STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501	
In the Matter of the Workers' Compensation Claim of: [Redacted] Claimant, vs. [Redacted] Employer, and **UNINSURED,** Insurer, Respondent Employer. And regarding **DELTA COUNTY MEMORIAL HOSPITAL,** Medical Provider, Respondent Hospital	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-065-586-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND

On October 9, 2019, a hearing in this matter was held in Grand Junction, Colorado before Administrative Law Judge Cassandra M. Sidanycz. The claimant was present and represented by [Redacted], Esq. The respondent hospital was represented by J[Redacted], Esq. [Redacted, herinafter **JB**] Billing Manager for the hospital; and [Redacted, hereinafter **LB**], Business Office Manager for the hospital, testified at the hearing. The respondent employer did not appear or otherwise participate in the hearing.

The hearing was digitally recorded from 8:30 a.m. to 11:12 a.m. The claimant's exhibits 1 through 7 were admitted into evidence. The respondent hospital's exhibits A through H were admitted into evidence.

On October 30, 2019, the ALJ issued Findings of Fact, Conclusions of Law, and Order. Delta County Memorial Hospital timely appealed to the Industrial Claim Appeals Office (the ICAO). The ICAO issued an Order of Remand on March 13, 2020 instructing the ALJ to issue a new order. Pursuant to the Order of Remand, on May 28, 2020, the ALJ issued Findings of Fact, Conclusion of Law, and Order on Remand.

The May 28, 2020 order was timely appealed to the ICAO. On August 21, 2020, the ICAO issued an order limiting the number of days for penalties to eight. Thereafter, the ICAO's order was appealed to the Colorado Court of Appeals. On June 17, 2021, the Court of Appeals affirmed, in part, and set aside in part, the ICAO order. The matter was then remanded to the ICAO, and ultimately remanded to the ALJ by the ICAO on

January 24, 2022. The ALJ issues this order pursuant to the January 24, 2022 remand order.

In this order, [Claimant redacted] will be referred to as "the claimant"; [Employer redacted] will be referred to as "the respondent employer" or "the employer"; and Delta County Memorial Hospital will be referred to as "the respondent hospital" or "the hospital".

Also in this order, "the ALJ" refers to the Administrative Law Judge; "C.R.S." refers to Colorado Revised Statutes (2017); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

- Whether the respondent hospital was properly joined as a party to this proceeding.

- Whether the language included in the claimant's Application for Hearing pled the issue of penalties with sufficient specificity.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent hospital pursuant to Sections 8-43-304 and 8-43-305, C.R.S., for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. The claimant has requested penalties for the period of June 13, 2019 up to and including October 9, 2019.

FINDINGS OF FACT

1. On July 22, 2017, the claimant suffered an injury while working as a tow truck driver. The injury occurred while the claimant was loading an F250 pickup truck onto her assigned tow truck. To do so, the claimant was lying on the ground attaching the safety chains. At that time, the winch on the tow truck released and caused the truck to roll back. The claimant was underneath the truck when this occurred and one of the tires of the pickup truck rolled onto the claimant's right arm. The claimant was able to remove her arm from under the tire. However, the truck rolled a second time and the tire rolled onto the claimant's chest. The claimant was able to extract herself from out from under the truck and called for help. Bystanders assisted the claimant in calling the respondent employer and emergency services.

2. The claimant initially received medical treatment at Valley View Hospital (VVH) in Glenwood Springs, Colorado. That initial treatment included six days in ICU at VVH. At the time of the accident, the claimant lived in New Castle, Colorado. Subsequently, the claimant moved to Hotchkiss, Colorado. After her move, the claimant transferred medical treatment for her injury to Delta County Memorial Hospital, the respondent hospital in the current case.

3. On September 11, 2018, the undersigned ALJ held a hearing on the issues of: 1) whether the claimant was an employee of the respondent employer; 2) whether she suffered a compensable injury; 3) whether the claimant's medical treatment was reasonable, necessary, and related to that injury; 4) whether the claimant's medical treatment was authorized; 5) whether the claimant was entitled to temporary total disability (TTD) benefits; and 6) whether penalties were to be assessed for the respondent employer's failure to obtain and maintain workers' compensation insurance.

4. On October 11, 2018, the ALJ entered Findings of Fact, Conclusions of Law, and Order (FFCLO) in which the respondent employer was found to have been the employer of the claimant at the time of the July 22, 2017 injury. In addition, the ALJ ordered that the employer was responsible for the payment of medical treatment related to the claimant's work injury. That treatment included treatment the claimant received from Delta County Memorial Hospital.

5. At hearing, the claimant testified that she provided the respondent hospital a copy of the ALJ's FFCLO. The claimant has also provided copies of the FFCLO to collection agencies attempting to collect on behalf of the hospital. However, the claimant has continued to receive bills from the hospital for medical treatment related to her work injury.

6. The claimant also testified that the respondent employer has not paid any amount related to her work injury, as ordered by the ALJ. The claimant testified that to her knowledge the respondent employer has not made any payment to any of her medical providers.

7. On April 10, 2019, the claimant's attorney authored a letter in which he informed the hospital that they were to collect from the respondent employer. In that letter counsel referenced Section 8-42-101(4), C.R.S. which states:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

8. In addition, the April 10, 2019 letter notified the hospital that they could be subject to penalties pursuant to Sections 8-43-304 and 8-43-305, C.R.S.

9. Ms. JB[Redacted] is the hospital's Billing Manager for physician billing. Ms. JB[Redacted] explained that the hospital has two billing departments. Those departments are physician billing and facility billing. Ms. JB[Redacted] testified that she first became aware of issues surrounding the claimant's bills on May 7, 2019. At that time, Ms. JB[Redacted] received the April 10, 2019 letter from the claimant's counsel and a copy of the FFCLO. Based upon her understanding of the FFCLO, Ms. JB[Redacted] instructed her staff to send the claimant's bills to the Division of Workers' Compensation (DOWC).

10. At the hearing, the hospital provided a copy of a communication from the DOWC in response to the hospital's attempts to bill the DOWC. In that communication the DOWC confirmed that the employer did not send any payment to the DOWC; nor did the employer post a bond. In a later communication from the DOWC, it was clarified that even if monies had been paid by the employer to the DOWC, those funds would ultimately be distributed to the claimant and not to any specific medical provider.

11. On June 13, 2019, counsel for the hospital responded to the April 10, 2019 letter from the claimant's counsel. In that reply, the hospital reiterated the information obtained from the DOWC. In that same response, the hospital took the position that "[the hospital's] only recourse is to resume collection from [the claimant]."

12.Ms. B[Redacted] testified that physician billing has not sent a bill to the claimant since May 7, 2019. A bill was sent to the claimant on that date, which was the same date Ms. JB[Redacted] learned of the ALJ's FFCLO. Ms. JB[Redacted] credibly testified that the May 7, 2019 bill was generated automatically within the billing system. Records entered into evidence at hearing indicate that the physician billing department has not billed the claimant since May 7, 2019.

13.Ms. JB[Redacted] also testified that amounts are owed for the claimant's medical treatment. However, Ms. JB[Redacted] is "holding" those bills as it is unclear to her where to send the billing. Based upon the information submitted via testimony and evidence, it does not appear to the ALJ that the hospital has sent any billing directly to the employer.

14.Ms. LB[Redacted] is the hospital's Business Office Manager. She and her staff handle facility billing. Ms. LB[Redacted] testified that she first learned that the claimant has an order regarding her medical bills in July 2019. Ms. LB[Redacted] also testified that bills are sent to collections through an automated system.

15. Records entered into evidence show that the respondent hospital sent bills directly to the claimant on June 18, 2019; July 2, 2019; July 8, 2019; July 18, 2019; July 31, 2019; August 7, 2019; August 13, 2019; and September 12, 2019.

16. Records entered into evidence indicate that some of the claimant's bills from the facility billing department have been turned over to collections. Specifically, on September 20, 2019, A-1 Collections began attempts to collect on two bills, one in the amount of $977.00 and the other in the amount of $547.00.

17. On June 18, 2019, the claimant filed an Application for Hearing (AFH) for penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. That application was rejected by the Office of Administrative Courts (OAC) because the case caption listed the hospital as the employer and did not correctly identify the respondent employer.

18. On June 19, 2019, the claimant filed a second AFH endorsing the same penalty issues. This AFH was also rejected by the OAC because the hospital and the respondent employer were identified together as "employer". The staff with the OAC instructed the claimant's counsel to caption the case as identified by the DOWC (ie. the claimant vs. the uninsured respondent employer).

19. On June 20, 2019, the claimant filed a third AFH for penalties for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. This application was processed by the OAC as the claimant and employer were properly identified on the case caption. In the June 20, 2019 AFH, "Penalties" was marked as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

20. All of the AFHs filed by the claimant were provided to the respondent hospital. In addition, the hospital was provided notice of the October 9, 2019 hearing.

21. The respondent hospital argues that the claimant has received other medical treatment from their facilities that is unrelated to the claimant's work injury. However, neither party presented evidence clarifying this "other" and allegedly unrelated treatment.

22. The respondent hospital further argues that if they are unable to collect from the claimant and are unable to collect from the DOWC, they are left without recourse. The ALJ is not persuaded by this assertion. The ALJ finds no impediment to the respondent hospital simply collecting from the respondent employer. As indicated by communications entered into evidence, the employer has apparently attempted to file for bankruptcy and the claimant is a creditor.

23. The ALJ credits the claimant's testimony and the evidence entered into evidence and finds that the claimant has demonstrated that the respondent hospital has continued to bill the claimant after receiving notice of the FFCLO. The ALJ finds that on June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019, the respondent hospital sent bills to the claimant. In addition, the ALJ finds two additional instances of the respondent hospital attempting to collect from the claimant when two bills were forwarded to collections on September 20, 2019. The ALJ also finds that the claimant has demonstrated that it is more likely than not that the respondent employer violated the language of Section 8-42-101(4), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (the 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. 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., 2008. 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. 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).

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 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 (2017).

4. The respondent hospital first argues that they were not properly joined in this case, and therefore a claim for penalties cannot be asserted against them. The ALJ disagrees. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that:

> Any employer or insurer, or any officer or agent of either, or any employee, **or any other person** who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty. . . or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles . . . shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge. . .(*emphasis added*).

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

5. As one of the claimant's authorized medical providers, the ALJ concludes that the respondent hospital is a subject to the provisions of the Act. Therefore, the hospital can be found to be in violation or in compliance with the Act.

6. The ALJ concludes that the claimant correctly captioned this case as the claimant vs the respondent employer and regarding the respondent hospital. The language of Section 8-43-304, C.R.S. does not require that penalties be asserted against a "party" to the claim. Furthermore, the hospital's reliance on two Industrial Claim Appeals Office (ICAO) orders[1] is unfounded. Neither of those cases are determined on the issue of "joining" a party to a claim. Nor do those cases speak to the procedural process for assessing penalties against a non-party medical provider. The ALJ concludes that the respondent hospital was properly notified of their involvement in the claimant's claim as a medical provider and the claimant's allegations of a statutory violation.

7. The respondent hospital has also argued that the claimant did not meet the specificity requirement in filing the Application for Hearing (AFH) requesting penalties. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015).

8. The purposes of the specificity requirement are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO, Apr. 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (ICAP, Dec. 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015). *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (ICAO, Apr. 2, 2007). Of course, the statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO Apr. 28, 2004).

---

[1] *Davis v. Cub Foods*, (WC 3-990-098; ICAO 11/20/93) and *Gutierrez v. Startek USA*, (WC 4-842-550-05; ICAO 8/29/14).

9. As found, the claimant's AFH marked "Penalties" as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

10. The ALJ has considered the specific facts of this case and finds that the claimant has met the specificity requirement in the inclusion of the above language in her AFH. The claimant identified that penalties were sought against the respondent hospital. The claimant also quoted the section of the Act that the hospital is alleged to have violated. The ALJ finds that the hospital was sufficiently notified of the issues to be addressed at hearing.

11. With regard to the issue before the ALJ, the ALJ notes that prior to the assessment of any penalties, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Section 8-43-305, C.R.S. provides that each day is a separate offense. Therefore, penalties may be assessed of up to $1,000.00 per day.

12. Section 8-42-101(4), C.R.S. provides: "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider **shall under no circumstances** seek to recover such costs or fees from the employee (*emphasis added*)." The ALJ reads the legislature's use of the language "shall" and "under no circumstances" to clearly state the intent that a medical provider shall cease all collection against a claimant once there has been an admission of liability or a final order.

13. In this case, the claimant seeks penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. for continuing to seek payment from the claimant for medical treatment. The claimant has requested penalties from June 13, 2019 up to and including the date of hearing, October 9, 2019.

14. The respondent hospital points to language found in Section 8-43-304(4), C.R.S. and argues that the claimant's burden of proof is clear and convincing evidence. The ALJ disagrees with this assertion. Section 8-43-304(4), C.R.S. addresses what is to occur if penalties are alleged, but the violation has been cured. Then, and only then, does the burden of proof increase from a preponderance of the evidence to clear and convincing evidence. Here, there has been no cure of the hospital's violation as they continue to seek payment from the claimant. Therefore, Section 8-43-304(4), C.R.S. is not applicable in the current case.

15. As found, the respondent hospital has continued to bill the claimant for medical treatment related to her work injury. In addition, the hospital's facility billing department has turned the claimant's balances over to collections. As found, these continued attempts to collect from the claimant constitute a violation of the clear language of Section 8-42-101(4), C.R.S. The respondent hospital was notified that they were to no longer pursue collection against the claimant. Nevertheless, they continue to seek payment from the claimant, despite the notification that the respondent employer is responsible for payment of the claimant's work related medical expenses.

16. The hospital has argued that there are certain bills at their facilities that may not be part of the treatment of the claimant's work related injury. While that may be the case, the ALJ finds no persuasive evidence on the record to indicate that the hospital has attempted to clarify any non-work related treatment. It is the position of this ALJ that is the responsibility of the medical provider to correctly categorize the claimant's medical treatment as work related and non-work related. The hospital's practice of billing the claimant for any and all treatment, despite the clear language of Section 8-42-101(4), C.R.S., further demonstrates the hospital's clear disregard of the Act.

17. In the Remand Order dated March 13, 2020, ICAO specifically stated "the penalties in this matter may only be imposed for the days on which the billing actually occurred". Therefore, the ALJ concludes that the respondent hospital billed the claimant eight times between June 13, 2019 through and including October 9, 2019; (June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019). In addition, two bills were sent to collections on September 20, 2019, resulting in two additional instances of the respondent hospital attempting to collect from the claimant.

18. Based upon all of the foregoing, the ALJ concludes that penalties are appropriate in this matter. Given the statutory violation, the ALJ orders the respondent hospital to pay to the claimant penalties of $750.00 per day for the 10 total billing instances that occurred during the period of June 13, 2019 through and including October 9, 2019. This results in total penalties of $7,500.00 ($750.00 per day for 10 separate instances). No portion of this total shall be apportioned to the uninsured employer fund.

ORDER

It is therefore ordered that the respondent hospital shall pay the claimant penalties totalling $7,500.00, for ten days as noted above.[2]

Dated this 3rd day of February 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the attached **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND** by U.S. Mail, or by e-mail addressed as follows:

Donald J. Kaufman, Esq.
donkaufman@glenwoodattorney.com

Douglas L. Stratton, Esq.
doug.stratton@ritsema-lyon.com

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Iliana Gallegos
Revenue Assessment Officer
DOWC Special Funds Unit
Iliana.gallegos@state.co.us

Gina Johannesman, Trustee
DOWC Special Funds Unit
gina.johannesman@state.co.us

Date: 3rd February 2022

Court Clerk

[2] See also the Court of Appeals June 27, 2021 Order, and the ICAO January 24, 2022 Remand Order.

ISSUES

The hearing in this matter was set on the endorsed issues of permanent partial disability (PPD) benefits and medical benefits after MMI. The parties made several concessions and agreements at hearing and in their post-hearing briefs that narrowed the issues considerably:

- Respondent is not challenging the 3% upper extremity rating assigned by Dr. McCranie for Claimant's left shoulder, which is identical to the rating assigned by the DIME. However, Respondent does not agree the scheduled rating should be "converted" to whole person.

- Respondent does not dispute the 5% lower extremity rating assigned by Dr. McCranie for Claimant's left hip. Claimant agrees he suffered only scheduled impairment to the left hip and agrees Dr. McCranie's rating is most consistent with the evidence.

- Claimant conceded there is insufficient evidence to prove permanent impairment to his right hip.

- The parties agreed to reserve issues related to medical benefits after MMI.

The issues remaining for determination are:

- Did Respondent overcome the DIME's cervical rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence the 3% left shoulder extremity rating should be "converted" to the 2% whole person equivalent?

- Did Claimant prove by a preponderance of the evidence he suffered whole person impairment to his right shoulder?

- If Claimant proved whole person impairment to his right shoulder, did Respondent overcome the DIME's 2% whole person rating by clear and convincing evidence?

- If Claimant failed to prove whole person impairment to his right shoulder, did he prove a 4% scheduled impairment by a preponderance of the evidence?

FINDINGS OF FACT

1. Claimant is a sergeant with Employer's police department. He has worked for the department for 19 years.

2. Claimant suffered admitted injuries on July 10, 2020 during a work-related motor vehicle accident while apprehending a suspect in a stolen vehicle.

3. Claimant received authorized treatment at Employer's occupational medicine clinic. At his initial visit with PA-C Paula Homberger on July 14, 2020, he reported pain in his neck, left shoulder/upper back, hips, and back. Examination of his neck showed bilateral paraspinal tenderness and diminished range of motion. Both shoulders were tender to palpation, worse on the left. There was anterior hip tenderness bilaterally. Ms. Homberger diagnosed a cervical strain, thoracic strain, bilateral shoulder strains, and bilateral hip strains/contusions. She ordered MRIs of the left shoulder and right hip. Claimant was placed on light duty and referred for PT, chiropractic treatment, and massage therapy.

4. The left shoulder MRI showed mild rotator cuff tendinosis with no tear. It also showed evidence of a prior remodeled injury of the anterior inferior glenoid chondral labral complex, with some capsular thickening but no edema to suggest acute re-injury.

5. The right hip MRI showed a chronic mild subcortical cystic change in the anterior superior margins of the acetabulum, but no evidence of a labral tear or other internal derangement.

6. Claimant steadily improved over the next few months, as reflected in the treatment records and pain diagrams he completed. His neck remained his biggest complaint, and he was eventually referred for a cervical MRI. The MRI showed mild to moderate degenerative changes at C5-6 and C6-7 but no acute pathology.

7. On August 18, 2020, Claimant reported his hips were mostly better but continued to be stiff and achy in the morning. There is no mention of any shoulder symptoms in the report or on Claimant's pain diagram. Claimant felt ready to return to full duty. He was again referred for chiropractic treatment.

8. On August 24, 2020, Claimant's chiropractor, Dr. Loparco, documented 2/10 pain in the hips and 1/10 pain in the shoulders. Tenderness and muscle spasms were observed in multiple areas, including the neck, shoulder, hip, and thoracic spine.

9. Claimant followed with Ms. Homberger on August 28, 2020. His primary complaint remained his neck and he was continuing to improve. Claimant marked only his neck on the pain diagram but told Ms. Homberger his hips still felt stiff and achy in the morning. He had returned to full duty work.

10. The pain diagram from Claimant's next appointment on October 8, 2020 reflects 1/10 neck pain with intermittent left hand numbness. There are no markings on the shoulders or hips, although Claimant reported "feeling the same" as his previous appointment. He had been attending chiropractic treatment three times per week and still had two sessions left. Ms. Homberger stated the bilateral shoulder and hip strains had "resolved."

11. Claimant was evaluated by Dr. Nicholas Kurz on February 16, 2021. He had finished his course of chiropractic treatment and was not using any pain medication. Claimant was working full duty without difficulty and denied any issues with activities of daily living. His pain diagram noted 4-5/10 neck pain "all the time," with numbness and tingling in his left arm. Even though there is no evidence of any pre-injury neck issues or treatment, Dr. Kurz opined Claimant's neck had returned to "baseline," and any ongoing symptoms were unrelated to the work accident. The remainder of Claimant's injuries were listed as "resolved." Dr. Kurz put Claimant was at MMI with no impairment and no restrictions.

12. Respondent filed a Final Admission of Liability (FAL) based on Dr. Kurz' report. Claimant timely objected to the FAL and requested a DIME.

13. Dr. Thomas Higginbotham performed the DIME on May 31, 2021. Claimant told Dr. Higginbotham his injuries had improved but he continued to have symptoms, particularly with respect to his neck. Claimant completed a pain diagram on which he identified pain in his neck, posterior shoulders, and hips. Claimant had pursued additional chiropractic treatment after MMI under his health insurance, with a $50 per visit co-pay. Claimant stated his neck pain worsened with increased physical activity but "he doesn't allow [it] to limit him." The physical examination was straightforward with no pain behaviors to suggest exaggeration. Dr. Higginbotham noted tenderness and tautness to palpation of the cervical anterior muscles, cervical paraspinal muscles, suboccipitals, and thoracic paraspinals. Cervical range of motion was mildly reduced in all planes. There was minimal palpatory shoulder tenderness and no evidence of impingement, but shoulder range of motion was slightly reduced bilaterally. Dr. Higginbotham credibly testified the reduced shoulder range of motion was probably related to scapulothoracic soft tissue dysfunction "including the rotator cuff muscles that are attached about the scapula onto the shoulder."

14. Dr. Higginbotham provided the following impairment ratings:

Cervical spine: 13% whole person
Right shoulder: 4% upper extremity / 2% whole person
Left shoulder: 3% upper extremity / 2% whole person
Right hip: 11% lower extremity / 4% whole person
Left hip: 6% lower extremity / 2% whole person

15. Dr. Higginbotham opined the clinical findings at the DIME were consistent with ongoing "strain patterns" from the work injuries. When questioned about pain diagrams and records from other providers that do not show ongoing symptoms in the shoulders or hips, Dr. Higginbotham explained such symptoms "have a tendency to recur. Strain patterns tend to be kind of quiescent and then can be present."

16. Dr. Kathy McCranie performed an IME for Respondent on December 9, 2021. Claimant reported ongoing injury-related symptoms in his neck, left shoulder, and left hip. Claimant denied any symptoms in the right shoulder or right hip. Physical examination showed tenderness to palpation of the left cervical paraspinals, bilateral

upper trapezius, bilateral levator scapulae, and bilateral supraspinatus muscles. Dr. McCranie agreed with Dr. Higginbotham that a cervical spine rating was warranted, and calculated a rating of 9%. She assigned a 3% upper extremity / 2% whole person rating for the left shoulder, and a 5% extremity rating for the left hip. Her rationale for rating the left shoulder and hip was: "the left shoulder MRI scan did not show any acute findings, but there was mild tendinosis, and on today's examination, mild impingement signs were indicative of persistent shoulder impairment. In the left hip, MRI scan findings do not show any acute injury. However, his examination was indicative of persistent hip pain and discomfort."

17. Dr. McCranie disagreed with Dr. Higginbotham that Claimant suffered any permanent impairment of the right shoulder or right hip. She acknowledged Claimant complained to Dr. Higginbotham of mild tenderness in his right shoulder but argued that "tenderness" is subjective and insufficient to support a permanent impairment. She also noted that Claimant told her the right shoulder and hip pain had resolved by the time of her IME. She conceded that Dr. Higginbotham's ratings contain no technical errors with respect to the range of motion measurements.

18. Dr. McCranie opined that Claimant's left shoulder and left hip ratings, which are not challenged by Respondent, reflect purely scheduled impairments, and should not converted to whole person. She opined the injury to Claimant's shoulders is distal to the glenohumeral joint and does not impact the torso/body. She also pointed to the cervical rating which she believes accounts for any proximal symptoms or limitations. Dr. McCranie opined Claimant's hip injuries were limited to the hips without any pain going into the back or the trunk. Lastly, Dr. McCranie cited Claimant's continued stellar performance in a highly physically demanding job as further proof that his shoulder and hip impairment ratings should be scheduled ratings and not whole person.

19. Dr. Higginbotham's opinions regarding Claimant's shoulder and neck impairment are credible and more persuasive that the contrary opinions offered by Dr. McCranie.

20. Respondent failed to overcome Dr. Higginbotham's 13% whole person cervical rating by clear and convincing evidence.

21. Claimant proved he suffered functional impairment to his shoulders not listed on the schedule.

22. Respondent failed to overcome Dr. Higginbotham's 2% whole person right shoulder rating by clear and convincing evidence.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

The parties have raised several interrelated issues regarding permanent impairment. The DIME provided multiple impairment ratings, one of which is clearly a whole person impairment (cervical) but the remainder of which may be whole person or

scheduled impairments (shoulders and hips). Claimant believes he suffered whole person impairment to his shoulders but agrees he has only scheduled impairment to the left hip.[1] Respondent agrees Claimant has impairment of the left shoulder but believe it is a scheduled impairment.

As postured, the issues create split burdens of proof. Additionally, there are preliminary questions regarding which of the DIME's findings are entitled to presumptive weight, and which findings are evaluated based on a preponderance of the evidence.

There is no dispute that Respondent must overcome the DIME's cervical rating by clear and convincing evidence. Regarding the shoulders, the initial consideration is whether they constitute scheduled or whole person impairments. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof which attends a DIME rating applies only if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (ICAO August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

In light of the foregoing principles, the ALJ has allocated the burdens of proof in the following manner: (1) Respondents must overcome the DIME's cervical rating by clear and convincing evidence; (2) Claimant must prove by a preponderance of the evidence he sustained whole person impairment to either or both shoulder; (3) if Claimant has whole person impairment to his shoulder(s), Respondents must overcome the DIME rating by clear and convincing evidence; (4) if Respondents overcome the DIME whole person rating, the proper rating is a factual question based on a preponderance of the evidence; (5) on the other hand, if Claimant does not have a whole person impairment, then Claimant must prove the proper shoulder rating(s) by a preponderance of the evidence.

B. Respondent did not overcome the cervical rating

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear

[1] The right hip is moot because Claimant concedes there is insufficient evidence to support a right hip rating. Likewise, the left hip requires no discussion, because Claimant accepts the 5% scheduled lower extremity rating advocated by Respondent.

and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *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). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Respondent filed to overcome the DIME's cervical rating by clear and convincing evidence. Dr. McCranie conceded there were no technical errors in Dr. Higginbotham's measurements or deviations from the rating protocols under the *AMA Guides*. The differences between Dr. Higginbotham and Dr. McCranie's cervical ROM measurements probably reflect reasonable day-to-day variability, coupled with potential interval improvement in the six months between the DIME and Dr. McCranie's IME. But the DIME does not err merely by using valid measurements obtained during his evaluation, notwithstanding the possibility the claimant may improve in the future.

C. Claimant proved whole person impairment to his shoulders

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person

impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

If the claimant has ratable impairment of the cervical spine and also seeks a whole person rating for the shoulder, the functional impairment used to "convert" the shoulder rating must be distinct from the cervical impairment. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Steinhauser v. Azco, Inc*., W.C. No. 4-808-991-02 (January 11, 2012).

Claimant proved he suffered whole person impairment to his shoulders not captured by the cervical spine rating. Dr. Higginbotham persuasively explained the reduced shoulder range of motion was related to dysfunction in the scapulothoracic area and rotator cuff muscles attached to the scapula. Those structures are part of Claimant's torso and not part of his "arm." They are also distinct from the anatomical structures covered by the cervical rating. Accordingly, Claimant is entitled to a 2% whole person rating for the left shoulder, as calculated by Dr. Higginbotham and Dr. McCranie. Additionally, Respondent must overcome Dr. Higginbotham's 2% right shoulder rating by clear and convincing evidence.

D. Respondent failed to overcome the DIME's right shoulder rating

As found, Respondent failed to overcome the DIME's right shoulder rating by clear and convincing evidence. Claimant suffered a documented soft tissue injury to this right shoulder. Although his symptoms improved significantly, he continued to experience intermittent symptoms, particularly with activity. Dr. Higginbotham concluded the right shoulder pain Claimant reported at the DIME was consistent with waxing and waning "strain patterns" from the accident. His physical examination showed dysfunction in the scapulothoracic area and rotator cuff muscles attached to the scapula, which caused measurable range of motion loss. These ROM deficits were correctly translated into a small impairment rating.

The mere fact that Claimant's right shoulder may have improved by the time of Dr. McCranie's IME six months after the DIME does not invalidate Dr. Higginbotham's rating. Permanent impairment is to be determined at the time of MMI. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998) ("MMI serves to demarcate when a disability becomes permanent"); *Golden Animal Hospital v. Horton*, 897 P.2d 833 (Colo. 1995). As a practical matter, a DIME will necessarily occur some months after MMI, and the examiner can only evaluate the claimant in real time. But the concordance between the claimant's condition at the time of MMI and findings at subsequent examinations becomes increasingly attenuated with the passage of time. Section 8-40-201(11.5) provides that the possibility of improvement resulting from the passage of time shall not affect a determination of MMI. It necessarily follows that improvement with time does not negate a claimant's impairment rating.

The argument that Claimant does not qualify for a right shoulder rating because there is no objective evidence of pathology such as an MRI is unpersuasive. Dr. McCranie assigned a left hip rating based solely on Claimant's subjective clinical presentation despite acknowledging the MRI showed no acute pathology. Specifically, Dr. McCranie relied on the fact that Claimant merely reported "some pain" with hip rotation. If such minimal clinical findings were sufficient to warrant a left hip rating, it is unclear why Dr. Higginbotham would be precluded from citing examination findings of scapulothoracic and rotator cuff muscle dysfunction affecting range of motion to support a right shoulder rating.

At most, Dr. McCranie's opinions represent a "mere difference of medical opinion" with Dr. Higginbotham, and do not rise to the level of clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's 13% whole person cervical rating is denied and dismissed.

2. Respondent's request to overcome the DIME's 2% whole person right shoulder rating is denied and dismissed.

3. Respondent shall pay Claimant PPD benefits based on a 13% whole person cervical rating, a 2% whole person left shoulder rating, a 2% whole person right shoulder rating, and a 5% scheduled left hip rating.

4. Respondent may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

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

6. Claimant's claim for permanent impairment of the right hip is denied and dismissed.

7. 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: February 3, 2022

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the Final Admission of Liability (FAL) filed by the respondents on December 7, 2020, is invalid because the FAL relies on an invalid impairment rating.

FINDINGS OF FACT

1. This claim has a lengthy procedural history. As the issue before the ALJ is narrow, the ALJ does not recite the claimant's entire medical history in this order. The claimant suffered an injury at work on January 22, 2020. The respondents have admitted liability for the injury.

2. The claimant's authorized treating provider (ATP) for this claim has been with Centura Centers for Occupational Medicine (CCOM) in Durango, Colorado. Throughout much of his treatment, the claimant was seen at CCOM by Dr. Adam Owens. The claimant was also seen at CCOM by Kelly MacLaurin, PA-C.

3. On October 14, 2020, the claimant was seen by PA MacLaurin. On that date, PA MacLaurin opined that the claimant had reached maximum medical improvement (MMI). PA MacLaurin performed a physical examination in which she noted that the claimant had reached MMI for neurology, neuropsychology, and Spine Colorado.

4. On that same date, a WC164 form was completed indicating that the claimant had reached MMI and an impairment rating was pending review by a doctor. The WC164 form of that date is co-signed by PA MacLaurin and Dr. Thomas Centi. Dr. Centi is the Medical Director of CCOM.

5. PA MacLaurin testified that when she saw the claimant on October 14, 2020, the claimant reported that he had completed all his treatment and was released from the specialists. PA MacLaurin credibly testified that based on her review it appeared that the claimant had plateaued, the claimant's remaining treatment could be performed under maintenance care, and there was an indication from the neuropsychologist that the condition was not work-related. It was for these reasons that PA MacLaurin placed the claimant at MMI on October 14, 2020, and referred the claimant to a physician within CCOM for an impairment rating.

6. On October 19, 2020, the claimant was seen by Dr. Owens. The claimant testified that he presented for an appointment with CCOM sometime in October and demanded to see Dr. Owens.

7. In the October 19, 2020 medical record, Dr. Owens noted that the claimant was at MMI and "has been tentatively arranged to have impairment rating with a different CCOM Dr. [i]n the near future." On exam, Dr. Owens noted: that the claimant was in no acute distress; was alert to person, place, and time. For HEENT[1] findings, Dr. Owens recorded "[n]ormocephalic and atraumatic, extraocular movements intact, patent nares". Finally, Dr. Owens noted that he "encouraged the patient to follow through with the plan that has been arranged by my medical director at CCOM."

8. A WC164 form dated October 19, 2020, is signed by Dr. Owens and PA MacLaurin. That WC164 form states that the claimant reached MMI on October 14, 2020, the claimant was released to full duty, but was not cleared for DOT driving. That same document indicates that an impairment rating was pending review by a doctor.

9. Sometime after his October 19, 2020 examination of the claimant, Dr. Owens left the CCOM practice.

10. Dr. Centi was employed by CCOM throughout 2020 as the Medical Director and he was PA MacLaurin's supervising physician. Dr. Centi is a Level II accredited physician. Dr. Centi testified that he primarily practiced medicine at the Colorado Springs, Colorado and Pueblo, Colorado CCOM locations in 2020. Occasionally, Dr. Centi would travel to the Durango CCOM location to treat patients.

11. At the time that Dr. Owens' resignation, CCOM prohibited air travel because of COVID-19 concerns. As a result, Dr. Centi could not travel to Durango to perform an in-person impairment rating for the claimant. In addition, CCOM did not have the capability to conduct virtual health visits at that time.

12. Dr. Centi testified that Dr. Owens should have performed the claimants impairment rating, but Dr. Owens did not. As Dr. Owens had resigned from CCOM before performing an impairment rating evaluation for the claimant, Dr. Centi was the next in line to complete the impairment rating. Due to the moratorium on air travel, and that there were no other Level II accredited physicians at the Durango CCOM, Dr. Centi performed a record review impairment rating for the claimant on November 27, 2020.

13. Based upon the medical records, Dr. Centi authored a report in which he noted that the claimant reached MMI on October 19, 2020. He also assigned a zero percent impairment rating for the claimant. Dr. Centi based his opinion, in part, on the neuropsychological examination that found that the claimant had a mild cognitive impairment, which was mostly related to sleep apnea and not the traumatic brain injury.

14. On December 7, 2020, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Centi's November 27, 2020, report.

---

[1] Head, eyes, ears, nose, and throat.

15. On January 6, 2021, the claimant filed an Objection to the FAL. On January 13, 2021, the claimant filed a Notice and Proposal with an Application for a Division Sponsored Independent Medical Examination (DIME).

16. On January 25, 2021, the parties attended a pre-hearing conference with PALJ Elsa Martinez Tenreiro. At that time, the issue before the PALJ was the respondents' motion to strike the claimant's Notice and Proposal. PALJ Martinez Tenreiro noted that the claimant filed the Notice and Proposal late, and granted the motion. As a result, the claimant's Notice and Proposal was stuck.

17. At that same pre-hearing, the claimant asserted that the FAL was invalid. PALJ Martinez Tenreiro declined to make any rulings on that issue, as it had not been noticed for that pre-hearing conference.

18. On April 15, 2021, the claimant filed an Application for Hearing (AFH). The issues endorsed in that AFH were: medical benefits; reasonably necessary; average weekly wage; temporary total disability benefits; permanent partial disability benefits; and permanent total disability benefits. On May 12, 2021, the respondents filed a response to the claimant's AFH.

