arthritis doesn't need an injury to make it hurt. Arthritis hurts because the joint is arthritic. It is just how that pathology manifests itself is with pain." [Transcript, p. 47:2-5]. In other words, simply because Claimant experienced pain while at work does not mean that work caused the pain. Rather, the simple fact that Claimant's cartilage naturally deteriorated over time resulted in the two joint surfaces rubbing together, causing the pain. Again, the ALJ, does not find this portion of Dr. O'Brien's opinion to be credible and persuasive. Claimant did not just wake up with hip pain. Claimant developed consistent and relentless hip pain that started while Claimant was awkwardly crouched and bent over working on the pipe at work. Thus, the ALJ finds that Claimant's pain did not merely occur while at work, but occurred at work due to his work activities.

33. On April 26, 2022, Dr. White performed a total left hip replacement. The hip replacement has relieved Claimant's hip pain. According to Claimant, he is feeling "great" since the hip replacement surgery. [Transcript 70:4:15].

34. The ALJ finds that Claimant suffered a compensable injury to his left hip on June 7, 2021, when he bent down in an awkward position to work on a pipe at work. The ALJ finds that the injury was in the form of a significant and permanent aggravation of Claimant's preexisting asymptomatic hip arthritis. Immediately after the accident, Claimant developed unrelenting left hip pain. Although Dr. White originally thought Claimant' pain was coming from his labrum, surgery to repair the labrum did not help, demonstrating the labrum was not the pain generator. Thereafter, Claimant underwent a left total hip replacement – which relieved Claimant's hip pain – establishing the pain generator that was caused by the work accident.

35. Based on the evidence submitted at hearing, the ALJ finds that Claimant suffered a substantial and permanent aggravation of a preexisting condition – his hip arthritis. The ALJ finds that Claimant's asymptomatic left hip arthritis was substantially and permanently aggravated and accelerated when he bent down in an awkward position to work on the clogged pipe at work.

36. The ALJ further finds that the need for the hip replacement surgery was caused by Claimant's work injury and that the surgery was reasonable and necessary to cure and relieve Claimant from the effects of his work injury. This supported by the fact that Claimant's work injury caused unrelenting hip pain that was not relieved until Claimant underwent the left hip replacement surgery.

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 need for the total hip arthroplasty arose out of and in the course of Claimant's employment.

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. 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). 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); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). 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).

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. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

On June 7, 2021, Claimant was inspecting a clogged pipe as part of his job duties. The pipe was one of a set of four pipes which ran horizontal from one building to another building over a paved area, approximately 30 feet above the paving/ground. Claimant first donned a full-body harness and tied himself to a beam as a safety measure to prevent a fall from the beam. Claimant then crawled through a handrail and continued to crawl and walk over two pipes, to get to the third pipe. Thereafter, Claimant moved horizontally along the pipes in a crouched over position to get to the area where part of clogged pipe had been removed to inspect the pipe. Upon reaching the area of the clogged pipe, Claimant then moved some tools and harnesses placed on the pipes by another work crew. Claimant then removed a "super sucker" hose which had been placed inside the clogged pipe.

Once Claimant moved everything out of the way, he was standing with both of his feet on a 4-inch beam in front of the area he needed to inspect, with the pipe directly in front of him in a position that he would have been straddling the pipe if that section of pipe

had not been removed. Claimant crouched down in an awkward position to look into the pipe and then developed excruciating pain in his left leg.

As soon as Claimant bent or crouched down to inspect the open end of the pipe in an awkward position, he felt a sharp, shooting pain down his left leg from his waist to his knee. Immediately following the injury, Claimant had trouble walking – Claimant had a bad limp. Then, the next morning he could not get off the toilet because he had so much hip pain. This is when he decided to go to the doctor.

At first, the doctors thought Claimant's hip and leg pain was coming from his back. Therefore, Claimant underwent an MRI of his lower back. When that was negative, they took additional MRIs of Claimant's thoracic and cervical spine as well as his brain. When those were also negative, they evaluated Claimant's left hip.

On June 28, 2021, Claimant underwent an MRI of his left hip. Dr. Sisk reviewed the report of the MRI, which revealed mild to moderate grade 2/3 chondromalacia in the periphery of the anterior superior and posterior left acetabulum with mild subcondral cystic change. He also noted nondisplaced partially contrast-filled detachment of the anterior superior right [sic] acetabular labrum. He further noted a 9 mm well-defined lesion in the meduallary bone of the left intertrochanteric femur without aggressive features which suggests a small enchondroma. As a result, Dr. Sisk opined that Claimant had an acute labral tear in the left hip and referred Claimant to Brian White, M.D.

Dr. White also concluded that Claimant's left hip pain was being caused by the torn labrum. As a result, Claimant underwent surgery by Dr. White to repair his torn labrum. When the surgery did not relieve Claimant's hip pain, Dr. White concluded that Claimant required a total hip replacement to cure and relieve him from the effects of his work injury.

On April 26, 2022, Dr. White performed a total left hip replacement. The hip replacement relieved Claimant's hip pain. Since having the hip replacement surgery, Claimant's left hip pain has subsided and he feels great.

Dr. O'Brien testified that June 7, 2021, incident did not result in a torn labrum. Regarding that issue, Dr. O'Brien might be right since the surgery performed by Dr. White did not resolve Claimant's hip pain. Regardless, the labrum surgery was still performed to address Claimant's hip pain that was caused by the work accident.

Dr. O'Brien also concluded that Claimant bending down to work on the clogged pipe could not have aggravated Claimant's arthritic hip and necessitated the need for the hip replacement. According to Dr. O'Brien, the only injuries that can aggravate and accelerate joint arthritis and thus make a person a candidate for a hip replacement more prematurely than they otherwise would have been, are injuries that fracture into a joint that is arthritic joint, or an injury that tears multiple ligaments. Thus, Dr. O'Brien appears to conclude that Claimant's arthritic hip just started hurting without any contribution from Claimant's work activities. But, based on the lack of hip pain before the incident, the immediate onset of hip pain while bending down in an awkward position, and the continuation of the pain until the hip replacement surgery, the ALJ finds and concludes that Claimant injured his hip due to his work activities on June 7, 2021, and such injury necessitated the need for the hip replacement. Thus, the ALJ does not find Dr. O'Brien's

opinions regarding causation of Claimant's hip pain and need for the hip replacement to be persuasive.

The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship as explained in *Scully v. Hooters of Colorado*, W.C. No. 4-745-712 (October 27, 2008). In *Scully* the claimant twisted to place dishes then felt an immediate onset of low back pain and spasms. The claimant had serious and chronic pre-existing low back problems. The ALJ, determined that the claimant did not suffer a new injury but merely experienced continuing symptoms from her chronic pre-existing condition. In *Scully* the claimant contended that because her back spasms occurred in the act of bussing tables and the spasms were immediately preceded by the claimant's twisting her back in the performance of an essential job function that the back spasm must have been caused by her twisting her back. The Panel found that this argument committed the logical fallacy of mistaking temporal proximity for a causal relationship. The Panel noted that correlation is not causation and in *Scully* the ALJ essentially concluded that there merely existed a coincidental correlation between the claimant's work and her symptoms. *See Scully v. Hooters of Colorado*, W.C. No. 4-745-712 (October 27, 2008).

However, the ALJ finds that this is not a case of mere temporal proximity, but rather temporal synchrony. (*See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539 (D. Colo. Feb. 25, 2010)) (To the extent certain events occur nearly simultaneously, the causal connection between them becomes quite strong.) In this case, in light of the close temporal relationship between Claimant's work activities of bending over in an awkward position, and the immediate onset of unrelenting hip and leg pain, the MRI findings, and Claimant's pain relief after the hip replacement surgery, and a lack of persuasive evidence of any preexisting hip pain, Claimant has established that he injured his hip due to his work activities on June 7, 2021, and such injury caused the need for the hip replacement surgery performed by Dr. White – thus making the hip replacement surgery reasonably necessary to treat Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes that Claimant suffered a compensable injury to his left hip that caused the need for the hip replacement surgery. The ALJ further finds and concludes that the hip replacement surgery was reasonably necessary to cure and relieve Claimant from the effects of his work injury.

ORDER

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

1. Respondent is liable for the hip replacement surgery performed by Dr. White. Therefore, Respondent shall pay for the surgery pursuant to the Colorado Workers' Compensation fee schedule.

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: August 29, 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 4-429-491-002

ISSUES

I. Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw the admission for maintenance care pursuant to the Final Admission of Liability dated May 27, 2003.

II. Whether Claimant has proved by a preponderance of the evidence that certain maintenance medical care continues to be reasonable, necessary and related to the admitted August 9, 1999 workplace injury.

III. Whether pursuant to C.R.S. § 8-42-101(5) Claimant is entitled to reasonable costs incurred in pursuing the deposition of L. Barton Goldman to maintain his entitlement to maintenance medical benefits.

STIPULATIONS

Claimant stipulated at hearing that he is no longer requesting the following as maintenance care: Vitamin D, Fluticasone, Ferritin and Testosterone. Claimant further stipulated that no ongoing maintenance treatment recommended by an ATP had been denied or unpaid by Respondents as of the date of hearing.

FINDINGS OF FACT

1. Claimant is 67 years old. Claimant worked for Employer as a roofer.

2. Claimant has longstanding pre-existing history of asthma, diagnosed at age three. Claimant has treated with prednisone or other medications, inhalers and allergy shots. Claimant was hospitalized for asthma complications in middle school and experienced multiple episodes of sinusitis. Claimant testified that, prior to his industrial injury, he would use his inhaler if he was exposed to irritants such as cotton or crop spray.

3. Claimant also has a pre-existing history of obesity.

4. Claimant sustained an industrial injury while working for Employer on August 9, 1999. Claimant fell through the cutout in a roof, falling 22-27 feet. Claimant was rendered unconscious and when he awoke reported experiencing some trouble breathing.

5. Claimant was hospitalized for a period of one month following the injury. He testified that during this time he was paralyzed and felt like he was unable to use the lower part of his chest to breathe.

6. Claimant has primarily undergone medical treatment for his industrial injury with authorized treating physicians ("ATPs") L. Barton Goldman, M.D., Lisa Maier, M.D. and Arash Babaei, M.D.

7. Dr. Maier first evaluated Claimant at National Jewish Medical Center on September 13, 2000. Claimant reported that while in the hospital he noted that he was unable to use the lower part of his chest to breathe and felt that he was only using his upper respiratory muscles. Claimant reported shallow breathing and tightness. Dr. Maier documented Claimant's history of asthma. She noted that, leading up to the work injury, Claimant had been able to work as a roofer, lifting heavy amounts and replacing roofs without any significant symptoms except the occasional wheezing and shortness of breath and exacerbations of wheezing with a respiratory infection. Claimant did not seek medical attention for those episodes. Dr. Maier further noted that, leading up to the work injury, Claimant was not using his inhalers more than regularly. She documented that Claimant was using 2 puffs of Vanceril and 2 puffs of albuterol in the morning, and occasionally use albuterol throughout the day, especially if he had a respiratory infection. Claimant reported that, at night, he used his Vanceril again along with his albuterol, 2 puffs from each inhaler. Dr. Maier noted that, while on steroids, Claimant experienced recurrent sinus infections that would often lead to pulmonary infections.