19. On June 10, 2021, Dr. Owens authored a report in which he opined that the claimant had reached MMI on October 19, 2020. Although this report indicates a "date of evaluation" of October 19, 2020, Dr. Owens did not author the report until June 10, 2021. In his June 10, 2021 report, Dr. Owens assessed a whole person permanent impairment rating of 20 percent. Dr. Owens testified that this would have been his assessment if he had prepared the report following his October 19, 2020 evaluation of the claimant.

20. On June 29, 2021, the parties attended a pre-hearing conference with PALJ John Sandberg. In his order, PALJ Sandberg noted that the issue before the merits ALJ is to determine whether the FAL is valid.

21. The sole issue before the ALJ is whether Dr. Centi's report was invalid, thus making the FAL filed by the respondents invalid. The ALJ is not persuaded that Dr. Centi's report is "invalid". Although relying upon prior medical records may not be "best practice" for completing such a report, the ALJ finds no requirement in the statute, the WCRP, or case law that requires Dr. Centi to physically examine the claimant, particularly since he determined that the claimant had a permanent impairment rating of zero percent. Here, it is clear to the ALJ that Dr. Centi adopted the examination findings of PA MacLaurin on October 14, 2020. The ALJ further notes that on October 19, 2020, Dr. Owens indicated that the claimant was released to full duty, (although not cleared for DOT driving), and that an impairment rating was pending review by a Level II provider.

22. The ALJ credits the medical records and the testimony of Dr. Centi and PA MacLaurin over the conflicting testimony of Dr. Owens and the claimant. Although it was not ideal, Dr. Centi performed a record review impairment rating because there was no Level II accredited physician at the Durango CCOM that could perform an impairment rating for the claimant.

23. For all of the forgoing reasons, the ALJ concludes that the impairment rating assessed by Dr. Centi is valid. Therefore, the FAL filed by the respondents is likewise valid.

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. 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).

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 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.

4. An authorized treating physician (ATP) shall make a determination as to when the injured worker reaches maximum medical improvement (MMI). Section 8-42-107(8)(b)(I), C.R.S. If either party disputes the ATPs determination of whether the injured worker has or has not reached MMI, they must pursue the DIME process. Section 8-42-107(8)(b)(II), C.R.S.

5. When an ATP who is not Level II accredited determines that an injured worker has reached MMI, the ATP shall determine if the injured worker sustained any permanent impairment and shall refer the injured worker to a Level II accredited physician for a medical impairment rating. Section 8-42-107(8)(b.5)(II), C.R.S. If either party disputes the impairment rating, the parties must pursue the DIME process. Section 8-42-107(8)(c), C.R.S.

6. The Workers' Compensation Act does not require in-person examinations for an ATP to determine permanent medical impairment. In fact, the Act specifically permits record review impairment ratings for injured workers that are not Colorado state residents at MMI. Section 8-42-107(8)(b.5)(I)(A), C.R.S.

7. Workers' Compensation Rules of Procedure (WCRP), Rule 16-2(B) states that an Authorized Treating Provider (ATP) is any of the following: (1) the treating physician designated by the employer and selected by the injured worker; (2) a healthcare provider to whom an ATP refers the injured worker for treatment, consultation, or impairment rating; (3) a physician selected by the injured worker when the injured worker has the right to select a provider; (4) a physician authorized by the employer when the employer has the right or obligation to make such an authorization; (5) a healthcare provider determined by the Director or an administrative law judge to be an ATP; or (6) a provider who is designated by the agreement of the injured worker and the payer.

8. Section 8-43-404(5)(a)(I)(A), C.R.S. specifically provides that a "corporate medical provider" may be included on the designated list of medical providers for an injured worker to select from when choosing an authorized treating provider. The designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician." *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). Whether a referral has been made is a question of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997).

9. CCOM is a corporate medical provider as discussed in Section 8-43-404(5)(a)(I)(A), C.R.S. As the medical director of CCOM, Dr. Centi would be included in the umbrella of the corporate medical provider designation of ATP. Dr. Centi was the supervising physician for PA MacLaurin. In addition, Dr. Centi would be considered an ATP within the chain of referrals.

10. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the December 7, 2020 FAL is invalid. As found, the ALJ is not persuaded that the impairment rating performed by Dr. Centi was invalid. As found, the medical records, and the testimony of Dr. Centi and PA MacLaurin are credible and persuasive.

ORDER

It is therefore ordered that the December 7, 2020 Final Admission of Liability is valid.

Dated this 3rd day of February 2021.

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

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

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

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

Note: This FFCL was served on February 3, 2022 and it is inferred that the ALJ's date was a clerical error.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-103-723-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 24, April 12, July 28, and November 1, 2021, in Denver, Colorado. The hearing was recorded by Google Meets recorded (reference: Google Meets, February 24, beginning at 1:30 PM, and ending at 4:30 PM; April 12, beginning at 1:30 PM, and ending at 2:30 PM; July 28, beginning at 8:30 AM, and ending at 9:30 AM; and, November 1, beginning at 8:30 AM, and ending at 9:00 AM).

The Claimant was present in person, virtually, and self-represented at all sessions of the hearing. Respondents were represented by [Redacted] Esq., at all sessions of the hearing.

Hereinafter [Redacted]shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits A, C-E, G-2-G-4 and H-M (erroneously marked by capital letters instead of Arabic numbers) were admitted into evidence, without objection. Respondents' Exhibits A-S were admitted into evidence, without objection. No stipulations were submitted.

The evidentiary deposition of Kathleen D'Angelo, M.D., taken on May 14, 2021, and lodged with the Office of Administrative Courts (OAC) on May 20, 2021.

At the conclusion of the hearing, the ALJ ordered post hearing briefs; Respondents' brief was filed on November 22, 2021. Claimant's brief was filed on December 14, 2021. No timely reply brief was filed and the matter was deemed ready for decision on December 20, 2021.

ISSUES

Although the parties designated other issues, the ALJ determined that the only issue to be determined by this decision concerns Claimant's request to reopen her claim. The ALJ earnestly advised the Claimant that if her claim was re-opened, she should seek the assistance of counsel. As herein below found and concluded, her claim is re-opened.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Respondents filed a Final Admission of Liability (FAL), mailed on June 21, 2021, admitting for a date of maximum medical improvement (MMI) of May 16, 2019, a little over two months from the date of injury, which was March 11, 2019; for aggregate temporary total and partial disability benefits of $1,623.63, from March 12, 2019 through April 17, 2019; for aggregate medical benefits of $1,427.55; and, for zero permanent disability benefits, pursuant to the opinion of Nazia Javed, M.D. , authorized treating physician (ATP). There was no admission concerning disfigurement benefits

The Injuries

2. The Claimant worked as a waitress for the Employer on March 11, 2019 when she sustained admitted injuries after tripping over a rack of glasses while delivering food to a customer. *Resp. Ex. A*. The Claimant received treatment for her injuries through May 16, 2019. *Resp. Ex. C.*

3. The Claimant was 25 years-old as of the date of the last session of the hearing. In addition to working as a waitress for the Employer herein, the Claimant

worked driving Ubers, as a model, while at the same time attending nursing school at the C.U. Health Sciences Center, where she ultimately graduated as an R.N. (Registered Nurse), near the top of her class.

Medical Course—Nazia Javed, M.D.

4. The Claimant went to UC Health on March 11, 2019, where she complained of **left lower extremity pain, and a facial contusion**. *Resp. Ex. H,* p. 43. Claimant followed up at UC Health with Karen Elmquist, P.A. ((Physician's Assistant) on March 18, 2019 for complaints of chronic rhinosinusitis. *Id.* at 53-54.

5. The Claimant began treatment with occupational medicine doctor,,Nazia Javed, M.D., on March 18, 2019. Dr. Javed noted right sided jaw pain and swelling in her left leg. *Resp. Ex. I,* p. 56-58. Dr. Javed referred the Claimant to physical therapy (PT), and released her to light duty work. In their brief, Respondents make a point that Claimant did not mention left leg problems and IME (Independent Medical Examiner), Dr. D'Angelo pins part of her opinion on this absence of subsequent articulation of left leg problems.

6. The Claimant followed up with Dr. Javed on April 17, 2019, and did not mention any ongoing pain in her left leg, according to Dr. Javed, and indicated that her back and shoulder symptoms had improved due to PT *Resp. Ex. I,* p. 61-62. Claimant "state[d] she feels better, no pains in left leg, contusion has healed well. Her back and shoulder muscles are better also." *Id.* Dr. Javed noted that Claimant's contusion had healed well. *Id.*

7. The Claimant only had three visits with doctor, Dr. Javed of Aviation & Occupational Medicine. Claimant requested to be seen by an Orthopedic specialist but was refused a referral by Dr. Javed. The Claimant was given referral for 2 months of physical therapy (PT) as a solution to her pains . Dr Javed failed to refer the Claimant an MRI (magnetic resonance imaging) or any other other diagnostics. Claimant's young age and lack of experience managing her medical issue through a work compensation provider required her to follow Dr. Javed's treatment plan. The Claimant was dissatisfied with Dr. Javed's care.

8. On April 17, 2019, the Claimant attended PT and was evaluated by Christine Hill, D.P.T. PT Hill noted that the Claimant had made progress and discharged her from therapy. *Resp. Ex. K.*

9. *The* Claimant returned to Dr. Javed on May 16, 2019. *Resp. Ex.* I, p. 64-65. According to Dr. Javed, the Claimant said that she had no pain in her left leg and that her contusion had healed well. *Id.* According to Dr. Javed, the Claimant told Dr. Javed that her back and shoulder muscles were pain free, and that she no longer had right sided jaw pain. *Id.* Claimant told Dr. Javed that she saw her personal dentist, who

indicated that her jaw was normal. *Id.* Physical examination of the back, neck, right shoulder, and left leg was normal, according to Dr. Javed. *Id.* Dr. Javed stated the opinion that Claimant was at MMI as of May 16, 2019 with no permanent impairment and released her from care to full duty. *Id.*

The Claimant

10. According to the Claimant, she received poor treatment for her injuries. Sustaining physical injuries while being in the middle of her most important exams did not give her much room to seek help concerning her injuries.

11. Respondents made a mutual mistake of material fact by not taking into account in filing the FAL her income from Uber, Lyft and her modeling jobs Instead of doing so, Respondents claimed an overpayment based on her "admitted AWW, which was based only her wages from the Employer and not her other pay from other, multiple employments. This omission amounts to a mutual mistae of material fact upon which the FAL was based.

12. Given the Claimant's financial and academic obligations, she went back to work as a part time waitress, with discomfort and pain in order to survive and provide for herself.

13. During the COVID-19 quarantine, Claimant was able to attend her school online and was paid unemployment (UI) at the same time. Claimant had more time to care for her injuries and her physical condition. Claimants attempted to contact the insurance carrier for help but was repeatedly dismissed by different agents who refused to look into Claimant's case and medical situation.

14. The Claimant had a right shoulder MRI and x-rays on April 1, 2020, and was diagnosed with supraspinatus tendinosis. Her medical findings indicate chronic shoulder pain and left leg swelling with discolored scar. Claimant mouth is still injured and in needs for teeth alignment. Respondents' IME, Dr. D'Angelo summarily dismisses these findings.

15. According to the Respondents, all of Claimant's medical exams are "insignificant," as opined by IME Dr. D'Angelo. The Claimant was working as a bedside nurse for the past year at The Center at Lincoln. Claimant's work as a nurse often required her to perform physically exerting tasks, such as patients repositioning and standing on her feet for extended periods. Claimant was becoming tired and exhausted having to fight off feelings pain and discomfort while trying her best to care for her patients. Claimant's medical condition forced her to quit her job as a rehab nurse and seek a job with a light physical workload. Claimant now works at a COVID- 19 testing facility. The injuries Claimant sustained during her work accident are preventing her from having the full capacity of working in physically demanding nursing environment,

such as the Intensive Care Unit (Claimant's original aspiration as a nurse). The FAL concerning no permanent impairment was based on a mutual mistake of material fact regarding permanent disability. The ALJ infers and finds that there was a "rush to judgment/closure regarding permanent impairment. (the FAL was filed a little over two months from the date of injuries).

16. The Claimant continues to work as model yet is limited due her permanent left leg scar and difficulty wearing high heels, which she had not experienced prior to the admitted injuries. The ALJ infers and finds that Claimant's chances of booking future modeling job that require exposed legs are very slim. Respondents, by ignoring "bodily disfigurement" in the FAL, made a mutual mistake of material fact.

17. Respondents argue that Claimant's claim closed pursuant to the Final on July 21, 2019, by virtue of the fact that there was no timely objection thereto. The aggregate evidence, however, supports the fact that the FAL was based on a mutual mistake of material fact concerning disfigurement and aggregate wages from multiple employments.

18. After Dr. Javed placed the Claimant at MMI on May 16, 2019 (barely two months after the date of injuries), the Claimant saw her primary care physician, Dr. Vanlandingham, for other medical reasons. She then saw Dr. McCabe on June 3, 2019 for a physical examination to be cleared to drive for Uber. *Resp. Ex. M*, p. 90. Dr. McCabe's report noted that Claimant was healthy overall with no known medical conditions causing problems, and that **she felt** fit to drive. *Id. Id.* Dr. McCabe did not deal with the issues of multiple employments, AWW, or bodily disfigurement.

19. The Claimant returned to Karen Elmquist, P.A, (Physician's Assistant) on July 25, 2019 for a referral to dermatology. *Id.* at 91. Claimant followed up with P.A. Elmquist on November 12, 2019 for a blood work referral for nursing school, but unrelated to her work injuries. complaints. *Id.* at 93. Claimant saw P.A. Elmquist again on January 27, 2020 for a sore throat and cough, *Id.* at 95. Respondents argue that because P.A. Elmquist did not deal with Claimant's admitted work injuries, this absence is evidence that the FAL resolved all issues in the Claimant's claim. The aggregate evidence belies this assertion.

The Employer

20. [Redacted, hereinafter Mr. O], the owner of Employer, testified that Claimant returned to
work for Employer at the end of April 2019 and continued working until March 16, 2020 when Employer furloughed 90% of its employees due to the Covid-19 pandemic. *Hrg. Aud. 2, 12:53-14:46.* Claimant's pleadings indicate she believes the reason for her termination from Employer was because of Covid 19. *CL. Ex. A*, p. 3. Claimant applied for and received unemployment benefits after she was laid off *Hrg. Aud. 1*, 2:06:15;

Resp. Ex. S. O[Redacted]'s testimony sheds **no** light, to refute the Claimant's testimony that she worked with pain.

21. The Claimant was laid off by Employer due to the Covid 19 pandemic on March 16, 2020, and on March 17, 2020 she contacted the Insurer about reopening her claim. *Hrg. Aud. 1*, 2:02:15-2:02:35. After she was furloughed by the Employer due to the Covid-19 pandemic, she presented to her physician with symptoms of her work injury. The ALJ infers and finds that there is nothing unreasonable about the Claimant's presentation concerning symptoms of the work injuries, given the fact that her layoff greatly reduced her means of support, whereas she had been working with pain.

Kathleen D'Angelo, M.D.

22. The Claimant had a right shoulder MRI and x-ray on April 1, 2020, and was diagnosed with mild supraspinatus tendinosis. Her rotator cuff appeared intact, and the right shoulder x-ray was unremarkable. *Resp. Ex. F*, p. 31-32; 34. Dr. D'Angelo opined that mild supraspinatus tendinosis is not an acute, traumatic finding, but is more likely the result of her mild lateral downsloping of the acromion. *Resp. Ex. N*, p. 131. Claimant also had an x-ray of her left tibia/fibula done on April 1, 2020 which was unremarkable. *Rep. Ex. F*, p. 33. There was a finding of a small, 6x4 benign exostosis off the proximal medial tibial metaphysis, which is benign and of no clinical significance, according to Dr. D'Angelo. *Id.*; *D'Angelo Depo. 22.* According to Dr. D'Angelo, Claimant's tibial issue is pre-existing. Prior to her work injury, Claimant had x-rays taken of her knees on March 26, 2018 which showed a small osseous excrescence from the cortex of the left proximal medial tibia. *Resp. Ex. F*, p. 30. According to Dr. D'Angelo, all of Claimant's conditions are insignificant, her condition has not changed since two months after the admitted injuries and, ultimately, Claimant's present condition is not work-related. The ALJ finds Dr. D'Angelo's. ultimate opinion as lacking in credibility because it vis refuted by the aggregate evidence concerning after-effects of the Claimant's admitted injuries.

Dental

23. The Claimant alleges that her teeth were knocked out of place in the accident, and has submitted photographs which she believes show mal-aligned teeth. *Cl. Ex. G.* Claimant, however, was already a patient at Risas Dental, and consulted with Risas Dental for a comprehensive evaluation in 2018. *Resp. Ex. G.* She followed up with Risas Dental on May 15, 2019 and discussed with her dentist that she was interested in braces because her left teeth were slowly moving inward. *Id.* Claimant had a wisdom tooth removed on May 20, 2019. *Id.* at 37-38. The dental note does not mention the work-injury. *Resp. Ex. G.* Claimant pursued this treatment through her personal insurance. *Resp. Ex. G.* There is probable cause to believe that the matter would properly be resolved by an expert opinion concerning causal relatedness or lack

thereof. The fact that the FAL did not consider this proposition amounts to a mutual mistake of material fact at the time of the FAL.

After the Admitted Injuries

24. The Claimant booked modeling jobs on three occasions, on September 14, 2020, September 15, 2020, and October 1, 2020. *Id.* Claimant was able to pursue a nursing degree and graduate *cum laude* after her injury, and is currently working full time as a R.N. *Hrg. Aud. 1,* 53:52-54:31; 2:01:00-2:01:35; *CL. Ex. H.* After graduation, Claimant also worked as a nurse at the Center at Lincoln in 2020. *Resp. Ex. P.* Claimant testified that she is currently earning more overall wages than she did while working for Employer because the wages for a R.N. are higher than for a waitress. *Id.* Claimant began working as a R.N. in August of 2020. *Id.*

Dr. D'Angelo Continued

25. Dr. D'Angelo, M.D. performed her IME of Claimant on September 21, 2020. *Resp. Ex. N.* At the IME appointment, Claimant told Dr. D'Angelo that her symptoms had been ongoing "pretty much since the injury." *Id.* at 103. Although Dr. D'Angelo was of the opinion that the Claimant self-limited with range of motion (ROM). *Id.* at 109. Dr. D'Angelo stated the categorical opinion that none of the Claimant's current complaints were claim-related, and that Claimant remained at MMI for this claim without the need for reopening. *Id.* at 110. Dr. D'Angelo offered no persuasive reason concerning to what the Claimant's current symptoms are related. The aggregate evidence does not permit an inference that the Claimant's current symptoms are related to an alternative non-work related cause. Moreover, Dr. D'Angelo implies that the Claimant is "OK.". Whereupon, Dr. D'Angelo implies that the Claimant's current symptoms must be related to unknown congenital pre-existing conditions or other undisclosed causes. The ALJ rejects Dr. D'Angelo's inferences in this regard. Dr. The ALJ rejects this premise as not supported by the totality of the evidence. Indeed, the ALJ finds the Claimant to be credible in her disagreement with Dr. D'Angelo's minimization of the Claimant's injuries.

26. The ALJ infers and finds that Dr. D'Angelo apparently relied heavily on the absence of medical notations concerning no complaints of pain to her right shoulder, left leg, jaw, neck, and upper back when visiting some physicians from May 2019 through March 2020-- between her injuries and the fact that that Claimant continued working during this period. *Id.* at 131. Dr. D"Angelo fails to address the fact that the Claimant worked with pain, or Dr. D"Angelo implies that the Claimant actually fabricated working with pain.

27. Dr. D'Angelo rendered a "catch-all" opinion that there is a lack of **objective findings** to substantiate Claimant's complaints, and that Claimant had

withdrawal with very minimal touch to her skin around the right shoulder. *Id.* Dr. D'Angelo noted no problem when Claimant moved her right arm while lifting paperwork or personal items, which shows, according to Dr. D"Angelo, that Claimant is self-limiting her range of motion. *Id.* This observation does not deal with whether or not the Claimant had a problem lifting a full carton of milk heavy food trays or lifting patients, for example. According to Dr. D'Angelo, the Claimant is not a reliable historian. The ALJ infers and finds that this observation is in and of itself, unwarranted and subjective, based on the fact that the Claimant presented as an articulate, credible witness in her testimony—in the manner of an individual who graduated *cum laude,* as a.R.N. from the UC Health Sciences Center,

28. According to Dr. D"Angelo, the Claimant requires no work restrictions and suffers from no permanent impairment. *Id.* at 132. Dr. D"Angelo's opinions, insofar as they may support the proposition that a re-opening is not warranted, evade the issues concerning mutual mistake of material fact. In fact, the ALJ finds Dr. D"Angelo's opinions in this regard lacking in credibility.

29. According to Dr. D'Angelo, there is no objective evidence supporting Claimant's ongoing complaints. *Id.* at 32. Dr. D'Angelo testified that Claimant's work-related condition has not deteriorated or worsened, that Claimant's work-related diagnoses had resolved as of the date of MMI, and that Claimant has no further diagnosis attributable or causally related to the work-injury. *Id.* at 31; 32. Dr. D'Angelo testified that it is medically improbable that Claimant's current condition is causally related to her work injury because she was allegedly pain free for many months following MMI (inferred from medical records reviewed by Dr. D'Angelo), and there is nothing to medically support a causal relationship between Claimant's current complaints and the work injury, according to Dr. D'Angelo. *Id. at 54.* The ALJ does **not** find this opinion to be credible in light of the totality of the evidence.

30. In support of her opinion that Claimant was at MMI and nothing has changed since then, Dr. D'Angelo testified that she had not seen any physician opinions stating that Claimant was not at MMI, or that Claimant was unable to work. *Id.* at 26. This non-medical opinion borders on taking on an adversarial tone and is not persuasive, and detracts from Dr. D'Angelo's overall credibility.. Further, Dr. DAngelo does not persuasively address the issue of AWW, based on multiple employments, permanent scarring of the leg and how it will affect the Claimant's modeling career.

31. Because of Claimant's disagreement with some of the lack of medical notations (noted by Dr. D"Angelo), Respondents argue that the Claimant is not credible. The ALJ infers and finds that this argument does not significantly undercut the core of the Claimant's testimony. Claimant testified that since the injury occurred, she is still suffering from shoulder and leg pain, and facial swelling. *Hrg. Aud 1*, 48:40-49:25. Claimant testified that she requested an MRI from Dr. Javed during the course of her treatment in the workers' compensation claim, but that Dr. Javed recommended PT

instead. *Id.* The ALJ infers and finds that Dr. D'Angelo attempted to justify a rush to closure, without adequate tests. According to the Claimant, she still suffers from all of the injuries she sustained while working. *Id.* Claimant testified that during the course of her workers' compensation treatment, she was not offered an injection or an MRI, and that she believes she needed these treatments to bring her to MMI during the course of her workers' compensation treatment. *Hrg. Aud. 53:20-53:42.* In light of the fact that the Claimant is a R.N,, having graduated from nursing school *cum laude,* the ALJ finds the Claimant's testimony in this regard more credible that Dr. D'Angelo's summary dismissal of the Claimant's present condition. The Claimant believes that her complaints "could have been solved" if the ATP, Dr. Javed, would have sent the Claimant to have an MRI during her treatment. *Id.* This fact supports the idea, that evidence of "what could have been is warranted because Claimant's testimony supports the fact that there was a mutual mistake of material fact at the time the FAL was filed.

32. Respondents place their arguments on the allegation that placement at MMI was appropriate and nothing further is warranted. Respondents do not persuasively deal with the issue of mutual mistake of material facts involving AWW based on multiple employments and bodily disfigurement as of the filing of the FAL.

Ultimate Findings

33. The ALJ finds the Claimant to be a credible witness. Further, the ALJ finds the overall opinions of Dr. D'Angelo as lacking credibility in some respects, *e.g.,* in not persuasively addressing the issues of AWW based on multiple employments, bodily disfigurement and its effects on Claimant's modeling career.

34. The ALJ infers and finds the credible testimony of the Claimant concerning her present condition is more credible than Dr. D'Angelo's ultimate opinions minimizing Claimant's present condition.

35. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that there was a mutual mistake of material facts, concerning AWW based on multiple employments and bodily disfigurement. Therefore, a re-opening of the Claimant's claim is warranted.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker 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. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** 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); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research or facts); the motives of a 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); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant was a credible witness. Further, as found, the overall opinions of Dr. D'Angelo were lacking credibility in some respects, *e.g.,* in not persuasively addressing the issues of AWW based on multiple employments, bodily disfigurement and its effects on Claimant's modeling career.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they should be

upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ makes a rational choice in determining that the credible testimony of the Claimant concerning her present condition is more credible than Dr. D'Angelo's ultimate opinions minimizing Claimant's present condition.

Multiple Employments

c. Where an injured worker has arranged **multiple** employments to earn a living, and the injury in part precludes some work , a fair computation of the true AWW should encompass all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant is entitled to hearing concerning the financial effects of her injuries on her multiple employments—as opposed to Respondents mistakenly admitting an AWW based on the solitary employment on the admitted date of injuries.

Re-Opening

d. Under section 8-43-303(1), C.R.S., a case may be re-opened after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). It is well established that if an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the injured worker. The additional injury is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Endorsement of "petition to reopen" on an application for hearing or response to application for hearing sufficiently raises the issue for consideration. *See Cooper v. Indus. Claim Appeals Office,* 109 P.3d 1056 (Colo. App. 2005). The Court of Appeals held that a mutual mistake of fact concerning the

claimant's condition was made at the time the DIME placed the claimant at MMI was a n appropriate ground for re-opening. *See Berg. V. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). As found, there was a mutual mistake of material fact, concerning AWW based on multiple employment and bodily disfigurement at the time the FAL was filed. Therefore, a re-opening of the Claimant's claim is warranted.

e. There is no restriction as to the number of times a case may be re-opened and when based upon new or different evidence no such limitation may be imposed by the courts, that being a matter for legislative expression. *Graden Coal Co. v. Ytoarralde,* 137 Colo. 527, 328 P.2d 105 (1958).

f. Mistake of fact at the time an FAL is filed is an appropriate ground for re-opening a claim, if the criteria for reopening are met. *See City and County of Denver v. Indus. Claim Appeals Office,* (2021COA146, December 2, 2021). As found, there was a mutual mistake of material fact at the time of the filing of the FAL, thus, warranting a re-opening thereof.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits and/or re-opening. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, there was a mutual mistake of material fact at the time of the filing of the FAL, thus, warranting a re-opening of the Claimant's claim.

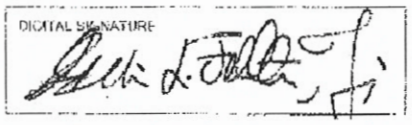
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 5-103-723-001 is hereby re-opened as to all issues..

B. Any and all issues not determined herein are reserved for future decision.

DATED this 7th day of February 2022.



EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

WC 5-103-723-001

OAC CERTIFICATE OF SERVICE

I hereby certify that on **February 7, 2022** a true and correct copy of the foregoing Order was served upon the following parties by email, to the addresses on file with the OAC, who shall provide copies to all other parties pursuant to OAC 16-G.

Arnell Edri
16046 E. Warner Drive
Denver, CO 80239

arnellbeckford@gmail.com

Emma K. Jamerson, Esq.
Ruegsegger Simons
Rs3@rs3legal.com

Division of Workers Compensation
Cdle_wcoac_orders@state.co.us
Cdle_medicalpolicy@state.co.us

/s/ Mary C.
Clerk - OAC

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-137-923-001

ISSUES

I. Whether the left rotator cuff surgery recommended by Claimant's treating surgeon, Dr. Michael Hewitt, is reasonable and necessary and causally related to the industrial injury.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work injury on April 26, 2020, to her left upper extremity while working as a Registered Nurse ("RN") for Respondents.
2. On April 28, 2020, Claimant was working in her capacity as registered nurse for respondent employer, when she tripped over an oxygen tube and fell landing on her left shoulder. Before this date, Claimant credibly testified that she had no prior injuries and active treatment of the left shoulder.
3. On the date of injury, Claimant reported to Swedish Emergency room with severe shoulder pain. An x-ray of the left shoulder revealed an acute non-displaced fracture of the left humeral neck and head extending along the base of the greater tuberosity. (C Ex. 15, BS 46A).
4. Claimant was seen by a P.A. at Concentra on April 28, 2021; at which visit, she was noted to have significant bruising. Claimant advised that she could not move her shoulder without pain and was having trouble sleeping. (C.Ex. 12, BS 001-004). Claimant was then seen by Dr. Villavicencio on May 1, 2020. On this date, Dr. Villavicencio recorded that claimant's range of motion remained very limited with significant pain in the day and causing sleep issues at night. The doctor provided Claimant with work restrictions on this day. (C. Ex. 12, BS 005-007).
5. Claimant testified that she was given light duty work and suffered a partial wage loss from April 28, 2020, through May 23, 2020. Thereafter, she was completely off work for about three (3) months, from May 24, 2020, through August 17, 2020. During this time, Claimant was attending physical therapy, massage therapy and was taking prescribed medications.
6. Claimant's employment as a registered nurse, requires her to, among other tasks, be able to transfer patients from bed to the wheelchair, or vis-versa, and/or lift patients off the floor, lift up to fifty (50) pounds, and perform CPR, which requires the administration of fifty (50) pounds of pressure. After returning to work, although Dr. Villavicencio had not provided continuing restrictions, Claimant credibly testified that she has continued to have trouble completing all of the integral functions of her job as a registered nurse. She has been unable to use her left arm to complete lifting tasks and could not perform the compression portion of the CPR skill, as she could

not compress the fifty pounds of pressure required to perform this skill. As a result, she has had to request and receive help from her co-workers.

7. On October 28, 2020, Dr. Villavicencio placed Claimant at MMI and assigned an impairment rating. (C.Ex. 12, BS 34-39). Claimant testified credibly that although she had been placed at MMI, she continued to experience pain and loss of function of her left shoulder and continued to have difficulty sleeping. As such, she was sent for an evaluation with Dr. Scott Primack, who evaluated Claimant on December 16, 2020. Dr. Primack concluded that Claimant's examination was consistent with a rotator cuff tear; and hence, he recommended an MRI scan. (C. Ex. 14).

8. Claimant underwent the left shoulder MRI scan on March 3, 2021, which scan evidenced: small partial-thickness tearing of the supraspinatus and infraspinatus tendons and small partial-thickness delaminating tear within the superior third of the subscapularis tendon. (C. Ex. 15, BS 45-46).

9. Upon review of the MRI scan, Dr. Villavicencio referred Claimant to Dr. Michael Hewitt, Orthopedic surgeon, who examined her on April 5, 2021. On this date, Dr. Hewitt reviewed the MRI scan and noted Claimant's continuing symptoms of pain with lifting and intermittent night pain and catching sensation in her shoulder. After reviewing the MRI, he diagnosed a Type 2 SLAP tear. Due to Claimant's continued objective findings, lack of improvement with conservative care and the evidence on MRI scan, Claimant and Dr. Hewitt agreed that surgery in the nature of a rotator cuff repair was the next best option. (C. Ex. 12, BS 18-19).

10. Claimant resigned her employment with Respondent-Employer in January 2021 and has worked for several other employers since as a registered nurse. Claimant testified credibly that she has suffered no new injuries to her shoulder since the original work-related injury in April 2020. Claimant also testified that she had to travel back to Chicago on multiple occasions, to attend to her ailing mother during the summer of 2021. During this time, Claimant testified that she and Dr. Hewitt agreed to pursue a more conservative route and attempt a subacromial injection before proceeding with surgery. This injection took place on September 16, 2021; but unfortunately, provided no relief. As a result, on October 25, 2021, Dr. Hewitt recommend proceeding with surgery. (C. Ex. 12. BS 002-003). On November 2, 2021, Dr. Hewitt requested authority to proceed with an arthroscopic repair rotator cuff of left shoulder with subacromial decompression. (C. Ex. 13, BS 42). This request was denied by Respondents, who secured a record review to support their denial from Dr. William Ciccone dated November 2, 2021.

11. In reviewing Dr. Ciccone's report, it becomes clear that he was unaware that Claimant was off work for a three-month time period after the injury, and that after Claimant was released to work full duty, that she has continued having lifting difficulties. Since he did not examine Claimant or interview her, he is unaware that since returning to work, she continues to experience difficulty with her left shoulder, so much so, that she needs to request help from co-workers to continue to work, and that she avoids the use of her left shoulder. Further, Dr. Ciccone does not refer to a review of the report written by Dr. Scott Primack, who recommended the MRI scan back in December 2020. Dr. Ciccone does, however, reference that Dr. Hewitt

noted, in a May 18, 2020, report that Claimant has a previous history of left shoulder pain. But, despite such a reference, there is a lack of credible and persuasive evidence that Claimant required, or was undergoing, treatment for her rotator cuff before the work accident. In the end, Dr. Ciccone disagreed with both authorized treating physicians, Drs. Hewitt and Villavicencio, and instead concluded that the findings on MRI are age related and not related to the industrial injury. Thus, he concludes that surgery is not causally related to the industrial injury. (R.Ex. A).

12. Upon review of Dr. Ciccone's report, both Drs. Hewitt and Villavicencio, continue to recommend surgery and find same to be, not only reasonable and necessary; but also, causally related to the industrial shoulder injury. In Dr. Hewitt's rebuttal report of December 8, 2021, he notes Claimant's continued lost range of motion and pain with objective findings and the existence of a positive impingement sign. On the other hand, Dr. Ciccone performed no physical examination. Therefore, he has no first-hand knowledge of a positive impingement sign, nor any detected lost range of motion, nor the existence of persistent weakness, as referenced by and found by Dr. Hewitt, the ATP. In his report, Dr. Hewitt notes that he strongly disagrees with Dr. Ciccone's opinions and finds his surgery recommendation to be not only reasonable and necessary; but also, causally related. (C.Ex. 13, BS 40). In his report of December 15, 2021, Dr. Villavicencio notes review of Dr. Ciccone's IME report, and yet, he continues to concur with Dr. Hewitt's recommendation for surgery.) (C. Ex. 12, BS 1).

13. The ALJ finds the opinions of the two treating physicians, to be more credible and persuasive than those of Dr. Ciccone. The opinions offered by Drs. Hewitt and Villavicencio are consistent with the underlying medical records and Claimant's testimony. The ALJ finds that Dr. Hewitt's recommendation is supported by his objective findings, and the fact that conservative care has failed. Surgery is the next most reasonable medical option to assist Ms. Remillard in regaining function in her injured left shoulder.

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 left rotator cuff surgery recommended by Claimant's treating surgeon, Dr. Michael Hewitt, is reasonable and necessary and causally related to the industrial injury.

Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). 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).

In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need 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 (Colo. App. 2000).

The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were 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, 172 Colo. 510, 474 P.2d 622 (1970);* § 8-41-301(1)(c), C.R.S. 2013.

As found, the credible evidence in this case demonstrates that Claimant has met her burden of establishing, by a preponderance of the evidence, that the April 26, 2020, work injury proximately caused the need for the recommended left shoulder rotator cuff surgery as requested by her treating surgeon, Dr. Hewitt, and her treating physician, Dr. Villavicencio. The persuasive evidence establishes that the surgery recommended by Dr. Hewitt is not only reasonable and necessary; but also causally related to the April 26, 2020, work related injury. As found, with respect to this determination, the ALJ credits the testimony of the treating surgeon and physician, over that of Respondents' hired medical record review expert, who failed to examine Claimant. The ALJ also finds that the medical reports and credible testimony of Claimant outline continuing persistent pain and functional impairment with failed conservative treatment, leading to and supporting Dr. Hewitt's recommendation for surgery. Thus, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence the shoulder surgery is reasonably necessary and causally related to her industrial injury.

ORDER

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

1. Respondents shall authorize and pay, pursuant to the Colorado Workers' Compensation medical benefits fee schedule, for the rotator cuff surgery and all expenses associated therewith as recommended by Dr. Hewitt.

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: February 8, 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 5-093-482-006

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties for failure to timely pay temporary total disability (TTD) benefits.

2. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties for conducting surveillance and for sending a Rule 16 letter.

FINDINGS OF FACT

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

1. Claimant suffered an industrial injury on November 23, 2018, and has been receiving TTD benefits since December 13, 2018. (Ex. E). Claimant testified that as of the date of the hearing he had been receiving TTD checks for three years and 15 days. (Tr. 29:17). Respondents issued TTD checks approximately every two weeks between December 13, 2018 and September 22, 2021. (Ex. E).

2. Claimant credibly testified that during this three year span, there were five times when his TTD check did not arrive and had to be reissued, and there were two times when his TTD check was issued or mailed late.

3. Claimant testified that he never received the TTD check that should have been issued around December 13, 2018. He further testified that Respondents reissued a replacement check on January 25, 2019. (Tr. 21:19). In his discovery responses, Claimant stated that this TTD check was reissued on January 10, 2019. (Ex. 1, p 124). According to Respondents' payment log, Respondents placed a "stop payment" on the December 13, 2018 check, and reissued the check on January 10, 2019. (Ex. F). The ALJ finds that Respondents reissued the December 13, 2018 check on January 10, 2019.

4. Claimant testified he did not receive his January 2, 2019 TTD check. After learning of this, Respondents placed a "stop payment" on the January 2, 2019 check and reissued the check on January 17, 2019. (Tr. 21:20-21 and Ex. F).

5. Claimant testified he should have received his TTD check on August 28, 2019, but did not. After learning of this, Respondents placed a "stop payment" on the August 28, 2019 check, and reissued the check on October 17, 2019. (Tr. 21:25-22:2 and Ex. F).

6. Claimant testified he did not receive his TTD check that should have been issued on January 29, 2020. Claimant testified he moved residences on January 25, 2020, and

notified Respondents' counsel of his new address. (Tr. 22:2-9). After learning Claimant had not received his TTD check, Respondents placed a "stop payment" on the January 29, 2020 check and reissued the check on March 16, 2020. (Ex. F).

7. Claimant testified he did not receive his September 23, 2020 TTD check. After learning of this, Respondents placed a "stop payment" on the September 23, 2020 check and reissued the check on October 28, 2020. (Tr. 22:13-16 and Ex. F).

8. Claimant testified that he did not receive his April 9, 2021 TTD check. (Tr. 22:17-23: 13) (Ex. 1, p. 124). Respondents issued the check on April 19, 2021. (Ex. F). The ALJ finds that while this check was issued late, this delay was not unreasonable.

9. Claimant testified that his July 14 or 15, 2021 TTD check was mailed five days late. (Tr. 24:24-25:2). Respondent issued Claimant a TTD check on July 19, 2021. (Ex. F). The ALJ finds that while this check was issued late, this delay was not unreasonable.

10. Claimant had the option to have his TTD payments processed via direct deposit. Claimant testified that the process did not work, so he did not utilize it. (Tr. 36:19-7). In an April 8, 2020 email, Claimant told his counsel, with respect to direct deposit, "[t]oo much difficulty, and I just don't trust the insurer. I prefer mailing my checks. If they continue to not mail my checks we can always request another hearing." (Ex. I at 57).

11. Between January 2020 and June 2021, Claimant moved three times. He moved on January 25 or 29, 2020, April 1, 2020, and June 11, 2021. (Tr. 22:2-24: 9) Claimant testified he had four different addresses during the life of the claim, all outlined in his answers to discovery. (Tr. 37:22). According to Claimant's discovery responses, his four addresses were:

a. 10115 W. Dartmouth Place, #202, Lakewood 80227
b. 10115 W. Dartmouth Avenue, #F-301, Lakewood 80227
c. 7355 W. Kentucky Drive Apt F, Lakewood 80226; and
d. 7395 W. Ohio Ave #107, Lakewood 80226

(Ex. A at 124).

12. There was significant confusion related to Claimant's move and change of address in January 2020. On cross-examination, Claimant retracted his testimony that he lived at **10115** W. Dartmouth Avenue, #F-301, Lakewood 80227, and testified that the correct address was **10075** W. Dartmouth Avenue, #F-301, Lakewood 80227. (Tr. 43:19-44:16).

13. On January 23, 2020, Claimant emailed his attorney stating he would be moving to 10075 W. Dartmouth Ave. #F-**103**, Lakewood, CO **80027,** on January 25, 2020. (Ex. I at 52).

14. On February 10, 2020, Claimant emailed his attorney stating that he was moving to 10075 W. Dartmouth Ave. #F-**301**, Lakewood, CO **80227**. (Ex. 1 at 110).

15. On February 18, 2020, Respondents issued Claimant's TTD check and sent it to 10075 W. Dartmouth Ave. #F-103, Lakewood, CO 80027. (Ex. G at 31)

16. Two days later, on February 20, 2020, Claimant's counsel asked Respondents to send Claimant's TTD checks to 10075 W. Dartmouth Ave. #F-103, Lakewood, CO 80027 (Ex. 1 at 111).

17. On March 11, 2020, after another correction of the address and request for reissuance, Respondents placed a "stop payment" on the TTD check for January 18, 2020 through January 31, 2020, and reissued it. (Ex. G at 33).

18. Claimant testified his attorney followed up with Respondents' counsel regarding the status of Claimant's TTD checks on multiple occasions, including March 4, 5, 10, 11, 13 and 18 of 2020. (T 26:11-27:11). He further testified that his attorney notified Respondents of his move and the checks were still late. (T 25:17-19).

19. The ALJ finds that Claimant's move in January 2020, and the multiple mistakes made by Claimant and his counsel with respect to the correct address, contributed to the difficulties in receiving his TTD check for the period of January 18, 2020 through January 31, 2020.

20. On October 12, 2020, Claimant notified his counsel at the time, that his September 24, 2020 TTD was two weeks late, and she reached out to Respondents' counsel. (Ex. 1 at 66-67). On October 13, 2020, after the initial inquiry into TTD payments, Respondents' counsel responded noting that the checks issued on September 23, 2020 and October 7, 2020 had not yet been cashed, and asked Claimant's counsel what action they would like, whether that includes a stop pay and reissue, and also to confirm the correct mailing address since counsel previously requested the TTD payments go to their law office. (Ex. 1 at 65). With respect to the September 23, 2020 TTD check, Claimant's counsel initially asked for the status of two checks, but withdrew one request after the check arrived, asking for the other check to be reissued. (T 34:22-25).

21. Claimant has been represented by five different attorneys during the life of his claim. (Tr. 31:17-18).

22. According to Respondents' payment log, the December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks were all issued timely. Payment was stopped on each of these checks, and the TTD checks were reissued after Respondents learned that Claimant did not receive his check and they had confirmation that the check had not cleared. (Ex. F at 19).

23. The ALJ finds that over the two and a half years from December 2018 to July 2021, five of Claimant's TTD checks never arrived, but Respondents reissued the checks once they were made aware that Claimant had not received the check, and they had

confirmation that the check had not cleared. During this time period, Claimant received one TTD check five days late, and Respondents issued one ten days late.

24. The ALJ finds that Respondents timely issued Claimant's December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks. The ALJ further finds that the time it took for Respondents to reissue these checks was reasonable.

25. The ALJ finds that Claimant's address changes and the incorrect address information being forwarded to counsel contributed to the difficulties in timely receiving his TTD checks.

26. The ALJ finds that Respondents timely cured the issues related to TTD checks that Claimant did not receive.

27. Claimant did not provide any evidence regarding the surveillance video or the Rule 16 letter that he alleged were a basis for penalties.

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 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).

Penalties for Late TTD Benefits

Claimant is seeking penalties for seven TTD payments that he received late between December 13, 2018 and September 22, 2021. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer's act or inaction constitutes a violation of the Act, a rule, or an order, and 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 based in law or fact. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003). There is, however, 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).

Section 8-42-105(2)(a), C.R.S. provides, in relevant part, that "the first installment of compensation shall be paid no later than the date that liability for the claim is admitted by the insurance carrier." Section 8-43-304(4), C.R.S. gives respondents the opportunity to cure alleged violations within twenty (20) days of the mailing of an application for hearing asserting penalties. The statute states that if the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation. Clear and convincing evidence is evidence that is stronger than a preponderance and is unmistakable and free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980).

The ALJ finds Claimant failed to meet his burden that Respondents violated the Act or that any such violation was objectively unreasonable under the clear and convincing standard that applies. Claimant has failed to establish that Respondents violated the Act because two checks arrived late, and five had to be reissued. The December 13, 2018, January 2, 2019, August 28, 2019, January 29, 2020 and September 23, 2020 TTD checks were all issued timely. (Findings of Fact ¶ 24). The evidence shows that each of these checks was issued timely and in compliance with the Act. *Id.* Once Respondents learned that Claimant never received these checks, they were placed on stop pay and reissued.

The date of reissuance for these checks also does not constitute a violation of the Act. *Id.* The ALJ recognizes there are practical issues involved in cancelling a check and

reissuing. Respondents communicated with Claimant and tried to resolve any stop pay/reissue issues timely. The ALJ further finds that the time it took for Respondents to reissue these checks was reasonable. *Id.* Claimant received the seven TTD checks at issue. Claimant has failed to prove by a preponderance of the evidence that Respondents violated the ACT and that penalties should be awarded.

Even if Claimant had established a violation of the Act, he failed to establish by clear and convincing evidence that Respondents' violation was objectively unreasonable. The ALJ recognizes the multiple moving parts with Claimant having five separate counsel and at least four separate personal mailing addresses. The ALJ finds that Claimant's address changes and the incorrect address information being forwarded to counsel contributed to the difficulties in timely receiving his TTD checks, particularly his January 29, 2020 TTD check. (*Id.* at ¶¶ 21 and 25). As for the other checks dated December 13, 2018, January 2, 2019, and August 28, 2019, Claimant failed to establish that the reissuance date was unreasonable, failing to provide evidence of any knowledge by Respondents of a violation or unreasonable action in reissuing the check to ensure it was paid. The ALJ finds that there is no evidence that Respondents actions were objectively unreasonable, given the duration of this claim, the multiple relocations and multiple change of counsel.

Claimant did not introduce any testimony on the issues of surveillance and the Rule 16 letter at hearing. (*Id.* at ¶ 27). There are no ripe issues in regards surveillance or the Rule 16 letter for which relief can be granted.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties related to late TTD payments is denied.

2. Claimant's request for penalties related to late surveillance is denied.

3. Claimant's request for penalties related to a Rule 16 letter is denied.

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: February 8, 2022

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

ISSUES

- Whether [Dependent Claimant, Redacted] established, by a preponderance of the evidence, that she and [Deceased Claimant, Redacted] were in a common law marriage at the time of his passing.

- If so, whether [Dependent Claimant] should be classified as a partially dependent beneficiary or a wholly dependent beneficiary.

STIPULATIONS

- The parties agreed that at the time of his death, [Deceased Claimant, redacted] had an average weekly wage (AWW) of $2,537.93.

- The parties also stipulated that [Minor Dependent, Redacted] is a wholly dependent beneficiary and entitled to receive workers' compensation death benefits.

FINDINGS OF FACT

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

1. [Deceased Claimant, redacted] passed away on May 13, 2021. At the time of his passing he had one natural born minor child, [Minor Dependent] (DOB: 4/26/10), from his relationship with Claimant. *Ex. G,* p. 18. He also had three adult children; [Redacted, hereinafter BH] (DOB: 1/2/98), [Redacted, hereinafter AH] (DOB: 8/19/95), and [Redacted, hereinafter VH] (DOB: 10/17/93), from a previous relationship, none of whom are not entitled to recover death benefits based upon their ages. *See Ex. F; see also*, C.R.S. §§ 8-41-501; 8-41-502. At the time of his passing, [Deceased Claimant, redacted] was in a relationship with Claimant. They lived together in South Fork, CO, with [Redacted minor dependent], [Redacted, hereinafter LG] (DOB: 2/6/09), and [Redacted, hereinafter DS] (DOB: 9/13/01). *See Ex. H.* LG[Redacted] and DS[Redacted] are Claimant's children from prior relationships. [Deceased Claimant, redacted] had not legally adopted LG[Redacted] or DS[Redacted] at the time of his passing. Consequently, they are not entitled to recover death benefits under the Workers' Compensation Act. *See* C.R.S. §§ 8-41-501; 8-41-502.

2. Claimant testified her romantic relationship with [Deceased Claimant] began August 3, 2001. They lived together without marrying for six years until they formally married on August 3, 2007, in Winnemucca, Nevada. *Ex. I.* Approximately one year later, Claimant and [Deceased Claimant] separated for roughly two years. Neither Claimant nor [Deceased Claimant] filed for divorce during this two-year period. However, they agreed to date other people.

3. Claimant began a relationship with [Redacted, hereinafter Mr. G] a couple months after her separation from [Deceased Claimant, redacted], moved in with Mr. G[Redacted] in Battle Mountain, NV, and lived with him for approximately 1 ½ years. During this time, Claimant gave birth to their child, LG[Redacted], on February 6, 2009. Claimant testified she left Mr. G[Redacted] in August 2009 and moved in with relatives in Elko, Nevada. Nonetheless, Claimant continued to see Mr. G[Redacted] while simultaneously rekindling her relationship with [Deceased Claimant, redacted]. [Redacted dependent, minor] was conceived during this period. As noted, she was born April 26, 2010.

4. Claimant testified [Deceased Claimant, redacted] did not know [Redacted, dependent minor] was his child initially. She testified she originally listed Mr. G[Redacted] as [Redacted dependent minor]'s father on the birth certificate, but she would later correct the birth certificate to reflect that [Redacted dependent minor]'s father was [Deceased Claimant, redacted] after a paternity test revealed him to be [Dependent minor]'s father. She also changed [Dependent minor]'s last name to [Deceased Claimant]'s. Submitted into evidence were two paternity tests, one for LG[Redacted] dated March 2, 2010, which confirmed [Deceased Claimant, redacted] was not LG[Redacted]'s biological father, and one for [Dependent minor] dated July 6, 2010, which determined he was [Dependent minor]'s father. *Ex. E, see also, Ex. G.* Claimant confirmed on cross-examination the paternity tests were done pursuant to court proceedings in which she and the State of Nevada were listed as obligees and [Deceased Claimant, redacted] as an obligor. She testified [Deceased Claimant, redacted] initiated the actions, as that was the only mechanism to have the testing completed in order to determine paternity for the two children. She testified that she still lists [Dependent minor]'s last name as Mr. G[Redacted]'s on tax returns, because she has been unable to change her last name with the Social Security Administration (SSA). *See Ex. N*, p. 79.

5. She testified Mr. G[Redacted] is currently obligated to pay $389 in monthly child support for LG[Redacted], which he pays "once in a while." She testified she "does not pay attention to" to the frequency of Mr. G[Redacted]'s child support payments but did acknowledge that there is a back due child support lien in excess of $17,000.00.

6. Claimant testified that after NH[Dependent minor] was born and her paternity established, she terminated her relationship with Mr. G[Redacted]. She and the children (DG[Redacted], LG[Redacted] and NH[Dependent minor]) then moved back in with [Deceased Claimant, redacted] in late 2010 or early 2011. Claimant, [Deceased Claimant, redacted] and the children lived in Elko, Nevada until June 2014, when they moved to South Fork, Colorado and rented a home. According to Claimant, the lease to this house was solely in [Deceased Claimant, redacted] name. Claimant testified she separated from [Deceased Claimant, redacted] again shortly after Christmas 2015. She moved into her own apartment with the children, and [Deceased Claimant, redacted] remained in the aforementioned rental home.

7. Claimant filed for divorce in May 2016. *See Ex. J.* The decree dissolving the marriage was signed October 13, 2016. *Id.* The decree notes, "The name change request is not detrimental to any person." Thus, Claimant was granted a legal restoration of her prior name, [Claimant name, redacted]. *Id.*, p. 22. Claimant professed ignorance regarding restoration of her maiden name and testified that she has used [Deceased Claimant, redacted] name as her legal last name since her divorce was finalized. Although ordered as part of the decree, [Deceased Claimant, redacted] failed to file a QDRO (Qualified Domestic Relations Order) concerning his retirement account. Consequently, Claimant's status regarding entitlement to any portion of [Deceased Claimant, redacted]'s retirement account at the time of the divorce is unknown. Based upon the evidence presented, it is also unknown whether [Deceased Claimant, redacted] identified Claimant as his spouse for purposes of qualifying her for entitlement to his retirement funds or life insurance benefits in the event of his premature death.

8. Claimant testified that during the pendency of their separation from May 2016 - October 2016, neither she nor [Deceased Claimant, redacted] told the kids they were divorcing. According to Claimant, because [Deceased Claimant, redacted]'s work required extensive travel away from home for weeks to months at a time, the children did not inquire as to his absence. Claimant testified that she and [Deceased Claimant, redacted] "did not take the divorce seriously." Rather, she testified that they started seeing each other approximately one month later in November 2016. According to Claimant, she and [Deceased Claimant, redacted] maintained separate residences but that he stayed at her apartment when he was in town. This arrangement continued until March 2018. At that time, [Deceased Claimant, redacted] bought a home located at 264 Pinon Circle in South Fork. Claimant and the children then moved back in with him. Claimant, the children and [Deceased Claimant, redacted] lived together at the 264 Pinon Circle address through his passing and she has continued her residence there since his death.

9. Claimant testified that when [Deceased Claimant, redacted]purchased the home at 264 Pinon Circle, he did so in his name only. Claimant testified this was done because she had bad credit at the time. On cross-examination, Claimant confirmed that the home was refinanced in September 2019, more than a year after they moved into together, again in [Deceased Claimant, redacted]'s name only. *Ex. L*, p. 37. She also testified that the property tax account was in his name at the time of his death. Throughout the time they lived together, Claimant and [Deceased Claimant, redacted] owned no real property jointly.

10. Utilities to the home at 264 Pinon Circle and other family expenses were largely in their names individually, not jointly. Claimant testified the water bill was paid once yearly in [Deceased Claimant, redacted]'s name. The electric bill was also solely in [Deceased Claimant, redacted]'s name, as were the cell phones used by those in the household. Moreover, the satellite TV bill was in his name. *Ex. L*, pp. 40, 42-43. Claimant agreed that she and [Deceased Claimant, redacted] owned separate vehicles titled in their names individually, and they had no jointly titled vehicles. The only

expenses held jointly were a car insurance policy and a propane account. *Id.,* pp. 39, 41-43.

11. Claimant testified she and [Deceased Claimant, redacted] each had three credit cards in their names individually. *See Id.,* pp. 46-51. She testified they each had individual checking accounts rather than joint checking/savings accounts. She testified that she had electronic access to [Deceased Claimant, redacted] checking account and she used that access to pay household bills from his account. She also conceded on cross-examination that neither she nor [Deceased Claimant, redacted] ever executed a will or other estate plan nor did they ever execute any powers of attorney (POA) to act on the behalf of the other at any time.

12. Claimant and [Deceased Claimant, redacted] filed separate tax returns in recent years. Their respective 2019 and 2020 tax returns were admitted into evidence as *Exhibits M & N.* Claimant testified that she personally completed each of their tax returns using computer-based software. On cross-examination, she was asked why they each filed as Head of Household, which is a filing status that requires the filer not be married.[1] She professed ignorance of the significance of filing both returns as Head of Household testifying that [Deceased Claimant, redacted] told her to file the taxes in that manner when they completed their returns in 2017. She testified she was unaware that couples who are common law married could file joint returns. Claimant testified that before 2017 and when they were married, H&R Block prepared their taxes. She could not recall whether they filed as married or head of household, at points stating she thought it was both. [Deceased Claimant, redacted] earned $104,354 in wages in the taxable year 2020. *Ex. M,* p. 52. Claimant earned $45,665.00 in wages in the taxable year 2020. *Ex. N*, p. 79.

13. Claimant's 2020 wages extend through August 15, 2020. She quit her job as a working manager at Mountain Pizza and Tap Room (Mountain Pizza) around August 15, 2020 due to what the ALJ finds was the requirement that she work substantial overtime hours to assure that the restaurant was properly staffed.[2] During cross-examination, Claimant agreed she was on track to earn about $75,000.00 - $80,000.00 for the year before she quit. It is uncontroverted that Claimant was unemployed between August 15, 2020 and February 7, 2021, when she returned to work cleaning vacation homes for her friend, Joyce Ann Reed. Claimant testified she worked as little as 4 hours per week, or as much as 20 hours per week during the busy period of Spring Break. As noted, wage records were ordered from Ms. Reed and reflect that Claimant earned $585.00 in February 2021, $742.50 in March 2021, and $587.50 in April 2021, prior to [Deceased Claimant, redacted]' passing in May 2021.

[1] U.S. Department of the Treasury. Internal Revenue Service. (2020) *Publication 501: Dependents, Standard Deduction, and Filing Information* (Cat. No. 15000U). Retrieved from https://www.irs.gov/publications/p501#en_US_2020_publink1000220775.

[2] Claimant testified that she would have to pick employees up from the Community Corrections Center in Alamosa, shuttle them to their shift in South Fork, and then drive them back to Alamosa after their shift, a distance of 192 miles roundtrip per day worked. According, to Claimant [Deceased Claimant, redacted] implored her to quit for sake of the children.

Exhibit O. When asked why she returned to work cleaning houses, Claimant testified she wanted to help and not "leave them hanging," referring to her employer. On re-direct, she clarified she was looking for work at the time Ms. Reed was looking for help. She testified the money she earned in this time went to household expenses.

14. Claimant testified neither she nor [Deceased Claimant, redacted] wore wedding rings, either while officially married or during any period following their divorce. According to Claimant, she was not a jewelry person, and the "promise ring" [Deceased Claimant, redacted] gave her was too small. She never attempted to have it re-sized. She also testified that [Deceased Claimant, redacted]' occupation as a driller precluded his wearing of a ring.

15. Claimant testified that even after their divorce, she and [Deceased Claimant, redacted]would introduce themselves to people as husband and wife when meeting new people, and also when going to events for the kids such as sporting activities or parent/teacher conferences. On cross-examination, she was pressed about whether or not at the kids' events they introduced themselves as husband and wife or just as the parents of the children, and she changed her testimony to admit the latter was the case.

16. On cross-examination, Claimant testified she and [Deceased Claimant, redacted] never talked about formally marrying again after their divorce and reconciliation. She admitted that they had no agreement to be married or later become married in any capacity. She was asked about what was different in the scenarios of 2008 versus 2016, where the first separation extended over a couple of years but without them being divorced, compared to 2016 where they got divorced after a shorter separation. She testified that she just needed a break from [Deceased Claimant, redacted] in 2008 but in 2016, they were fighting frequently which lead to their divorce. She testified that after their divorce and subsequent reconciliation, their relationship was better due to agreements they made as to how to best work through their differences. According to Claimant, the relationship between she and [Deceased Claimant, redacted] was "perfect" after their divorce so she saw no reason for the two to remarry.

17. Ms. Joyce Ann Reed testified at hearing. She testified that she became acquainted with Claimant and [Deceased Claimant, redacted] in approximately 2015 through the church they all attended. She testified generally that she saw them at church and at least on one occasion she and her husband took [Deceased Claimant, redacted] and the children ice fishing. However, she testified that she never went to their home, never went out to eat with them, never took trips with them, or engaged in other activities with them. Importantly, she testified that she had no actual knowledge of whether Claimant and [Deceased Claimant, redacted] considered themselves a married couple.

18. Ms. Reed also testified that Claimant has worked for her cleaning the vacation rental properties she manages. According to Ms. Reed, Claimant began work for her in 2016 and continued her employment until she started working at Mountain

Pizza. Per Ms. Reed, Claimant then started working for her again at some point after she stopped working at the pizzeria. As noted, *Exhibit O* are the records Ms. Reed produced reflecting Claimant's wages for 2021.

19. Claimant also called Rose Tullos to testify at hearing. Ms. Tullos testified that she is a neighbor of Claimant. She testified that when Claimant and [Deceased Claimant, redacted] moved into the neighborhood her recollection was that "maybe" one of them introduced the other as husband or wife when they first met, but she did not recall specifically. She testified they would visit each other's homes, attended BBQs together, and went out to dinner with each other on a couple occasions. She testified she had no actual knowledge of whether Claimant and [Deceased Claimant, redacted] were married. Rather, she testified she assumed they were married based upon interactions with the family. She admitted on cross-examination, that she would assume generally that any couple raising children while living under one roof and using the same last name were probably married.

CONCLUSIONS OF LAW

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

Generally

A. In accordance with Section 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 Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Death Benefits

B. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1)(a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1)(c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate."

C. Section 8-42-115(1)(b), C.R.S., states: "(1) In case death proximately results from the injury, the benefits shall be in the amount and to the persons following: . . . (b) If there are wholly dependent persons at the time of death, the payment shall be

in accordance with the provisions of § 8-42-114." If there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. § 8-42-119, C.R.S.

D. There are no precise statutory definitions of what constitutes a wholly dependent person verses a partially dependent person or how such classes of dependents must be determined financially. Partial dependents are simply noted by statute to be entitled to receive "only that portion of the benefits provided for those wholly dependent which the average amount of the wages regularly contributed by the deceased to such partial dependents at and for a reasonable time immediately prior to the injury bore to the total income of the dependents during the same time." *Id.*

E. In this case, Claimant contends that at the time of Mr. [Deceased Claimant, redacted]'s death she was wholly dependent on his income. In support of her contention Claimant points out that, [Deceased Claimant, redacted]' average weekly wage was "greater in a single week than [her] gross compensation for the preceding 3 months." According to Claimant, the entire household lived on [Deceased Claimant, redacted] wages while her financial contribution to the household was less than 1% at the time of his death. Because dependency is fixed as of the date of injury (death), Claimant contends that she, in addition to NH[Dependent minor], as his dependent child, was wholly dependent on [Deceased Claimant, redacted] at the time of his death.

F. Assuming that Claimant is considered to be [Deceased Claimant, redacted]' common law spouse, Respondents contend that she should be classified as a partial dependent based upon her earnings in the months leading up to [Deceased Claimant, redacted] untimely death. As provided for by statute, if there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. C.R.S. § 8-42-119. Therefore, if Claimant was only partially dependent on [Deceased Claimant, redacted]' income at the time of his death, Respondents argue that she would be unable to recover any benefits during NH[Dependent minor]'s period of entitlement as a stipulated wholly dependent child.

G. In this case, Respondents note that the Act does not define how much income a person must earn from other sources, to be dependent upon a worker who suffers a fatal accident, in order to be classified as a partially verses a wholly dependent individual. According to Respondents, the guidance provided by the Act revolves around the discussion of distribution of benefits amongst partially dependent individuals, stated to be the "average amount of the wages regularly contributed by the deceased to such partial dependents at and for a reasonable time immediately prior to the injury bore to the total income of the dependents during the same time." C.R.S. § 8-42-119. In essence, Respondents contend that if an alleged dependent receives income from other sources and not wholly from the deceased worker, than those dependents must be paid out in a proportion similar to the proportion of support provided by the deceased worker in life. With this guidance as the closest definition to what constitutes a partially dependent individual, Respondents argue that an individual who receives some income from sources other than the income provided by the deceased would, by definition, be a

partial dependent. Within this context, Respondents assert that Claimant should be considered a partially dependent individual at best.

H. In support of their contention, Respondents note that in the months preceding [Deceased Claimant, redacted]' passing, Claimant had returned to work cleaning houses, which reasonably would have continued into the foreseeable future even absent the present circumstances necessitating her return to work. While her average monthly earnings ($638.33) for the three-month period extending from February – April 2021 were not "excessive" in comparison to [Deceased Claimant, redacted]' wages, Respondent's contend that Claimant's wages[3] were not insignificant and must be accounted for when determining her level of dependency. Respondents argue further that the case for Claimant being considered partially dependent only is strengthened if the period for receipt of income stretches back into 2020 when she was working as general manager at Mountain Pizza. In that employment, Claimant agreed she was on track to earn about $75,000 - $80,000 before she quit. Regardless of when the analysis is applied, Respondents contend that Claimant's receipt of income from her own employment renders her a partially dependent beneficiary only. Accordingly, Respondents assert that NH[Dependent minor] is the sole wholly dependent beneficiary entitled to receive death benefits in this case. Per Respondents, because Claimant is a partially dependent only, she is not entitled to recover any death benefits until NH[Dependent minor]'s period of entitlement ends, and only then if she is unmarried.

I. While Respondents raise questions regarding Claimant's dependency status based upon her earnings in the months leading up to [Deceased Claimant, redacted] passing, the evidence presented persuades the ALJ that Claimant's employment and receipt of wages by itself is insufficient to overcome the presumption of dependency for a widowed spouse. Rather, there must be proof that [Deceased Claimant, redacted] provided no support to Claimant. *Clarke v. Clarke*, 95 Colo. 409, 36 P.2d 461 (1934); See also, *Diamond Industries, Division of Medford Corp. v. Claimant in Death of Crouse*, 589 P.2d 1383 (Colo.App. 1978)(rejecting the argument that widowed spouse was only entitled to 43% of the death benefits because the deceased contributed only 43% of the income earn by the couple). Even where the decedent provides no support to the spouse, the need for support may be sufficient to prove dependency. *Tilley v. Bill's Sinclair*, 524 P.2d 314 (Colo.App. 1974). Because dependency is fixed at the time of death, the ALJ finds Respondents' suggestion that Claimant was not dependent because of wages she earned in 2020, before [Deceased Claimant, redacted] death, is at odds with the Act and unpersuasive. Here, the evidence presented supports a conclusion that Claimant was dependent on [Deceased Claimant, redacted]' income despite the wages she earned cleaning houses at the time of his passing. Indeed, the ALJ finds/concludes that Claimant's aggregate earnings ($1,915.00) over the three months preceding [Deceased Claimant, redacted] death, which as noted, is less than a single week of [Deceased Claimant, redacted] stipulated earnings ($2,537.93), strongly supports a conclusion that she was dependent on his income. Nonetheless, the question of whether Claimant was in a common law marriage

[3] Excluding child support payments from Mr. G[Redacted] when made periodically, which was a source of income to Claimant and LG[Redacted] that presumably benefited the household.

with [Deceased Claimant, redacted] at the time of his death must be answered before any award of death benefits can be issued to her in this case.

Common Law Marriage

J. Colorado has long recognized common law marriages. See *Taylor v. Taylor*, 50 P. 1049 (Colo.App. 1897). Since 1987, the pivotal case in Colorado outlining the requirements for establishing a common law marriage has been *People v. Lucero*, 747 P.2d 660 (Colo.1987). In *Lucero*, the Colorado Supreme Court stated that a common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. In doing so, it focused on cohabitation of the parties and their reputation in the community as the two primary factors to evaluate an intention to be married, although any evidence manifesting such an intention to establish a marriage could fulfill the burden of proof. *See Id.* at p. 665.

K. Recently the Colorado Supreme Court revisited the standard and refined the test to emphasize the parties' mutual agreement to enter into a marital relationship in the context of a trio of opinions issued on January 11, 2021. The primary case setting forth the Court's new standard was *Hogsett v. Neale*, 478 P.3d 713 (Colo. 2021). It elaborated on the new standard and need to review the totality of the circumstances in the case of *In re Estate of Yudkin*, 478 P.3d 732 (Colo. 2021).[4] In *Hogsett*, the Court modified the applicable test to acknowledge modern norms, which rendered the more traditional indicia of marriage no longer exclusive to marital relationships, i.e. those recognized by *Lucero* as typically indicative of a marital relationship because that indicia is often present in non-marital relationships currently. The new test established by *Hogsett*, while retaining elements from *Lucero*, is essentially that a common law marriage is "established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, manifested by conduct reflecting that agreement." *Hogsett*, 478 P.3d at 715. The *Hogsett* court elaborated that marriage represents "a deeply personal commitment to another human being . . . and the decision whether and whom to marry is among life's momentous acts of self-definition." *Id.* at p. 719, citing *Goodrige v. Dep't of Pub. Health*, 798 N.E.2d at 954-55 (2003). The core inquiry under this standard is whether the parties intended to enter into a truly marital relationship involving a committed, intimate relationship of mutual support and obligation. *Id.* at p. 715. The necessity to show an agreement to marry is absolute in this standard, although the Court retained the elements of *Lucero* that such an agreement could be inferred from the parties' conduct assessed within the context of the overall relationship. *Id.*

L. The *Hogsett* Court further elucidated factors which a Court should examine when necessary to infer an agreement to marry, including instances of shared financial responsibility such as leases, joint bills, filing joint tax returns, evidence of

[4] The third case, *In re Marriage of LaFleur and Pyfer*, 479 P.3d 869 (Colo. 2021), largely focused on the issue of whether same sex couples could prove the existence of a common law entered into prior to same sex marriages before Colorado legally recognized same sex marriages.

estate planning including wills, symbols of commitment (rings), the couples references to each other, and also the more traditional factors such as cohabitation, having children together, and use of surnames. *Id.* at pp. 722-725. However, it also noted the more important factors emphasized by *Lucero*, namely cohabitation, using each other's surnames, and having children together, were less decisive in modern times given the frequency with which those factors may be present in couples who both considered themselves married and not. *Id.* at pp. 722-723. The Supreme Court emphasized these points further in the *Yudkin* case, noting the purpose of a court's examination is to discover the intent of the parties to be married, not "test the couple's agreement to marry against an outdated marital ideal." *Yudkin*, 478 P.3d at 718.

M. In this case, the evidence establishes that Claimant and [Deceased Claimant, redacted] were in a long term personal relationship with a level of commitment that at one time resulted in a formal marriage. Nonetheless, their relationship deteriorated and they divorced. Moreover, the ALJ agrees with Respondents that the course of their relationship following their divorce up to and at the time of [Deceased Claimant, redacted]' passing did not mirror the "momentous act of self-definition" the Colorado Supreme Court contemplated when deciding to refine the doctrine of common law marriage. The core query of *Hogsett* is to identify the existence of an intent to be married. Here, Claimant testified that after their divorce she and [Deceased Claimant, redacted] had no plans on becoming formally married again, they did not discuss it, and it otherwise was not manifested in any express agreement. Absent that express agreement, the ALJ may try to infer an agreement from the overall circumstances presented. While the ALJ is able to infer from the evidence the two appeared to care for each other and NH[Dependent minor]'s interests, there is insufficient evidence for the ALJ conclude that those factors rose to an intent to become married again subsequent to their formal divorce.

N. The on again – off again nature of Claimant and [Deceased Claimant, redacted]' relationship does not reflect a series of events for the last several years from which agreement to marry can be inferred. Indeed, during the course of their formal marriage, Claimant and [Deceased Claimant, redacted] separated and Claimant then entered into another long-term relationship with Mr. G[Redacted], moving in with him and conceiving his child, LG[Redacted], all while still being formally married to [Deceased Claimant, redacted]. Claimant and [Deceased Claimant, redacted]' only joint child was conceived in this period while Claimant was in multiple intimate relationships at the same time.