8. Dr. Maier noted that Claimant now required the use of oxygen, which he had not required in the past. In addition to performing a physical examination, Dr. Maier reviewed Claimant's medical records dating back to the date of the work injury. Her impression included, *inter alia*:

> 1) Hypoventilation with resultant hypoxemia, as evidenced on arterial blood gas in October 1999 and currently. This is not accounted for by [Claimant's] underlying lung disease, as he was never a smoker and had asthma and should not develop significant hypoventilation. In addition, he has a normal A-a gradient, which again would suggest that the problem does not lie within the lung parenchyma but may be neurologic in origin from diaphragm paralysis for example.
>
> 2) Shortness of breath. Again, this may be multifactorial. I am concerned that [Claimant] has hypoventilation related to a neurologic process such as diaphragm paralysis. The shortness of breath may also be contributed to by [Claimant's] underlying asthma. At this point, there is no evidence that there is a cardiovascular problem contributing to shortness of breath.
>
> 3) Asthma. [Claimant] has had a long history of asthma. He has evidence of significant obstructive lung disease on his spirometry, however, he had been well controlled prior to his fall and, as a result, I am concerned that his increasing shortness of breath is not related to his asthma.

> 4) Status post fall with cervical spine fracture and evidence of a contusion in the cervical cord on MRI initially. This certainly is concerning for a possible neurologic problem which may be resulting in hypoventilation and shortness of breath. Specifically, the diaphragm is innervated through the cervical cord and its innervation may have been affected by the fall.
>
> 5) Sleep disorder, as related by symptoms and with nocturnal pulse oximetry. [Claimant] may have a component of obstructive sleep apnea, but likely has worsening hypoventilation at night possibly related to the underlying neurologic process. This will need further evaluation, as it may certainly be contributing to some of his daytime symptoms.
>
> 6) History of allergies. These certainly may worsen [Claimant's] asthma, but are unlikely to cause worsening to the point of causing hypoventilation.

(Cl. Ex. 2, p. 9).

9. Dr. Maier noted that, prior to Claimant's work injury, his long-standing history of asthma was well under control, noting that Claimant was on minimal medications leading up to the work injury. She stated that, since Claimant's work injury, he had a marked increase in symptoms of shortness of breath, primarily dyspnea on exertion, chest tightness and a sensation of being unable to breathe with the bottom part of his chest. Dr. Maier further noted that as a result of the work fall, Claimant sustained a cervical spine vertical fracture with evidence on an MRI of contusion to the spinal cord. Dr. Maier remarked that, since October 1999, Claimant had evidence of hypoventilation on arterial blood gas, which was confirmed during her exercise testing. A chest radiograph did not reveal significant parenchymal abnormality. She noted that Claimant developed a rib fracture initially which may have partially contributed to hypoventilation, though not to the level noted at the time.

10. She concluded that her evaluation suggested that Claimant was unable to increase ventilation, even during exercise. Specifically, Claimant's pCO2 rose as he was unable to hyperventilate during exercise. She stated that this limited her differential diagnosis of the source of Claimant's hypoventilation. Dr. Maier explained,

> For example, in obesity hypoventilation syndrome which might be considered in [Claimant's] case, individuals are able to hyperventilate during exercise so they can physically have a normal ventilatory response, just 'won't' usually. However, in hypoventilation from a neuromuscular problem, individuals are unable to hyperventilate or normally ventilate during exercise. In [Claimant's] case this is concerning for a cervical cord lesion that may have resulted in either unilateral, or potentially even bilateral, diaphragm paralysis.

(Cl. Ex. 1, p. 10).

11. Dr. Maier remarked that evaluation of Claimant's diaphragm was needed, including a SNIF test and possibly nerve conduction studies or EMGs of the phrenic nerve. She noted that Claimant had some symptoms that could be consistent with obstructive sleep apnea and recommended a formal sleep study. Dr. Maier was concerned that Claimant's hypoventilation was primarily the result of his work fall, and that it was contributing to his sleep disorder. She remarked that she needed to definitively establish this relationship and its impact on Claimant's sleep disorder.

12. Claimant was placed at maximum medical improvement ("MMI") on June 4, 2002. Respondents filed final admissions of liability, admitting for maintenance medical treatment.

13. On January 24, 2003 Dr. Maier created a "life care plan" for Claimant. She wrote, in pertinent part:

> It would be expected that I would need to see him at approximately six month intervals for his severe central alveolar hyperventilation, obstructive sleep apnea, asthma, and pulmonary hypertension which has resulted from the latter.
>
> * * *
>
> [Claimant] will require lifelong treatment of his medical problems as outlined above. This will include medications such as Serevent, meter dose inhaler to be used 2 puff b.i.d., Flovent meter dose inhaler 220 micrograms to be used 2 puffs twice a day, both of which should be equivalent to approximately one inhaler a month. He will also need an albuterol meter dose inhaler to be used as needed and this also should be equivalent to one inhaler a month. In addition he will require on-going treatment with CPAP at 14cm of water with one liter of supplemental oxygen or potentially BiPAP in the future along with oxygen to be used at four liters at rest and six liters with exertion. It is expected that he will continue to need all of these medications and treatments throughout his life.
>
> In addition, it is likely that [Claimant] may have an aggravation of his respiratory diseases. Specifically, he is more likely than not to develop bronchitis at least yearly which would require treatment with antibiotics, and possibly a prednisone burst on nebulizer to dispense albuterol. In addition he has greater than 50% risk for having an aggravation of his asthma on an at least yearly basis whether attributable to infection such as bronchitis or pneumonia or due to other cause. This will likely require treatment with Prednisone and may require intermittent treatment with nebulized medications such as albuterol. He also is likely to develop a pneumonia approximately every five to ten years which would require evaluation with a chest radiograph and treatment with a antibiotic. This also could necessitate

> inpatient care if severe enough. Other complications of his respiratory problems could include cor pulmonale or right heart failure which would necessitate treatment with other medications such as Lasix or other diuretic and increased oxygen therapy. In addition as a preventive measure, he should have year flu vaccine and pneumonia vaccine every five to ten years to help prevent the above problems. The risk of his developing these complications is high and greater than 50% for all of those listed above . . .
>
> In evaluation of these problems and/or routine care of [Claimant], it is likely that he will need to have a yearly chest radiograph obtained, especially to insure that he does not have pneumonia should he have a bout of bronchitis. To monitor his asthma, he will need to have spirometry performed at least twice a year along with pulmonary function tests obtained on average on a yearly basis. To monitor his response to his sleep treatment whether it be CPAP or BiPAP, he is likely to need a nocturnal pulse oximetry performed in his home on an every other year basis alternating with a formal sleep study within the laboratory on an every other year or every 24 month's basis. He will also likely require an echocardiogram to evaluate his pulmonary hypertension and the status of his right ventricle to determine if he does have evidence of right heart failure on an every 12 to 24 month basis . . .

(Cl. Ex. 5, pp. 117-118).

14. On March 3, 2003, Claimant saw Lawrence Repsher, M.D. at the emergency department of Exempla Lutheran Medical Center. Dr. Repsher stated,

> The patient has been evaluated and is followed at National Jewish Hospital by Lisa Meyer, MD, pulmonary disease. He has well documented primary alveolar hypoventilation. This has been suspected to be due to the cervical injury at least according to [Claimant], although since the respiratory control center is in the roof of the 4th ventricle, that is no where near the cervical spine, I don't understand this speculation. He has also been suspected of having left diaphragmatic paralysis. However, his SNIF tests and actual nerve conduction and muscle conduction studies of the diaphragm have been 'inconclusive.' At any rate, he has chronic CO2 retention but probably no intrinsic lung disease other than his reactive airways disease.

(R. Ex. F, pp. 925-926).

15. Dr. Repsher's impression included, *inter alia*, unusual neurologic symptoms and signs of unclear etiology; status post multiple orthopedic injuries related to work related injuries of a fall from a roof, stable; obstructive sleep apnea, on CPAP therapy; primary alveolar hypoventilation, "doubt any relationship to his cervical spine injury"; and possible but not documented left diaphragmatic paralysis.

16. Claimant continued to treat with Drs. Goldman, Maier, Repsher and various other physicians. On March 23, 2003 it was noted that Claimant was recently diagnosed as a diabetic. On November 7, 2007, Dr. Maier opined that Claimant developed pulmonary hypertension secondary to Claimant's central hypoventilation and hypoxemia, which was the result of his work injury and asthma.

17. Claimant has been diagnosed with somatic symptom disorder. Dr. Ron Carbaugh said of claimant, "In additional to the role of personality and unrelated psychosocial stressors on [Claimant's] presentation at this time, there are clinical signs as part of this pain psychology assessment that his 'symptom magnification' is on a conscious basis and related to compensability issues." (R. Ex. H, p. 955). In 2009, Dr. Robert Kleinman reported after interview and testing, "He has some magical thinking. This is seen in schizotypal personality, Schizotypal personality has some features of paranoia." (R. Ex. G, pp. 945, 949).

18. On September 18, 2013, cardiologist Douglas Martel, M.D. remarked, "[Claimant] is however morbidly obese with risk factors for CAD. His exertionally medicated hypoxemia despite supplemental oxygen could be an angina equivalent, but I suspect is more related to obesity hypoventilation syndrome." (R. Ex. J, p. 973). At the time of this evaluation, Claimant had a body mass index of 48.3, up 13 pounds from his prior visit with Dr. Martel. At one point, Claimant's BMI was 47.7, which Dr. Martel continued to opine was the cause of Claimant's medical issues.

19. In August and October 2016, Dr. Goldman noted that Claimant's work-related conditions and non-work related comorbidities were becoming "murky." He remarked that the work injury was certainly contributing to Claimant's left knee issues, but that the possible need for a total knee arthroplasty was likely outside the scope of the claim. Dr. Goldman's medical records from 2018 document Claimant's continued reports of various musculoskeletal complaints, including back, left hand, left shoulder, left knee and right knee complaints.

20. Claimant weaned himself off of opioids as of November or December 2018.

21. On March 21, 2019, Dr. Goldman noted that Claimant's left knee degenerative changes were likely substantially impacted by the work injury, but were also due to the aging process.

22. On October 16, 2019, Dr. Maier noted that Claimant had lost 79 pounds and reported some improvement in his breathing, but experienced continued issues.

23. On December 19, 2019, Dr. Goldman noted that he supported Dr. Maier's recommendations to include pulmonary hypertension as being a work-related condition in light of the central apnea and respiratory depression issues that have been considered claims related ever since Claimant negotiated his MMI and post-MMI status.

24. Dr. Goldman documented that Claimant had been prescribed benzoyl peroxide topical wash for his acne as well as selenium sulfite lotion, noting that Claimant takes this medication due to dermatitis around his CPAP mask and occasionally when he has dermatitis from his AndroGel. Dr. Goldman further noted that Claimant continued on 3 L of oxygen per minute at rest and 5L/mim with CPAP and up to 6L/min with exertion. Claimant remained on inhalers and on Combivent and Singulair and was continuing to use Flonase, Mucinex, Diltizaem and Nifedipine. He wrote,

> Due to his mildly elevated creatinine and increased GERD symptoms I have asked [Claimant] to utilize the ibuprofen sparingly, no more than 600 mg 1 tablet per day at most with food. He should only use it when his knee or back pain increased over a 6/10 level and he is not having any gastric symptoms. He may continue polyethylene glycol no more than once a day as long as his gastroenterologist concurs. We will repeat serum creatinine/chemistry and hemogram. [Claimant] will remain on his AndroGel 2 pumps per day, CBD (but I have discouraged the medical marijuana in light of his psychosocial diagnosis and medical condition complexity), MiraLAX once a day, vitamin D and B12, and ibuprofen 600 mg no more than once a day. He may continue to take melatonin 3 mg at bedtime but generally at this dosage no more than 2 out of every 3 weeks so as not to further depress pineal gland function endogenous melatonin secretion. Otherwise he will remain on medications as prescribed by his other physicians as well as his CPAP and oxygen supplementation.

(Cl. Ex. 2, pp. 20-21).

25. Claimant attended a follow-up visit with Dr. Goldman via telephone on August 10, 2020. Dr. Goldman noted that a July 20, 2018 consultation note from a Dr. Ku documented that Claimant's dysphagia and GERD were substantially due to opioid-induced gastro-paresis and esophageal dysmotility. Dr. Goldman noted that Dr. Babei's recent consultation supported that causation assessment. Dr. Goldman referenced a December 16, 2019 evaluation note from Dr. Dalabih who opined that Claimant's primary respiratory issues were due to obesity hypoventilation syndrome and not a work-related injury.

26. Respondents dispute the relatedness of Claimant's pulmonary and cardiac conditions. Respondents also request an order regarding what, if any, of Claimant's current medical treatment is reasonable, necessary and related to the work injury.

27. On August 10, 2020, Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. D'Angelo conducted a comprehensive review of Claimant's medical records and physically examined Claimant. Dr. D'Angelo found the following work-related diagnoses: cervical spine fractures; lumbar spine trauma; left knee trauma; left shoulder trauma; left hip acetabular fracture; rib fractures; multiple contusions; and secondary hypogonadism. She concluded that the following were non-work-related diagnoses: essential hypertension; obesity; type 2

diabetes; atypical chest pain; degenerative spine disease; degenerative joint disease; and asthma.

28. Dr. D'Angelo opined that Claimant no longer required any medical maintenance treatment as related to the work injury, including treatment for his musculoskeletal injuries and pulmonary conditions. Dr. D'Angelo noted that the pulmonary function tests performed at National Jewish Medical Center by Dr. Maier were not consistent with a severe restrictive pattern as one might anticipate with diaphragmatic paralysis. She stated that, furthermore, Claimant's obesity at the beginning and middle of his course of treatment might have caused the alveolar hypoventilation. Dr. D'Angelo concluded that she could not find a causal connection between Claimant's respiratory issues and the work injury, given what she perceived to be the lack of evidence for diaphragmatic paralysis. Dr. D'Angelo opined that Claimant's underlying and pre-existing asthma, pulmonary status, and acquired pulmonary hypertension were all causally unrelated to the work injury.

29. Claimant attended a follow-up evaluation with Dr. Maier on September 16, 2020. Claimant reported that he experienced no change in recent years and that continued to have all of the medical problems Dr. Maier had previously noted. Dr. Maier gave the following assessment, in pertinent part:

> 1) Chronic alveolar hypoventilation secondary to spinal cord injury which he sustained during his work injury which has resulted in hypoxemia, as well as central apnea, and clear worsening of obstructive airways disease.
>
> 2) Asthma, obstructive airways disease. These have been accepted as work-related conditions and clearly were markedly worsened after his injury in 1999. Prior to that he had had only mild asthma that had not required treatment and following his injury he had severe asthma that required multiple medications which he has continued to require to this day. These issues are well outlined in my evaluation of [Claimant] when I first started seeing him in 2000 throughout my notes in the early 2000 and more recently. On review of my notes it is clear that his spirometry at that time and ongoing has been out of proportion to his asthma that he had prior.
>
> 3) Central and obstructive sleep apnea, currently treated with CPAP and supplemental oxygen at night, which is also work related. Again prior to his injury while he had some obstructive sleep apnea it had been mild and he did not have evidence of chronic alveolar hypoventilation that we have documented over the years and that clearly was due to an (*sic*) caused by his injury from August 1999.
>
> 4) Pulmonary hypertension which is work-related as it is due to and a result of his chronic alveolar hypoventilation, hypoxemia, and central apnea with a medical degree of probability in my opinion and as documented in my notes dating back to 2000.

* * *

7) Obesity with marked weight loss. His obesity has certainly been caused and/or contributed by his work-related diagnosis as he has been unable to exert himself and/or even move appropriately because of his severe injuries that he is sustained years ago. This certainly may have aggravated the above medical problems.

(Cl. Ex. 3, pp. 26-27).

13. Dr. Maier opined:

> 1. [I]t is still my opinion with a reasonable degree of marked medical that the above illnesses are and were work-related and were due to his severe injury that he sustained as a roofer while failing 2 flights years ago as outlined in my numerous prior notes dating back to 2000. Specifically he sustained a spinal cord injury and developed chronic alveolar hypoventilation as well as central apnea that have clearly caused and aggravated his prior history of very mild asthma and very mild sleep apnea and hypoxemia. I had outlined my recommendations dating back to 2000 and my notes as well as in the care plan dated January 24, 2003 in regards to [Claimant's] ongoing need for treatment for these medical conditions to include inhalers, treatment for central and obstructive sleep apnea, antibiotics for infections that he is at increased risk for as well as flares of his underlying disease, other testing including x-rays pulmonary, pulmonary function tests, echocardiograms as well as follow-up with other providers based on his ongoing problems. While certainly some improvement may be seen in some of these medical problems as he has lost some weight, interestingly his weight is similar to what it was when I evaluated him back in early 2000. This supports my ongoing medical opinion with a reasonable degree of medical that the medical problems he sustained due to his injury in 1999 are still in place and do to that same injury today. This has been incredibly hard for him because of his inability to move with his severe pain and has actually contributed to his weight gain over the years. The constellation of problems that he has including his chronic alveolar hypoventilation, central sleep apnea are due to his cervical spine injury from the fall and then in turn have resulted in pulmonary hypertension as well as worsening of a number of other problems as have been outlined over the years. His obstructive airways disease also from a historical standpoint and in my opinion with a reasonable degree of medical probability significantly worsened and became severe after

> his injury. I am happy to provide additional specific comments or address specific issues.

(Cl. Ex 3, p. 27).

30. Dr. Maier opined that Claimant required continued use of oxygen; inhalers; Singulair; treatment with Dr. Goldman; Flonase and alkolol nasal washes; weight management; follow-up with pulmonary hypertension team due to hypoventilation due to his work-related conditions of obstructive lung disease, central apnea and hypoxemia; a cardiologist follow up; and treatment for sleep apnea.

31. On June 3, 2021 Dr. Goldman issued a Special Report after reviewing Dr. D'Angelo's IME report. He disagreed with Dr. D'Angelo that all of Claimant's medical treatment was no longer reasonable, necessary and related to the work injury. He did, however, note that he shared Dr. D'Angelo's "concern and skepticism" regarding the relationship of Claimant's pulmonary issues to the work-related injury. Dr. Goldman explained,

> In reviewing and re-reviewing his records, I have been able to determine that predominantly his pulmonary, cervical, low back, left knee and left shoulder and in addition to opioid-induced GERD, gastroparesis, constipation, and hypogonadism have been most consistently documented both at the time of [Claimant's] injury and ever since as being ongoing and accepted work-related conditions. From the very beginning of assumptions of [Claimant's] care I was skeptical in terms of how much of his pulmonary issues were specifically due to a centrally mediated spinal cord injury in the absence of other obvious objective signs of upper cervical/brainstem compromise in addition to his already overweight to obese status and pre-existing history of reactive airway disease; nevertheless, Dr. Steig…and the parties to this claim all agreed to include [Claimant's] pulmonary complaints as managed by Dr. Meier at National Jewish as part of his settlement. I have therefore supported and relied up Dr. Meier's care of [Claimant's] pulmonary conditions and complications thereof and within the context of this claim accordingly.

(R. Ex. D, p. 851).

32. Dr. Goldman further wrote,

> Although there are clearly worsening, non-work-related, age-related conditions impacting [Claimant's] current presentation and work-related maintenance care, there has never been a lapse in his consistent complaining of symptoms relative to those work-related conditions that were accepted by [Insurer] at the outset of this claim, that I have consistently documented for approximately 20 years, and have even been noted as being claims related by Dr. D'Angelo.

(Id. at p. 855).

33. Dr. Goldman opined that Claimant's GERD, gastroparesis and constipation were likely opioid-initiated and that such conditions were ongoing and unrelenting sequela of Claimant's work injury. He further noted,

> I am well aware [that Claimant's] obesity and the aging process are also highly contributory to particularly his low back, knee, GERD, and hypogonadal conditions as well as likely to the obstructive components of his sleep apnea; nevertheless, there is also no doubt that his approximately 2 decades of chronic opioid management was a significant aggravating and/or accelerating work-related treatment leading to additional medically necessary work related treatment of these conditions.

(Id. at p. 852).

34. On September 7, 2021, Dr. D'Angelo issued an addendum to her IME report after reviewing Dr. Goldman's June 3, 2021 medical report. Dr. D'Angelo reiterated her opinion that Claimant's pulmonary issues are not causally related to the work injury. She explained that, if Claimant did have centrally mediated hypoventilation syndrome due to a spinal cord injury, she would anticipate Claimant also having concomitant physical signs of upper cervical and or brainstem dysfunction, which he does not. Dr. D'Angelo noted that Claimant has issues with obesity which is known to be a direct cause of hypoventilation, and that Claimant had pre-injury airways spasms and reactivity, which are unrelated to the work injury. Dr. D'Angelo continued to opine that Claimant's ongoing medical treatment for his cardiopulmonary condition, as well as any need for supplemental oxygen, is not related. She noted that Claimant's current issues of diabetes and obesity are significant causes of gastrointestinal concerns in patients of Claimant's age.

35. Dr. D'Angelo testified by deposition on December 23, 2021. Dr. D'Angelo testified on behalf of Respondents as a Level II accredited expert in internal medicine. Dr. D'Angelo testified consistent with her IME reports and continued to opine that Claimant's current medications and treatment are not reasonable, necessary and related to his August 1999 work injury. Dr. D'Angelo testified that she did not see any evidence in the medical records of a brain or spinal injury that caused hypoventilation. She further testified that she did not see any evidence of a left hemidiaphragm collapse, stating that the x-rays and CT scans did not demonstrate any findings of unilateral diaphragm palsy. Dr. D'Angelo testified that the phrenic nerve controls the diaphragm, whose roots from C3, C4 and C5, and there was no evidence of any disruptions in the nerves at those levels. She explained that she did not see findings consistent with unilateral diaphragmatic paralysis on any of Claimant's neck MRIs.