O. Moreover, after the reconciliation from their first separation, Claimant and [Deceased Claimant, redacted] divorced, choosing to sever the marital commitment they made to each other. Claimant testified that they simply did not think much of the divorce, which she characterized as being done almost impulsively. While her characterization of the divorce may have been meant to minimize the significance of it, in doing so she also demonstrated, at least her view (if not her and [Deceased Claimant, redacted]' combined) that whether to become or remain married was less than the "momentous act(s) of self-definition," as the *Hogsett* Court discussed. That

lack of commitment to the institution of marriage mirrors the events of years earlier when they separated and Claimant entered into her long-term relationship with Mr. G[Redacted]. The course of their relationship has not been demonstrated to have been one of complete commitment even when formally married.

P. As found, Claimant testified that she and [Deceased Claimant, redacted]' relationship was "perfect" when he passed away in terms of them not fighting as often as they previously had, but that does not equate under the principles announced in *Hogsett* to constitute a marriage. As the *Yudkin* Court noted, it is the ALJ's role to discover the intent of the parties to be married, rather than apply a vague test as to whether at the time of [Deceased Claimant, redacted]' passing a traditional picture of a happy home was sufficient to apply an outdated ideal of marriage. It certainly cannot be said they were common law married after their formal divorce when they were voluntarily living apart and simply dating. While their resumption of cohabitation with the children could constitute some indicia of a marital relationship, the Court in *Hogsett* was quick to note that this holdover factor from *Lucero* is no longer reliable to demarcate a boundary between marital and non-marital unions because many unmarried couples live and have children together. The evidence presented as a whole provides scant proof that Claimant and [Deceased Claimant, redacted] transitioned back into a marital relationship after moving in together in 2018. Indeed, the evidence presented persuades the ALJ that neither Claimant nor [Deceased Claimant, redacted] considered the legal ramifications of their prior divorce and indicate in any form a desire to re-establish a relationship, which carried the attributes of a legally binding relationship. They never executed any estate planning documents. They filed separate tax returns in a manner that required the parties not be married. The entirety of both their assets were owned individually, in the form of bank accounts, credits cards, and vehicles.[5] Even the home in which they lived was owned individually by [Deceased Claimant, redacted]. From every aspect in which Claimant and [Deceased Claimant, redacted] had set up their lives, there was no sign of an intent to enter into the legal institution of marriage. See *Sara Ortega v. Blue Star Holding Company*, W.C. No. 4-661-263-02 (ICAO, April 17, 2018). This fact is even more striking in light of their prior formal marriage and the presumed understanding the two had about the role of the legal process in a marriage, regardless of the extent of their sophistication concerning legal issues. Absent the presentation of additional indicia of an intent to enter into a true marital relationship, the ALJ concludes Claimant has failed to establish that she was common law married to [Deceased Claimant, redacted] at the time of his passing.

Q. Perhaps by habit and history from their prior formal marriage (e.g. use of the [Deceased Claimant, redacted]'s surname and referring to each other as spouses, although the evidence of the latter presented at hearing was minimal), Claimant may have felt as if she was married in the context of a social institution, but there is no persuasive evidence that she and [Deceased Claimant, redacted] agreed to enter into the *legal* institution of marriage. *See Hogsett*, 478 P.3d at 715 (stating common law

[5] As noted, the identity of any person entitled to [Deceased Claimant, redacted] retirement funds and/or life insurance is unknown.

marriage is "established by the *mutual* consent or *agreement* of the couple to enter the legal and social institution of marriage.")(Emphasis added).

R. As noted, the only peripheral evidence of a marital relationship presented besides Claimant's own testimony was the testimony of Ms. Tullo stating she perhaps recalled Claimant or [Deceased Claimant, redacted] introducing each other as spouses on one occasion, which the ALJ concludes is a fact somewhat counterproductive to Claimant's case when that single occasion is weighed against Ms. Tullo's testimony about the frequency with which the families spent time together. Ms. Tullo otherwise admitted her assumption that Claimant and [Deceased Claimant, redacted] were married was based upon the outdated societal norms the Supreme Court has steered the common law marriage standard away from; i.e. cohabitation, raising kids, and use of a common surname. In this case, Claimant's use of a common surname must also be viewed in light of the context of the parties' entire relationship. The two had formally divorced, but Claimant by her own testimony was not aware her name had been formally changed as part of the divorce and she continued to use the [Deceased Claimant, redacted]'s name even after they were divorced and living apart. Her use of the [Deceased Claimant, redacted]'s name was therefore ongoing due solely to her misunderstanding that the divorce had not affected the status of her legal name.

S. Based upon the principles announced in Hogsett and Yudkin, the ALJ finds/concludes that there is insufficient evidence to prove the existence of a common law marriage in this case. Indeed, based upon Claimant's testimony that the two never talked about remarrying following their divorce, the ALJ finds a lack of evidence to support a conclusion that she and [Deceased Claimant, redacted] consented or expressed a mutual agreement to enter into the social and legal institution of marriage. Moreover, there is insufficient indicia to infer such an agreement to the extent required by the Supreme Court under the aforementioned cases. Because Claimant has failed to prove the existence of a common law marriage, her claim for death benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for death benefits is denied and dismissed.

2. NH[Redacted, Dependent minor] is the sole wholly dependent person entitled to recover death benefits under the Act in this case. Respondents shall pay such benefits to NH[Dependent minor] from the date of [Deceased Claimant, redacted]'s passing until said benefits can be terminated by operation of law.

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

DATED: February 10, 2022

/s/ Richard M. Lamphere_____

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

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

ISSUES

The issues set for determination included:

- Did Respondents prove by a preponderance of the evidence that Claimant sustained an injury as a result of an intervening event that occurred at Lapels Cleaners, on or around October 14, 2010, sufficient to sever the causal relationship between her present symptoms and her July 29, 2005 injury at Craig Hospital?

- Are further medical maintenance benefits provided by Michael Gesquiere, M.D. reasonable, necessary, or related to the July 29, 2005 work injury?

- Did Respondents prove, by a preponderance of the evidence, that the affirmative defense of statute of limitations against a reopening of an award for indemnity benefits is applicable?

- Is Claimant is entitled to TTD benefits from December 31, 2010 to ongoing and TPD benefits from April 30, 2010 to February 4, 201?

- Is Claimant entitled to a higher average weekly wage ("AWW")?

- Is Claimant entitled to penalties?

PROCEDURAL HISTORY

This case had an extensive procedural history before the record was closed. There were two hearings in 2016 for which counsel for Claimant sought a continuance, which was opposed by Respondents. After the June 30, 2017 hearing was completed, the case was set for a full day hearing on September 13, 2017, which was continued at Claimant's request. The parties then agreed to complete the testimony by deposition. The AWW issue was added by Order, dated August 29, 2019.

The record then remained open for the completion of Dr. Gesquiere's deposition. A dispute arose concerning the completion of the deposition, as well as payment for the transcript. This dispute was resolved by the January 31, 2018 Order.

The case was then held in abeyance pursuant to the agreement of the parties and the Order issued by the undersigned ALJ on November 7, 2019. This Order was issued to allow the parties to participate in a settlement conference.

In January 2020, a status update was requested by the undersigned and ultimately the parties advised the Court an Order was requested. Hearing transcripts

were subsequently lodged with the Court. After a delay, Volumes I, II and III of the transcripts of Dr. Gesquiere's deposition (taken on three separate days) were lodged with the Court on June 15, 2020.

The undersigned issued a Summary Order on March 26, 2021. Claimant requested a full order on March 30, 2021. An Amended proposed Order was filed on behalf of Respondents. This Order follows.

STIPULATIONS

The parties reached the following Stipulations:

1. The issue of penalties endorsed by Claimant in her February 29, 2016 Response to Application for Hearing ("RAH") was resolved pursuant to the parties' August 26, 2016 Joint Stipulation.

2. The parties agreed that Dr. Michael Gesquiere is an Authorized Treating Physician ("ATP") per the parties' July 30, 2015 Joint Stipulation.

3. The parties agreed to payment/repayment of the third deposition of Dr. Gesquiere (which occurred on June 6, 2018) in accordance with the parties' September 21, 2017 Joint Stipulation and January 31, 2018 Order.

The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant worked as a rehabilitation technician at Employer.

2. There was no evidence in the record which showed that Claimant suffered an injury to or required treatment for her cervical spine before 2005. There was no evidence Claimant had physical restrictions before her work injury. Claimant treated for headaches in 1997, but there was no evidence in the record that she required treatment for headaches in the five years before the work injury.

3. On July 29, 2005, Claimant suffered an admitted industrial injury while working for Employer. She was assisting a patient into a wheelchair when the patient became agitated and grabbed her neck. Claimant testified the patient hung onto her neck for several minutes.

4. Claimant sustained an injury to her neck and shoulder. Claimant testified she felt neck pain and developed a headache as a result of this injury.

5. Claimant initially received conservative treatment from ATP-s designated by Employer for her injury, including Hugh Macaulay, M.D. In the initial evaluation on July 29, 2005, Dr. Macaulay diagnosed a cervical strain and headaches, secondary to

the strain. Claimant received treatment recommended by Dr. Macaulay, which included medications and physical therapy ("PT").

6. Claimant's report of symptoms increased over time and Dr. Macaulay referred her for EMG testing, which took place on September 6, 2005 with David Reinhard, M.D. The EMG performed on this date did not show evidence of cervical radiculopathy or brachial plexopathy. The EMG showed mild to moderate median neuropathy (carpal tunnel syndrome) at the right wrist, which Dr. Reinhard opined was not work-related.

7. On December 15, 2005, Claimant was evaluated by Joel L Cohen, Ph.D. for the emotional sequalae from her work-related injury. Claimant was described as pleasant, but quite distressed frustrated by the persistent nature of her pain. Dr. Cohen's psychological diagnoses included both adjustment reaction with mixed emotional features, as well as a diagnosis of psychological factors affecting physical condition. He recommended six to eight sessions of psychotherapy. Claimant began psychotherapy, seeing Dr. Cohen in follow-up on December 28, 2005, January 4, 12, 2006, with some gradual improvement noted. The ALJ found the need for psychotherapy was directly related to the work injury

8. Claimant returned to Dr. Macaulay on January 25, 2006, with complaints of worsening headaches and neck pain with no aggravating factors, including work. Dr. Macaulay noted that Claimant underwent an MRI which showed a mild disc bulge at C5-6 on the right with possible nerve impingement. Claimant denied radicular symptoms. Dr. Macaulay's assessment was: cervical strain. Dr. Macaulay noted that the trigger point injections performed by Christopher Lafontano, D.O. (in August 2005)[1] were not overly beneficial and referred Claimant for a second opinion with Scott Primack, M.D.

9. Claimant was evaluated by Dr. Primack on January 27, 2006. Claimant reported symptoms of ongoing neck pain and radiating symptoms going into the right upper extremity. Dr. Primack's diagnoses were: cervical spine/right upper extremity-EMG/NCV was essentially unremarkable, but the cervical MRI indicated some effacement of the exiting right C6 nerve root. Claimant had been through rehabilitation and trigger point injections. Dr. Primack recommended a right C6 epidural steroid injection (ESI). The ALJ concluded this treatment was recommended because of Claimant's symptoms and the objective evidence of effacement present on the MRI.[2]

10. Claimant underwent the epidural steroid injection on February 2, 2006 which was administered by Floyd Ring, M.D. Dr. Ring noted that Claimant had no true radicular components associated with the cervical spine but had numbness and tingling into the fourth and fifth digits, as well as somewhat in the third. Claimant reported

[1] Dr. LaFontano's assessment was: somatic dysfunction of the cervical, thoracic and ribs; myalgia; cervicalgia and muscle spasm. Claimant's Exhibit 15, p. 356.

[2] Exhibit 15, p. 391.

decreased neck pain and headaches during a follow-up visit with Dr. Macaulay on February 7, 2006.

11. Claimant returned to Dr. Cohen on February 9, 16, March 2, 2006 and was making progress with regard to reducing her stress level and depression. The ALJ noted these records documented a direct connection between Claimant's emotional issues and the work injury.

12. Claimant underwent another ESI performed by Dr. Ring on March 28, 2006, for complaints of C7 distribution right arm paresthesias. She said she experienced some relief in the arm, but intensified pain in the neck.[3]

13. In the April 11, 2006 evaluation, Dr. Macaulay found that the right upper extremity dermatomes appeared appropriately innervated. Claimant continued to experience neck and upper extremity symptoms. In his report dated May 5, 2005, Dr. Macaulay diagnosed Claimant with cervical spine strain; right upper extremity parasthesias; C5-6 disk protrusion. Dr. Macaulay then referred Claimant to Andrew Daily, M.D.

14. In the neurosurgical consultation performed by Dr. Dailey on May 17, 2006, he noted Claimant had developed left upper extremity paresthesias after the injury. An MRI performed on this date showed straightening and a reversal of the cervical curvature centered at C5-6. There was a C5-6 disc bulge just touching the cord. Dr. Daily subsequently recommended a cervical discectomy at C5-6 for progressive complaints and significant degeneration. The ALJ determined Claimant required this treatment of her neck, headaches and both upper extremities as a result of the July 29, 2005 work injury.

15. On June 12, 2006, Claimant was evaluated by Stephen Johnson, M.D. [neurosurgeon]. Dr. Johnson noted that Claimant had an ESI at C4-5 with Dr. Ring that helped her headache symptoms. Dr. Johnson stated that Claimant also had a C7 injection that did not significantly help her symptoms. Dr. Johnson found Claimant initially had left wrist weakness, with mild discomfort on neck extension and finger extension on the left. Further testing was within normal limits. Dr. Johnson agreed with Dr. Dailey that Claimant was symptomatic, at least in part, from the disc disease at C5-6 and that she would benefit from the proposed discectomy and fusion at C5-6.

16. Claimant saw Dr. Cohen at regular intervals for the first six months of 2006. In the report following the session on June 16, 2020, Dr. Cohen noted that although Claimant was distressed, her situation was more stable than when he originally met with her. Claimant reported difficulties with depression that were tied to her physical symptoms. Dr. Cohen recommended that Claimant's psychotherapy continue after the surgery.

[3] Exhibit 15, pp. 225-227.

17. On June 20, 2006, Claimant underwent an anterior cervical discectomy and allograft fusion at C5-6. The surgery was performed by Dr. Dailey, who opined conservative treatment measures had failed and surgery was required.

18. Following the surgery, Claimant returned to Dr. Macaulay. Claimant initially reported that her left arm pain was gone at the time of the June 26, 2006 evaluation. By the next day, however, she told Dr. Macaulay that she was having fairly significant discomfort in her left upper extremity, but that it was somewhat less than prior to her surgery.

19. Claimant complained of neck pain and bilateral shoulder soreness in the follow-up evaluation on July 29, 2006 appointment with Dr. Macaulay. At that time, Claimant denied radicular symptoms, but had hypersensitivity in the medial aspect of the bilateral forearms. On examination, Dr. Macaulay noted Claimant had 5/5 strength in the bilateral upper extremities. Claimant was referred for PT and prescribed medications. In the evaluation on August 11, 2005, Dr. Macaulay found parasthetic sensation extending into the C6 distribution bilaterally. Dr. Macaulay noted that Claimant had 5/5 strength from a motor standpoint with relatively normal range of motion in the hands, elbows, and shoulders.

20. In the August 17, 2006 evaluation with Dr. Macaulay, Claimant complained of neck pain with headache. Dr. Macaulay noted that Claimant had full range of motion ("ROM") in the cervical spine with some decreased active ROM with rotation. Claimant said her right upper extremity felt different, which was reproduced with brachial plexus stretch, especially in the median distribution. On August 25, 2006, Dr. Macaulay indicated that his examination of films showed good stability of the cervical spine with an intact fusion. Claimant continued to have work restrictions and was unable to drive.

21. On October 23, 2006, Claimant underwent additional diagnostic testing for neurological issues with Dr. Reinhard. Claimant had symmetric muscle reflexes in the upper extremities, with no focal motor deficits. Dr. Reinhard found it was a normal EMG/NCS of the upper extremities that showed no electrodiagnostic evidence of cervical radiculopathy, brachial plexopathy, polyneuropathy, or peripheral mononeuropathy.[4] The study showed mild neuropathy at the right wrist, which Dr. Reinhard said was unrelated.

22. After the surgery, Claimant was also saw Dr. Cohen for psychotherapy. The notes from her appointment on October 25, 2006 reflected Claimant's report that her right arm had improved, but she had increased left arm complaints. Claimant continued to receive psychotherapy for depression which was tied to pain complaints.

23. Claimant was re-evaluated by Dr. Macaulay on November 6, 2006, with her chief complains listed as: cervical spine strain; right upper extremity paresthesias;

[4] Exhibit 15, p. 410.

C5-6 protrusions; ACDF, C5-6, 6/20/06. On examination, Claimant had full neck ROM, with myofascial tension found in the upper trapezius musculature, paracervical and parathoracic muscles. Reproduction of symptoms with brachial plexus stretching in the left upper extremity was present in the radial, median and ulnar distributions.

24. On January 26, 2007, Dr. Macaulay determined Claimant was at MMI. Claimant had pin in the cervical spine, as well as right and left upper extremities. At that evaluation, Claimant's diagnoses included: cervical spine strain; right upper extremity paresthesias; C5-6 disc protrusion; anterior cervical discectomy and fusion, C5-6. Claimant was assigned a 24% whole person impairment, which included a medical impairment for the cervical spine, as well as loss of range of motion. The ALJ concluded the diagnosis of right upper extremity paresthesias was evidence of an injury to this area of Claimant's body.

25. Respondents filed a Final Admission of Liability ("FAL") on or about February 1, 2007. The FAL admitted for Dr. Macaulay's permanent medical impairment rating, as well as admitting for medical maintenance benefits after MMI that were related, reasonable and necessary. The FAL reflected payment of temporary total disability ("TTD") benefits through August 14, 2006 and temporary partial disability ("TPD") benefits paid through September 4, 2006. Permanent partial disability ("PPD") benefits based upon the medical impairment rating were to be paid through June 24, 2009.

26. Claimant returned to work for Employer in 2007 and performed duties other than those when she was injured. Claimant left this employment as of January 26, 2007.[5] The ALJ concluded this was unrelated to the work injury.

27. The ALJ found that the medical records admitted at hearing documented right upper extremity pain, neck pain and paresthesias for which Claimant required treatment after the July 29, 2005 work injury. Those symptoms were reported by Claimant after Dr. Macaluay determined she was at MMI. Claimant also suffered from depression and required treatment after the July 29, 2005 work injury. Claimant also reported headaches to her treating physicians, which continued after she was found to be at MMI.

28. After she was found to be at MMI, Claimant testified she had headaches, neck pain, right shoulder pain, right thoracic pain from the shoulder blade to the spine, as well as muscle spasms.[6] Claimant was credible when describing these symptoms.

29. Claimant continued to treat with Dr. Cohen in 2007 and the records reflected regular psychotherapy visits. Dr. Cohen noted Claimant required treatment for

[5] Hearing Transcript Vol II, pp. 60:1-5.

[6] Hearing Transcript Vol II, pp. 68:1-14.

depression related to symptoms in the notes dated May 16, October 22, November 5, 2007 and January 7, 2008.

30. Claimant returned to Dr. Macaulay on April 25, 2008 and reported 10/10 pain localized in the neck, head, and shoulders. Dr. Macaulay noted myofascial tension throughout the upper extremities and especially the paracervical musculature, limited ROM with active and passive testing, subjective complaints of decreased sensation to light touch in bilateral upper extremities, what right worse than left. Dr. Macaulay prescribed dilaudid and stated that Claimant was to go to the emergency room if her symptoms worsened. On April 28, 2008, Claimant had continued complaints of bilateral upper extremity numbness. Dr. Macaulay recommended a repeat MRI of the cervical spine with gadolinium and bilateral upper extremity EMG/NCVs.

31. On May 2, 2008, a repeat cervical MRI showed minor disc bulging at C6-7, causing mild left-sided foraminal narrowing. This was objective evidence which documented the condition of Claimant's spine, including a potential pain generator.

32. On May 14, 2008, Claimant presented at the Emergency Department at Swedish Medical Center (southwest) ["Swedish"] for headache symptoms. She was treated with a course of Morphine and Zofran. Claimant also treated for headaches at the ED at Swedish on January 21, 2010 and September 13, 2010. She was also treated for chronic back and neck pain at Swedish on September 27, 2010, January 24, 2011 and August 6, 2011. Claimant treated for headaches and chronic upper extremity pain on July 1, 2013. The ALJ found this hospital treatment was causally related to the July 29, 2005 work injury.

33. James Ogsbury, III, M.D. evaluated Claimant on May 21, 2008 and characterized the disc protrusion as "significant" in his May 21, 2008 report and diagnosed status post ACDFP C5/6; persistent cervical nerve root irritation syndrome with axial pain and headache predominant and non-radicular right, greater than leg arm pain and numbness. Dr. Ogsbury noted Claimant's symptom complex had not resolved since the surgery.[7] The ALJ credited this opinion.

34. Claimant treated with Antony Euser, D.O. from 2009 through March 10, 2015. Dr. Euser initially evaluated Claimant on November 5, 2009, at which time he said he was awaiting her full chart. Claimant was noted to be on maintenance care. Dr. Euser evaluated Claimant on November 25, 2009, January 25, February 4 and March 4, 2010.

35. When Dr. Euser evaluated Claimant on March 4, 2010, she was noted to be working under restrictions and Dr. Euser's assessment was: cervical spine fusion and he monitored/refilled Claimant's prescriptions. Claimant was found to be not at MMI. This was before Claimant began working at Lapel's Cleaners. The ALJ found

[7] Exhibit 15, p. 841.

Claimant's worsening symptoms, as well as the fact she was no longer at MMI was related to her original work injury.

36. Dr. Euser saw Claimant at regular intervals, including an evaluation on April 8, 2010. As part of these evaluations, Dr. Euser monitored her symptoms and prescribed medications. In the evaluation on April 8, 2010, Claimant's headaches were noted to have continued and a CT scan was recommended. David Solsberg, M.D. noted the CT scan noted no intracranial abnormality. Dr. Euser's assessment was: cervical spine fusion; headache and hypothyroidism. The ALJ found that Dr. Euser ordered the CT scan because of symptoms related to the July 29, 2005 work injury.

37. Dr. Euser examined Claimant on May 6, June 3, July 8, August 5, September 16 and October 13, 2010. In the June 3, 2010 report, he noted Claimant was experiencing more pain, as her job had changed. Claimant did not identify a discrete injury or trauma related to this employment, nor did Dr. Euser conclude this was a new injury. These records reflected the continued need to treat cervical symtoms.

38. Claimant worked for approximately 14-15 months at Gold Label Cleaners from approximately November 2008-August 2010. Claimant also worked for a period answering telephones at home. No employment or wage records were admitted related to this employment.

39. Dr. Euser completed a medical necessity form for Insurer on October 13, 2010, in which he opined Claimant's depression was secondary to the July 29, 2005 work injury. Dr. Euser noted Claimant had experienced a severe increase in headaches, neck pain and right shoulder/trapezius pain, as well as increased numbness in the right arm. This record was evidence that Claimant's symptoms were related to the July 29, 2005 work injury.

40. Claimant began work at Lapel's Cleaners on approximately April 20, 2010. Claimant's payroll records from April 30-December 31, 2010 from Lapel's Dry Cleaners were admitted into evidence.[8] Claimant testified that the job was supposed to be easier, but she performed the job of a presser. Claimant testified she did not reinjure herself while working at Lapel's. Claimant left this employment in January 2011 and did not work after that time.[9] Claimant advised her healthcare providers that she did not think this was a separate injury. The medical records during this period of time did not contain direct references to an increase in symptoms related to the Lapel's employment

41. Dr. Euser continued to treat Claimant and evaluated her on November 18, 2010, January 6 & 25, February 10, March 3, April 7 & 28, May 5, June 2, July 7, August 4, September 1, November 3, 2011. During these appointments, Dr. Euser

[8] Exhibit 16.

[9] This was confirmed by the July 26, 2012 SSA Decision-Exhibit 17.

concluded Claimant was no longer at MMI as a result of increased pain symptoms. However, Claimant's treatment was identified as "maintenance" in these records. The ALJ inferred that this treatment was required to maintain MMI and prevent the deterioration of Claimant's condition.

42. For purposes of the statute of limitations on re-opening indemnity benefits, the deadline for requesting TDD/TPD benefits was June 24, 2011.

43. There was no evidence in the record that Claimant filed an Application for Hearing ("AFH") on or before June 24, 2011 in which she requested indemnity benefits.

44. On November 29, 2011, Claimant filed a Petition to Reopen for worsening of condition. An AFH (Expedited) was filed concurrently that same day.[10] Respondents filed a Response to the AFH (Expedited) on December 2, 2011. No hearing took place on this AFH.

45. An AFH (Expedited) was filed by Claimant on February 6, 2012 and Respondents' RAH was filed on February 8, 2012.[11]

46. On February 29, 2012, Claimant underwent an independent medical examination with Brian Reiss, M.D., at the request of Respondents. At that time, Claimant noted the headaches were most bothersome to her and she was also experiencing neck pain. Claimant stated her right upper extremity felt abnormal/dead and she also experienced scapular pain when she reached above her head, along with spasms. Claimant had constant numbness to her anterior arm, dorsal forearm and dorsum of her hand (presumably on the right side), as she denied left upper extremity complaints. Dr. Reese noted Claimant's neck rotation was limited to the right.

47. Dr. Reiss stated Claimant's current diagnoses were chronic back pain and chronic headaches, intermittent falling. Dr. Reiss said the first of these diagnoses were be causally related to a work injury, but he did not believe September 1, 2011 fall was related to the work injury. Dr. Reiss said Claimant remained at MMI. Dr. Reiss indicated it was not clear why or if her falling was related to the cervical spine injury. There was no evidence of cord injury or cord compression or myelopathy and her cervical discectomy and fusion or solid. Dr. Reiss opined it would be highly unusual to associate a problem with falling with a well-healed one level neck surgery.

48. Dr. Reiss noted treatment for her ongoing chronic neck pain and headaches was problematic. He suggested consideration of reevaluation with the rehabilitation for physician and possibly some PT, as well as modifications of medication. The medications that were reasonably related to retreatment for work injury included Lexapro, gabapentin, Cymbalta, bystolic and metaxalone. The ALJ inferred

[10] Exhibits 5 and 6.

[11] Exhibits 8 and 9, respectively.

that Dr. Reiss was not questioning that Claimant continued to require to treatment and medications, but rather was recommending an evaluation to determine the type and duration of said treatment.

49. A hearing took place on July 6, 2012, after which time ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order on July 30, 2012. As part of this Order, Judge Felter concluded Claimant proved a worsening of condition and relied upon the testimony of Dr. Euser, whom he found credible. ALJ Felter found Respondents did not timely raise the statute of limitations defense to the Petition to Reopen and, therefore, waived this defense.

50. The instant case was reopened by ALJ Felter's Order, pursuant § 8-43-303(1), C.R.S. The reopening was as to medical benefits only and all other issues were reserved. A timely appeal was filed and on January 17, 2013, the Industrial Claim Appeals Office dismissed an appeal as interlocutory.[12] Pursuant to ALJ Felter's Order, Claimant was entitled to medical benefits. The medical records admitted at hearing reflected these were provided by Dr. Euser in this timeframe.

51. Even though the issue of indemnity benefits was reserved by virtue of ALJ Felter's Order, Claimant did not request those benefits before June 24, 2011, nor was an AFH filed requesting TTD or TPD benefits in 2012 or 2013.

52. Dr. Euser also evaluated Claimant on January 10, February 9 & 17, March 1, April 12, May 7 & 10, July 6, August 17, September 14, October 12 & 24, November 9, December 7, 2012. During this time, Dr. Euser continued to prescribe medications and also made referrals for Claimant. All of these appointments were described by Dr. Euser as "maintenance". The ALJ inferred Dr. Euser was of the opinion that the treatment he provided to Claimant was reasonable and necessary, as well as related to the work injury.

53. Claimant returned to Dr. Euser on January 4, 25, 29, March 1, April 19, May 28, 24, June 29, 2013.[13] A CT of the head and cervical spine was ordered by Dr. Euser, which was found to be within normal limits.

54. Dr. Euser evaluated Claimant on August 2 & 30, October 4, November 1, 4, December 6 & 14, 2013, January 3, March 7, June 2 & 20, July 11, September 5, 2014. Dr. Euser's assessment included headache; pain in joint in shoulder region; pain in thoracic spine; unspecified hypothyroidism; unspecified back disorders. Dr. Euser's records during this period of time reflected a reference to the July 29, 2005 work injury and the ALJ inferred Dr. Euser concluded the treatment required because of the injury.

[12] Exhibit 12.

[13] Hearing Transcript Vol II, pp. 58:10-12; 59:9-10.

55. The ALJ concluded from Dr. Euser's treatment records that the treatment he rendered was related to the work injury Claimant sustained while working for Employer. The ALJ incorporated by reference ALJ Felter's conclusions regarding Dr. Euser's credibility when the issue of re-opening was adjudicated. Further, based upon Dr. Euser's treatment records and his deposition testimony, the ALJ concluded Claimant's July 29, 2005 work-related injury was the cause for her need for treatment.

56. Claimant filed a Worker's Claim for Compensation against Lapel's Dry Cleaners on March 11, 2013.[14] The Claimant represented that the body parts affected included her neck, headaches, and bilateral upper extremities. Claimant listed the injury as an occupational disease with a date of injury as December 31, 2010.

57. There was no evidence in the record that a hearing was held in this case or that it was adjudicated.

58. Dr. Euser referred Claimant to Dr. Gesquiere and Claimant began treating with Dr. Gesquiere November 13, 2014. Claimant saw Dr. Gesquiere on multiple occasions from November 2014 to 2017.

59. When Claimant was evaluated on November 13, 2014 by Dr. Gesquiere, she complained of chronic right shoulder, neck and right upper extremity, headaches and migraine type pain. On examination, Claimant had significant tenderness over the right except for the talus muscle and the occipital nerve, along with tenderness over the cervical paraspinal right trapezius and rhomboid muscle. Decreased ROM was noted in the cervical spine.

60. Dr. Gesquiere's diagnoses were: chronic pain syndrome with opioid tolerance independence-patient is on multimodal therapy; cervical post laminectomy syndrome; cervical radiculopathy; right carpal tunnel syndrome; migraine headache versus occipital neuralgia. Dr. Gesquiere administered a greater occipital nerve block end right and recommended an MRI of the cervical spine.

61. Claimant underwent an EMG with Levi Miller, M.D. on February 11, 2015. The impression was abnormal and showed chronic denervation and evidence of severe right-sided carpal tunnel. Dr. Levi indicated that the study was essentially unchanged from the July 26, 2012 EMG.[15]

62. On May 25, 2015, Claimant returned to Peak Anesthesia after a repeat C6 ESI and indicated that she had more than 75% relief of pain and a significant decrease in headaches. RHE T at 252. Trigger point injections did not help. Claimant complained of ongoing neck and shoulder pain.

[14] Exhibit V.

[15] Exhibit 15 pp. 422-423.

63. Respondents filed an AFH on January 15, 2016. The AFH requested a hearing on the issues of medical benefits (authorized provider; reasonably necessary), as well as causation and independent intervening injury. Respondents also raised the statute of limitations defense.

64. Claimant filed her RAH on February 29, 2016 and requested a hearing on the medical benefits issues, as well as TTD benefits from December 31, 2010 and ongoing and TPD benefits from April 30, 2010 to February 4, 2011, as well as penalties.[16]

65. Claimant did not request reopening of the claim vis a vis indemnity benefits within six years of the date of injury or two years after the last payment of indemnity benefits was due.

66. The February 29, 2016 RAH filed by Claimant requested an Order reopening the claim with regard to indemnity benefits. The ALJ found Claimant's request for TTD benefits is time-barred.

67. Claimant continued to see Dr. Gesquiere in 2017. The records documented symptoms of cervical and upper extremity pain. The ALJ found the treatment provided by Dr. Gesquiere was to maintain MMI.

68. On May 19, 2017, Claimant underwent a repeat MRI of the cervical spine, upon referral by Dr. Kent Schreiber.[17] The MRI showed new canal stenosis at C3-4 and C4-5, upon comparison with the prior MRI from December 9, 2014. *Id*. The MRI showed mild to moderate foraminal narrowing at C6-7, which was unchanged from the previous MRI.

69. On June 20, 2017, Claimant was evaluated by Dr. Gesquiere for headaches, neck pain, right shoulder and right upper extremity pain. Dr. Gesquiere characterized this as evaluation and continued treatment of ongoing pain symptoms. Dr. Gesquiere noted Claimant had decreased cervical ROM, with significant trigger point bilaterally, worse on the right side. DTR biceps and brachial radialis appeared near symmetical, with the right biceps diminished.

70. Dr. Gesquiere's assessment was: chronic pain syndrome; brachial neuritis or radiculitis NOS; spinal stenosis and cervical region; post laminectomy syndrome, cervical region. After reviewing Claimant's MRI, Dr. Gesquiere referred Claimant to Dr. Mobley for further evaluation of the previous fusion and adjacent segment to see if pain symptoms could be resolved with revision and extension of her cervical fusion as a treatment option. Dr. Gesquiere also recommended Botox treatment. The ALJ inferred Claimant's continued symptoms related to her original injury and fusion surgery. This was borne out by the medical records related to Dr. Gesquiere's treatment.

[16] Claimant's RAH was initially stricken, but reinstated by the Order dated July 27, 2016.

[17] Exhibit U.

71. Claimant requires continuing treatment for her chronic pain which arose out of her July 29, 2005 work injury.

72. Claimant did not prove she was entitled to a higher AWW.

73. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

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

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

Statute of Limitations-TTD/TPD

An ALJ has broad discretion to reopen an award under certain circumstances. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). However, a petition to reopen a claim is subject to time limitations. *In Re Eichstedt*, WC 4-528-268 (ICAO, Dec. 22, 2010). A petition must be filed within six years of the date of injury pursuant to §8-43-303(1), C.R.S. *See Thye v. Vermeer Sales and Serv.,* 662 P.2d 188, 190 (Colo. App. 1983).

Furthermore, a Petition to Reopen is barred unless filed within two years of the last payment of benefits or compensation pursuant to § 8-43-303(2), C.R.S. on the ground of fraud, overpayment, error, mistake or change in condition. *Calvert v. Industrial Claim Appeals Office,* 155 P.3d 474, 476-77 (Colo. App. 2006). As found, Claimant did

not request TTD/TPD benefits until after the status of limitations had run. (Findings of Fact 42-43, 51). Claimant did not provide evidence to support an argument that the statute of limitations was tolled. Therefore, the claim for reopening to recover said benefits was time-barred. The ALJ determined there was no legal authority to extend the time in which Claimant could seek indemnity benefits.

***Grover* Medical Benefits**

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once Claimant establishes the probable need for future medical treatment she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chili's Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

As a starting point, the evidence showed Claimant suffered an admitted injury on July 29, 2005 in which she injured her neck and develop symptoms which included upper extremity pain and headaches. Claimant's treatment course was both lengthy and substantial, including a cervical fusion. As determined in Findings of Fact 5–15, Claimant required treatment for symptoms that involved neck pain, upper extremity pain and headaches. Claimant also required psychotherapy, as she had symptoms of depression related to her physical injury. The ALJ concluded these were related to the 2005 injury.