36. Dr. D'Angelo testified that Claimant underwent a sleep study in July 1990 which showed mild obstructive sleep apnea prior to the work injury and severe baseline hypoxemia as well as severe oxygen desaturation. Dr. D'Angelo explained that obesity-

related hypoventilation is very common in patients who have BMIs in the mid-30s to high 40s, such as Claimant.

37. Dr. D'Angelo explained the purpose of each of Claimant's current medications and/or treatments and gave her opinion as follows:

a. Albuterol sulfate, a bronchodilator used for treatment of asthma and/or COPD. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. Dr. D'Angelo explained that Claimant had a preexisting history of asthma and medications for this condition before the work injury and, to her knowledge, has not been diagnosed with COPD.

b. Rabeprozole/Aciphex – a protein pump inhibitor used to decrease the acidity of gastric acid. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. She explained that although it was initially believed that Claimant's GERD was due to his opioid medication, since Claimant has not taken opioids for three years, his current GERD symptoms would not be related to the opioids taken under this claim. She testified to a different theory that Claimant's GERD was due to inappropriate muscle spasm of the esophagus caused by the spinal cord or the brain. Dr. D'Angelo opined that there was no physiological rationale for Claimant's GI issues to be considered work-related.

c. Combivent – a two-component inhaler, for bronchospasm that can also inhibit secretions. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

d. Serevent diskus/Salmeterol – a bronchodilator, long-acting beta agonist for decreasing bronchospasm. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

e. Prednisone – a steroid that decreases inflammation. Dr. D'Angelo opined that this medication is no longer reasonable, necessary or related, as it caused side effects for Claimant.

f. Flovent – a steroid inhaler that decreases inflammation in asthmatics to help them better oxygenate. Dr. D'Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as she does not believe that Claimant's pulmonary condition is related to the claim.

g. Ibuprofen – an anti-inflammatory pain and fever reliever. Claimant is not using ibuprofen every day. Claimant takes this medication for pain. Dr. D’Angelo opined that Claimant’s degenerative spine disease and degenerative joint disease are not work related and the ibuprofen is not reasonable, necessary or related to Claimant’s work injury.

h. Polyethylene glycol – a laxative prescribed by Claimant’s gastroenterologist Dr. Babaei. Dr. D’Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury. She testified that, in the absence of opioids being taken under this claim, there is no clear purpose for this drug as related to the work injury.

i. Benzoyl peroxide wash - dermatologic for rashes. Claimant testified that he uses this because of skin irritation from his oxygen and CPAP mask. Dr. D’Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as medications to resolve the effects of Claimant’s pulmonary treatment is unrelated to the claim.

j. Selenium sulfide - rrescribed for skin fungal infections after antibiotics. Dr. D’Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury, as it is also associated with the uses of the CPAP and oxygen, which she deems unrelated to the work injury.

k. Azithromycin - antibiotics for respiratory tract and lower respiratory tract infections. Dr. D’Angelo opined that this medication is not reasonable, necessary or related to maintain Claimant at MMI for his work injury.

l. Diltiazem – a calcium channel blocker used as an antihypertensive. Dr. D’Angelo opined that this medication is not related, reasonable, or necessary at this time to maintain MMI for the work injury of August 9 1999. Dr. Martel attributes Claimant’s cardio conditions to his obesity.

m. CPAP machine and associated hardware and supplies. Dr. D’Angelo opined that this medical equipment is not related, reasonable, or necessary at this time to MMI for the work injury. She testified that, based on the 1990 sleep study, Claimant had issues with sleep apnea prior to the work injury. She further testified that Claimant has been and continues to be obese, which is a well-known cause of sleep apnea.

n. Medication for cough or chest congestion. Dr. Maier opines that every bacterial or viral infection claimant experiences is due to claimant’s fall in 1999, ignoring any other possible intervening exposure or cause. Based upon her opinion that the pulmonary conditions are not work-related, Dr. D’Angelo opined that this medical equipment is not related, reasonable, or necessary to maintain Claimant at MMI for the work injury.

o. Nifedipine – a calcium channel blocker being used for dysphagia, or painful swallowing due to esophageal muscle spasm, prescribed by gastroenterologist Dr. Babaei. Dr. D'Angelo opined that this medication is not related, reasonable, or necessary to maintain MMI for the work injury. Dr. D'Angelo testified that she did not see any physiological connection, reiterating her opinion that Claimant's GERD is unrelated to the work injury.

p. Oxygen and oxygen related equipment. Dr. D'Angelo noted that a 1990 sleep study noted at baseline, Claimant had hypoxia. Dr. D'Angelo opined that this medical equipment is not related, reasonable, or necessary at this time to maintain MMI for the work injury, as Claimant's pulmonary condition is due to his pre-existing co-morbidities.

q. Treatment for hypertension. Dr. D'Angelo testified that there is no link between Claimant's injuries and essential hypertension. Dr. D'Angelo opined that this medical treatment is not related, reasonable, or necessary at this time to maintain MMI for the work injury.

r. Treatment for diabetes. Dr. D'Angelo opined that this medical treatment is not related, reasonable, or necessary at this time to maintain MMI for the work injury.

38. Regarding Claimant's orthopedic issues, Dr. D'Angelo testified that early records do not show fractures at the levels that now appear to be the source of cervical complaints. She explained that Claimant's left shoulder was part of his initial work injury. She noted that a surgery consult was performed, and the only treatment available at this time would be a reverse left shoulder joint replacement. Dr. D'Angelo testified that, due to Claimant's underlying medical conditions, this was not pursued, and Claimant indicated he did not want this surgery. There is no current left shoulder treatment recommended. She stated that Claimant's left knee was a part of his original work injury and there is no current treatment recommended for his left knee.

39. Dr. Maier reviewed Dr. D'Angelo's deposition testimony and issued a letter dated January 19, 2022. She wrote,

> I have reviewed a deposition by Dr. D'Angelo who claims that [Claimant] does not have any work related lung diseases. This is contrary to the evidence that not only I but also my colleagues here at National Jewish Health in my division and in our pulmonary division have provided. From a historical standpoint whether [Claimant] had asthma as a child or not, he was not requiring regular use of inhalers prior to his injury and did require them on a regular basis to control his lung disease after his hospitalizations and his injury. He also has required them ever since for treatment of asthma that was clearly at the least aggravated by his prolonged hospitalization and workplace accident. In addition, he underwent evaluation here by myself and with one of our world renown neuromuscular pulmonary experts Dr.

> Barry Make who confirmed my opinion that [Claimant] had chronic alveolar hypoventilation and central apnea due to and consequential to his accident and injury which resulted in permanent damage to his cervical spine. Specifically, Dr. Make and I both opined that he sustained a spinal cord injury and developed chronic alveolar hypoventilation as well as central apnea that were clearly caused and aggravated compared to his prior history of very mild asthma and very mild sleep apnea and hypoxemia before his injury. Again he was not requiring ongoing treatment and has required significant and sustained treatment since his injury. Thus, it is still my opinion with a reasonable degree of medical probability that his respiratory illnesses are and were work-related and were due to his severe injury that he sustained as a roofer while falling 2 flights in 1999 as outlined in my numerous prior notes dating back to 2000.
>
> * * *
>
> While certainly some improvement may be seen in some of these medical problems as he has lost some weight, interestingly his weight is similar to what it was when I evaluated him back in early 2000. This supports my ongoing medical opinion with a reasonable degree of medical that the medical problems he sustained due to his injury in 1999 are still in place and due to that same injury today. This has been incredibly hard for him because of his inability to move with his severe pain and has actually contributed to his weight gain over the years. The constellation of problems that he has including his chronic alveolar hypoventilation, central sleep apnea are due to his cervical spine injury from the fall and then in turn have resulted in pulmonary hypertension as well as worsening of a number of other problems including aggravation of asthma and causing and or aggravating gastroesophageal reflux disease. His obstructive airways disease also from a historical standpoint and in my opinion with a reasonable degree of medical probability significantly worsened and became severe after his injury.

(Cl. Ex. 6, pp. 120-121).

40. Dr. Goldman testified by deposition on January 25, 2022. Dr. Goldman testified as a Level II accredited expert in physical medicine, rehabilitation and IMEs. Dr. Goldman testified that he initially referred Claimant to Dr. Maier and that he has deferred to Dr. Maier regarding Claimant’s pulmonary condition due to Dr. Maier’s significant amount of expertise in that area and Claimant’s particular diagnosis. Dr. Goldman continues to support Dr. Maier’s recommendations to include pulmonary hypertension as being a work-related condition and continues to defer to Dr. Maier regarding whether certain medications and treatment remain reasonable, necessary and related to Claimant’s work injury. Dr. Goldman testified that, although Claimant has developed other complications from a pulmonary perspective, “[t]hey can all be considered accelerated or aggravated because of the work-related decreased ventilatory and oxygen capacity that he’s demonstrated consistently ever since [the work injury], in the absence of any other injuries

to his brain or his neck or lungs or phrenic nerve of which I am aware.” (Goldman Dep. 26:11-16).

41. Dr. Goldman testified that Claimant’s current medications remain reasonable, necessary and related. He testified that, with respect to the pulmonary medications, anything beyond what Claimant was taking before his work injury would likely represent a cascading set of complications from the injury of 1999 that depressed his ventilatory capacity…” (Goldman Dep. 15:4-9). He remarked that Claimant’s presentation has been unwavering in terms of his breathing and that has played out just as Dr. Maier has outlined. Dr. Goldman further testified that, but for the work injury, he doubts Claimant would be on these medicines, noting that some of the inhalers represent a “substantial escalation” in dosage and frequency compared to Claimant’s usage prior to the work injury.

42. Dr. Goldman testified that Claimant represents a rather unique case in terms of types of situations he generally sees. He explained that he has observed Claimant consistently over the course of 20 years and during that time Claimant’s respiratory rate did not change with the use of opioids. Regarding Claimant’s orthopedic issues, Dr. Goldman opined that Claimant continued to experience work-related orthopedic issues, but at this time, due to his comorbidities, further treatment such as surgery is too dangerous and thus not recommended. Dr. Goldman explained that Claimant’s opioid-related GERD is likely work related. He testified that gastrointestinal issues usually improve once a patient stops taking opioids. He explained, however, that this was not the case for Claimant, considering his age and the extensive amount of time Claimant was on opioids. Dr. Goldman opined that Claimant’s obesity was in part self-imposed and in part not self-imposed, noting that Claimant had attempted to be more active than many other chronic pain patients he’d seen. Dr. Goldman acknowledged that obesity can cause sleep apnea, cardiac issues, hypoxemia, joint pain and pulmonary hypertension.

43. Dr. Goldman testified that Claimant’s left shoulder, neck, low back, left knee and decreased ventilatory capacity, hypoxemia have been ongoing issues not associated with reinjury or other non-work related issues. Dr. Goldman further testified that, although [Claimant] has developed other complications from a pulmonary perspective, the work injury accelerated or aggravated Claimant’s respiratory and pulmonary conditions, which has been demonstrated consistently ever since the work injury. Dr. Goldman testified that there is objective evidence of post traumatic degeneration in Claimant’s spinal cord.

44. On cross-examination, Respondents’ counsel addressed references in Dr. Goldman’s records that Insurer had purportedly waived their right to argue the reasonableness, necessity and relatedness of medical benefits at this time. Dr. Goldman clarified that he was not indicating Respondents waived their right to contest liability, and that to his knowledge there was no settlement agreement between Claimant and Respondents. He stated that it was his understanding pulmonary treatment would be included in Claimant’s maintenance plan. Dr. Goldman testified,

> My position, and I think I put it in even to my last report of June of 2021 that, you know, I understand the controversies here, but to override the precedent of my treating this patient in good faith, and I think in a fairly cost effective and safe way compared to how most of these cases go, that we would need a much higher level of pulmonary and probably neurological independent medical examination expertise to be persuasive for me not to continue to treat [Claimant] or support his treatment in good faith.

(Goldman Dep. 30:4-13).

45. When asked if he continued to be skeptical about Dr. Maier's theory regarding the relatedness of Claimant's pulmonary condition, he testified:

> I would say now having reread her original consult in preparation for today's testimony that I think that she makes the most medically probable case for why [Claimant] required ongoing oxygen since this injury and his need thereof has been due to this injury as a matter of exclusion. Yes, I understand the controversies, and my skepticism is a healthy one, but I think my position has always been, we'll need to have someone of equal or greater stature as a pulmonologist and perhaps a neurologist to allow me to contravene or contradict Dr. Maier's opinion in this regard for the last 20 years.

(Goldman Dep. 35:15-25, 36:1).

46. Claimant testified at hearing that his current medications and treatment assist with his respiratory, cardiopulmonary, and gastrointestinal issues. He explained that he requires dermatologic washes due to rashes produced by his CPAP and oxygen machines, as well as the use of certain related antibiotics. Claimant testified that he was weighed approximately 256 lbs. prior to the injury, and over the course of the last several years has fluctuated up to 335 lbs. Claimant currently weighs approximately 276 lbs. Claimant's symptoms have remained relatively the same throughout the course of his maintenance treatment.

47. The ALJ finds the opinion and/or testimony of Drs. Maier and Goldman, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions/testimony of Drs. D'Angelo, Martel and Repsher.

48. Respondents failed to prove by a preponderance of the evidence medical treatment is no longer reasonable, necessary and related to Claimant's work injury such that they are permitted to withdraw their admission of liability.

49. Claimant proved by a preponderance of the evidence that the current medications at issue are longer reasonable, necessary and related to his work injury.

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).

Withdrawal of an Admission

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-

838-01 (ICAO, Oct. 1, 2013). The statute serves the same function in regard to maintenance medical benefits. Notably, where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden pursuant to §8-43-201(1), C.R.S. to prove that the treatment is not related and reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of the claimant's condition. See *Salisbury v. Prowers County School District*, *supra*.

As acknowledged by Dr. Goldman, Claimant presents a unique case and the combination of his pre-existing conditions, severity of the work injury, and passage of time resulting in other non-work related conditions complicate the determination of what medical treatment, if any, remains reasonable, necessary and related to Claimant's August 9, 1999 work injury. Respondents do not argue, nor is there any evidence, that an intervening injury severed the causal connection between the injury and Claimant's disability and need for treatment. Here, the relevant consideration is not whether the work injury is the sole cause of Claimant's need for treatment but, rather, if the work injury remains a significant cause of Claimant's need for treatment. *See, e.g., H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *In re Claim of Serrano*, WC No. 5-112-470-002 (ICAO, May 27, 2021.

Respondents argue that there is insufficient evidence supporting Dr. Maier's opinions regarding the relatedness of Claimant's respiratory and cardiopulmonary conditions, and that Claimant's ongoing need for treatment is the result of non-work related pre-existing conditions. Respondents further contend that no further treatment is reasonable or necessary for Claimant's work-related orthopedic conditions. As found, the preponderant evidence fails to demonstrate that medical maintenance benefits are no longer reasonable, necessary or related to the work injury.

It is undisputed that Claimant has a pre-existing history of obstructive lung disease/asthma, obstructive sleep apnea and obesity. Dr. Maier addressed each of these conditions in her initial evaluation and multiple subsequent reports. Both Claimant and Dr. Maier acknowledge that, prior to the work injury, Claimant was using inhalers to manage his asthma. However, there is no evidence refuting Claimant's report and Dr. Maier's determination that, leading up to the work injury, Claimant's asthma was well controlled without the need for additional treatment. Dr. Maier credibly opined that, while Claimant had some obstructive sleep apnea prior to the work injury, it was mild and there was no evidence of chronic alveolar hypoventilation that was noted soon after the work injury and consistently thereafter.

Dr. Maier addressed Claimant's obesity as a potential cause of his hypoventilation syndrome but, based on her testing, credibly differentiated between obesity hypoventilation syndrome and hypoventilation syndrome resulting from a neuromuscular issue as in Claimant's case. Claimant was obese at the time of the work injury but did not require the significant respiratory and pulmonary treatment that he did after the work injury. Despite losing and gaining weight throughout the course of his treatment, Claimant has continued to require ongoing respiratory and cardiopulmonary treatment, as noted by Drs. Maier and Goldman. Thus, while other non-work related conditions (pre-existing

respiratory conditions, obesity, age) may be contributing to Claimant's need for treatment, the preponderant evidence establishes that the work injury was and remains a significant cause of Claimant's ongoing symptoms and need for treatment.

Dr. D'Angelo opines that Claimant's continued gastrointestinal issues and need for treatment are no longer work related, as Claimant ceased taking opioids over three years ago. While Dr. Goldman acknowledges that it typically would be expected for opioid-induced gastrointestinal issues to subside with the cessation opioid use, he credibly explained that, with age and Claimant's chronic opioid use over the course of 20 years, the opioids are likely a significant aggravating factor in Claimant's gastrointestinal issues. Regarding Claimant's orthopedic issues, Dr. Goldman credibly testified that Claimant's neck, left shoulder, left knee and low back conditions remain work-related; however, considering his comorbidities, there is no further treatment being recommended at this time.

Respondents further argue that Dr. Goldman's opinion that Respondents are liable for Claimant's pulmonary complaints is not based on medical principles, but instead on his assertion that Respondents legally waived the right to argue against their liability. Dr. Goldman clarified in his deposition testimony that it was not his belief that Respondents waived any right to challenge the maintenance medical treatment. The ALJ is not persuaded that Dr. Goldman's opinion is solely rooted in trepidation about "overriding" the precedent of Claimant's prior treatment. Dr. Goldman credibly testified that Dr. Maier's opinion regarding Claimant's cardiopulmonary conditions and need for treatment is the most medically probable. He specifically opined that additional pulmonary and possibly neurological examinations would need to take place for him to conclude that Claimant's medical treatment is no longer reasonable, necessary and related. Dr. Goldman very clearly continues to defer to Dr. Maier's opinion and recommendations based on her expertise and the medical findings. Dr. Maier has credibly and persuasively explained her findings and basis for her conclusions in multiple reports. Both Drs. Maier and Goldman, who have treated Claimant for over 20 years, continue to opine that there remains reasonably necessary medical treatment to relieve the effects of Claimant's work injury and maintain Claimant at MMI.

Based on the totality of the evidence, Respondents failed to prove it is more probable than not no further medical treatment is reasonable, necessary or related to Claimant's work injury. The preponderant evidence establishes that the work injury remains a significant cause of Claimant's respiratory, cardiopulmonary, orthopedic and gastrointestinal issues and need for ongoing treatment. Accordingly, Respondents are not permitted to withdraw their admissions of liability admitting for maintenance treatment.

Medical Treatment

The need for medical treatment may extend beyond the point of MMI where the 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). An award for *Grover* 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. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

As discussed, Claimant experiences ongoing respiratory, cardiopulmonary, orthopedic and gastrointestinal issues related to the work injury. The preponderant evidence demonstrates that he continues to need treatment to relieve the effects of his injury and to prevent deterioration of his condition. Since sustaining the work injury, Claimant's ATPs have managed Claimant's symptoms with medications, oxygen and the use of a CPAP machine. Claimant credibly testified, and the medical records support, that this treatment has been helpful in maintaining Claimant's condition. Drs. Goldman and/or Maier have credibly opined that the medications at issue are related to Claimant's work injury and reasonably necessary to maintain Claimant at MMI.

Accordingly, the ALJ concludes that the following treatment is reasonable, necessary and related to relieve and prevent the deterioration of Claimant's respiratory and cardiopulmonary conditions: (1) Albuterol sulfate; (2) Combivent; (3) Serevent diskus/Salmeterol; (4) Flovent; (5) Prednisone; and (6) Diltiazem; (7) Alkalol; (8) Oxygen and related equipment; and (9) CPAP machine and related equipment.

Dr. Maier credibly opined that Claimant was likely to experience aggravations of respiratory diseases due to his condition, necessitating the use of antibiotics and/or cough and chest medicines. While other non-work related causes could contribute to aggravations of respiratory diseases, the preponderant evidence does not establish that Claimant's work-related condition is not a significant causal factor as well. Accordingly, Azithromycin and cough and chest medicines are deemed reasonable, necessary and causally related to Claimant's work injury. Claimant has developed skin rashes due to the use of oxygen and CPAP machines, as well as antibiotics, all related to the work injury. Benzoyl peroxide wash and Selenium sulfide, used to treat these effects, are reasonable, necessary and causally related to the work injury.

As discussed above, Dr. Goldman credibly opined that Claimant continues to experience gastrointestinal issues as a result of the work injury. As such, Raberprozole/Achiphex, Polythylene glycol, and Nifedipine prescribed to treat Claimant's related gastrointestinal symptoms are reasonable and necessary.

Lastly, Claimant continues to take ibuprofen for its anti-inflammatory and pain relieving properties. The ALJ acknowledges that there are non-work related factors contributing to Claimant's orthopedic pain, including age and natural degeneration, as well as pain resulting from non-work related body parts (i.e. the right shoulder). Nonetheless, the effects of the work related injury continue to be a significant cause of Claimant's pain, necessitating the use of ibuprofen. Accordingly, ibuprofen is deemed reasonable, necessary and related maintenance treatment.

To the extent Claimant seeks maintenance treatment for his diabetes, the preponderant evidence does not establish that any treatment for diabetes is reasonable, necessary and related to the work injury.

Claimant's Request for Costs Pursuant to §8-42-101(5), C.R.S.

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

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

Claimant requests cost for the deposition of L. Barton Goldman, M.D. which was taken on January 25, 2022 and necessitated by Respondents' Application for Hearing dated October 4, 2021 requesting that maintenance care be discontinued.

Here, Respondents contest Claimant's entitlement to ongoing medical maintenance benefits, seeking an order permitting them to withdraw their FALs admitting for general maintenance care or, in the alternative, specifying what treatment remains reasonably necessary and related to the work injury. Respondents have not denied nor failed to pay for any requested authorized treatment recommended by an ATP. Claimant continued to receive the recommended treatment under the claim throughout Respondents' challenge of their liability for the treatment. As no recommended treatment has been unpaid, Respondents are not liable for reasonable costs incurred in pursuing the medical benefit under §8-42-101(5), C.R.S.