Following the surgery, Claimant required extensive treatment for the cervical spine and upper extremity, as well as for headaches. (Findings of Fact 18–24). The claim was in reopened by the order issued by ALJ Felter and pursuant to said order, claimant was entitled to medical benefits. (Findings of Fact 50–51). Claimant continue to treat with Dr. Euser, who provided active treatment, as well as monitoring Claimant's medications. (Findings of Fact 52–55.) The ALJ concluded that the treatment provided by Dr. Euser was reasonable and necessary, as well as related to the July 29, 2005 injury. Claimant's treatment was then transferred to Dr. Gesquiere, who has provided treatment to the present.

The ALJ concluded Claimant met her burden of proof and showed she was entitled to maintenance medical benefits. The ALJ found it was more probable than not that Claimant's need for treatment to maintain MMI was related to the July 29, 2005 injury. This was based upon the evidence in the form of the records of the physicians (Drs. Euser and Dr. Gesquiere) who provided maintenance medical treatment to Claimant. These ATP-s treated Claimant over a period of years and they conducted

multiple evaluations, as well as documenting Claimant's symptoms. The ALJ credited the opinions of those treating physicians over the various physicians Respondents retained to perform independent medical examinations over the years, which included Dr. Ridings, Dr. Fall, Dr. Reiss and Dr. Rauzzino.

When coming to this conclusion, that ALJ considered Respondents' argument that Claimant developed new symptoms of her time and that the diagnostic testing remained unchanged over the last few years. Based on the totality of the evidence, the ALJ found Claimant consistently reported symptoms that were referable to the cervical spine, which included headaches. (Findings of Fact 52-54, 70-71). Claimant also require treatment for upper extremity symptoms that the ALJ determined was related to the injury. Accordingly, Claimant met her burden of proof and she is entitled to continued maintenance treatment to maintain her condition (and MMI) and to prevent the deterioration of her condition.

Intervening Cause

Respondents contended Claimant's employment (for different employers) and injury at a subsequent employer (Lapel's) constituted an intervening case, which served to cut-off their liability for medical benefits. Respondents had the burden of proof on this issue. On the question of intervening injury, the ALJ determined Respondents did not meet their burden of proof. An intervening injury may sever the causal connection between the injury and Claimant's temporary disability if Claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (Colo.1970).

The ALJ concluded there was insufficient evidence to find that Claimant's work at Lapel's Cleaners was an intervening cause in this case, at least with regard to medical benefits. (Finding of Fact 41). Although her symptoms fluctuated and there were some occasional increased symptoms after her short tenure at that employer, it was more probable than not that Claimant continued to require maintenance treatment because of the original injury. The ALJ concluded Claimant consistently reported cervical symptoms and required treatment for those symptoms. The ALJ found this need for treatment was the result of the original injury. As determined in Findings of Fact 37, 42, 52-55, the medical records related to the treatment rendered by Dr. Euser and Dr. Gesquiere supported this conclusion. Claimant's testimony also supported this conclusion.

AWW

§ 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to

determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages to based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bar, the ALJ determined Claimant did not prove she was entitled to a higher AWW. First, the ALJ concluded that any claim for TTD/TPD benefits was time-barred. Therefore, the request for a higher AWW was moot. Second, Claimant did not establish that she would be entitled to a higher AWW because of a wage loss and lost earning capacity that was tied to the injury. As found, Claimant left the employment with Employer for reasons not related to the subject injury. (Finding of Fact 26). She had other employment following the injury and there was insufficient evidence in the record to establish that Claimant was entitled to a higher AWW, based upon a loss of earning capacity or wage loss. Claimant did not adduce evidence to make such a showing and therefore the claim for a higher AWW fails.

ORDER

IT IS HEREBY ORDERED:

1. Claimant proved she was entitled to *Grover* medical benefits to maintain MMI.

2. Respondents shall provide maintenance medical treatments to Claimant, pursuant to the Colorado Workers' Compensation Fee Schedule, as recommended by Dr. Gesquiere and his referrals.

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

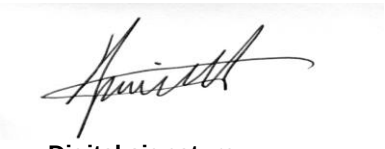
4. Claimant's claim for a higher AWW is denied and dismissed.

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: February 10, 2022

STATE OF COLORADO



Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable occupational disease involving her neck?

- The parties stipulated to an average weekly wage (AWW) of $2,000.

- The parties stipulated that, if the claim is compensable, Claimant is entitled to TTD benefits from December 16, 2019 to January 17, 2020, at the maximum rate of $948.15. The parties stipulated Claimant is also entitled to TPD benefits but agreed to reserve the specific amount(s).

FINDINGS OF FACT

1. Claimant has been a dental hygienist since 1994. She has worked for Employer since 2013.

2. Claimant's work entailed cleaning patients' teeth and other tasks associated with oral hygiene. In performing her duties, Claimant is required to maintain relatively static neck postures for extended periods. She typically sits on the right side of patients and holds her head tilted to the right while accessing patients' mouths.

3. Claimant has a documented history of neck pain since at least 2004. She received chiropractic treatment from Dr. Randy Knoche in 2004 and 2005 for primarily right-sided neck pain and headaches. There is no indication of significant symptoms radiating into the upper extremities.

4. Claimant's neck symptoms improved, and she had no treatment for neck pain from May 2005 until August 2009. She saw Dr. Knoche on August 31, 2009 with complaints of neck pain, headaches "off and on," and right thumb pain for approximately five weeks. Dr. Knoche's records note "Px" in the thumb. The meaning of this notation is not entirely clear but based on other references in Dr. Knoche's records, "Px" probably means "pain." She had a few chiropractic sessions and her neck symptoms improved from "constant" to "intermittent."

5. Claimant sought no further treatment for neck pain until after a motor vehicle accident on November 19, 2013. Claimant's vehicle was "T-boned" on the driver's side. She suffered injuries, including a "whiplash" injury to her neck.

6. Claimant saw her PCP, Dr. Alexios Constantinides, on November 20, 2013. Dr. Constantinides diagnosed cervical and thoracic strains from the MVA. He performed osteopathic manipulation and prescribed NSAIDs.

7. On November 26, 2013, Dr. Constantinides documented neck pain with rotation but no radicular symptoms.

8. Dr. Constantinides performed OMT several times over the next few weeks. Examination findings such as spasm and tenderness to palpation remained consistent with cervical and thoracic soft tissue injuries and myofascial dysfunction. Claimant repeatedly denied any radicular symptoms.

9. On March 13, 2014, Dr. Constantinides documented Claimant was gradually improving with PT and massage therapy although her neck and upper back were fatigued at the end of the workday.

10. On June 12, 2014, Claimant reported her neck was doing better, but she had recently developed numbness and tingling in her right pinkie. She was "unsure if MVA related," and noted the finger symptoms were particularly prominent "while scaling teeth at work."

11. At her June 26, 2014 appointment, Claimant reported "both hands falling asleep."

12. On August 28, 2014, Claimant stated her neck continued to improve but she was still having numbness in her hands, worse on the right, and worse at night. Dr. Constantinides referred Claimant for an EMG "to discern cervical radic[ulopathy] vs. CTS vs. other."

13. Claimant saw Dr. Griffis for electrodiagnostic testing on September 17, 2014. Her chief complaint was numbness and tingling in the 4th and 5th fingers of both hands. She also reported neck pain since the MVA. Tinel's was positive at the elbows bilaterally. The electrodiagnostic testing showed no evidence of carpal tunnel syndrome, cubital tunnel syndrome, or cervical radiculopathy. Dr. Griffis diagnosed mild ulnar neuritis at the elbows, but ordered a cervical MRI to rule out a cervical disc herniation or nerve root impingement.

14. The MRI was completed on September 26, 2014. It showed a disc protrusion at C5-6 that narrowed the left lateral recess, contacting and slightly deforming the cord. There was no cord signal abnormality to suggest edema or myelomalacia. The MRI also showed a mild/moderate posterior bulge at C6-7. There was no foraminal stenosis or impingement at any level.

15. After reviewing the MRI, Dr. Griffis diagnosed ulnar neuritis and a chronic cervical strain. He instructed Claimant on home stretching exercises and released her from care.

16. At an appointment on January 9, 2015, Claimant told Dr. Constantinides her neck pain and hand numbness were improving with massage therapy. Her work schedule had recently increased to four day per week, and she noted increased symptoms by the end of the work week.

17. On February 20, 2015, Dr. Constantinides documented Claimant was working four days per week seeing six patients per day, which was aggravating her neck and upper back symptoms. Her pain also increased with nonwork activities such as house cleaning and yard work.

18. There are no further treatment records until a follow-up appointment with Dr. Constantinides on February 16, 2017. The primary focus of the visit was a respiratory infection and low back pain. However, Claimant also reported "some mild neck pain without recent trauma or radicular symptoms."

19. On March 30, 2018, Claimant returned with complaints of right hand weakness and reduced dexterity. The symptoms seemed to worsen after recent right-sided breast surgery. Physical examination was normal, including a negative Spurling's test. Dr. Constantinides ordered a repeat EMG.

20. Claimant reported the symptoms to Employer and stated she thought the condition was caused by "twenty-six years of being a dental hygienist" and holding her neck in awkward and fixed positions. Employer did not file an Employer's First Report, refer Claimant to a physician, or take any other action. Eventually she retained counsel who filed a claim for her.

21. Claimant saw Dr. Dale Cassidy, an orthopedic surgeon, on May 18, 2018 with complaints of pain, numbness, tingling, and weakness in the right hand. Her symptoms were primarily in the 4th and 5th fingers. The symptoms worsened while performing her work as a dental hygienist. She told Dr. Cassidy about her history of neck pain but denied any radiation from the neck down to her hand. Examination of the right arm showed normal strength and sensation except some paresthesias involving the right 4th and 5th fingers and the dorsal ulnar aspect of the right hand. Tinel's was positive medially over the right ulnar nerve. He noted "no evidence of cervical pathology and her Spurling's test and neck range of motion was generally unremarkable." Dr. Cassidy diagnosed mild lateral epicondylitis and right cubital tunnel syndrome. He gave Claimant a splint to wear at night.

22. Follow up visits with Dr. Cassidy on June 11, July 16, and July 25, 2018, showed some improvement with use of the wrist splint.

23. Claimant returned to Dr. Cassidy on October 15, 2018 with worsening symptoms in her hand and arm, including weakness. Examination of the right elbow showed no tenderness and full range of motion. Provocative testing for carpal and cubital tunnel was negative, and the recent EMG had showed no evidence of peripheral compression. Dr. Cassidy noted Claimant's symptoms were progressing down to her hand with weakness and paresthesias. He wrote "[g]iven her unusual symptoms as well as shoulder and neck pain I would recommend a scan of her cervical spine as well as brachial plexus."

24. A cervical MRI on October 27, 2018 showed C5-6 intervertebral disc height loss with a posterior disc osteophyte complex. There was moderate right neural foraminal

stenosis primarily caused by uncovertebral hypertrophy. There was no left-side stenosis. A brachial plexus MRI performed the same day was normal.

25. Claimant followed up with Dr. Cassidy on November 20, 2018 to review the MRI findings. She had some tenderness over the right lateral epicondyle but no clinical signs of cubital tunnel syndrome. Dr. Cassidy released Claimant to follow up "as needed" for her elbow and referred her to the "spine team" for evaluation of her neck.

26. Claimant saw Dr. Paul Stanton, a spine surgeon, on December 13, 2018. Her biggest complaint was ongoing right upper extremity weakness. She indicated the arm symptoms were worse when performing her job as a dental hygienist. She found relief with "resting her head." Physical examination showed mild weakness with wrist extension and biceps on the right. Dr. Stanton ordered x-rays which showed advanced disc space collapse at C5-6. He also reviewed the October 2018 MRI. Dr. Stanton opined Claimant "will eventually need to have this reconstructed," but was not enthusiastic about the prospect of surgery. He recommended a cervical ESI at C5-6.

27. Claimant saw Dr. Scott Ross, an interventional pain management specialist, on January 21, 2019. She described "rather notable right-sided neck pain and paresthesias that are in a C6 distribution." She explained the paresthesias were initially in the third to fifth digits of the right hand, but that had resolved and been replaced with weakness and paresthesias in the first and second fingers of the right hand. She described feeling clumsy and loss of dexterity.

28. The records January 21, 2019 show Claimant seen Dr. Ross "approximately seven years ago" for cervical injections. The prior records are not in evidence but Claimant only recalled seeing Dr. Ross after the MVA. She testified he performed "injections" but did not remember exactly what was done. On her intake form, Claimant stated her neck pain started "17 years ago" but the upper extremity weakness started in approximately April 2018. When asked about the cause of the problems, she marked "work injury" and "auto accident."

29. On March 20, 2019, Claimant was evaluated by David Whatmore, physician's assistant for Dr. Chad Prusmack. Mr. Whatmore noted, "since [the MVA] she has had a lot of pain on the right side of the neck, significantly worsening headaches and his started noticing some weakness developing into the right hand particularly with her grip strength." Examination showed mild weakness in the right bicep and triceps and limited cervical range of motion. Mr. Whatmore recommended a C5-6 ESI to further delineate the pain generator.

30. Dr. Ross performed a right C5-6 transforaminal ESI on April 22, 2019. She had a good diagnostic response with approximately three weeks of relief.

31. Claimant followed up with Mr. Whatmore on May 14, 2019. He opined she was a candidate for a disc replacement or a C5-6 fusion.

32. Another cervical MRI was done on November 6, 2019. It showed central and right lateral protrusions and osteophytes at C5-6, causing moderate right foraminal narrowing.

33. Mr. Whatmore reevaluated Claimant on December 9, 2019. After consulting with Dr. Prusmack, he recommended a C5-6 disc replacement.

34. Dr. Prusmack performed an anterior cervical discectomy with C5-6 artificial disc replacement on December 17, 2019.

35. Claimant responded well to the surgery and recover quickly. On March 2, 2020, she reported resolution of her neck pain and radicular symptoms. Dr. Prusmack lifted her restrictions and allowed her to return to work.

36. On April 22, 2020, Mr. Whatmore had a discussion with Claimant about the etiology of her neck symptoms. He noted she had only occasional neck pain before the MVA, and had a "marked escalation of symptoms as a result of her motor vehicle collision." Mr. Whatmore opined the need for surgery was caused by the MVA.

37. Dr. Douglas Scott performed an IME for Respondents on November 9, 2021. Dr. Scott noted Claimant's history of neck pain since at least 2004. He opined the imaging studies showed longstanding, progressive and chronic cervical spondylosis with intravertebral disc narrowing and stenosis at C5-6, "the level most often injured and cervical neck whiplash injury." He also cited Mr. Whatmore's opinion the neck surgery was necessitated by the MVA. Dr. Scott concluded the C5-6 pathology was related to the 2013 MVA "which caused a 'whiplash' which required subsequent chiropractic treatment, physical therapy, pain management, and possible cervical neck injections." He opined the need for surgery was due to the natural progression of the MVA, without regard to Claimant's work activities.

38. On July 6, 2021, Dr. Prusmack wrote a letter in response to an inquiry from Claimant's counsel regarding causation of the surgery. He opined Claimant's work as a dental hygienist exacerbated her prior neck issues and was the root cause of her need for surgery. He noted she was put at MMI for the MVA in February 2015 and released with no impairment or restrictions. There was no suggestion that she needed any surgery at that time. Over the next several years she developed progressive neck pain, arm pain and weakness that was reported to be "worse with work as a dental hygienist." He noted Claimant "was constantly in awkward, bent neck and static postures." He cited literature showing high rates of neck problems among dental hygienist and dentists because of the neck postures peculiar to their profession. Dr. Prusmack concluded that the 2013 MVA may have contributed to Claimant's neck issues, but it was her work which exacerbated these issues and ultimately required surgery in 2019.

39. Dr. Prusmack testified via deposition to elaborate on the opinions expressed in his report. He opined the pathology that led to surgery was related to both the MVA and Claimant's work, but her work contributed the "majority" of causation. Dr. Prusmack opined the MVA probably weakened the structures in Claimant's cervical spine and made

them more susceptible to injury from the prolonged static neck postures associated with her work. Dr. Prusmack pointed to the "accelerated and significant" worsening of MRI findings between 2014 and 2019, which was more than he would expect from a purely natural progression. He emphasized that the pathology at C5-6 was primarily on the right side of Claimant's spine, which correlated with years of maintaining static neck posture with her head tilted to the right. Claimant's body "counterbalanced" the work-related "asymmetries [and] poor recruitment patterns" by building osteophytes and remodeling the discs. This led to progressive right-sided foraminal stenosis and ultimately necessitated the surgery.

40. Dr. Prusmack's causation opinions are credible and more persuasive than contrary opinions in the record.

41. Aside from a few understandable memory lapses regarding details of her medical history, Claimant's testimony was credible and persuasive.

42. Claimant proved she suffered an occupational disease to her cervical spine as a direct and proximate result of her work for Employer.

43. Claimant has a surgical scar on the front of her neck approximately 2 inches long and approximately ¼ inch wide. The scar is irregularly shaped, partially raised, partially indented, and discolored compared to the surrounding skin. The ALJ finds Claimant should be awarded $2,000 for disfigurement.

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).

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 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*.

As found, Claimant proved she suffered an occupational disease involving her cervical spine proximately caused by her work as a dental hygienist. Dr. Prusmack's analysis and conclusions are persuasive. The correlation between Claimant's primarily right-sided spinal pathology and her typical posture with her head tilted to the right is compelling. Dr. Prusmack is probably correct that the MVA set the stage, but Claimant's work ultimately pushed her over the edge to the point she required surgery. In that regard, Claimant's work aggravated, accelerated, and combined with her pre-existing condition to produce a need for treatment and disability. There is no persuasive evidence to suggest Claimant maintains static or awkward neck postures outside of work at a level remotely comparable to her exposure at work.

B. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to her anterior neck because of the work injury. The ALJ concludes Claimant should be awarded $2,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's claim for an occupational disease on April 1, 2018 is compensable.

2. Insurer shall pay Claimant TTD benefits at the rate of $948.15 from December 19, 2019 to January 17, 2020.

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

4. Insurer shall pay Claimant $2,000 for disfigurement.

5. 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: February 16, 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 5-153-276-001/002/003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2021.

II. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical benefits to cure or relieve the effects of his industrial injuries.

III. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to a one-time change of physician to Dr. Kareem Sobky at Presbyterian St. Luke.

IV. If compensable, what is Claimant's average weekly wage.

V. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from October 23, 2020 through the date of maximum medical improvement.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to penalties for alleged violations of Section 8-43-203, C.R.S. and W.C.R.P. Rule 5-2 for Respondents' alleged failure to admit or deny the claim in a timely manner or if Respondents have cured any potential penalties pursuant to Section 8-43-304(4), C.R.S.

PROCEDURAL HISTORY

This matter was previously scheduled for Hearing for May 11, 2021 and came before Administrative Law Judge Edwin L. Felter, Jr. The parties submitted their exhibits at that time. Claimant stated that he did not have time to review Respondents' exhibits as they were provided electronically and he was unable to access them. Respondents stated that a hard copy of the exhibit packet had been left on Claimant's porch, but Claimant stated that he had not receive it. The parties disclose that PALJ Susan Phillips combined all issues listed on the multiple Applications for Hearing into one hearing.

There are two regular Applications for Hearing. One was filed by Claimant's prior counsel on December 23, 2020 which lists issues of compensability, medical benefits, average weekly wage ($1,191.71), temporary disability benefits and requests authorization of care under Dr. Carlos Glass, psychologist, pursuant to Dr. Corson's referral. The second one was filed by Claimant on December 23, 2020, which includes the additional issue of penalties for failure to admit or deny the claim, was accompanied by a Concentra Work Activity Status Report dated December 8, 2020 and a letter from

the Division dated December 15, 2020, stating that they had not received a timely admission or denial. The third is an Applications for Expedited Hearing—One-Time Change of Authorized Treating Physician dated January 11, 2021 with an attached Notice of One-Time Change of Physician & Authorization for Release of Medical Information filed by Claimant on January 5, 2021 for a change to Dr. Kareem Sobky at Presbyterian St. Luke, from Dr. Corson at Concentra.

Other relevant procedural history includes Claimant's Petition to the Division's Director for penalties dated January 6, 2021 and Motion for Summary Judgment dated January 15, 2021. The motions were denied on January 27, 2021 by Director Tauriello pursuant to Sec. 8-43-203(2)(a), C.R.S. It is clear that the Motion for Summary Judgement was also filed with the OAC as ALJ Steven R. Kabler also denied the motion on January 26, 2021.

A Prehearing Order for Prehearing Conference of February 8, 2021 was issued by PALJ Susan D. Phillips granting Respondents' motion to engage in discovery with the *pro se* Claimant, denying Respondents' motion to compel Claimant's attendance at an IME, granting an extension of time, vacating a prior hearing set for March 12, 2021, consolidating all issues for the rescheduled hearing, denying Claimant's motion to compel claim file as moot, and denying Claimant's motion for penalties.

On May 7, 2021 and on subsequent dates Claimant sent multiple emails to the Office of Administrative Courts demanding an order that Respondents pay for benefits based on alleged statements made during the May 11, 2021 hearing before ALJ Felter. In an abundance of caution, Respondents filed a Response to Claimant's Motion for Summary Judgment on June 17, 2021. On June 28, 2021 ALJ Felter issued an order denying Claimant's Motion for Summary Judgment.

On July 14, 2021 ALJ Felter issued an Order Concerning Hearing of August 27, 2021 indicating that any ALJ could hear this matter and that no further extensions would be allowed unless under "extreme good cause."

During pretrial matters, Claimant was advised that he had the right to be represented by an attorney and waived that right. He was also advised that he would be held to the same standard as an attorney with regard to his knowledge of the Act, rules and case law and that the court could not assist in his prosecution of the claim. Claimant acknowledge his understanding and requested leave to proceed *pro se* (self-represented).

Claimant's exhibits 1 through 13A and 15 through 17 were admitted into evidence. Respondents objected to Exhibit 1 and 4 as Claimant had circled and written on the exhibits. This ALJ took judicial notice that there were some marks and writing on the exhibits but that this ALJ would not take notice, other than as part of Claimant's position statement regarding these markings, as they do not change the wording on the documents themselves. Respondents objected to Exhibits 15 through 17. These photographs were admitted following Claimant laying a foundation. Respondents' Exhibits A through Z were admitted into evidence over Claimant's objections.

Respondents stipulated that Insurer was the correct insurer for Employer on the Claimant's claim for date of injury of October 23, 2020.

The parties stipulated that Claimant continued to be on work restrictions through April 20, 2021.

FINDINGS OF FACT

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

1. Claimant testified that he was employed by Employer from April 1, 2020 through October 23, 2020 as a Class A truck driver. His duties included hauling flooring products in a large tractor trailer. Claimant had deliveries both within the state and out of state (Wyoming). This required Claimant to check the loads on the trailer, hook up the trailer, drive and deliver the products within a certain amount of time. He would also use a forklift to move the heavy products when necessary. Claimant was only allowed to drive up to 11 hours a day, at which time Claimant had to have overnight stays at motels. Overnights would occur approximately once per week. Claimant would be reimbursed for the overnight expenses including a per diem. Respondents would frequently pay for the motels with a company credit card. Claimant testified that on October 22, 2020 he was able to complete his job duties without difficulty, including unloading his truck while performing deliveries, and that he would not have been able to do so if he had been hurt.

2. During the week of October 23, 2020 Claimant was due to haul product from the Aurora facility to locations that were not familiar to Claimant. Claimant was assigned the new route because a co-worker was on vacation. Claimant objected to the change because he did not know the routes that had to be covered, did not have any training regarding the routes, including the delivery points and customers, the opening and closing times or the deadlines for delivery.

3. Claimant arrived at the Employer's facility extremely early on October 23, 2020 because he needed to obtain the paperwork, familiarize himself with the routes for deliveries, the loads on the trailer, the order of the delivers and whether the products were loaded in the right order in order to accomplish the deliveries. He also needed to make sure that the products were strapped in correctly. Claimant testified that the products were extremely heavy and his first delivery had to happen by 6 a.m. in the morning. On that particular day, it had snowed and the parking lot was covered in snow and ice. Claimant stated that the person in charge of the loading frequently would raise the trailer to a higher level, with the nose higher than the back end, in order to use a forklift, and would fail to level the trailer out after loading. This would cause problems when Claimant was hitching the semi-truck to the trailer because they were not able to couple correctly to secure the trailer to the semi-truck. Claimant needed to have the semi-truck come together with the trailer so that the king pin and lock achieve coupling in order to secure the load. However, if the front end was too high, this cannot happen.

4. On October 23, 2020 Claimant arrived at approximately 2:00 a.m. Claimant had been provided with the security code so that he could enter the building when needed. He entered the building to access the truck, that was kept in the building due to the cold weather. He stated that he had safety glasses, gloves, and steel toed boots, as required. He took the truck to his personal vehicle to get his personal belongings. As Claimant was walking from the vehicle to the truck, his arms full of personal items he was transferring, Claimant states he slipped on the ice and fell forward, injuring his abdomen and both knees. He states that it was so slippery that he lost control and that it was very fast. He also hit his head hard. He does not know if he lost consciousness. Claimant stated that he got up afterwards, after what he thought might have been a few minutes, and continued to the dock area to check the trailer.

5. Claimant assumed that the fall would have been caught by the security system on the building. He stated that the employees are advised that the premises are under surveillance because of the cost of the products, which could amount to millions of dollars. Claimant found out later that the security system was not operational and failed to record the fall as the video set up were just "dummies."[1] Claimant determined since Concentra was not open at that time in the morning and there was no one around to discuss what had happened to him that he would proceed with his deliveries and see how he did. He managed the pre-trip inspection of the semi-truck and drove to the dock area where the trailer was parked in the bay. He found that the trailer was too high. He tried to manually lower the trailer with the hand crank. He struggled with the crank and overstrained himself, causing severe pain in his abdomen and groin. Claimant did not know if the hernias occurred at the time of the fall or when he strained himself but his abdomen was already hurting by the time he was trying to crank the trailer down. Claimant testified that it took him approximately 20 to 30 minutes to get the trailer level so that it could be coupled with the truck.

6. Claimant identified and explained the notations he had made on the pictures he had taken of the parking lot and dock area with his phones. The parking lot and dock pictures were taken on the day of the injury at approximately 5:50 a.m.[2] These pictures were taken with his work phone. He described the hook up mechanism shown on the photos showing the large gap between the trailer and the truck (5th wheel). He stated that the lock jaws had a release handle once the coupling was achieved but it would not operate unless the coupling occurred correctly. When the trailer was not level, the trailer would show the plate on the trailer as uneven. Claimant explained that the trailer must then be lowered so that the trailer skid plate is level or parallel with the 5th wheel plate until the king pin was able to be secured on the plate then the lock jaw released, so the handle could be operated to secure the load. The building pictures were taken on April 11, 2021.[3] These pictures were taken by Claimant with his personal phone. He downloaded and printed the pictures himself. He explained that the difference in color was because he printed some pictures with his own printer, which stopped working, and the remaining pictures with his mother-in-law's printer. He testified that no other person

[1] Exhibit 1 pp. 1-2; Exhibit 17 pp. 1 & 3.
[2] Exhibit 15 & 16
[3] Exhibit 17

had access to either of his phones before he downloaded the pictures. As found, Claimant is credible and has proven that he was injured in the course and scope of his employment, injuring his bilateral knees and abdomen.

7. Once Claimant was on his way, he was forced to stop at the open weigh station. He was advised that he was significantly overweight, at approximately 68,000 pounds. He returned to the facility and unloaded some of the product that he no longer had time to deliver that day due to the delays. He used a forklift to perform the activity. Claimant testified that he was in pain the whole time he was working that day and asked the customers to perform the unloading. On his way back, he contacted Concentra. He was asked questions, including whether he had been exposed to COVID-19. Claimant disclosed that he had been at the VA Hospital, after which he received a call that he might have been exposed. Concentra advised that they would be unable to see him for an exam until after a fourteen day self-quarantine.

8. Claimant returned to the Employer's facility and advised the management that he could not unload the trailer. Claimant stated he later communicated with the Human Resources department for Employer by email, specifically the HR Consultant (J.B.), regarding the accident and incident and the fact that Concentra refused to see him for the next two weeks due to COVID-19 exposure. Since Claimant failed to receive a response from HR, he consulted with his personal provider, Dr. Tutt. He was provided with an appointment for the following Monday. Claimant stated that he did not discuss the work injury with his supervisor because he considered that he had a "hostile work environment" and was not getting along with his supervisor. Specifically, he discussed that his supervisor had threatened him not to make any further complaints about any issues about the company work or the other workers. He therefore would only discuss matters directly affecting his work, schedule or hours, not his medical conditions. As found, Claimant is credible in his testimony.

9. Claimant's direct supervisor testified that he provided text messages that he had kept from communications between himself and "[Claimant's first name] Driver," who he stated was Claimant.[4] The texts included several from June 2020, when Claimant had discussed a work-related back injury that subsequently resolved on November 9, 2020. On Monday, October 26, 2020 Claimant sent the following text to his supervisor:

> Claimant:
>
> Good evening Sir, I have a problem. I was informed today that I may have been exposed to vivid [sic.] 19 at the VA where I go for some of my therapy sessions.
>
> I will begin a new test and screening tomorrow, but not sure how things are handled at work??? I'm being told I should self quarantine for 2 weeks but need to communicate with you.
>
> …

[4] Exhibit 0, bates 75-89.

I attempted my therapy, but was turned away until I complete my screening period and am determined to be safe.

Supervisor:

... If you are not showing symptoms you can come to work.

Claimant:

Do I request sick time, or PTO. I have a mild grade fever and have felt a little sluggish since Friday morning. I need to go to clinic for test and first screening tomorrow, I'd like to request time off.

Supervisor:
Ok let me know when you plan to be back.

Claimant:
I will speak with doctors and keep you informed, thanks Sir.

On October 28, 2020 Claimant sent his supervisor a text stating:

Claimant:

Hello Sir, just spoke with Mr. P[HR] and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there. I will make every effort to keep you informed as soon as I get answers myself.

10. On October 29, 2020 Claimant mentions that he may be seeing a specialist but when questioned by his supervisor for what, he failed to respond. The October 30, 2020 text references that Claimant had submitted information addressing further medical concerns to HR. This was repeated on November 2, 2020, stating that he had texted the information to the HR Consultant. On November 3, 2020, though it seems that the texts are from a different phone or text stream.

11. Claimant responded on Friday, Oct 30, 2020 as follows:

Claimant:
Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns. But on a more pressing scale, I am unable to enter the Paylocity program to enter medical leave for this week, or next. Can you please assist and enter hours for me? Thanks.

12. It is not apparent from the texts that the supervisor responded to the above text based on the provided texts. On Monday, Nov 2, 2020 Claimant sent his supervisor a follow-up text:

Claimant:
Good afternoon Sir, my primary doctor states my fever has returned and my blood pressure is extremely high, so they are continuing the quarantine for now. Other medical information has been sent to HR.

Supervisor:

[Claimant] Hr will be calling you today. They said they haven't heard from you?

Claimant:
Ok, I have been texting Ms. [HR Consultant]'s number all my information.

Supervisor:
Make sure you speak with her today please.

Claimant:
I will be expecting and awaiting her call.

Claimant:
[Supervisor] I tried to call Ms. [HR Consultant] at 801-349-2595 but got no answer. Not sure why I can't reach her for follow up.

Supervisor
That is the correct number so I'll let her know.

Claimant:
Thanks Sir

13. On Tuesday, Nov 3, 2020 the supervisors' texts screen show:

Claimant:
Sorry, I can't talk right now.

14. The next text in the exhibits shows "Text Message, Friday 7:41 AM." It is suggested by the placement of this text that since it is on the same screenshot as the prior November 3, 2020 text, that it would be Friday November 6, 2020. It seems to be addressed to the HR Consultant. This text does not display as the other text sent by Claimant in a grey box, but in green, like the texts from the supervisor. It looks like a copy and pasted text so it may be from October 30, 2020. The text states as follows:

Claimant:
Good morning Ms. [HR Consultant], I'm writing to inform you I may have suffered an OJI. I fell on the ice last Friday in the company parking lot as I was getting ready for driving at 2am. I believe I may have injury to my

Then the message is cut off and continues "necessary by my medical providers." Then another cut off portion states "I believe the hernia problem is the…" and again it is cut off. Following these partial messages, another message from Claimant to his supervisor on "Wednesday at 3:03 PM" states:

Claimant:
Hey [supervisor], I finished sending the rest of those messages to Ms. [HR Consultant] myself. Have a good evening.

15. This ALJ infers from the texts above that Claimant likely authored the texts but, whether the text messages were truly authored at the times suggested by the order

of the list provided by the supervisor is in question. Some texts were clearly sent to the supervisor by another individual such as the time reference of "Text Message, Friday 7:41 AM" as it looks different than the other texts and is in green instead of gray as other texts which are likely authored by Claimant. This ALJ finds that the texts under Finding of Fact numbers 9 through 14 are, in fact, texts sent by Claimant. This is supported by certain references made by Claimant on October 26 which stated that "I attempted my therapy, but was turned away until I complete my screening period." This is consistent with Claimant's testimony that he attempted to see someone at Concentra but was turned away due to his COVID exposure. It also follows that Claimant informed his supervisor on October 28 that he "just spoke with [HR] and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there." This is supported by the fact that Claimant was seen by Dr. Tutt on November 2, 2020. And on October 30 Claimant stated "Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns." From all this information, this ALJ finds that the copied text message listing "Text Message, Friday 7:41 AM" was more likely than not a text message originally sent by Claimant to the HR Consultant on Friday October 30, 2020, advising them of the prior Friday's work related slip and fall accident and clearly advised of the hernia problem, though the full text message was not displayed by the evidence submitted. However this is supported by Claimant's testimony listed above explaining how he was injured and reported the injuries, who's testimony as listed above in Findings of Fact 1 through 8 is found credible.

16. The last text dated "Today 8:18 AM," which this ALJ infers to have taken place around November 9, 2020, based on the supervisor's testimony and the employment records, detailing the Claimant's termination, is clearly addressed to multiple individuals, and states:

> Claimant:
> Good morning all, trying to get things off on a good note. Just need to get my final paycheck provided today as per Colorado guidelines. [Supervisor] I need my clipboard out of the truck, and I will be returning company products as well. [First unknown person] I'll need information on what I need to do to file my short and long term disability claim thru the insurance. [Second unknown person], you're right, Work Comp will take care of my OJI concerns. Thanks, [Claimant].

17. Claimant has a past history of several medical conditions. On June 26, 2016 Claimant was under the care of Dr. Charles Glass, a psychologist, due to a diagnosis of adjustment reaction with anxious features, relating to an on the job slip and fall injury in 2015 when he injured his right shoulder.[5] This care related to Claimant's fear of surgery and his past experiences with surgeries.

18. Claimant went through the Division Independent Medical Examination (DIME) process in 2017, as a result of his right shoulder injury in 2015.[6] The evaluation

[5] Exhibit P, bates 90-93.
[6] Exhibit T, bates 199-231.

included multiple conditions. The DIME physician identified no masses or tenderness in the abdomen.[7] The DIME documented examining the lower extremities showing muscle tone is diminished on gross inspection on the right side compared to the left. He found mild bilateral iliotibial-band tenderness on palpation, sitting straight leg raising was near full, with evidence of hamstring tension bilaterally. Surgery of the right shoulder occurred in April 2017.[8] The first documented work-related injury occurred on September 20, 2007, documenting thoracolumbar condition, for which he was given an impairment rating.[9] The DIME physician noted that the MRI of the lumbar spine showed a mild disc bulge from L4-S1 with moderate facet hypertrophy changes at L5-S1 but found that the lumbar spine condition was not related to the 2017 injury.

19. Claimant had a substantial right knee injury and surgeries resulting in a total right knee replacement (TKA) in January 2018.[10] Prior to surgery he was diagnosed with right knee osteoarthritis (OA) with retained hardware from prior ORIF for Tibial Plateau fracture and prior anterior cruciate ligament (ACL) reconstruction. In April 2018 Claimant complained of left foot problems and was diagnosed with a left foot second intermetatarsal space neuroma.[11]

20. Dr. Cebrian reported that on August 1, 2019 Claimant was seen at UCHealth Emergency Care by Dr. Matthew Zuckerman and Claimant reported that he had a past history of chronic low back pain.[12]

21. Past medical-history is positive for hypertension diagnosed in the mid-1990's, diabetes diagnosed in 2017 and blood clots experienced in 2015 related to contusions to the right lower extremity.[13]

22. Claimant underwent a Department of Transportation (DOT) physical on March 26, 2020. At that time, Nurse Kathy Okamatsu completed the Federal Motor Carrier Safety Regulation examination, including of the abdomen and lower extremities for any abnormalities. She advised that Claimant had no abnormalities for the abdomen or the extremities and met the federal standards but required periodic monitoring of hypertension, finding Claimant qualified to continue driving. The same nurse also performed the October 22, 2019 DOT exam, making similar findings.[14]

23. On August 31, 2020 Claimant established care with Dr. Jennifer Marie Tutt at Centura Health. Dr. Tutt stated that Claimant had hyperextended his left knee four weeks prior to the exam but his symptoms had been slowly improving since the incident.[15]

---

[7] Exhibit T, bate 223.
[8] Exhibit T, bate 229.
[9] Exhibit T, bate 202.
[10] Exhibit R, Kaiser medical records, bates 143-162; Exhibit S, bates 170-198.
[11] Exhibit R, bates 167-168
[12] Exhibit Y, bate 439.
[13] Exhibit T, bate 221.
[14] Exhibits 5 and 5B.
[15] Exhibit U, bates 236.

24. Claimant returned to Dr. Tutt on November 2, 2020. Dr. Tutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. She suspected Claimant has an inguinal hernia so she ordered an ultrasound of the groin and also a referral to general surgery. She also placed a referral to orthopedic surgery.[16] Dr. Tutt assessed the following: [17]

> 1. Groin pan.
> Complains of having left groin pain and swelling for almost 2 weeks.
> Symptoms occurred after he slipped on the ice in a parking lot.
> The swelling/bulging gets worse and more painful with deep cough.
> Concerned he may have a hernia. Has a history of a right-sided hernia requiring surgery 12 years ago.
> Minimal pain at rest however with a cough pain can be quite severe. Has been taking Aleve with only partial relief.
>
> 2. Knee pain.
> C/o having left knee pain x 3-4 months.
> Injured his knee by twisting/hyperextending it several months ago.
> At that time had persistent swelling and pain. His symptoms gradually improved with time and using Voltaren gel.
> Reinjured his knee 10 days ago after slipping on ice.
> His current pain is worse than it was before. At rest his pain is a 6 out of 10.
> Has been taking Aleve with partial relief.

25. Respondents completed a First Report of Injury (FROI) on November 6, 2020 documenting that Respondents were notified of the work related injuries on November 3, 2020 regarding injuries to Claimant's knee and groin due to a fall. They reported the date of injury as October 22, 2020[18] and stated that was Claimant's last day of work. The form was completed by an HR Employer Representative, the HR Consultant, which noted Claimant's average weekly wage as $1,180.00.

26. An Employer Termination Slip was issued on November 9, 2020, stating that Employer was unable to accommodate Claimant's light duty restrictions and Claimant was formally terminated from employment with Employer as of November 9, 2020.[19]

27. Claimant was first seen at Concentra on November 9, 2020 by Nurse Kathy Okamatsu. The history reported was that Claimant was in the process of moving items from his personal truck to the company truck, while walking on the icy parking lot. He slipped on the ice, falling forward and landing on both knees but that he did not strike his head. Shortly thereafter, Claimant used both hands to turn the crank arm of his truck to move the landing gear, while lowering the high trailer and had a sudden onset of pain in the left groin. On exam Nurse Okamatsu found tenderness over the left lateral collateral ligament, over the medial collateral ligament and diffusely over the posterior knee. Upon palpation of the left knee she found crepitus and that Claimant had abnormal flexion and

[16] Exhibit U, bates 259.
[17] Exhibit U, bate 261.
[18] Instead of the correct date of October 23, 2020.
[19] Exhibit L, bate 57.

extension while performing range of motion, though without pain. She found mild swelling and tenderness of the right knee proximally to the patella. She also observed mild limping. Upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. She assessed that Claimant had a strain in the left groin, and bilateral knee injuries. Nurse Okamatsu made a causality determination, stating that it is at least 51% likely this condition is a result of exposure at work. She ordered an MRI of the left knee and an ultrasound of the abdomen, as well as x-rays of the bilateral knees. She provided restrictions of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling.

28. Claimant had a limited abdominal ultrasound of the left groin area, on November 9, 2020, which showed a large indirect inguinal hernia.[20] This was pursuant to Nurse Okamatsu's referral. Also on November 9, 2020, Claimant obtained an MRI of the left knee, also pursuant to Nurse Okamatsu, which showed a horizontal tear of the left knee medial meniscus of the posterior horn, mild to moderate medial compartment arthritis, subchondral edema of the medial tibial plateau, moderate patellofemoral compartment osteoarthritis with some moderate to high-grade involvement of the central to lateral trochlea, subchondral edema, and left knee joint effusion.[21]

29. On November 11, 2020, Dr. Thomas Corson reviewed the MRI results with Claimant, which revealed a left medial meniscus tear of the posterior horn and the ultrasound reveals a reducible hernia. Dr. Corson reported Claimant's history of "significant PTSD and severe anxiety (he became tearful and anxious upon hearing the results and the likelihood of needing surgery for the hernia and possibly the meniscus. He sees a psychiatrist for his PTSD and says he was going to need to see him after hearing this news. He has a significant phobia of surgery." Claimant also reported that his right knee was still causing him a fair bit of discomfort as well. On exam Dr. Corson found reducible hernias on both the right and left inguinal sites. He also found swelling of the left knee over the medial joint line and tenderness as well as altered gait. He noted that Claimant was anxious, concerned, quiet and tearful. Dr. Corson modified restrictions to include 5 lbs. lifting occasionally and may not walk on uneven terrain or climb ladders. Claimant was referred to Dr. Robert Glass, psychologist (to assist Claimant with severe anxiety due to likelihood of surgery); to a general surgeon for the hernia, to an orthopedic surgeon at Steadman Hawkins in Vail, Dr. Hackett, for the knee conditions and to physical therapy.[22]

30. Employer sent Claimant a COBRA letter dated November 16, 2020 advising Claimant that he would no longer be entitled to health insurance benefits from Employer as of his termination on November 30, 2020. If he wished to continue health benefits under COBRA beginning December 1, 2020, he would be required to pay a premium of $1,172.61 per month to cover medical, dental and vision benefits.

[20] Exhibit U, bate 318.
[21] Exhibit U, bates 333-334.
[22] Exhibit V, bates 358-362.

31. Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed.[23] The Notice of Contest (NOC) showed a date of injury as October 22, 2020[24], consistent with the FROI filed by Employer. It is noted that the claim number on the NOC of "5153276" is the correct one for this claim, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim.

32. Employer's Statement, which is dated December 1, 2020 and signed by HR Consultant, stating that Claimant was no longer employed as of October 30, 2020.[25] It shows that as of June 1, 2020 Claimant's weekly earnings were $1,191.71 and Claimant worked 40 hours a week.

33. Dr. Charles Glass documented on December 3, 2020 that Claimant was interested in pursuing psychological evaluation and treatment but appointments were only being conducted by telehealth because of the Coronavirus pandemic and Claimant did not have the technical capability to have telehealth appointments.

34. Claimant returned to Concentra for follow-up on December 8, 2020. Dr. Corson examined Claimant, and palpated reducible right and left inguinal hernias. He found right knee swelling, tenderness diffusely over the anterior knee, over the lateral joint line, over the medial joint line, in the undersurface of the patella, in the inferior pole patella, on the distal patella tendon, in the mid portion of the patella tendon and in the superior pole patella, with limited range of motion in all planes. Dr. Corson found swelling of the left knee at the medial joint line, the patella, with tenderness over the medial collateral ligament, diffusely over the medial knee and diffusely over the posterior knee, in addition to crepitus and limited range of motion in all planes. He stated that MMI was unknown because he was awaiting specialist input. He assessed acute medial meniscal tear of the left knee, injury to the right knee and inguinal hernias. Dr. Corson stated that the objective findings were consistent with history and work-related mechanism of injury.

35. On December 15, 2020 the Division issued an Urgent Notice Requiring Immediate Response. It notified Respondents that the period for filing a timely position statement had expired and that they were potentially in a penalty situation, as an admission or denial had not been filed with the Division. As found, Respondents complied with the requirement to file a Notice of Contest on November 19, 2020, though Division may have rejected it due to discrepancies of the date of injury.

36. On December 22, 2020 Dr. Corson again evaluated Claimant and continued to provide work restrictions of lifting up to five pounds, pushing and pulling up to fifteen pounds no crawling, kneeling, squatting, climbing or walking on uneven surfaces.

37. Claimant filed a Notice of One-Time Change of Physician & Authorization form on January 5, 2021 requesting a change from Dr. Corson to Dr. Sobky. On January

[23] Exhibit 10.
[24] Instead of the correct date of October 23, 2020.
[25] Exhibit 9.

6, 2021 Respondents denied the change of physician as Dr. Sobky was not on the designated provider list. Attached to the letter was a designated provider list but nothing on the list or document showed this had been provided to Claimant. Claimant testified that he did not receive the list until he received the January 6, 2021 letter. As found Respondents failed to use the correct form required by the rules as there is no certificate of mailing nor is it signed by Claimant. As further found, the designated provider list was not provided in a "verifiable manner"[26] as required by the rules. It is also found that Claimant filed the One-Time Change of Physician request within ninety days of the date of the injury. The deadline was January 21, 2021, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A). Therefore, Claimant is entitled to a one-time change of physician under this provision. Claimant testified that after he filed the Notice he changed provider to Dr. Sobky who took over care.

38. Dr. Kareem Sobky of HealthOne/OrthoOne, of Colorado Limb Consultants, evaluated Claimant on January 13, 2021 for the bilateral knee problems. He obtained x-rays that showed a total right knee arthroplasty in good position, no sign of obvious complications though a small fleck of bone or cement at the superior pole of the patella, but that the implants seemed to be stable. He also reviewed the left knee MRI, which he read as showing a medial meniscus tear, full thickness chondral loss, full thickness chondral loss of the medial femoral condyle. Dr. Sobky referred Claimant for physical therapy for edema control, strengthening of the quads, hip girdle, stabilization of the bilateral knees, and modalities twice a week for six weeks.

39. On January 15, 2021 Insurer filed an Amended Notice of Contest, which stated that it was "refiled to correct DOL [date of loss] to 10/23/2020." It included the claim number as "5153276," which is the correct workers' compensation claim number in this matter.

40. Claimant was evaluated by Dr. Anthony Canfield first on February 23, 2021 for the bilateral inguinal hernias. It is inferred that this was pursuant to a referral within the chain of referral as the "Workmen's Comp. coordinator" was present during the evaluation. On exam, Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva but the right side was uncomfortable but he did not feel a hernia on the right. He ordered a right sided dynamic ultrasound to rule out possible right groin recurrent right inguinal hernia. Dr. Canfield on exam found Claimant was negative for back pain or joint stiffness and had a steady gait. He stated that the right and possibly the left inguinal injuries were work related. On February 24, 2021 he filed a request for surgery authorization scheduled for March 18, 2021 at Presbyterian St. Luke.

41. Claimant underwent an MRI of his right knee on March 3, 2021. The MRI showed low signal intensity thickening and internal architectural distortion of the quadriceps tendon; longitudinal clefts of hyperintensity at the patellar insertion consistent with partial tearing, overall comprising approximately 15% of the cross-sectional

[26] Exhibit M, bate 58-59.

circumference. The right knee showed signs of mild proximal tendinosis without signs of a tear.[27]

42. Dr. Sobky assessed Claimant again on March 12, 2021. He read the right knee MRI, which showed an interstitial tear of the distal lateral quadriceps but no avulsion, loosening of the prosthesis or fracture of the prosthesis, no patellar tendon or quadriceps tendon avulsion. He found no significant effusion at that time. Dr. Sobky stated that Claimant continued to have significant bilateral weakness of the lower extremities, significant quadriceps atrophy of the right lower extremity, dysfunction and derangement of the left knee, tear of the medial meniscus of the left knee, and noted that Claimant was anticipating hernia surgery the following week. Dr. Sobky advised that he would take additional x-rays of the right knee on his follow up visit to determine what other treatment would be needed but that he should continue with physical therapy.

43. On March 25, 2021 Dr. Alexandra McKenzie issued a report following a limited ultrasound of the right inguinal area. She found no definite evidence of a right inguinal hernia, stating that the ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan for further evaluation.

44. Dr. Corson stated on March 30, 2021 that Claimant's general surgeon, Dr. Canfield, had ordered a CT of his abdomen. He also documented that the MRI of the right knee showed some particle disease, but did not have the actual reports to review. He continued to state that the objective findings were consistent with history and work-related mechanism of injury. Dr. Corson continued to provide work restrictions consistent to those provide in December 2020.

45. On April 20, 2021, Dr. Carlos Cebrian authored an independent medical evaluation (IME). Respondents retained Dr. Cebrian, to conduct an IME evaluation which took place on April 5, 2021. Dr. Cebrian opined that Claimant's alleged mechanisms of injury did not support that he suffered a work injuries on October 23, 2020. Dr. Cebrian addressed the four areas of complaint in order. Regarding the left knee, Dr. Cebrian noted that Claimant's left knee pain complaint began the summer of 2020 due to a hyperextension and twisting injury documented by Claimant's personal care provider Dr. Tutt. Claimant's described his mechanism of injury to Dr. Cebrian as falling forward onto his knees. Dr. Cebrian stated this would be consistent with a bruise or strain, but would not with a meniscal tear. Regarding Claimant's right knee, Dr. Cebrian opined that Claimant had a history of right knee pain and complaints, including a prior right knee arthroplasty. He noted that Claimant did not complain of right knee pain on his initial evaluation with Dr. Tutt and therefore, the right knee complaints were pre-existing, not related to the work injury. Regarding Claimant's hernia, Dr. Cebrian noted that there was no evidence of a right-sided hernia condition. Regarding the left-sided hernia, Dr. Cebrian noted that Claimant's hernia was very large on the initial sonogram, indicating that it was a pre-existing condition. Dr. Cebrian noted that Claimant has a history of hernia repairs including a repair in 2007. Dr. Cebrian concluded that the request for a left inguinal hernia repair was not causally related to the work injury.

[27] Exhibit Z, bates 460-461.

46. Dr. Corson, either by coincidence, communication with the nurse case manager, who was present by telephone throughout the visit, or by receipt of Dr. Cebrian's report, determined on April 20, 2021 that Claimant had reached MMI without need for further care or restrictions. However, his report still documented that the objective findings were consistent with history and work-related mechanism of injury. His assessment was as follows:

1. Acute medial meniscal tear, left, initial encounter (S83.242A)
2. Hernia, inguinal (K40.90)
3. Knee injury, left, initial encounter (S89.92XA)
4. Knee injury, right, initial encounter (S89.91XA)
5. Painful orthopaedic hardware (T84.84XA)
6. Strain of groin, left, initial encounter (S76.212A)

47. Dr. Cebrian testified at hearing consistent with his report. He stated that Claimant had a lengthy history of right knee complaints, including a right total knee arthroplasty. He testified that Claimant's right knee x-ray and other imaging studies did not show any damage to the hardware. With regard to the partial 15% quadriceps interstitial tear shown on the MRI, he stated that it was too small to be significant and was probably age related. Dr. Cebrian testified that Claimant's left knee meniscal injury pre-dated the work injury as documented in August and November of 2020 reports by Dr. Tutt. Dr. Cebrian testified that Claimant's left knee meniscal tear was consistent with a twisting injury not a straightforward fall to his knees initially described by Claimant. Lastly, Dr. Cebrian stated that there was no evidence suggesting that Claimant had or has a right-sided hernia and that inguinal hernias are generally the result of congenital non-work factors, that an upper body cranking motion would not put significant pressure on the groin in a way that would cause or worsen an inguinal hernia. Dr. Cebrian also noted that Claimant had not complained of lower back pain until approximately six months after the work injury. As found, while Dr. Cebrian opined that that the work related incidents of October 23, 2020 did not cause Claimant's injuries to his bilateral knees and inguinal areas, this ALJ does not find his above-summarized report and hearing testimony credible.

48. Claimant testified that when he slipped on ice, he had multiple items in his hands as he was transferring them from his personal vehicle to his work truck. He was unbalanced and was slipping and sliding on the ice. He fell forward but knows that he was unstable on the ice before he actually fell forward. He did not recall exactly how much twisting involved in the manner in which he was falling but knows there was some twisting involved before he fell forward. He also stated that while he was attempting to use the crank handle to lower the loaded trailer, he was slipping on the ice and had to attempt to lower the trailer multiple times before he was successful, all the while slipping on the ice, which was shown in the pictures he submitted.

49. Claimant agreed that he had prior problems with his knees, but not to the extent as after the October 23, 2020 injury. He did not deny that he had a hyperextension problem in the summer, but that it had resolved by the time of this injury, with the care he

had been previously given. He advised Dr. Tutt of that fact, which she documented. He also stated that his abdomen was sore after he fell but that the force involved in pulling on the hand crank was very significant because the trailer was overloaded with 68,000 lbs. of materials and he was slipping while performing the task. He disagreed with his supervisor that the crank was easy to move. Claimant's testimony is credible and persuasive.

50. Claimant testified that he believed he earned $28.00 per hour plus overtime and incidentals. His incidentals were overnight trip per diem of approximately $500.00 per week. He received approximately $125.00 for the phone, $80.00 for the meals and for hotels up to $300.00 per night. Claimant also testified that when Claimant was stranded for the weekend on a Saturday, that his hours were not compensated despite being away from home. He also testified that he did not return to work after the October 23, 2020 date of injury, that Employer made a mistake in first reporting the injury as having occurred October 22, 2020 and that he was formally terminated as of November 9, 2020 because of his restrictions.

51. Claimant's direct supervisor testified he was the warehouse manager for Employer. He stated that someone that has a work related injury can report to him but that Claimant did not. He conceded that employees could report work injuries directly to the Human Resources (HR) department. He would generally communicate with Claimant directly or by text. He identified [Claimant] Drive as Claimant in the text messages he provided, as listed above. He stated that he was not at the warehouse until approximately 7:30 a.m. each day. He stated that Claimant was paid hourly and was provide $20.00 per diem for breakfast and $60.00 per diem for dinner. The supervisor stated that generally he paid for hotels or motels with his own credit card, which was approximately $100.00 to $200.00 per night but that they would reimburse employees for out of pocket costs. The supervisor stated that the crank is not difficult to move but could not state what amount of strength or force in terms of pounds is required or if the weight of the trailer would change the amount of force involved, but that drivers had to do it every day.

52. Insurer's Senior Claims Representative testified that he had been involved in the claim since December 2020. The Claims Representative stated that Insurer received the claim on November 6, 2020. He stated that Insurer's records show that they sent in the Notice of Contest dated November 19, 2020 but that Division rejected the NOC because it did not have the correct date of loss that corresponded with the workers' compensation number. Insurer received correspondence from Division and documented a conversation with a Division representative regarding the NOC that was filed. Insurer then communicated with Employer to resolve the issue of the date of injury. After the Claims Representative was able to communicate with Employer and received further information, Respondent Insurer filed a new NOC on January 15, 2021. He advised that NOCs are required to be filed electronically with the Division pursuant to the rules but that hard copies are sent to the parties. The Claims Representative is found credible. As found, it is determined that Respondents filed a timely Notice of Contest in this matter, which was likely rejected by the Division due to the discrepancy in the date of injury. As

found, both NOCs provided Claimant notice of Respondents' position and no penalties are due for failure to admit or deny.

53. The wage records show that Claimant earned $30,367.87 from April 1, 2020 through October 15, 2020 for a weekly average of $1,073.61 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020, and that Employer reported Claimant's average weekly wages as $1,180.00 and $1,191.71 in two separate documents. Despite these facts, as found, it is determined that the fair approximation of Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, which includes the $80.00 per diem and the average earnings from April 1, 2020 through October 15, 2020. As of December 1, 2020, Claimant lost his health benefits, including medical, dental and vision. Claimant's COBRA benefits amounted to $1,172.61 per month or $270.60 per week [$1,172.61 x 12 / 52]. Therefore, as found, Claimant's AWW, beginning on December 1, 2020, was $1,424.21.

CONCLUSIONS OF LAW

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., 2020. 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 probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *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. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *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); *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).

Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). 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. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to

produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of his employment on October 23, 2020. Claimant slipped on ice in Employer's parking lot, injuring his bilateral lower extremities, including a meniscal tear on the left side and aggravating the right knee as well as causing a quadriceps injury on the right. The accident also resulted in injury to his bilateral inguinal areas causing a definite hernia on the left side and possible hernia on the right side, aggravating the preexisting right sided conditions. This is supported by Claimant's testimony, which will not be recited here, but is contained in Findings of Fact 1 through 8 as well as Findings of Fact 15, 48 and 49. This determination is also supported by the opinions of Dr. Corson, Dr. Tutt, Nurse Okamatsu, Dr. Sobky and Dr. Canfield.

Specifically it is found that Claimant injured his left knee, right knee and quadriceps, and bilateral inguinal areas on October 23, 2020 as a direct consequence of the fall and subsequent efforts in cranking motions to secure the trailer to the truck on October 23, 2020. Dr. Tutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. Dr. Tutt stated that Claimant had symptoms which occurred after he slipped on the ice in a parking lot including swelling/bulging in his abdomen, which gets worse and more painful with deep cough. She was concerned he may have a hernia, as he had a history of a right-sided hernia requiring surgery 12 years before, and reinjured his knee 10 days ago after slipping on ice. Nurse Okamatsu specifically found on exam on November 9, 2020 that Claimant had swelling and tenderness of the right knee proximally to the patella, left knee crepitus and abnormal flexion and extension, and upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. Dr. Corson specifically stated multiple times that the mechanism of the Claimant's injuries were the cause of the work related injuries. Upon examination on two different occasions, he found palpable reducible hernias on both the right and the left. Dr. Corson reviewed the left knee MRI, which he read as showing medial meniscus tear, full thickness chondral loss, and full thickness chondral loss of the medial femoral condyle. Dr. Corson reported that Claimant became tearful and anxious upon hearing the results of the diagnostic testing and the likelihood of needing surgery for the hernia and possibly the meniscus. Dr. Sobky also found that Claimant had a horizontal tear of the left knee medial meniscus and a right knee interstitial tear of the distal lateral quadriceps. This ALJ finds all of this evidence credible and persuasive.

With regard to the bilateral hernias, Dr. Corson continued to state that the Claimant's objective findings were consistent with history and work-related mechanism of injury, continuing to diagnose Claimant with inguinal hernias, left meniscal tear and right knee painful hardware, even at the time of releasing Claimant from care. Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva. On the right side Dr. Canfield noted that Claimant was uncomfortable but he did not feel a specific hernia at the time of exam but ordered a right sided dynamic ultrasound to rule out possible right groin inguinal hernia. The ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan, which has not yet taken place. Lastly,

Claimant underwent a DIME in 2017 and DOT physicals in both 2019 and 2020 with Nurse Okamatsu which included abdominal examinations, all three of which revealed no masses or abnormalities in the abdomen. Nothing in Dr. Cebrian's report or testimony persuades this ALJ that this is not the case. While Dr. Cebrian opined that that the work related incidents of October 23, 2020 did not cause Claimant's injuries to his bilateral knees and inguinal areas, this ALJ does not find that credible or persuasive. As found, based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that the October 23, 2020 incidents aggravated, accelerated or combined with his preexisting conditions to cause disability and need for medical treatment and therefore are compensable injuries. When considered in its totality, the ALJ concludes that the evidence in this case supports the reasonable inferences/conclusions that Claimant suffers from compensable left and right knee injuries including a right quadriceps injury, as well as bilateral inguinal injuries and psychological sequelae from the severe anxiety due to likely need for surgery, as recommended by Dr. Canfield.

Claimant has failed to show that his low back was injured in the claim as he did not have an exacerbation or aggravation of the low back as a result of the October 23, 2020 accidents. Claimant argues that the records from Dr. Sobky demonstrate a spinal injury and foot drop issue. However, no such records were persuasive in this matter. In fact, Dr. Canfield examined him on February 23, 2021 and found Claimant was negative for back pain or joint stiffness and had a steady gait. Medical records show that Claimant failed to mention problems with his back immediately after and subsequent to the injury for several months. The only source of prior medical records is the summary provided by Dr. Cebrian, which show that Claimant has a significant history of chronic low back problems dating back to 2007. The mere fact a claimant experiences symptoms following a work injury 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 (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, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function or on the job injuries, 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 symptoms and work activities. As found, it is determined that the October 23, 2020 accident did not cause Claimant's continuing low back pain and any evidence to the contrary is found not credible or persuasive. Claimant has failed to show by a preponderance of the evidence that the October 23, 2020 work injury caused any injury or aggravation of his preexisting chronic low back complaints.

Medical benefits

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), the employer has the right to choose the treating

physician in the first instance. It is well established that an employer does not lose the right to designate a treating physician merely because it denies a claim. *Yeck v. Industrial Claim Appeals Office,* 966 P.2d 228 (Colo. App. 1999). Once the employer has exercised its right of selection, the claimant may not unilaterally change physicians without prior approval from the respondents, by statute or an ALJ. Such permission may be express or implied, and a physician becomes authorized if the "employer has expressly or impliedly conveyed to the employee the impression" that he has permission to treat with the physician. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Here, the First Report of Injury states that Claimant provided notice of the injury as of November 3, 2020 and Claimant established care with Concentra as of November 9, 2020. As found, Respondents referred Claimant to Concentra upon notice of the claim. In fact, Claimant testified that he knew he needed to contact Concentra as of the day of injury and did so, but was unable to be seen because of his exposure to COVID-19, so he attended Dr. Tutt on November 2, 2020. This initial visit with Dr. Tutt is considered emergent care services and are compensable.

Claimant was then seen and treated at Concentra as of November 9, 2020. This indicates that Claimant chose to be seen by Concentra providers and the subsequent referrals of those providers. Therefore, as found, Claimant's authorized treating providers are Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Glass and the orthopedic specialist at Steadman Hawkins, Dr. Hackett, pursuant to Dr. Corson's referrals. As found, this is in addition to the diagnostic testing and treatment referred by these providers, including physical therapy, pool therapy, MRIs of the left and right knees, ultrasounds of the abdomen, CT of the abdomen prescribed by Dr. Canfield and the psychological care prescribed by Dr. Corson with Dr. Glass, which are all authorized, reasonably necessary and related to the injury.

It is unclear from the record if Dr. Corson, another authorized provider or if Insurer authorized Dr. Sobky to address Claimant's work related lower extremity injuries. However, Respondents conceded in their brief that Dr. Sobky was already an authorized treating physician in this matter. Therefore, this is taken as a judicial admission and Dr. Sobky is also an authorized treating physician.

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular

treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Dr. Sobky stated on March 12, 2021 that Claimant required continued physical therapy and was to proceed with hernia surgery. Dr. Canfield ordered a CT of his abdomen. Claimant has proven that the surgery, as recommended by Dr. Canfield, and for which he submitted a request for prior authorization, for the left inguinal hernia, is reasonably necessary and related to the compensable work injury of October 23, 2020. Claimant has proven that he requires further diagnostic testing as stated by the Dr. McKenzie, who performed the right inguinal limited ultrasound and recommended a CT scan for further evaluation, as well as Dr. Canfield, which this ALJ finds as reasonably necessary medical care. Claimant was found to have both swelling of the right knee and a quadriceps injury, which also need to be addressed by the authorized treating providers. Dr. Corson referred Claimant to Dr. Glass for psychological treatment due to Claimant's anxiety related to proposed surgery, and which is found reasonably necessary and related to the injury. All of this care did not take place but is found to be reasonably necessary and related to the injury.

Change of Physician

Claimant requested a one-time change of physician to Dr. Sobky. He filed his request on January 5, 2021, on the Division required form, which was certified to the claims handler. On January 6, 2021 Respondents' counsel sent a letter to deny the one time change of physician citing to W.C.R.P. Rule 8-5(A) and (B). Claimant filed an Application for Expedited Hearing related to that One-Time Change of Physician on January 11, 2021. Claimant attached to the Application for Expedited Hearing the Notice of One-Time Change of Physician to Dr. Sobky and Respondents' letter that cited to the rule.

Since the request was filed within the required 90 days pursuant to Sec. 8-43-404(5)(a)(III), C.R.S., which states specifically:

> An employee may obtain a one-time change in the designated authorized treating physician under this section by providing notice that meets the following requirements:
>
> (A) The notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement;…"

Claimant filed the Notice of One-Time Change of Physician & Authorization form on January 5, 2021 to request a change of provider from Dr. Corson of Concentra to Dr. Kareem Sobky at Presbyterian St. Luke. The deadline to request a one-time change of

physician was January 21, 2021, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A).

Respondents' cited in their denial letter WC.R.P. Rules 8-5(A-C), which state as follows:

> (A) Within ninety (90) days following the date of injury, but before reaching maximum medical improvement, an injured worker may request a one-time change of authorized treating physician pursuant to §8-43-404(5)(a)(III). The new physician must be a physician on the designated provider list or provide medical services for a designated corporate medical provider on the list. The medical provider(s) to whom the injured worker may change is determined by the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C).
>
> (B) To make a change pursuant to this Rule 8-5 the injured worker must complete and sign the form established by the division for this purpose. The injured worker shall submit the form to the employer by mailing or hand-delivering the completed form to the person(s) designated by the employer to receive the form. The person(s) so designated is listed on the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C) as the respondents' representative(s). The injured worker may, but is not required to, provide the form to the impacted physicians. In any event, the respondents' representative(s) shall notify the impacted physicians and the individual adjusting the claim of the change, unless an objection is submitted pursuant to paragraph (C) of this Rule 8-5.
>
> (C) If the insurer or employer believes the notice provided pursuant to this rule does not meet statutory requirements and does not accept the change of physicians, it must provide written objection to the injured worker within seven (7) business days following receipt of the form referenced in paragraph (B). The written objection shall set out the reason(s) for the belief that the notice does not meet statutory requirements.
>
> (1) If the employer or insurer does not provide timely objection as set out in this paragraph (C), the injured worker's request to change physicians must be processed and the new physician considered an authorized treating physician as of the time of the injured worker's initial visit with the new physician.
>
> (2) If written objection is provided and the dispute continues, any party may file a motion or, if there is a factual dispute requiring a hearing, any party may request that the hearing be set on an expedited basis.

Respondents cite to W.C.R.P. Rule 8-5(A), which in turn states that "The medical provider(s) to whom the injured worker may change is determined by the designated provider list given to the injured worker pursuant to Rule 8-2 or 8-5(C)." Respondents were on notice that the *pro se* Claimant may request a one-time change of physician.

W.C.R.P. Rule 8-2(A) states

> (A) When an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider. For purposes of this rule 8, the list will be referred to as the designated provider list.

(1) A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury.

(2) The designated provider list must include contact information for the insurer of record including address, phone number and claims contact information. If the employer is self-insured, the same contact information is required including the names and contact information of persons responsible for adjusting the claim.

Respondents had actual notice of the claim likely by October 30, 2020 but no later than November 9, 2020, as he was terminated on November 10, 2020 due to inability to accommodate his restrictions. Respondents failed to provide a copy of the designated provider list by November 16, 2020 in a verifiable manner. Respondents knew or should have known that they failed to provide a timely designated provider list within the seven days from the date of the injury or the date of notice of the injury, as required by rule and statute, pursuant to Sec. 8-43-404(5)(a)(I)(A), C.R.S. and W.C.R.P. Rule 8-2.

W.C.R.P. Rule 8-2(E), specifically states "If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." In this matter, Claimant selected Dr. Sobky as his authorized treating provider. There is no persuasive evidence showing that Respondents provided a designated provider list in compliance with the rules and statute. In essence, Respondents have conceded that they failed to meet the statutory requirements by not including the appropriate form. Therefore, Claimant's selection of Dr. Sobky makes Dr. Sobky the new authorized treating physician.

In *Berthold v. Indus. Claim Appeals Office of Colo.,* 410 P.3d 810 (Colo. App. 2017) the court held that "section 8-43-404(5)(a)(IV) applies only to changes of physician obtained under section 8-43-404(5)(a)(III)." Section 8-43-404(5)(a)(IV)(C) states that "[T]he originally authorized treating physician shall continue as the authorized treating physician for the injured employee until the injured employee's initial visit with the newly authorized treating physician, at which time the treatment relationship with the initially authorized treating physician shall terminate." Here, Claimant filed the Notice of One-Time Change of physician on January 5, 2021 and was evaluated by Dr. Sobky on January 13, 2021. Therefore, the termination provision of the statute requires the termination of the relationship with Dr. Corson happened as of January 13, 2021.

Respondents argue that Claimant waive the right to have this issues addressed as the issue was not addressed in Claimant's post hearing position statement or brief. The respondents do not contend they submitted a designated provider list in compliance with the statute until they attached it to the January 6, 2021 denial and objection to the request for a change of physician. The ALJ noted Rule 8-2(A)(1) specifies the list must be given to the claimant within seven days following the date the employer received notice. The sanction applicable to a failure to timely provide the list involves passing to the claimant the authority to select a physician or chiropractor of the claimant's choosing. See *In re Claim of Austin vs. Wells Fargo*, W.C. No. 4-973-614-05, ICAO (April 20, 2018).

As found Claimant filed the One-Time Change of Physician request within ninety days of the date of the injury in compliance with the rules. A one-time change of physician deauthorizes or terminates Dr. Corson and the Concentra as the authorized treating providers pursuant to statute. Therefore, it is concluded, Claimant has shown by a preponderance of the evidence that he is entitled to a one time change of physician to Dr. Sobky.

While Respondents argue that Claimant reached maximum medical improvement, no evidence was provided showing that Dr. Sobky placed Claimant at MMI.