ORDER

1. Respondents failed to prove by a preponderance of the evidence that maintenance medical treatment is no longer reasonable, necessary and related to Claimant's August 9, 1999 work injury. Respondents' request to withdraw their admission of liability is denied and dismissed.

2. Respondents are liable for the following medical treatment recommended by Claimant's ATPs and deemed reasonable, necessary and related to the August 9, 1999 work injury: (1) Albuterol sulfate; (1) Combivent; (3) Serevent diskus/Salmeterol; (4) Flovent; (5) Prednisone; (6) Diltiazem; (7) Alkalol; (8) Oxygen and related equipment; (9) CPAP machine and related equipment; (10) Azithromycin and cough and chest medicines; (11) Benzoyl peroxide wash; (12) Selenium sulfide; (13) Raberprozole/Achiphex; (14) Polythylene glycol; (15) Nifedipine; and (16) Ibuprofen.

3. As stipulated to by the parties, Fluticasone, Ferritin and Testosterone are no longer reasonable, necessary or related to Claimant's work injury.

4. Respondents proved by a preponderance of the evidence that Claimant's diabetes and need for treatment is unrelated to the work injury.

5. Claimant's request for reasonable costs under Section 8-42-101(5), C.R.S. is denied and dismissed.

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: August 29, 2022

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondents prove Claimant's impairment rating and associated PPD award should be apportioned based on the rating Claimant received in a prior workers' compensation claim?
- Did Claimant prove the admitted 17% scheduled ratings should be "converted" to the equivalent 10% whole person rating?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Disfigurement.
- The parties stipulated to an increased AWW of $881.58 effective January 1, 2022.

FINDINGS OF FACT

1. Claimant works a heavy equipment operator for Employer's Road and Bridge Department. He suffered an admitted injury to his right shoulder on February 21, 2020 while shoveling asphalt.

2. An MR arthrogram on May 14 2020 showed a right posterior labral tear and possible anterior extension of a SLAP tear.

3. Dr. Robert Hunter performed a Reverse Bankart posterior labral reconstruction on November 18, 2020. The anterior labrum was stable and intact.

4. Claimant continued to have problems with his shoulder after surgery, so he sought a second opinion from Dr. David Weinstein. Dr. Weinstein concluded Claimant's persistent symptoms were primarily related to inflammation of the rotator cuff, glenohumeral joint, and biceps.

5. On July 8, 2021, Dr. Weinstein performed a right arthroscopic subacromial decompression, extensive glenohumeral debridement with synovectomy, and a right open biceps tenodesis revision.

6. Claimant participated in several months of PT. At his final PT session on November 22, 2021, the therapist noted "good strength and PROM right shoulder despite persistent symptoms reported." No further sessions were scheduled, pending a follow-up appointment with Dr. Weinstein.

7. Claimant had his final appointment with Dr. Weinstein on November 24, 2021. Dr. Weinstein noted diffuse tenderness over the scapular rotators and pectoralis major, and focal tenderness over the right biceps and triceps. Claimant had no neck pain

and full cervical ROM. Examination of the right shoulder showed reduced range of motion, but no sign of impingement or instability and good improvement in strength. Dr. Weinstein opined Claimant's rotator cuff and biceps had improved following surgery, and his residual symptoms were primarily related to right upper extremity myofascial inflammation. He gave Claimant a prescription for Voltaren gel (NSAID) with no refills. Dr. Weinstein opined Claimant was at MMI. He stated, "I do not see any other treatment that would be beneficial at this time, other than continuing his home exercises, and the use of anti-inflammatory medication. I told the patient even if he has pain, he is doing no harm as this is due to the myofascial component."

8. Claimant completed a Functional Capacity Evaluation (FCE) on January 7, 2022. He reported ongoing right shoulder pain, reduced ROM, and loss of strength, and sleep disturbance because of pain. The FCE showed Claimant can work at the light exertional level with no overhead reaching with the right arm, no crawling, and no climbing ladders.

9. Claimant's primary ATP, Dr. Thomas Centi, put Claimant at MMI on January 7, 2022 after he completed the FCE. Physical examination showed point tenderness with palpation to the anterior and lateral capsule and "somewhat limited" shoulder ROM. Dr. Centi provided a right shoulder impairment rating of 17% extremity/10% whole person. Dr. Centi opined Claimant required no maintenance treatment and released him from care.

10. Respondents filed a Final Admission of Liability (FAL) on January 13, 2022 admitting for the 17% scheduled extremity rating assigned by Dr. Centi. The FAL denied medical benefits after MMI.

11. Claimant timely objected to the FAL and requested a hearing. Claimant endorsed "Permanent Partial Disability Benefits" on the Application for Hearing.

12. Respondents filed a timely Response to Application for Hearing on February 16, 2022. Respondents endorsed "apportionment" as an affirmative defense to Claimant's request for additional PPD benefits.

13. Claimant had a prior work-related injury to his right shoulder on March 12, 2006, while working for Employer. His diagnoses from that injury included rotator cuff tendinosis, impingement, and a labral tear. Claimant underwent multiple right shoulder surgeries for the 2006 injury. The first surgery was a subacromial decompression, bursal resection, and debridement of the posterior labrum. The second surgery was an arthroscopic rotator cuff repair and distal clavicle resection. Claimant also had a biceps tenodesis related to the 2006 work accident.

14. Claimant underwent a DIME with Dr. Thomas Higginbotham on June 17, 2009. Dr. Higginbotham's physical examination showed persistent tenderness to palpation over the AC joint, the coracoid process, and the bicipital grove. Dr. Higginbotham assigned a rating of 22% upper extremity/13% whole person for the right

shoulder. The rating was based on shoulder ROM deficits combined with 10% for the distal clavicle resection and subacromial decompression.

15. Respondents filed a FAL on July 16, 2009 admitting for the 22% extremity rating assigned by the DIME. For unknown reasons, and despite being represented by counsel, Claimant did not challenge the FAL and seek compensation based on the 13% whole person equivalent rating.

16. Dr. Nicholas Olsen performed an IME for Respondents on June 13, 2022. The significant findings on physical examination were tension and pain with deep palpation of the supraspinatus and infraspinatus, pain over the biceps tendon attachment, and reduced shoulder ROM. Dr. Olsen agreed with Dr. Weinstein and Dr. Centi that Claimant needs no maintenance care besides continuing his home exercise program. Dr. Olsen opined the rating from Claimant's prior injury needs to be apportioned from his current impairment, although he did not have the records available to perform the computation.

17. Claimant credibly testified his injury causes pain in the anterior and lateral aspect of his right shoulder. This testimony is corroborated by clinical findings documented in the medical records.

18. Claimant also testified he experiences pain in his right scapula and right trapezius, extending to his neck. He testified these symptoms limit his ability to perform various activities such as reaching, lifting, and driving. Claimant conceded he never mentioned scapular pain to Dr. Olsen or any treating provider. Multiple providers documented a lack of neck symptoms and full cervical range of motion. There is no credible evidence of trapezius pain in the medical records at or near MMI.

19. Respondents proved Claimant previously received a PPD award for a permanent impairment rating for the "same body part." The prior impairment from the 2006 injury must be subtracted from the current impairment. Because the prior rating was higher than the current rating, the compensable rating from the 2020 injury is 0%.

20. Claimant's request for "conversion" of the rating is moot.

21. Claimant failed to prove he needs additional medical treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required.

22. Claimant has injury-related surgical scarring about his right shoulder consisting of: (1) a 2-inch long by ¼ inch wide surgical scar; (2) two ½-inch diameter arthroscopic portal scars; and (3) a 1-inch by ½ inch surgical scar on the right anterior axilla. The ALJ finds Claimant should be awarded $1,400 for disfigurement.

CONCLUSIONS OF LAW

A. The issue of apportionment is not closed

Claimant asserts the issue of apportionment is closed by the FAL because his request for hearing was limited to the issue of "conversion," and therefore did not "open the door" for a broader challenge to the PPD award. The ALJ disagrees with this argument. Claimant's February 10, 2022 Application for Hearing specifically endorsed the issue of "Permanent Partial Disability benefits." The sub-issue of "whole person conversion" is subsumed by the broader issue of "PPD benefits." Indeed, the conversion issue only impacts the amount of PPD benefits to which a claimant is entitled. Claimant's separate reference to "conversion" in the "other issues" section of the application was not necessary keep PPD open, nor did it otherwise limit the effect of checking the box for "PPD benefits." Under Colorado's "notice pleading" regime, checking a box on the application for hearing is sufficient to prevent closure of that issue. *E.g., Command Communications, Inc. v. Fritz Companies*, 36 P.3d 182 (Colo. App. 2001) ("Colorado has a liberal notice pleading rule"); *Calkins v. DFC Ceramics, Inc.*, W.C. No. 3-631-704 (September 18, 1992). Because the issue of PPD is not closed, Respondents may defend the claim for additional PPD benefits on any basis appropriate under the circumstances, including apportionment for a prior rating. *E.g.*, *Barela v. CMHIP*, W.C. No. 4-842-938-03 (July 29, 2013); *Franco v. Denver Public Schools*, W.C. No. 4-818-579-01 (April 23, 2013); *Fausnacht v. Inflated Dough, Inc.*, W.C. No. 4-160-133 (July 20, 1999).

B. Respondents proved apportionment is required

Section 8-42-104(5)(a) provides that a claimant's PPD award "shall be reduced" if the claimant "has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under [the Act]." The statute requires that the "the permanent medical impairment rating applicable to the previous injury" be subtracted from the "permanent medical impairment rating for the subsequent injury to the same body part." Apportionment is an affirmative defense that the respondents must prove. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Bradford v. Nationsway Transport Service*, W.C. No. 4-349-599 (March 16, 2000).

As found, Respondents proved Claimant had a previous impairment to the "same body part" in his 2006 claim for which he received "an award." First, from a basic "common sense" perspective, the injuries and impairments in both cases affected Claimant's "right shoulder." More important, there was substantial overlap between the specific pathology and surgical procedures in both claims. Both injuries resulted in surgery directed to the posterior labrum. Both required subacromial decompressions. Both required a biceps tenodesis. The impairment ratings for both injuries were primarily based on right shoulder range of motion deficits. Additionally, the only physician to address the issue (Dr. Olsen) opined apportionment of the prior rating is required.

Claimant's argument that apportionment is precluded because he was only paid for a scheduled rating in the 2006 claim is unpersuasive. The purpose of the apportionment statute is to prevent claimants from being paid twice for the same

impairment. *King v. Starbucks*, W.C. No. 4-802-142 (March 28, 2011). It is unlikely the General Assembly intended to create an exception whereby claimants with shoulder injuries can receive two awards for the same shoulder simply by characterizing one impairment as scheduled and the other as whole person.

Admittedly, the rating for the 2006 injury included a diagnosis-based component for the distal clavicle resection, which has no analogue in the rating for the 2020 injury. But the current version of the apportionment requires that the prior "rating" be subtracted from the current "rating." It provides no discretion to parse the components of the underlying "impairment" when applying apportionment. *Compare Nunez-Talavera v. Pipeline Industries, Inc.*, W.C. No. 4-679-964 (January 4, 2008) (decided under previous version of the statute that required apportionment of previous "impairment," rather than the prior "rating").