"Section 8-42-107(8)(b)(I), C.R.S., provides that 'an authorized treating physician shall make a determination' as to the achievement of MMI. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo.App. 2002). A determination of MMI by an authorized treating physician terminates a Claimant's ability to seek further care without a determination by a Division of Workers' Compensation Independent Medical Examiner's (DIME) opinion pursuant to Sec. 8-42-107(8)(b)(II), C.R.S., which states in pertinent part "If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2…" While Dr. Corson did state that Claimant was at MMI on April 20, 2021, Dr. Corson was no longer Claimant's ATP by January 13, 2021, the first time Claimant was evaluated by Dr. Sobky. Therefore, Dr. Corson was no longer Claimant's ATP and Respondents' reliance on his reports after January 13, 2021 are in error and void or stricken.

Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). 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). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v.United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

As found, Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, and Claimant's AWW beginning on December 1, 2020 is $1,424.21. Respondents filed the FROI on November 6, 2020 reporting Claimant's average weekly wage as $1,180.00 and an Employer's Statement reporting a wage of 1,191.71. Employer conceded that Claimant received a wage increase on June 1, 2020 to $27.50 per hour and that Claimant would also travel with overnights at least once per week. Respondents also conceded that Claimant would be provided a per diem of $20.00 for breakfast and $60.00 for dinner for a total of $80.00 per week. The wage records show that Claimant earned $30,367.87 from April 1, 2020 through October 15, 2020 for a weekly average of $1,073.61 from April 1, 2020 through October 15, 2020 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020 but determined that the fair approximation, despite the increase, is $1,073.61 plus the per diem of $80.00 for a total of $1,153.61 as of the date of the injury. Pursuant to the COBRA letter Claimant's health benefits were terminated as of November 30, 2020. The cost of continuing health benefits, beginning December 1, 2020, was $1,172.61 per month, $270.60 per week, which would increase the average weekly wage to $1,424.21. The ALJ concludes this methodology of calculating Claimant's AWW is the most accurate, appropriate, and fair approximation of Claimant's AWW.

Temporary total disability benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

Respondents argued that if the claim was deemed compensable, that Claimant's entitlement of temporary disability benefits should be terminated as of April 20, 2021 when Dr. Corson released Claimant to full duty. In *Archuletta v. Industrial Claim Appeals Office,* 381 P.3d 374 (Colo. App. 2016), the Colorado Court of Appeals addressed the applicability of the termination provisions enunciated in § 8-42-105(3), C.R.S. The Court specifically held that if the claimant receives a return to work from an attending physician prior to receiving TTD benefits, then TTD benefits cannot cease or be terminated because they never commenced. See also *Chavez v. Costco Wholesales, Inc.,* W.C. 5-096-055-003, I.C.A.O. (February 4, 2022). Further, since Dr. Corson was not Claimant's ATP after January 13, 2021, Dr. Corson's opinion regarding MMI is not compelling, especially in light of Claimant requiring further surgery and treatment that has not yet taken place and has been deemed authorized, reasonable, necessary and related to the October 23, 2020 injury.

As found, Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning October 23, 2020 as Claimant testified that he was able to perform his job on October 22, 2020 and on October 23, 2020 he was not able to perform all of his activities. He specifically testified that he had to request that the customers unload the truck for him. He was unable to work after that date. Further, after he was provided restrictions by the Concentra ATP, Nurse Okamatsu, of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling, Employer issued a termination slip stating that they were unable to accommodate Claimant's restrictions. As found, Claimant's testimony is found credible and the medical records in this case document that Claimant was continually kept on restrictions by Dr. Corson through January 13, 2021 when Dr. Sobky took over care. Dr. Sobky's last note on March 12, 2021 indicated that Claimant would be proceeding with surgery the following week. Dr. Sobky also mentions that Claimant was having significant amounts of dysfunction and limping at that point, with no mention of changing Claimant's restrictions. Claimant is entitled to TTD beginning October 24, 2020 until terminated by law or otherwise released to work or placed at MMI by Claimant's new ATP, Dr. Sobky, as of January 13, 2021.

Penalties

Claimant argues that since the Division issued a letter dated December 15, 2020, stating that Division had not received a timely admission or denial from Respondents, that Claimant is entitled to penalties pursuant to alleged violations of Section 8-43-203(1)(a), C.R.S. and W.C.R.P. Rule 5-2. Section 8-43-203(1)(a) states that "the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…" W.C.R.P. Rule 5-2 states in pertinent part:

> (C) The insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division. If an Employer's First Report of Injury should have been filed with the Division, but wasn't, the insurer's statement concerning liability is considered to be due within 20 days from the date the Employer's First Report of Injury should have been filed. The date a First Report of Injury should have been filed with the Division is the last day it could have been timely filed in compliance with paragraph (B) above.
>
> (D) The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation or Dependent's Notice and Claim for Compensation.
>
> (E) A statement regarding liability is required for any claim in which a division-issued workers' compensation claim number is assigned or a First Report of Injury should have been filed pursuant to paragraph (B) of this rule. A statement regarding liability shall not be filed without a First Report of

> Injury, Worker's Claim for Compensation, or Dependents Notice and claim having been successfully filed and assigned a workers' compensation claim number. A first report of injury must be filed prior to a notice of contest being accepted by the division.

This ALJ infers from Claimant's argument that Claimant is stating that he did not have notice of the denial. However, Claimant failed to state that he did not receive the Notice of Contest dated November 19, 2020 and, in fact, confirmed his address as stated on the Notice of Contest. Pursuant to W.C.R.P. Rule 1-4(1)(A), proper service is to be made by mail. In *Bowlen v. Munford*, 921 P.2d 59, 60 (Colo. App.1996) the court acknowledged the rule that whenever a document is filed with the Division, a copy of the document shall be mailed 'to each party to the claim'; *Kuhndog, Inc. v. Ind. Claim Appeals Office,* 207 P.3d 949 (Colo. App. 2009).

Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed. The Notice of Contest had the correct claim number of 5-153-276, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim. While the Division may have rejected the NOC due to the incorrect date of injury, the NOC served to give notice to Claimant regarding the denial of the claim.

An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise Claimant of the pendency of the action and afford Claimant an opportunity to present a response. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Schmidt v. Langel*, 874 P.2d 447, 451 (Colo.App.1993).

Due process does not require that the method of providing notice be absolutely certain to effect notice in every instance; it only requires that the method be reasonably calculated to effect notice to Claimant. *Kuhndog, Inc. v. Ind. Claim Appeals Office, supra.* Further, the record indicates, and Claimant does not contest, that Claimant was provided actual notice, as he provided a copy of the NOC in his Exhibit packet[28]. Accordingly, the service made in this instance was not deficient. *EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office*, 74 P.3d 516, 518 (Colo.App.2003) (when there is no indication that the prescribed method of notice is jurisdictional, actual notice satisfied due process).

Further, under Sec. 8-43-203(2)(a), an employer "may become liable" to Claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The phrase "may become liable" means imposition of penalties under Sec. 8-42-203(2)(a) is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home,* 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter

[28] Exhibit 10.

future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office,* 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). This has not occurred in this case. The Claims Representative testified that the NOC was filed timely on November 19, 2020 and this is credible.

Claimant failed to prove Employer should be penalized under Sec. 8-43-203(2)(a), C.R.S as there was no harm and, since Claimant received actual notice of the denial, there is no need to address the issue of the cure provision in this matter. The Claimant's claim for penalties is denied and dismissed.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2020 causing injuries to his bilateral knees, right quadriceps and bilateral inguinal injuries, including the sequelae of those injuries.

2. Claimant's claim of a lumbar spine injury or aggravation is denied and dismissed.

3. Respondents shall pay for the authorized, reasonable and necessary medical benefits to cure or relieve the effects of Claimant's industrial injuries of October 23, 2020, including all care, referrals through the Concentra system, diagnostic testing and therapy as stated above, including Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Sobky, Dr. Glass, Dr. McKenzie, Dr. Tutt (for only the emergency visit of November 2, 2020), Denver Integrated Imaging, Health Images Cherry Creek, Presbiterian St. Lukes' Medical Center Diagnostic Imaging Department and the orthopedic specialist at Steadman Hawkins, Dr. Hackett.

4. Claimant has proven by a preponderance of the evidence that he is entitled a one-time change of physician pursuant to Sec. 8-43-404(5)(a)(III) and (IV), C.R.S. to Dr. Kareem Sobky at Presbyterian St. Luke as his new authorized treating physician from January 13, 2021 forward, and terminating the relationship with Dr. Corson and Concentra. Any actions taken by Respondents in reliance of a Concentra provider placing Claimant at MMI after January 13, 2021 is void and stricken.

5. Claimant's average weekly wage as of October 23, 2020 is $1,153.61, for a temporary total disability rate of $769.07. Beginning December 1, 2020 Claimant's AWW is adjusted to $1,424.21, due to cancellation of his health insurance (COBRA), for a TTD rate of $949.47.

6. Respondents shall pay temporary total disability benefits from October 24, 2020 until terminated by law. Claimant is owed temporary total disability benefits from October 24, 2020 through November 30, 2020 in the amount of $4,174.95. Claimant is owed TTD from December 1, 2020 through the date of the hearing, August 27, 2021, in the amount of $36,622.41. TTD shall continue after that date until terminated by law.

7. Claimant's claim for penalties is denied and dismissed.

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

9. 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 the 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 this 17th day of February 2022.

Digital Signature

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that medical maintenance benefits in the form of 12 chiropractic visits recommended by Authorized Treating Physician (ATP) Greg Reichhardt, M.D. are reasonable, necessary and causally related to his August 30, 2017 industrial injury.

2. Whether Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Pre-Load Supervisor. On August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. He was immediately transported to Medical Center of the Rockies Emergency Department and underwent surgery to stabilize his condition.

2. Claimant subsequently underwent therapy, rehabilitation and pain management. He also received a prosthesis for his right upper extremity.

3. On November 12, 2018 Frederick Mark Paz, M.D. performed an independent medical examination of Claimant. He reviewed Claimant's medical history and conducted a physical examination. After considering the direct history provided by Claimant during this evaluation, the findings on physical examination and prior medical records, Dr. Paz concluded that it was medically probable that Claimant's traumatic right trans-humeral amputation was causally related to his August 30, 2017 accident. Furthermore, Claimant's posttraumatic stress disorder, depression, and headaches were causally related to the August 30, 2017 incident. Finally, Dr. Paz determined that Claimant had reached Maximum Medical Improvement (MMI).

4. On December 17, 2018 Authorized Treating Physician (ATP) Kimberly L. Siegel, M.D. determined that Claimant had reached MMI. Dr. Siegel assigned Claimant a 100% right upper extremity and a 14% mental permanent impairment. She did not assign Claimant a permanent impairment for his cervical spine because his cervical and back pain was myofascial in nature and reactive to the traumatic amputation. Moreover, an MRI of the cervical spine did not reveal pathology consistent with Claimant's symptoms. Dr. Siegel also determined that Claimant was entitled to receive medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

5. On July 19, 2019 Dr. Paz conducted a follow-up independent medical examination of Claimant. Based on his clinical assessments and review of prior records, he determined that Claimant's back symptoms were not causally related to an axial spine diagnosis. Specifically, Claimant's subjective symptoms were not consistent with a lumbar

spine diagnosis. Notably, the chiropractic treatments Claimant had received did not reduce his back symptoms and maintain his functional level of activity.

6. In an October 5, 2020 report Claimant's chiropractor Bruce W. Weber, D.C. recounted Claimant's neck and back condition. He explained that Claimant "had his arm taken off on a conveyor belt while working" for Employer on August 30, 2017. Dr. Weber detailed that Claimant was

> very sore today in neck and back, hard to turn his neck, coupling motion of spine with the loss of his shoulder is severe due to the lack of attachment points of his muscles of his scapula and then to the spine, there is severe asymmetry of his spine and pulling to opposite side. Headaches daily and very sore since he has not been adjusted to compensate for the constant, recurrent, pulling to his upper back due to the loss of his shoulder.

He remarked that Claimant was much better after an adjustment and had been miserable for four months when he was unable to obtain treatment.

7. Claimant explained that since reaching MMI he has been evaluated by ATP Greg Reichhardt, M.D. on a monthly basis. On March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches.

8. On April 2, 2021 Dr. Paz performed a Rule 16 Review of the requested 12 additional sessions of chiropractic treatment. In reviewing Claimant's medical records Dr. Paz considered a February 23, 2021 report from Dr. Reichhardt. Dr. Reichhardt had recorded that, on the evening prior to the examination, Claimant had fallen down two steps, 12 feet across the basement floor and struck his head on a cement wall. Claimant impacted the left frontal area, with no posttraumatic amnesia, loss of consciousness, disorientation, or confusion. Claimant noted that he has suffered neck pain since the February 22, 2021 accident. Based on the preceding medical history, Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable the fall Claimant sustained on February 22, 2021 was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

9. Claimant testified at the hearing in this matter about his need for additional chiropractic sessions. He remarked that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease.

10. On August 18, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Reichhardt. Dr. Reichhardt testified that Claimant's current symptoms include headaches, neck pain, thoracic pain and lower back pain. He also noted that Claimant continues to experience phantom limb pain associated with his right arm amputation. Dr. Reichhardt attributed the preceding symptoms to Claimant's August 30, 2017 industrial injury.

11. Dr. Reichhardt detailed that he disagreed with the opinions of Dr. Paz regarding the denial of Claimant's chiropractic treatment. He explained that, despite the success of an independent exercise program with the vast majority of his patients, Claimant's situation was unique because of his amputation. Specifically, Claimant suffers biomechanical challenges because the loss of his arm creates imbalances in the cervical and thoracic area as well as supporting and manipulating his prosthesis. Dr. Reichhardt summarized that "while I do follow the medical treatment guidelines, recommendation to try to focus people on an active independent exercise program, I do find that his condition represents an extenuating circumstance in that the usage of the chiropractic treatment would still be within the guidelines."

12. Dr. Reichhardt explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that "because of the potential for imbalance due to the loss of his arm and also associated with the use of the prosthesis and conditioning factors that may contribute to that, he has ongoing problems with his neck and upper back that warrant chiropractic treatment more so than the standard cervical strain." Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back.

13. Dr. Reichhardt also commented that Claimant developed migraines after his August 30, 2017 industrial injury. He determined that Claimant's condition involved his neck, either as a direct injury or as a result of excessive strain, and balance associated with his amputation and use of his prosthesis. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

14. In his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing "a lateral deviation of his upper thoracic spine due to the imbalance of muscle pull from side to side due to the loss of his shoulder acting as an attachment point to the muscles." He was laterally deviating his neck to the left shoulder and suffered pain with right lateral flexion, Dr. Weber noted that Claimant's was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to

his amputation. Specifically, Claimant's lower back was "concaving to compensate for the weight difference from one side to another due to the loss of his arm."

15. On January 7, 2022 the parties conducted the post-hearing evidentiary deposition of Dr. Paz. Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based upon his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that "there was no pathology which was causally associated with the symptoms in the cervical, thoracic, or lumbar spine . . . none of the symptoms were identified pathophysiologically to be clinically correlated with Claimant's [occipital headache] symptoms."

16. Dr. Paz also addressed Dr. Reichhardt's reference to imbalance created by the August 30, 2017 right arm amputation as a basis for additional chiropractic treatment. Initially, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. He noted that Dr. Reichhardt's "own testimony was that he really didn't have an explanation as to what structurally the explanation would be as to why there would be imbalance." Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

17. Claimant has demonstrated that it is more probably true than not that medical maintenance benefits in the form of 12 additional chiropractic visits as recommended by ATP Dr. Reichhardt are reasonable, necessary and causally related to his August 30, 2017 industrial injury. Initially, on August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. Claimant subsequently received therapy, rehabilitation and pain management. He also obtained a prosthesis for his right upper extremity. On December 17, 2018 ATP Dr. Siegel determined that Claimant had reached MMI and recommended medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

18. On March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches. Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable that Claimant's February 22, 2021 fall was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

19. Claimant credibly testified that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment

improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease. The medical records and persuasive opinion of Dr. Reichhardt support Claimant's testimony.

20. In an October 5, 2020 report Dr. Weber persuasively recounted that the coupling motion of Claimant's spine with the loss of his shoulder was severe due to the lack of attachment points of his muscles on his scapula and spine. Notably, there was severe asymmetry of his spine and pulling to the opposite side. Claimant experienced daily headaches and was sore in the absence of chiropractic adjustments to compensate for the constant, recurrent, pulling on his upper back due to the loss of his shoulder. Moreover, in his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing a lateral deviation of his upper thoracic spine because of the imbalance of muscle pull from side to side due to the loss of his shoulder that acted as an attachment point to the muscles. Dr. Weber noted that Claimant was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to his amputation.

21. Dr. Reichhardt persuasively explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that, because of the potential for imbalance due to the loss of Claimant's arm and the use of the prosthesis, he has ongoing problems with his neck and upper back that warrant chiropractic treatment. Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause[s] irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. He also commented that Claimant developed migraines after his August 30, 2017 industrial injury. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

22. In contrast, Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based on his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that there was no pathology causally associated with Claimant's symptoms in the cervical, thoracic, or lumbar spine. Furthermore, none of the symptoms were clinically correlated with Claimant's occipital headache symptoms. Finally, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

23. Based on Claimant's credible testimony, Dr. Weber's chiropractic records and the persuasive opinion of Dr. Reichhardt, Claimant has demonstrated that medical maintenance benefits in the form of 12 additional chiropractic visits are reasonable, necessary and causally related to his August 30, 2017 industrial injury. As an ATP, Dr. Reichhardt has consistently treated Claimant during the course of his claim and noted continuing aggravation to the structures in his neck and his back as a result of his right arm amputation. The amputation caused Claimant's left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. Claimant also developed migraine headaches as a result of neck and myofascial pain. Dr. Paz's contrary opinion that Claimant neck and back symptoms are unrelated to the August 30, 217 amputation is not supported by the medical records or persuasive evidence. Accordingly, Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

24. Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S. The record reveals that a medical maintenance benefit in the form of 12 additional chiropractic sessions was requested by ATP Dr. Reichhardt. The request was both unpaid and contested. As detailed in preceding sections of the present opinion, the benefit was ordered by the undersigned ALJ following a hearing initiated through an application for a hearing. Claimant is therefore entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

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. 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).

5. 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).

Additional Chiropractic Treatment

6. As found, Claimant has demonstrated by a preponderance of the evidence that medical maintenance benefits in the form of 12 additional chiropractic visits as recommended by ATP Dr. Reichhardt are reasonable, necessary and causally related to his August 30, 2017 industrial injury. Initially, on August 30, 2017 Claimant suffered a traumatic amputation of his right upper extremity while working with a piece of machinery. Claimant subsequently received therapy, rehabilitation and pain management. He also obtained a prosthesis for his right upper extremity. On December 17, 2018 ATP Dr. Siegel determined that Claimant had reached MMI and recommended medical maintenance benefits that included up to 40 chiropractic sessions to be reassessed every three years.

7. As found, on March 24, 2021 Dr. Reichhardt referred Claimant for 12 additional sessions of chiropractic treatment for his neck and shoulder related to ongoing occipital headaches. Dr. Paz concluded that 12 chiropractic sessions were not authorized. Specifically, it was not medically probable that Claimant's February 22, 2021 fall was causally related to his August 30, 2017 industrial accident. Dr. Paz also noted "the prior record does not document episodic neurologic vision changes associated with [Claimant's] headaches." Respondents subsequently denied Claimant's request for additional chiropractic treatment.

8. As found, Claimant credibly testified that chiropractic treatment improves his symptoms and provides immediate relief. Claimant explained that consistent chiropractic treatment also provides lasting benefits. Notably, when treatment is interrupted, it takes time to re-establish prolonged benefits. Claimant summarized that chiropractic treatment improves his function because he is more mobile, it is easier to maintain posture and his headaches decrease. The medical records and persuasive opinion of Dr. Reichhardt support Claimant's testimony.

9. As found, in an October 5, 2020 report Dr. Weber persuasively recounted that the coupling motion of Claimant's spine with the loss of his shoulder was severe due to the lack of attachment points of his muscles on his scapula and spine. Notably, there was severe asymmetry of his spine and pulling to the opposite side. Claimant experienced daily headaches and was sore in the absence of chiropractic adjustments to compensate for the constant, recurrent, pulling on his upper back due to the loss of his shoulder. Moreover, in his report of October 12, 2021 Dr. Weber detailed Claimant's imbalance as a result of his August 30, 2017 right arm amputation. He remarked that Claimant was experiencing a lateral deviation of his upper thoracic spine because of the imbalance of muscle pull from side to side due to the loss of his shoulder that acted as an attachment point to the muscles. Dr. Weber noted that Claimant was suffering muscle spasms with lateral flexion of his neck because of the loss in weight and counterbalance due to his amputation.

10. As found, Dr. Reichhardt persuasively explained that additional chiropractic treatment is necessary to augment Claimant's independent exercise program. He specified that, because of the potential for imbalance due to the loss of Claimant's arm and the use of the prosthesis, he has ongoing problems with his neck and upper back that warrant chiropractic treatment. Dr. Reichhardt detailed that Claimant requires additional chiropractic treatment because he experiences constant or at least regular intermittent stress to his upper back and neck. Chiropractic sessions relieve Claimant's symptoms associated with his imbalance and help him to remain functional. Notably, the imbalance created by Claimant's amputation "cause[s] irritation and aggravation to the structures in his neck and his back." Dr. Reichhardt summarized that Claimant's loss of the mass or weight on his right side caused his left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. He also commented that Claimant developed migraines after his August 30, 2017 industrial injury. Dr. Reichhardt reasoned that Claimant could have developed migraine headaches or occipital neuralgia as a result of the neck and myofascial pain associated with the accident.

11. As found, in contrast, Dr. Paz maintained that additional chiropractic treatment is not reasonable, necessary or related to Claimant's August 30, 2017 industrial injury. He noted that there were no objective findings that Claimant suffers from myofascial pain or that justify ongoing treatment of the cervical spine. Dr. Paz reasoned that, based on his clinical assessments at his independent medical examinations and considering Claimant's prior medical records, it was not medically probable that Claimant's back symptoms were causally related to an axial spine diagnosis. He detailed that there was no pathology causally associated with Claimant's symptoms in the cervical,

thoracic, or lumbar spine. Furthermore, none of the symptoms were clinically correlated with Claimant's occipital headache symptoms. Finally, Dr. Paz explained that there has been no "imbalance" detailed in any medical terms or defined in Claimant's history of medical treatment. Generally, the "imbalance" referenced by Dr. Reichhardt was insufficient to cause Claimant's back and neck issues or warrant additional chiropractic sessions.

12. As found, based on Claimant's credible testimony, Dr. Weber's chiropractic records and the persuasive opinion of Dr. Reichhardt, Claimant has demonstrated that medical maintenance benefits in the form of 12 additional chiropractic visits are reasonable, necessary and causally related to his August 30, 2017 industrial injury. As an ATP, Dr. Reichhardt has consistently treated Claimant during the course of his claim and noted continuing aggravation to the structures in his neck and his back as a result of his right arm amputation. The amputation caused Claimant's left side to be heavier and thus created a biomechanical imbalance for his neck and upper back. Claimant also developed migraine headaches as a result of neck and myofascial pain. Dr. Paz's contrary opinion that Claimant neck and back symptoms are unrelated to the August 30, 217 amputation is not supported by the medical records or persuasive evidence. Accordingly, Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

Recovery of Costs

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

> 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.

14. As found, Claimant is entitled to recover costs related to the litigation of a medical maintenance benefit pursuant to §8-42-101(5), C.R.S. The record reveals that a medical maintenance benefit in the form of 12 additional chiropractic sessions was requested by ATP Dr. Reichhardt. The request was both unpaid and contested. As detailed in preceding sections of the present opinion, the benefit was ordered by the undersigned ALJ following a hearing initiated through an application for a hearing. Claimant is therefore entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

ORDER

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

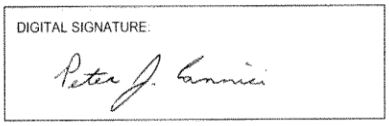
1. Claimant's request for medical maintenance benefits in the form of 12 additional chiropractic visits is granted.

2. Claimant is entitled to receive reasonable costs incurred in pursuing the medical benefit. Claimant shall submit the evidence of costs to the ALJ pursuant to §8-43-207 C.R.S.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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: February 17, 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

W.C. No. 5-148-535-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 4, 2022, in Denver, Colorado. The hearing was electronically recorded (reference: 1/4/2022, beginning at 1:45 PM, and ending at 2:35 PM)..

The Claimant was present in person and represented by [Redacted]., Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted]shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 13 were admitted into evidence, without objection. Respondents’ Exhibits A through S were admitted without objection. Respondents’ Exhibit B, p. 16 was admitted over objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was

filed, electronically, on January 12, 2022. Claimant filed no timely objections as to form. Therefore, the matter was ready for decision on January 19, 2022. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant has overcome the opinion of John Burris, M.D., the Division Independent Medical Examiner (DIME) by clear and convincing evidence, as to the date of maximum medical improvement (MMI); and, f not, whether the Claimant is entitled to post-MMI maintenance medical benefits.

FINDINGS OF FACT

'Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 64 year-old commercial accounts manager for the Employer.

2. Claimant sustained a prior work injury in November 2017. Claimant pulled herself up into a truck that did not have running boards and injured her chest, shoulder, back and right arm. (Ex. J. 292). Imaging showed degenerative changes. (Ex. G, pg. 251). After undergoing conservative treatment, Claimant was discharged at MMI on July 18, 2018 with no impairment rating. (Ex. G, pg. 255).

3. On October 30, 2019, Claimant sustained another prior work injury when she was cleaning snow off some vehicles and her right foot slipped on ice. She did not fall and was able to steady herself. She reported right low back pain radiating into her buttocks. (Ex. C, pg. 26). Claimant was referred for chiropractic and acupuncture treatment. (Ex. C, pg. 28). Claimant was placed at MMI with no impairment rating on December 6, 2019 by Dr. Gary Zuehlsdorff. Claimant reported that she had only a residual ache in her low back. (Ex. C, pg. 39-40).

4. In this claim, on June 22, 2020, Claimant reported to Dr. Sharon Walker at On the Mend that she pulled herself up into a super duty truck that did not have running boards on June 17, 2020. Claimant testified that she slipped when pulling herself up, but did not fall, and landed back on her feet. Claimant reported low back pain, right shoulder pain and upper extremity numbness. (Resp. Ex. C, pg. 42).

5. Claimant returned to On the Mend on June 30, 2020 and requested a referral back to her treating chiropractor from the prior 2017 work injury. (Ex. C pg. 47).

Claimant began treatment with Dr. Roger Smith for chiropractic care on June 30, 2020. (Ex. D, pg. 155).

6. Dr. Allison Fall performed a Respondents' IME on November 5, 2020. Dr. Fall opined that the mechanism of injury was unclear as there were some variations in the mechanism of injury as Claimant added that she had been pushing on doors which caused injury to her arm prior to attempting to pull herself up into the truck. After a review of the records and examination, Dr. Fall concluded that claimant sustained some myofascial pain as a result of grabbing the handle to pull herself up into the vehicle and then stepping back off. Dr. Fall noted that Claimant's examination was unremarkable and there were no signs of sacroiliac joint dysfunction or radiculopathy. Dr. Fall concluded that any mild muscular strain would have resolved. Dr. Fall noted claimant could pursue ongoing chiropractic treatment on her own. (Ex. B, pg. 24).

7. Claimant continued with conservative care with her chiropractor, Dr. Smith. (Ex. D, pg. 155 – 182). She continued with massage therapy at Vetanze Therapy. (Ex. E, pg. 199-212).

8. On April 6, 2021, Dr. Zuehlsdorff placed claimant at MMI. Dr. Zuehlsdorff opined that Claimant had undergone significant conservative care, including chiropractic care, acupuncture and some physical therapy. Claimant reported only 50% improvement after nearly ten months of treatment. Dr. Zuehlsdorff assigned a 14% whole person for the cervical spine and 18% whole person for the lumbar spine for a combined 29% whole person impairment. Dr. Zuehlsdorff did not recommend any maintenance care. (Ex. C, pg. 111-112).

9. Respondents requested a Division IME.

10. Dr. Burris performed a Division IME on July 20, 2021 and evaluated Claimant's right shoulder, cervical spine and lumbar spine. (Ex. A.). Dr. Burris opined that based on the reported mechanism of injury, the clinical notes, and diagnostic testing, claimant suffered minor lumbar and right shoulder soft tissue strains. (Ex. A, pg. 9).

11. Dr. Burris agreed with MMI as of April 6, 2021. Dr. Burris assigned no impairment rating. Dr. Burris concluded that claimant had completed exhaustive treatment exceeding the Colorado DOWC treatment guidelines without appreciable change in her subjective complaints or functional status. (Ex. A, pg. 9). Dr. Burris supported his opinion that Claimant's subjective complaints were out of proportion to the nature of the workplace event. Furthermore, Claimant's clinical course had not followed a typical physiologic pattern associated with an acute event. Dr. Burris noted that Claimant's diagnostic testing from the recent injury was essentially unchanged from testing predating the event. Dr. Burris opined that Dr. Zuehlsdorff's rating was not

supported by objective findings. (Ex. A, pg. 10-11). Dr. Burris did not recommend any medical maintenance care. (Ex. A, pg. 11).

12. Respondents filed a Final Admission of Liability on August 17, 2021, admitting to Dr. Burris's Division IME opinions. (Ex. 7). Claimant filed an Application for Hearing to overcome the opinions of Dr. Burris. (Ex. 9).

13. Claimant testified that while the mechanism of injury in her current claim was similar to the 2017 claim, her pain from the current claim was much worse overall and it severely impacted her whole body and function. Claimant testified that she did not have any residual issues from her 2017 or 2019 claims.

14. Claimant further testified that she felt she was not at MMI as she needed continued treatment with Dr. Smith, her chiropractor, for her work-related injuries. Claimant testified that she remained in pain and she was unable to do many of the things that she used to be able to do.

15. Claimant testified that Dr. Smith had recently begun to provide a new form of chiropractic treatment and Claimant was optimistic this treatment would improve her condition. She testified to date she had experienced some improvement in her pain and function from the new treatment and she wanted to continue this treatment.

CONCLUSIONS OF LAW

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

Overcoming the Division IME

a. A Division IME physician's findings concerning whether the claimant has reached MMI and regarding permanent medical impairment are generally binding unless overcome by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

b. While claimant testified that she believed she was not at MMI and required more treatment to reach MMI, Claimant failed to prove by clear and convincing evidence that Dr. Burris erred in his determination that Claimant reached MMI as of April 6, 2021.

c. After a review of the records, both Dr. Zuehlsdorff and Dr. Burris concluded that claimant had reached MMI as of April 6, 2021. Claimant offered no medical evidence that Dr. Burris's determination of MMI was incorrect. Claimant's subjective belief that she is not at MMI is insufficient to prove by clear and convincing evidence that Dr. Burris's determination of MMI was incorrect.

d. Similarly, claimant provided no medical records or testimony that the impairment rating assigned by Dr. Burris was incorrect and such evidence was unmistakable and free from serious or substantial doubt. Claimant relies on Dr. Zuehlsdorff's impairment rating to dispute Dr. Burris's impairment rating, but after a review of the records, this is merely a difference of opinion and does not amount to clear and convincing evidence. Furthermore, Claimant's testimony regarding her ongoing pain and lack of function does not constitute clear and convincing evidence that the Division IME made an error with respect to claimant's impairment rating.

Medical Maintenance Benefits

e. A claimant is entitled to post-MMI maintenance medical benefits if future medical treatment will be "reasonably necessary to relieve the claimant from the effects of the industrial injury or occupational disease even though such treatment will not be received until sometime subsequent to the award of permanent disability". *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1998). In deciding whether maintenance care is necessary there must be evidence which establishes "but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that [s]he will suffer a greater disability than [s]he has thus far." *Stollmeyer v. Industrial Claim Appeals Office of State of Colo.*¸916 P.2d 609, 610 (Colo. App. 1995).

f. Neither Dr. Zuehlsdorff nor Dr. Burris recommended any medical maintenance care. Dr. Fall opined that Claimant should pursue chiropractic care on her own.

g. Nonetheless, Claimant has continued to treat with her chiropractor for her low back condition. Claimant has testified that chiropractic treatment continues to help her. Claimant's testimony is credible that the chiropractic treatments from Dr. Smith is necessary to maintain her condition.

h. However, C.R.S. §8-42-101(3)(a)(III) provides that compensation for fees for chiropractic treatments shall not be made more than ninety days after the first of such treatments nor after the twelfth such treatment, whichever first occurs, unless the chiropractor has received level I accreditation.

i. Therefore, based on claimant's testimony, claimant has proven by a preponderance of the evidence that she is entitled to medical maintenance care for the chiropractic treatment by Dr. Smith subject to the limitations set forth by statute.

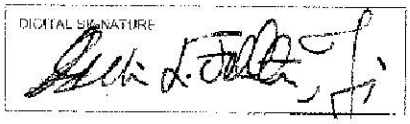
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant failed to prove by clear and convincing evidence that Dr. Burris erred in his opinions as to MMI and impairment rating. Claimant has not overcome the Division IME.

B. Claimant has proven by a preponderance of the evidence that she is entitled to medical maintenance care. Specifically, Claimant has proven she is entitled to chiropractic care, subject to the limits set forth in C.R.S. §8-42-101(3)(a)(III).

DATED this 21st day of February, 2022.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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

WC 5-148-535-003

OAC CERTIFICATE OF SERVICE

I hereby certify that on **February 22, 2022** a true and correct copy of the foregoing Order was served upon the following parties by email, to the addresses on file with the OAC, who shall provide copies to all other parties pursuant to OAC 16-G.

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us
cdle_medicalpolicy@state.co.us

Division of Workers' Compensation
DIME Unit
imeunit@state.co.us

Roger Fraley, Esq.
Irwin Fraley, PLLC
Rfraley201@comcast.net

Amanda Branson, Esq.
Pollart & Miller
Pm-oac@pollartmiller.com

/s/ Mary C.
Clerk - OAC

ISSUES

Whether the claimant has overcome, by clear and convincing evidence, the opinions of the Division-sponsored independent medical examination (DIME) physician that the claimant's cervical spine was not injured, and therefore no impairment rating was assigned to the claimant's cervical spine.

Whether the claimant has demonstrated, by a preponderance of the evidence, that her average weekly wage (AWW) should be increased for the period of February 1, 2021 through February 28, 2021, due to the loss of her health insurance.

FINDINGS OF FACT

1. The claimant suffered an injury at work on March 25, 2020, while working as a barista. On that date, the claimant was injured when she was struck by three boxes of frozen sandwiches that fell from a shelf. The claimant testified that she was struck on the back of her head near the base of her skull.

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

3. On March 27, 2020, Dr. McLaughlin ordered a head computed tomography (CT) scan. On March 31, 2020, a head CT showed no acute intracranial pathology. In addition to the head CT, x-rays were taken of the claimant's cervical spine. The x-rays showed no fracture or bone lesion, and no spondylolisthesis.

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

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

6. On April 23, 2020, the respondent filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits.

7. On May 4, 2020, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported that she felt very fatigued after working a full shift, with a headache and tightness in her neck. At that time, Dr. McLaughlin limited the claimant to working four hour shifts.

8. On June 25, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that the claimant suffered a contusion to the cervical and occipital area with a minor muscle strain. Dr. Bernton further opined that the claimant's continuing symptoms were likely the result of anxiety, and depression (with somatoform complaints). In addition, he opined that the claimant had reached maximum medical improvement (MMI) as of the date of the IME.