Claimant was previously compensated for an impairment of his right shoulder. Therefore, Respondents are entitled to apportionment. Because his prior rating of 22% extremity/13% whole person was higher than 17% extremity/10% whole person rating from the 2020 claim, Claimant is entitled to no additional PPD benefits.

C. Claimant failed to prove entitlement to medical benefits after MMI

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve 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 failed to prove he needs additional treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required. Claimant testified he would like to return to an ATP "to see if they can explain to me why I still have so much pain." But Claimant previously acknowledged that Dr. Weinstein explained "it may take a year for all to heal up, and that he may not get the arm back fully." Dr. Weinstein and Dr. Centi were both aware of Claimant's ongoing symptoms but neither thought he needed any further treatment. There is no persuasive evidence of any change in Claimant's condition

or other factor that would reasonably be expected to change his ATPs minds on that subject. Nor is there any persuasive reason to expect additional PT would be ordered, given that Claimant has been provided a home exercise program.

D. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,400 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant’s average weekly wage is $881.58, effective January 1, 2022.

2. Claimant’s request for additional PPD benefits is denied and dismissed.

3. Claimant’s request for a general award of medical benefits after MMI is denied and dismissed.

4. Insurer shall pay Claimant $1,400 for disfigurement. Insurer may take credit for any disfigurement benefits previously paid in this claim.

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: August 29, 2022

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1. If Claimant suffered compensable injuries to his bilateral feet and ankles, his medical treatment was reasonable, necessary and causally related.

2. The parties will resolve issues related to payment, reimbursement and/or lost wages as necessary.

FINDINGS OF FACT

1. Claimant is a 51-year-old helicopter pilot for Employer's police department. He asserts that he sustained a bilateral foot/ankle occupational disease as a result of piloting a police helicopter. Claimant has worked for Employer since September 2006 and started flying air support in 2011. He is currently the Chief Pilot in Employer's police force.

2. Claimant's shifts typically begin at 4:00 p.m. and last approximately eight hours. During the period, Claimant and another Officer fly two shifts ranging between one and one-half and two hours. If the other Officer is a certified pilot, they will trade serving as the pilot and the Tactical Flight Officer (TFO) between flights. Claimant testified he has amassed approximately 4,500 hours of flight time during the course of his employment.

3. Since the fall of 2020 Claimant has flown a Bell 407-GXI helicopter. Prior to the fall of 2020, he flew a standard Bell 407 helicopter. In his current Bell 407-GXI helicopter, there are two anti-torque pedals that are operated in tandem. The pedals operate the rear tail rotor to counteract the torque that is brought through the blades into the fuselage and control the direction of the fuselage. The pedals use hydraulic servos that are designed to make them easier to operate. During normal flight operations, Claimant keeps his feet on the pedals at all times and exerts pressure of 3-5 pounds. Claimant did not testify to resting the backs of his heels on the pedals or feeling pressure from the pedals onto the backs of his heels.

4. Claimant explained that he performs aerial surveillance, tracking fleeing suspects, perimeter containment and searches. [Redacted, hereinafter AC], previously a Flight Officer for Employer from 2005 until 2012, further detailed the police flight operations. AC[Redacted] testified that police flight can be different from normal helicopter operations. For example, orbiting a traffic stop would require taking the aircraft out of trim so the TFO can observe what is happening. He clarified that operation during the preceding maneuvers usually does not require much force on the pedals.

AC[Redacted] agreed with Claimant that normal operation only requires 3-5 pounds of pressure on the helicopter pedals.

5. Claimant explained that his symptoms began about five or six years ago when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter that required even more use of the ankle to operate the pedal assembly. Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain in his heels, stiffness and burning sensations. He thus sought medical treatment in January, 2021. Claimant initially obtained conservative care through Employer's in-house physical therapy department.

6. Claimant first visited [Employer in-house PT, Redacted, hereinafter PDT] on January 5, 2021. He reported bilateral heel pain for three months without improvement. He attributed his symptoms to the use of pedals while flying Employer's helicopter. Claimant was assessed with "achilles tendinopathy secondary to muscular tightness, weakness and overuse."

7. Between January 2021 and July 10, 2021 Claimant attended 12 sessions of physical therapy with PDT[Redacted]. At each session, the provider remarked that Claimant was improving and responding to therapy. However, on July 16, 2021 PDT[Redacted] noted Claimant had reported that his symptoms were not improving and his personal physicians had recommended surgery. Moreover, because his condition was work-related he should follow-up with the occupational medicine provider.

8. While receiving treatment with PDT[Redacted], Claimant also sought medical advice from primary care physician New West Physicians. Claimant first visited Kristine Thorne, PA at New West Physicians on February 12, 2021. X-rays revealed "mild OA without fracture or arosion and small traction enthesophyte of the calcaneus bones." PA Thorne referred Claimant for a podiatry consultation.

9. On February 16, 2021 Claimant visited Julia K. Riley, DPM at New West Physicians. Dr. Riley determined Claimant suffered from insertional tendonitis and recommended continued physical therapy in an attempt to avoid surgery. At a March 16, 2021 follow-up appointment Dr. Riley diagnosed Achilles tendinits of the left and right lower extremities. She commented that Claimant was not improving and suggested a boot for three weeks.

10. On July 13, 2021 Claimant visited Brett D. Sachs, DPM, at Rocky Mountain Foot & Ankle. Claimant reported his lower extremity symptoms were aggravated with activity and ambulation. He specifically noted that using the pedals on his helicopter aggravated his symptoms. Dr. Sachs also diagnosed Claimant with Achilles tendinitis. He explained that Claimant had not responded to conservative measures and recommended possible surgical intervention. However, like Dr. Riley, Dr. Sachs made no connection between Claimant's occupation and diagnosis.

11. On July 14, 2021 Claimant reported his symptoms to Employer. Claimant specifically stated he was "sitting in the helicopter for thousands of hours with his feet on the anti-torque pedals caused the bone spurs." Claimant selected Denver Health – Center for Occupational Safety and Health (COSH) as his Authorized Treating Physician (ATP).

12. On July 15, 2021 Claimant visited ATP Elizabeth Esty, M.D. at COSH. Claimant reported worsening bilateral heel and distal posterior lower leg pain that began in October 2020. Dr. Esty noted that Claimant had over 8,000 hours of flight time and flying the helicopter required extended periods of exerting almost continuous foot pressure of three to five pounds. Dr. Esty did not provide a detailed diagnosis and did not assess causation. Instead, because Dr. Sachs had already proposed surgery, Dr. Esty referred Claimant to Stuart Myers, M.D. for a second surgical opinion.

13. Dr. Myers at Orthopedic Centers of Colorado evaluated Claimant on July 27, 2021. He explained that Claimant had suffered the progressive worsening of posterior heel and Achilles pain that began in the fall of 2020. Dr. Myers noted Claimant flies a helicopter and began to notice pain after holding his foot in a dorsiflexed position for several hours at a time while flying. He also remarked that Claimant's pain increased after activity and limited his ability to run and participate in sports with his children. Dr. Myers commented that conservative care had failed. He recommended surgical intervention and a preoperative MRI.

14. On August 17, 2021 Claimant returned to Dr. Myers for an examination. After reviewing MRIs, Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." He concluded that Claimant's symptoms "were precipitated and exacerbated by work activity." Dr. Myers recommended surgery including "excision of the enthesophyte, debridement of the Achilles with repair and reattachment."

15. In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They jointly concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present."

16. On December 13, 2021 Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel. Dr. Meyers subsequently operated on Claimant's right heel on February 28, 2022.

17. Respondent retained Paul Stone, DPM to perform a records review and independent medical examination. Dr. Stone authored a report dated January 21, 2022 and testified at the hearing in this matter. On physical examination, Dr. Stone found pain at Claimant's Achilles insertion or in the middle portion of the heel bone. He diagnosed insertional Achilles tendinitis and determined that the condition was not related to Claimant's operation of the helicopter at work.

18. Dr. Stone explained that Claimant's insertional Achilles tendinitis is not related to his job duties. He cited W.C.R.P 17-5, Exhibit 6, (E)(1)(a)(ii) of the Colorado

Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) to support his position. The preceding section addresses traumatic and repetitive Achilles injuries. It provides:

> Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders.

19. Dr. Stone discussed that the occupational relationship between Claimant's condition and employment usually involves walking on hard surfaces or repetitive motion such as jumping or climbing up and down ladders. The preceding mechanisms involve a straight knee that causes loading onto the Achilles tendon. Loading onto the Achilles tendon then causes Achilles tendonitis. However, when Dr. Stone reviewed images of the helicopter cockpit and later watched over 100 minutes of Claimant's flight operation, he observed Claimant sitting in a relaxed position with his knee bent and ankles flexed downward. The preceding posture releases the tension on the Achilles tendon and thus makes it improbable that operation of helicopter pedals will cause tendinitis.

20. Dr. Stone reasoned that, in order for Claimant's pedal operation to cause tendinitis, he would have to move his foot up during flight. The movement would place a load on the Achilles tendon that could lead to tendinitis. While Claimant moved his foot in an upward direction during flight operations, his feet were never past 90 degrees or neutral (dorsiflexed) that would case loading of the Achilles tendon. Dr. Stone concluded that Claimant's Achilles tendinitis was likely either caused by age-related degeneration or the result of recreational activities such as exercising at the gym or hiking.

21. Claimant retained John Hughes, M.D. to provide a medical opinion regarding causation. Dr. Hughes performed a records review and physical evaluation on February 15, 2022. He remarked that Claimant had accumulated 4,000 hours of flight time and tactical flight operation of a helicopter required a forceful give and take of the pedals. Dr. Hughes commented that Claimant presented with a complex history of Achilles tendon injuries sustained while operating a helicopter in a tactical fashion. Claimant described that "much of his helicopter operation involves quick turns and control operation becomes complex in the course of chasing a fleeing vehicle or participating in other tactical activities using a helicopter." Dr. Hughes noted that Claimant's helicopter operation differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties."

22. Dr. Hughes remarked that in over 30 years of caring for commercial aviators, including many rotary wing pilots, he had not observed Claimant's condition. Nevertheless, he concluded that "it appears to be biologically plausible in [Claimant's] case given his history of overexertion on these controls. His description of operation of the antitorque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." Dr. Hughes agreed with Dr. Esty's opinion on the issue

of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

23. After reviewing the video of Claimant flying, Dr. Hughes also responded to questions from Claimant's counsel in a letter dated March 8, 2022. In addition to mentioning that he observed some dorsiflexion of Claimant's feet during flight, he noted that: (1) Claimant "may press down firmly during tactical maneuvering;" and (2) "tactical rotary-wing operation is an athletic event compared to point-to-point operation."

24. On March 21, 2021 Dr. Myers authored a supplemental report on causation. He had reviewed video of Claimant flying the Bell 407 GXI helicopter as well as the independent medical examination reports from Drs. Stone and Hughes. Dr. Myers agreed with Dr. Hughes that flying the helicopter necessitated the reasonable and necessary medical treatment that Claimant had received. In the report, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Notably, the portion of the *Guidelines* that Dr. Myers referenced involves conditions of the upper extremities and does not contain either the word "foot" or "ankle." Dr. Meyers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantarflexion while operating the helicopter, but the the real culprit is pressure over the Achilles insertion.

25. In commenting on the video of Claimant flying the Bell 407 GXI helicopter Dr. Myers explained: "it is clear that [Claimant] has constant pressure on his Achilles insertion via the anti-torque pedal apparatus while operating the helicopter. This compression causes increased discomfort related to the underlying diagnosis, retrocalcaneal bursitis and Achilles tendinitis/tendinosis."

26. Dr. Myers explained that Dr. Stone was "focusing on the wrong potential pathomechanical connection between use of the anti-torque paddles and the exacerbation of [Claimant's] symptoms." He detailed that constantly applying pressure to the pedals in the helicopter drives the heel into the support platform and causes constant pressure over the Achilles insertion.

27. Dr. Stone responded to Dr. Myers' March 21, 2021 Supplemental report. He testified that Dr. Myers should have relied on the *Lower Extremity Guidelines* instead of the *Cumulative Trauma Guidelines* in assessing causation. The *Cumulative Trauma Guidelines* fail to mention causation for a specific diagnosis in the lower extremities. Dr. Stone also addressed Dr. Myers' citation of the Roche article by explaining that it is inapplicable to the present matter because Claimant's flight operation does not place loading on the Achilles tendon. Finally, Dr. Stone challenged Dr. Myers' assertion that dorsiflexion was present while not actually finding Claimant's feet were dorsiflexed past 90 degrees or neutral.

28. Claimant has failed to demonstrate that it is more probably true than not that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of her employment with Employer. Initially, Claimant explained that his symptoms began about five or six years earlier when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter and Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain, stiffness and burning sensations in his heels. He thus sought medical treatment in January, 2021. Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." After conservative treatment failed, Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel on December 13, 2021. Dr. Myers subsequently operated on Claimant's right heel on February 28, 2022.

29. Dr. Myers reasoned that Claimant's symptoms "were precipitated and exacerbated by work activity." In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present." In his analysis, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Dr. Myers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantar flexion during helicopter operation, but the real culprit is pressure over the Achilles insertion.

30. Similarly, Dr. Hughes concluded that Claimant's "description of operation of the anti-torque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." He noted that Claimant's helicopter use differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties." Dr. Hughes agreed with Dr. Esty's opinion on the issue of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

31. In contrast, Dr. Stone persuasively concluded that Claimant's work activities as a helicopter pilot did not cause an occupational disease to his bilateral feet and ankles. Dr. Stone supported his diagnosis and conclusions by relying on The *Lower Extremity Injury* portion of the *Guidelines* (section E.1.A.). Section E.1.A specifically references Claimant's diagnosed condition of Achilles tendinitis. The *Guidelines* provide "Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping, or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders." Dr. Stone explained the preceding actions

cause Achilles tendinitis because the knee is straight and thus places a load on the Achilles tendon. Claimant described no similar activities as part of his employment.

32. Dr. Stone detailed that neither Claimant's seated position while flying nor movement in flight caused loading. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone remarked that the likely cause of Claimant's condition was either age-related degeneration or recreational activities outside of employment.

33. The record reveals that the opinions of Drs. Hughes and Myers are not based on a proper causation analysis and do not sufficiently connect Claimant's work activities as a helicopter pilot to an occupational disease involving his bilateral feet and ankles. Initially, Dr. Hughes' causation assessment is based on Claimant's helicopter flight consistently involving quick turns and forceful pressure on the pedals or "tactical flying." However, the preceding assumption contradicts the testimony from both Claimant and Lt. Carry. They did not use the term "tactical flying" or describe such severe flight operations. Furthermore, Dr. Hughes' causation opinion is further undercut by his description of the mechanism of injury as uncommon, if not unique and biologically plausible, instead of medically probable.

34. In formulating his causation opinion Dr. Myers relied on a portion of the *Guidelines* that do not involve an assessment of the lower extremities, but only address cumulative trauma conditions to the upper extremities. Because Claimant's injuries involve the lower extremities, Dr. Myers' analysis is misplaced. Furthermore, Dr. Myers provided his initial opinion on August 18, 2021 regarding Claimant's dorsiflexed feet while flying absent an actual understanding of helicopter operation. After reviewing a video of Claimant flying, Dr. Myers focused on Claimant's foot movement through degrees of dorsiflexion. However, he did not state that the feet are dorsiflexed during flight.

35. In contrast, Dr. Stone persuasively determined that Claimant's seated position and movement during flight did not cause loading of the Achilles tendon. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone's opinion is supported by *The Lower Extremity Injury Guidelines* because the document specifically lists activities with a straight knee that place a load on the Achilles tendon as the likely cause of tendinitis. The opinions of Drs. Esty, Myers and Hughes do not provide an adequate causation analysis directly linking Claimant's symptoms to his piloting duties. Although Claimant attributed his symptoms to flying a helicopter for Employer, the record reveals that his condition did not follow as a natural incident of his work activities that can be fairly traced to his employment as a proximate cause. It is thus speculative to connect Claimant's bilateral foot and ankle injuries to flying a helicopter for Employer. Claimant's job duties did not likely cause, intensify, or, to a reasonable degree, aggravate his condition and cause the need for medical treatment. Accordingly, Claimant's request for Workers' Compensation 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).

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, it does not follow that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("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"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. 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.

9. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that

test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease to his bilateral feet and ankles during the course and scope of her employment with Employer. Initially, Claimant explained that his symptoms began about five or six years earlier when he experienced pain in his heels and tightness in his calves while operating Employer's Bell 407 helicopter. In 2019, Employer obtained a new Bell 407 GXI helicopter and Claimant continued to experience temporary, post-flight symptoms. By October 2020, Claimant was suffering chronic pain, stiffness and burning sensations in his heels. He thus sought medical treatment in January, 2021. Dr. Myers assessed Claimant with "bilateral Achilles insertional tendinitis and insertional enthesophytes." After conservative treatment failed, Dr. Myers performed a left calcaneus excision of Haglund's deformity and debridement of chronic Achilles tear with detachment of Claimant's left heel on December 13, 2021. Dr. Myers subsequently operated on Claimant's right heel on February 28, 2022.

11. As found, Dr. Myers reasoned that Claimant's symptoms "were precipitated and exacerbated by work activity." In a report dated August 19, 2021, Dr. Myers also documented a discussion with Dr. Esty in which they discussed Claimant's history, physical and imaging studies. They concluded that Claimant's work as a helicopter pilot had "precipitated and exacerbated the symptoms now present." In his analysis, Dr. Myers referenced W.C.R.P. 17, Ex.5, of the *Guidelines* that covers Medical Causation Assessment for Cumulative Trauma Conditions. Dr. Myers also cited a portion of a 2013 article by Roche regarding the relationship between pressure and insertional Achilles tendonitis. He concluded that Claimant's feet pass through degrees of dorsiflexion/plantar flexion during helicopter operation, but the real culprit is pressure over the Achilles insertion.

12. As found, similarly, Dr. Hughes concluded that Claimant's "description of operation of the anti-torque pedals appears to me to be sufficient to cause the Achilles tendon conditions that he has sustained." He noted that Claimant's helicopter use differed "quite significantly from the general type of helicopter operation performed in other activities such as reporting on traffic and delivering medical casualties." Dr. Hughes agreed with Dr. Esty's opinion on the issue of causation and concluded that Claimant's need for "medical and surgical treatment has been reasonable, necessary, and related to his operation of the Bell 407 helicopter in the course of his work for [Employer]." He also noted that Claimant lacked "any alternate medical explanation for development of" the condition in his heels.

13. As found, in contrast, Dr. Stone persuasively concluded that Claimant's work activities as a helicopter pilot did not cause an occupational disease to his bilateral feet and ankles. Dr. Stone supported his diagnosis and conclusions by relying on The *Lower Extremity Injury* portion of the *Guidelines* (section E.1.A.). Section E.1.A specifically references Claimant's diagnosed condition of Achilles tendinitis. The *Guidelines* provide "Occupational Relationship: Incomplete tears or ruptures are related to a fall, twisting, jumping, or sudden load on ankle with dorsiflexion. Tendinopathy may be exacerbated by continually walking on hard surfaces or repetitive motions such as jumping in and out of a vehicle or climbing up and down ladders." Dr. Stone explained the preceding actions cause Achilles tendinitis because the knee is straight and thus places a load on the Achilles tendon. Claimant described no similar activities as part of his employment.

14. As found, Dr. Stone detailed that neither Claimant's seated position while flying nor movement in flight caused loading. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone remarked that the likely cause of Claimant's condition was either age-related degeneration or recreational activities outside of employment.

15. As found, the record reveals that the opinions of Drs. Hughes and Myers are not based on a proper causation analysis and do not sufficiently connect Claimant's work activities as a helicopter pilot to an occupational disease involving his bilateral feet and ankles. Initially, Dr. Hughes' causation assessment is based on Claimant's helicopter flight consistently involving quick turns and forceful pressure on the pedals or "tactical flying." However, the preceding assumption contradicts the testimony from both Claimant and Lt. Carry. They did not use the term "tactical flying" or describe such severe flight operations. Furthermore, Dr. Hughes' causation opinion is further undercut by his description of the mechanism of injury as uncommon, if not unique and biologically plausible, instead of medically probable.

16. As found, in formulating his causation opinion Dr. Myers relied on a portion of the *Guidelines* that do not involve an assessment of the lower extremities, but only address cumulative trauma conditions to the upper extremities. Because Claimant's injuries involve the lower extremities, Dr. Myers' analysis is misplaced. Furthermore, Dr. Myers provided his initial opinion on August 18, 2021 regarding Claimant's dorsiflexed feet while flying absent an actual understanding of helicopter operation. After reviewing a video of Claimant flying, Dr. Myers focused on Claimant's foot movement through degrees of dorsiflexion. However, he did not state that the feet are dorsiflexed during flight.

17. As found, in contrast, Dr. Stone persuasively determined that Claimant's seated position and movement during flight did not cause loading of the Achilles tendon. Therefore, Claimant's operation of the helicopter pedals was not a medically probable cause of his Achilles tendonitis. Dr. Stone's opinion is supported by *The Lower Extremity Injury Guidelines* because the document specifically lists activities with a straight knee that place a load on the Achilles tendon as the likely cause of tendinitis. The opinions of Drs. Esty, Myers and Hughes do not provide an adequate causation analysis directly linking Claimant's symptoms to his piloting duties. Although Claimant attributed his

symptoms to flying a helicopter for Employer, the record reveals that his condition did not follow as a natural incident of his work activities that can be fairly traced to his employment as a proximate cause. It is thus speculative to connect Claimant's bilateral foot and ankle injuries to flying a helicopter for Employer. Claimant's job duties did not likely cause, intensify, or, to a reasonable degree, aggravate his condition and cause the need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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: August 30, 2022.

____

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