9. On July 31, 2020, Dr. McLaughlin released the claimant to full duty, with no work restrictions.

10. On August 31, 2020, Dr. McLaughlin referred the claimant to Brittany Matsumura for consultation. On September 14, 2020, the claimant was seen by Dr. Matsumura. At that time, the claimant reported occasional visual disturbances, increased migraine headaches, dizziness, and occasional memory issues. Dr. Matsumura noted the claimant's neurologic exam was normal. She recommended the claimant take propranolol to treat her headaches.

11. During his treatment of the claimant, Dr. McLaughlin identified the claimant's diagnoses as: headache and cervical strain.

12. Throughout her treatment with Dr. Matsumura, the claimant's diagnoses were identified as: post-traumatic headache, myofascial muscle pain, cervicalgia, and dizziness.

13. The claimant testified that she believes that both her head and neck were injured on March 25, 2020. The further claimant testified that since the injury she has had pain and issues with her neck range of motion.

14. The claimant's spouse testified that he and the claimant have medical insurance through the employer. He further testified that he believes that the health insurance was canceled in February 2021. The claimant and her spouse learned that their insurance was canceled when they attempted to fill a prescription. It is their understanding that the insurance was reinstated March 1, 2021. A similar situation occurred in June 2020, when the claimant was provided written notice that her health insurance was canceled. However, in February 2021, the claimant did not receive any written notice.

15. On April 19, 2021, Dr. McLaughlin determined that the claimant had reached MMI. At that time, Dr. McLaughlin assessed a whole person permanent impairment rating of 11 percent. This whole person impairment rating was reached by assigning six percent impairment for the claimant's cervical spine (with four percent for a Table 52 rating and two percent for range of motion) and five percent impairment for the claimant's headaches.

16. On July 13, 2021, the claimant attended a Division sponsored independent medical examination (DIME) with Dr. John Hughes. In connection with the DIME, Dr. Hughes reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Hughes identified that the claimant suffered a "work-related blow to the head with development of post-traumatic migraine headaches". Dr. Hughes agreed with Dr. McLaughlin that the claimant had reached MMI by April 19, 2021. Dr. Hughes assessed a whole person permanent impairment rating of five percent. This was based upon the claimant's traumatic head injury. Dr. Hughes opined that the claimant did not suffer a cervical spine injury. Therefore, he did not assess an impairment rating for the cervical spine.

17. On July 21, 2021, the respondents filed a Final Admission of Liability (FAL) which relied upon Dr. Hughes's DIME report.

18. On November 1, 2021, Dr. Bernton authored a report in which he opined that the medical records supported Dr. Hughes's determination that the claimant does not have any permanent impairment to her cervical spine. Dr. Bernton also noted that based upon his review of the claimant's medical records,significant rigidity of the cervical spine was not evident, nor documented consistently. Dr. Bernton further noted that none of the claimant's providers pursued magnetic resonance imaging (MRI) of the claimant's cervical spine.

19. The ALJ credits the medical records and the opinions of Dr. Hughes over the contrary opinions of Dr. McLaughlin. The ALJ finds that it was appropriate for Dr. Hughes to assess an impairment rating without the inclusion of the cervical spine. The ALJ finds that the opinion of Dr. McLaughlin that the cervical spine should have been included in the rating is a mere difference of opinion and does not rise to the level of any error on the part of Dr. Hughes. The ALJ finds that the claimant has failed to overcome Dr. Hughes's DIME opinion regarding the impairment rating.

20. The ALJ finds that the claimant has not demonstrated that it is more likely than not that she is entitled to an increase in her temporary average weekly wage (AWW) for the month of February 2021. The ALJ finds that the claimant has failed to demonstrate that her health insurance was canceled in February 2021. Furthermore, even if the insurance was canceled during that time, the ALJ finds no persuasive evidence on the record that any loss of insurance coverage in February 2021 was related to the claimant's work injury.

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. 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).

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 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.

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

5. As found, the claimant has failed to prove by clear and convincing evidence that Dr. Hughes's impairment rating was incorrect. The claimant has failed to establish anything other than a difference of opinion between medical providers. As found, the medical records and the opinions of Dr. Hughes are credible and persuasive.

6. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and the claimant must have access to the benefit on a day-to-day basis, or an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM*

Corporation, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her average weekly wage (AWW) should be increased for the period of February 1, 2021 through February 28, 2021, due to the loss of her health insurance. As found, the claimant has failed to demonstrate that her health insurance was canceled in February 2021. Furthermore, even if the insurance was canceled during that time, the ALJ found no persuasive evidence that any loss of insurance coverage was related to the claimant's work injury

ORDER

It is therefore ordered:

1. The claimant has failed to overcome the DIME physician's opinion regarding the claimant's permanent impairment rating.

2. The claimant's request for an increase in her average weekly wage (AWW) for the period of February 1, 2021 through February 28, 2021, is denied and dismissed.

Dated this 22nd day of February 2022.

Cassandra M. Sidanycz
Administrative Law Judge

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above

address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained a compensable injury arising out of the course and scope of his employment on June 4, 2021, injuring his left knee.

II. Whether Claimant has proven, by a preponderance of the evidence that he is entitled to medical benefits as a result of a compensable industrial injury.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on September 7, 2021 on multiple issues including compensability, medical benefits that are authorized, reasonably necessary and related to the alleged work related injury of June 4, 2021, average weekly wage and temporary disability benefits. Claimant withdrew the issues of average weekly wage and temporary disability benefits at the time of the hearing.

Respondents filed a Response to Application for Hearing on September 10, 2021 adding issues of responsible for termination and authorization of medical provider. Respondents withdrew the issue of termination in response to Claimant's withdrawal of the issue of temporary disability benefits and stipulated that the providers Claimant was treated by were authorized.

Prehearing Administrative Law Judge Royce Mueller entered a prehearing conference order on December 29, 2021 granting Respondents' motion for a post-hearing deposition of authorized treating provider (ATP) Lori Rossi, M.D. Respondents sent a Notice of Deposition of Dr. Rossi for January 31, 2022.

FINDINGS OF FACT

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

1. Claimant worked for Employer as a heavy duty alignment technician for a period of almost 21 years, on and off. The last period of employment started as of March 1, 2021. The job required Claimant to perform duties involving bending, kneeling and twisting, lifting over 100 lbs. and up to 300 lbs. with lift assistance, laying on the ground and creeper, getting up and down from a creeper, lifting heavy parts in awkward positions and installing them on vehicles. Claimant worked on a variety of vehicles, from cars to large busses and 18 wheelers.

2. Claimant credibly testified that he had not had prior left knee problems before June 4, 2021.

3. On Friday, June 4, 2021, between 9 and 10 a.m., Claimant was working on the kingpins[1] of a large bus for Employer. This required Claimant to remove the wheel, hub and tire assembly from the bus with a dolly. As he was removing the wheel it started to roll and slide. In an attempt to stop the tire from rolling away, he tried to catch the tire with his leg to prevent it from falling. Claimant felt an immediate pop, and pain in his left knee within the hour. Claimant stated that he thought he had tweaked the knee and it would get better with rest over the weekend. He stated that in dealing with heavy machinery, it is common to have these kinds of incidents and felt it was not necessary to report each bump and bruise as that would mean he would report something almost on a daily basis. Claimant stated that he told his coworker, but did not report the injury to HR because they were gone for the day, by the end of the day when he realized the severity of the injury. He stated that he reported the injury first thing on Monday, June 7, 2021.

4. The left knee pain became progressively worse over the following hours and on June 5, 2021 he could hardly put any weight on his left knee. He rested that day, elevating his leg on his couch all day alternating using ice and heat on the knee. On June 6, 2021 Claimant accompanied his wife to the grocery store and he only lasted approximately 15 minutes before he needed to go to his truck and to rest his leg due to the pain. On the way home, Claimant stopped for gas for his vehicle. While he was pumping the gas, he turned towards the truck and his left leg gave out, causing him to fall against the gas pump.

5. Claimant went to the emergency room at Medical Center of Aurora and was first seen by Nurse Gail K. Turner. She noted that Claimant was being seen after an injury on Friday, with continued pain, swelling and decreased range of motion. The note goes on to state that Claimant had left knee pain while attempting to stand at work, with continued pain in the left knee and hip since Friday.

6. Claimant was then seen by an ER physician, Dr. Anna Schubert, who documented a different mechanism of injury involving a recliner. Dr. Schubert concluded after examination that Claimant had a small joint effusion with possible ligamentous injury, recommended therapy, over the counter medication and a follow up with orthopedics. The radiologist, Dr. Benjamin Sacks described that the plain films showed possible small effusion and recommended an MRI of the left knee.

7. Claimant testified that he spoke to the nurse to advise about his work related left knee injury before he was seen by the physician. Claimant testified he does not own a recliner, denied sitting in a recliner anytime between June 4 and June 6, and denied making any statements about getting out of a recliner. As found, the first contact with Nurse Turner is more persuasive and credible over the contrary notations of Dr. Schubert.

[1] The main pivot in the steering mechanism.

8. Claimant was next attended by Dr. Lori Rossi on June 7, 2021 at Midtown Occupational Medicine. Dr. Rossi documented that Claimant injured his left knee after repeatedly getting up and down from a creeper. Claimant went into the office on crutches, with continued pain with ambulation. She noted diffuse anterior swelling and positive McMurray's test,[2] was unable to bear weight and had instability with popping. Dr. Rossi requested that Dr. Noel see Claimant as she valued his opinion with regard to causality. Dr. Rossi at this time stated that the objective findings were yet to be determined as work related. She recommended restrictions, over the counter medication, prescribed a soft knee brace since the knee was unstable, and ice for the swelling.

9. Employer completed the First Report of Injury on June 8, 2021, which noted that Claimant injured his left knee while working under a tractor, performing a wheel alignment and had popping and could not bear weight.

10. On June 10, 2021 Claimant was evaluated by Dr. Lon Noel. Claimant provided a more detailed mechanism of injury where he was performing an alignment with a 350 lb. dolly, while picking up the tire, it shifted and he slid under it. Claimant developed left knee pain, which was progressively worsened causing him to have problems walking. Dr. Noel noted that Claimant had an antalgic gait, favoring the left lower extremity, had swelling anteriorly, with an equivocal McMurray's test. Dr. Noel concluded that the Claimant's left knee injury was work related and that the objective findings were consistent with the mechanism of injury. He also recommended an MRI of the left knee.

11. The left knee MRI from Health Images on June 21, 2021 showed mild degeneration of the ACL, a large area of full thickness and near full thickness cartilage loss in the central patella with mild reactive marrow edema,[3] posterior root rupture of the medial meniscus including mild extrusion of the meniscal body, and cartilage irregularity of the condyle with a small area of high grade cartilage fissuring and small joint effusion.

12. On June 22, 2021, Claimant was seen by Dr. Rossi. She noted that "Causality was originally an issue, but cleared up by Dr. Noel at the last clinic visit." Dr. Rossi now changed that the objective findings were consistent with the history and the work related mechanism of injury. Dr. Rossi reviewed Claimant's left knee MRI and diagnosed him with a medial meniscus tear. Dr. Rossi referred Claimant to an orthopedic surgeon, Dr. Hewitt.

13. Respondents filed a Notice of Contest on July 12, 2021 stating the claim was denied for further investigation for compensability.

14. Dr. Rossi again saw Claimant on July 22, 2021 and continued to recommend restrictions and the prior treatment plan, including the referral to Dr. Hewitt. This was echoed in the reports from August 9, 2021 and August 23, 2021.

[2] Test to identify potential meniscus tears in the knee.
[3] Typically a response to an injury.

15. Claimant was evaluated by Dr. Michael Hewitt, an orthopedic surgeon, on September 3, 2021. He reviewed the MRI and examined Claimant, which showed a large joint effusion. He aspirated 40cc of fluid and performed a cortisone injection. He also recommended an unloader brace.

16. Claimant stated that he was last seen by a doctor about his left knee on September 21, 2021 as his care was denied from then on. Claimant stated that he continued working, though modifying what he was doing, and being very deliberate and careful with what work he performed, as his left knee kept popping, gave out sometimes and continued to have pain every time he put weight down, though he mostly did not have problems with range of motion.

17. Dr. Robert Watson, a level II occupational medicine physician, issued a records review dated December 7, 2021 at Respondents' request. Dr. Watson stated that inconsistencies in the medical records made it more probable than not that Claimant was not injured on the job on June 4, 2021.

18. Dr. Watson testified at hearing consistent with his report, outlining all the inconsistencies in the records, stating that it was more likely that Claimant tore his meniscus while getting up from a recliner.

19. Dr. Rossi testified by deposition on January 31, 2022. She stated that she diagnosed Claimant with an acute posterior root medial meniscus rupture. She testified that initially, after reviewing all the records, she opined that Claimant sustained a work related injury. She stated that it was unlikely that Claimant's ruptured meniscus was caused by standing up from a recliner.

20. As found, it is more likely than not that on June 4, 2021, Claimant injured his left knee in the mechanism he described at the hearing and that is reflected in Dr. Noel's June 10, 2021 report. Dr. Noel took the time to obtain a full description of the mechanism of injury. As found, it more likely than not that the June 6, 2021 report by Dr. Schubert does not accurately reflect Claimant's mechanism of injury. Further, Dr. Noel and Nurse Turner are more persuasive and credible over the contrary opinion of Dr. Watson and the testimony of Dr. Rossi. Lastly, Dr. Rossi's opinion, after Dr. Noel evaluated Claimant, assessing that the injury was work related was more credible than the subsequent change of opinion. As found, Claimant's left knee was asymptomatic before the work related injury, he worked a heavy duty job, with heavy parts, assembling and dismantling the kingpins, which required Claimant to remove the wheel, hub, and tire assembly from the bus with a dolly, all of which were very heavy. As found, Claimant was injured in the course and scope of his employment with Employer on June 4, 2021.

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. 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. 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).

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). 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).

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); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. 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.

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

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Indus, Comm'n*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, the medical records, Claimant's testimony, and the opinions of Dr. Noel, the opinion of Dr. Rossi following Dr. Noel's evaluation and before her deposition, and the

records of Nurse Turner are credible and persuasive, over the contrary opinion of Dr. Watson and the deposition testimony of Dr. Rossi, which are not persuasive. Claimant asserted he was working a heavy duty job, working performing an alignment when the tire was sliding and he had to put his leg under the tire to brace it. He immediately felt a pop and shortly thereafter, started feeling pain in his left knee, while getting up and down from the creepers. Further, Claimant had no prior left knee injuries or symptoms before the June 4, 2021 work related injury. Claimant is credible and persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered injuries to his left knee arising out of and in the course and scope of his employment with Employer on June 4, 2021 and that the injury was proximately caused by the June 4, 2021 accident.

C. Medical Benefits

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

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this work injury. As found, Claimant has proven by a preponderance of the evidence that the treatment Claimant received from the emergency room at Aurora Medical Center, Dr. Rossi, Dr. Noel, Dr. Hewitt, Health Images and other providers within the chain of referral was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work related injury, including but not limited to the physical therapy, the braces, crutches and nonsteroidal medications, the aspiration and the cortisone injection. As found, Claimant has proven by a preponderance of the evidence that the physical therapy recommended by Dr. Hewitt is reasonable medical treatment related to Claimant's left knee work related injury of June 4, 2021.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits for date of injury of June 4, 2021 for his left knee injury is compensable.

2. Employer shall cover all authorized, reasonably necessary treatment related to the June 4, 2021 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from at Aurora Medical Center, Midtown Occupational Medicine, Dr. Rossi, Dr. Noel, Dr. Hewitt, Health Images and other providers within the chain of referral.

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 22nd day of June, 2022.

Digital Signature

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

Note: This order was issued on February 22, 2022. The above cited month was a scrivener's error.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-165-956-003

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the May 19, 2021, request by authorized treating provider ("ATP") Lucas Schnell, D.O., for a left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medical meniscectomy is reasonable and necessary as well as causally related to Claimant's admitted industrial injury.

II. Whether Claimant established by a preponderance of the evidence that the proposed L5-S1 lumbar disc arthroplasty requested by authorized treating provider ("ATP") Stephen Pehler, M.D., on August 19, 2021, is reasonable and necessary as well as causally related to Claimant's admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant suffered an admitted industrial injury on February 19, 2021, while working as a delivery/dock worker for Employer. Before starting work as a deliver/dock worker for Employer in 2019, Claimant worked 20 years in the same position at YRC. In Claimant's position, he had to drive semis and deliver product to different locations.

2. On February 19, 2021, Claimant had backed two semis together, back-to-back, and was moving an aluminum ramp that was folded in half, which weighed about 180 to 220 pounds, between the trucks beds when he felt a pop in his low back which took him down to the ground, hitting both knees and landing on his hands. Claimant described the pain as severe and said that he remained on the ground due to pain until he could pick himself up. Claimant's testimony was consistent with the report of injury made by Brian Alvarez, M.D., three days later on February 22, 2021. *See* Claimant's Exhibit Tab 6, Bate Stamp ("BS") 27.

3. Claimant testified that before his admitted injury of February 19, 2021, he did not have symptoms or pain in either his left knee or low back which lasted more than a few days, had never missed a day of work due to back pain, and had not required any ongoing medical treatment for his left knee or low back.

4. For example, Claimant testified that although he had received treatment for back pain three times on January 8, 2020, January 28, 2020, and August 10, 2020 these singular visits were for pain originating from lifting at work but that the back pain went away and he did no follow-up care.

5. Claimant also testified that he had been involved in two separate car accidents on March 2, 2020, and December 4, 2020 but received no medical treatment from either accident for his back or knee, had no symptoms or lingering pain complaints, and missed no time from work.

6. Claimant also testified that between August 2018 and December 2019 he was treated at Kaiser Permanente for pancreatitis which he thought caused him to suffer from back pain. But his back pain at that time did not involve numbness or weakness in his legs.

7. Claimant's medical records that predate his work injury demonstrate that Claimant did have intermittent back pain for which he received treatment. But the records do not demonstrate that Claimant also had numbness and weakness in his legs.

8. Following Claimant's admitted industrial injury, at his first February 22, 2021, visit with authorized treating provider ("ATP") Bryan Alvarez, M.D., at Aurora Colorado Occupational Medical Partners ("Aurora COMP") Claimant was diagnosed with a lumbar spine sprain and assigned physical therapy, massage therapy, and chiropractic treatment. *See* Claimant's Exhibit Tab 6, BS 27-32.

9. On Claimant's pain diagram, filled out on February 22, 2021, he did not circle the left knee but credibly testified that he told ATP Alvarez about the knee, but he did not know at his first visit whether the knee was related to the back pain or a separate condition. *See* Claimant's Exhibit Tab 6, BS 33. At the first visit, Claimant also indicated on ATP Alvarez's intake form that he had had prior gastrointestinal abdominal pain as well as muscle weakness and previous back pain. *See* Claimant's Exhibit Tab 6, BS 35.

10. Following Claimant's initial visit with ATP Alvarez, Claimant underwent a series of chiropractic treatment with Zachary Jipp, DC, (*See* Claimant's Exhibit Tab 7, physical therapy at Aurora COMP with multiple providers, *see* Claimant's Exhibit Tab 8) and massage therapy (*See* Claimant's Exhibit Tab 9), but such treatments provided no lasting relief.

11. On March 4, 2021, at Claimant's first physical therapy visits, it was noted that he had "occass paresth over bilat hips," and that:

> Pt injured lower spine after pulling a ramp out of the truck. Pt Experienced severe, sudden LBP, and felt a "pop" in his back. The pain took him down to his knees. Pain did improve from DOI but now pain remains unchanged. Pt has begun chiropr. Rx and reports increase in lower trunk soreness with Rx. Sleep is interrupted. Pain level is at 7/10 currently, over lower trunk
>
> *See* Claimant's Exhibit Tab 8, BS 122.

12. At Claimant's second visit with ATP Alvarez on March 8, 2021, Claimant reported the following:

> Bob is a 56 y/o male who presents with lower back pain s/p back injury. Today he reports no improvement of his back pain. He has 6/10 pain that spreads across his lower back as well as one

> episode of a tingling sensation from his back to his L knee. He also reports aching of his bilateral hips and a feeling of instability of the L knee. He denies saddle anesthesia, incontinence, numbness, or pain radiating down his leg. He has done one session of PT and Chiro which he reports exacerbate this back pain. The pain increases with movement and decreases with rest. He is no longer taking any medications for his pain as the flexeril made him "groggy" and the meloxicam gave him diarrhea. He has not been working since the injury. X-ray showed with no signs of fracture. Today we discussed getting an MRI and continuing PT/Chiro/Massage.

See Claimant's Exhibit Tab 6, BS 41 (Emphasis added).

13. On March 9, 2021, at physical therapy, it was noted that along with low back pain, Claimant's "left lateral knee is weak and painful." *See* Claimant's Exhibit Tab 8, BS 125.

14. On March 9, 2021, during massage therapy the massage therapist's objective findings were:

> Palpation reveals hypertonicity and tenderness in b/l lower back. Mid back and upper legs.
>
> Swedish and deep tissue applied bilaterally to latissimus dorsi, mid/low traps, thoracolumbar paraspinals . . . .

See Claimant's Exhibit Tab 9, BS 143.

15. On March 21, 2021, ATP Alvarez noted that Claimant "has had increased left knee instability and the same low back pain as previously noted in his last appointment. *See* Claimant's Exhibit Tab 6, BS 48.

16. On March 22, 2021, ATP Alvarez put in a request for Claimant to have an MRI of the left knee and to continue physical therapy, massage therapy, and chiropractic therapy. *See* Claimant's Exhibit 6, BS 58.

17. On March 22, 2021, when making the MRI referral ATP Alvarez noted:

> Orthopedist Referral
>
> I recommended a consultation with a qualified Orthopedist.
>
> **Referral Reason: L-Medial Meniscal Tear**
>
> Referral Status: Regular 55-year-old gentleman who works as a commercial truck driver. While in the middle of. . . His lumbar spine has been the more painful region and thus is taken out most of his therapy and attention. The left knee symptoms were getting worse and did not improve despite physical therapy exercises. An MRI was obtained and showed a medial meniscal tear with overlying peer meniscal cyst. Please evaluate and appreciate recommendations for management.

See Claimant's Exhibit Tab 6, BS 60.

18. On March 17, 2021, Claimant underwent an MRI of the lumbar spine requested by ATP Alvarez, which MRI found:

    1. Straightening typical lordosis of the lumbar spine.
    2. Multilevel disc bulges and protrusions, most prominent at L4-L5 and L5-S1. Mild to moderate bilateral L5-S1 neuroforaminal narrowing abuts and may irritate the exiting bilateral L5 nerve roots. Mild bilateral L3-4 and L4-5 neuroforaminal narrowing.
    3. Some mild L5-S1thecal sac narrowing and indentation of the anterior thecal sac at other levels.
    4. Multilevel fact arthropathy and some facet joint effusions.

    See Claimant's Exhibit Tab 10, BS 157.

19. On March 24, 2021, Claimant's back pain was slowly improving but his left knee pain and instability remained. *See* Claimant's Exhibit Tab 8, BS 127.

20. On April 1, 2021, at physical therapy it was noted that Claimant's low back pain was at 5/10 and that he was laying in a recliner to relieve pain but that the left knee was still painful. *See* Claimant's Exhibit Tab 8, BS 129.

21. On April 1, 2021, at the massage therapy visit the massage therapist noted:

    > After MT, pt reports better movement in low back. Pain decreased to 3/10. Pain is more localized to right SI area as opposed to wide spread throughout the iliac crest.

    See Claimant's Exhibit Tab 9, BS 145.

21. On April 1, 2021, Claimant had an MRI of the left knee performed at Health Images which was requested by ATP Alvarez. That MRI came back with findings of:

    1. Medial meniscal tear with overlying parameniscal cyst.
    2. Absence of the anterior cruciate ligament consistent with previous complete disruption.
    3. Mild chondromalacia of the patellofemoral compartment.

    See Claimant's Exhibit Tab 11, BS 159.

22. On April 1, 2021, after reading the left MRI knee study, ATP Alvarez referred Claimant out for a consultation with a "qualified orthopedist" noting again:

    > Referral Status: Regular 55-year-old gentleman who works as a commercial truck driver. On the day of injury, the patient was pulling the ramp out from back of the truck when he felt a pop in his low back. The pain was great enough to make him fall to his knees, specifically on the left knee. Since the injury he has reported left knee pain but the lumbar spine has been the more painful and thus has taken most of his attention. The left knee symptoms were getting worse and did not improve despite physical

> therapy exercise. An MRI was obtained and showed a medial meniscal tear with overlying peer meniscal cyst. Please evaluate and appreciate recommendations for management.

See Claimant's Exhibit Tab 9, BS 146.

23. On April 21, 2021, Claimant was still complaining of left knee pain and instability. *See* Claimant's Exhibit Tab 8, BS 140.

24. On April 7, 2021, Claimant, based on the referral from ATP Alvarez, was evaluated at the Center for Spine & Orthopedics by Luca Schnell, D.O., who made a recommendation for:

    1. ACL brace.
    2. Formal physical therapy.
    3. Intraarticular steroid injection today.
    4. Follow-up in 6 weeks for reassessment.
    5. No squatting, stooping, kneeling, climbing, or lifting greater and 30 pounds.

See Claimant's Exhibit Tab 12, BS 161.

25. At the April 7, 2021 visit ATP Schnell injected Claimant's left knee with lidocaine and noted:

> I discussed with Robert that he has an ACL deficiency which potentially could be chronic as I do not see any acute edema or pivot-shift type of lesion. He also has a medial meniscus tear. I think the feeling of instability could be coming from the meniscus or the ACL issue. He does not recall an instability sensation prior to this work related event. We will exhaust conservative treatment. If he fails this, I would consider arthroscopic ACL reconstruction with allograft and partial medial meniscectomy.

See Claimant's Exhibit Tab 12, BS 161-162 (Emphasis added).

26. On May 19, 2021, ATP Schnell noted the following:

> Robert returns and states unfortunately he is still having medial joint line pain and a feeling of gross instability of his knee when he does not wear his ACL brace. He does note that the brace helps him tremendously. He stresses that he did not have any of these symptoms prior to his work-related injury that occurred on February 19, 2021. He has a known complete ACL rupture as well as posterior horn medial meniscus tear with parameniscal cyst.
>
> * * *
>
> Impression:
>
> 1. Left knee posterior horn medial meniscus tear with parameniscal cyst.

2. Left knee complete ACL rupture.
3. Left knee mild primary osteoarthritis.

Recommendation:

1. Left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy.
2. no squatting, stooping, kneeling, climbing or lifting greater than 30 pounds.
3. Follow up for pre-op visit after authorization obtained.

I discussed with Robert he has failed conservative treatment in the form of physical therapy, steroid injection, and ACL bracing. I think that he will have some permanent instability if his ACL rupture is not addressed, as well as some chronic pain with his meniscus tear. I discussed the options of allograft versus autograft for ACL reconstruction. He is amenable to allograft with partial meniscectomy. Regarding cautions, the patient did have an acute injury at work which he relates all of his symptoms to. He said he had no prior problems with the knee before this and now has instability, which would correlate with his ACL rupture. I cannot definitively determine the acuity of his ACL tear. Subjectively the patient denies any prior history of instability. I do think it is reasonable to correlate his twisting injury with the pathology noted on his MRI.

See Claimant's Exhibit Tab 12, BS 164-165.

27. On May 20, 2021, ATP Schnell put in a request for a left ACL reconstruction and meniscectomy.

28. After the surgical request was submitted, Respondent had Claimant's records reviewed by James P. Lindberg, M.D. He noted that if Claimant's missing ACL or the meniscus tear was actually acute and result of the work injury, there would have been ACL remnants and a bloody effusion on his MRI, with significant pain and disability. The complete absence of an ACL was not compatible with an acute injury and the meniscal tear was secondary to his long-standing ACL ligament tear (Resp 015-16). Dr. Lindbergh further noted there was no mention of any kind of twisting injury - in fact the records indicate he fell forward immediately onto his hands and knees. On the other hand, Claimant credibly testified that he really does not know whether he twisted his knee, all he knows is that his body went out due to his back pain and he ended up on the ground and developed back and knee pain. As a result, Claimant most likely twisted his knee during the accident due to the onset of pain and instability after the work accident.

29. Dr. Lindberg did not examine Claimant but based on the record review, gave the opinion that "the meniscus tear is secondary to his long standing anterior cruciate ligament tear and if he decides to have surgery done by Dr. Schnell, it should be

done under his own insurance, that it was not a result of Claimant falling on his hands and knees." *See* Claimant's Exhibit Tab 17, BS 201-204.

30. Dr. Lindberg's report was provided to ATP Schnell who opined as follows:

> After review of Dr. Lindberg's report, I do agree with some of the conclusions of his report. Regarding Mr. Warren's ACL rupture, I cannot directly correlate this with his work-related injury. It is accurate there was no bloody effusion or edema noted on the MRI of Mr. Warren's left knee on 04/01/2021. Therefore, this could be a chronic tear, unrelated to his work-related injury on 02/19/2021.
>
> Regarding his medial meniscus tear, it was initially report to me by Mr. Warren that he had a twisting type injury when he fell, which would coincide with the posterior horn medial meniscus tear. However, I cannot directly say with high probability that his meniscus tear was from his work-related accident. It is unable to be determined from his MRI or clinical exam.
>
> Overall, I cannot directly state that Mr. Warren's multiple injuries to his knee are directly related to his work injury based on his history, imaging findings and clinical exam. I do feel Mr. Warren could potentially have some chronic pain and instability in his knee due to his meniscus tear and ACL rupture. I would be happy to address these issues for the patient in the future outside of his work claim.

See Claimant's Exhibit Tab 12, BS 166.

31. Claimant credibly testified that his left knee has been unstable since the injury, that in his working life he has had no knee problems, and that if in fact the ACL was previously ruptured, the knee was stable until his admitted industrial injury where he fell on his knee. The medical records reflect that after the first visit with ATP Alvarez, the medical records are consistent with Claimant's testimony.

32. While the request for surgery in the knee claim was under denial, Claimant was referred out to Nicholas Olsen, D.O., for a series of injections to his lumbar spine and then to the Center for Spine and Orthopedics. The treatment received at those facilities did not relieve Claimant's symptoms. *See* Claimant's Exhibit Tabs 13-14.

33. Claimant credibly testified that he was unhappy with the lack of progress as it related to his lumbar spine and ATP Alvarez sent him out for a second opinion to the Orthopedic Centers of Colorado where he was evaluated by ATPs Stephen Pehler, M.D., and Maria Kaplan, P.A. At the first visit which occurred on August 11, 2021, ATP Kaplan noted:

> [P]atient is very pleasant 56-year-old male for initial consultation of his low back pain with intermittent right buttock, hip and lower extremity radiculopathy and tingling. He was involved in a work-related injury on 2-19-2021 in which he was lifting a 180 pound ramp, twisted wrong and fell to the ground. Since that time he has had constant and fairly debilitating low back pain. He has completed physical therapy without any relief to his symptoms has

> also had a total of 14 cortisone injections as well as 2 Medrol Dosepaks with minimal improvement to his symptoms. His most recent injection was one week ago. He currently takes Tylenol and ibuprofen. He reports the majority of his pain is in his low back with some right thigh pain intermittently. He has tried muscle spasm medicines and this was not helpful. He has increased pain with lumbar flexion, extension, rotation as well as physical activities and prolonged standing and walking. He has not been able to return back to work due to his pain. He denies changes to bowel bladder function, focal weakness, saddle anesthesia.
>
> * * *
>
> At this point in time, patient is a forms of conservative therapies including physical therapy, anti-inflammatories, pain medicines, rest as well as multiple cortisone injections to the lumbar spine without any improvement to his symptoms. He has reduced qualify of life due to pain and is unable to work or do any physical activities. We discussed surgical intervention due to his symptoms as well as radiographic findings. The surgery would be a L5-S1 lumbar disc arthroplasty. We discussed the risks and benefits of surgery as well as postoperative outcomes and expectations and he would like to move forward with this. We will submit to insurance for authorization and he will need preoperative clearance prior to scheduling. We will prescribe gabapentin to take for nerve pain.

See Claimant's Exhibit Tab 16, BS 197-198 (Emphasis added).

34. On August 15, 2021, a CT was performed of Claimant's lumbar spine. *See* Claimant's Exhibit Tab 15-16.

35. On August 19, 2021, Claimant returned to ATP Pehler at Orthopedic Centers of Colorado who noted that:

> Interval history: This patient is very pleasant 56-year-old male is here today for preoperative consultation. He continues to have debilitating levels of back pain as well as right greater than left buttock and lower extremity pain. He has attempted now 14 corticosteroid injections in the Workmen's Comp. setting including 2 Medrol Dosepaks. He has had only limited and intermittent relief. His symptoms are affecting his quality of life as well as his ability to work. He had previously recommended a lumbar disc replacement.
>
> * * *
>
> Assessment Plan:
>
> This point time, we will continue forward insurance approval for his lumbar disc replacement. We reviewed the risk and benefits as well as expectations in the postoperative setting. He voiced understanding. He does wish to proceed forward. We will hopefully schedule the near future. He continues to have back pain

> as well as buttock and leg pain that is affecting his quality of life as well as ability ambulate**.** He has spondylosis and disc height loss with this protrusion at the L5-S1 level. The rest of his lumbar spine from L1 down to L5 look pristine. He has attempted extensive conservative treatment and continues to be symptomatic.

See Claimant's Exhibit Tab 16, BS 199 (Emphasis added).

36. After receiving ATP Pehler's request for surgery, Respondent had Claimant evaluated by Brian Reiss, M.D. It was Dr. Reiss' written opinion and testimony at hearing that Claimant had a clear history of chronic recurring low back pain that was not consistent with chronic pancreatitis. (See Respondents' Exhibit J, BS 69,70. He also concluded that Claimant's current level of pain was very similar to his prior intermittent recurring lower back pain. *See* Respondents' Exhibit J, BS 70. Lastly, it was also his opinion that the surgery recommended by Dr. Pehler was neither reasonable, necessary nor related to Claimant's admitted industrial injury, that Claimant had returned to baseline but that at most what Claimant required was a core strengthening program. *See* Claimant's Exhibit Tab 18.

37. Dr. Reiss also concluded that the surgery is inconsistent with the Colorado Medical treatment Guidelines. But again, such opinion seems heavily weighted on his contention that Claimant has returned to baseline and just needs some core strengthening – with which the ALJ disagrees. The ALJ also finds that the Guidelines are not persuasive based on the facts of this case.

38. ATP Pehler was provided with Dr. Reiss' denial and issued a report challenging his conclusions setting forth that:

> Dear ABF Freight
>
> Thank you for taking the time to review Mr. Robert Warren's case. As you know, this patient is a very pleasant 56-year-old male that was involved in a work-related injury on 02/19/2021. Prior to this injury Mr. Warrant denies any significant injuries or pathology to his lumbar spine. He does endorse some occasional musculoskeletal injuries that primarily resolved with supportive care. Since Mr. Warren's injury in February of 2021, he has attempted every form of conservative treatment possible. This has included physical therapy, pool therapy, anti-inflammatory medications, muscle spasm medications, corticosteroids, epidural steroid, and facet injections all without any significant symptomatic relief. His symptoms have greatly affected his quality of life and ability to work.
>
> * * *
>
> Imaging obtained in my office and from his prior MRI demonstrated disc height loss and a disc herniation at the L5-S1 level. Given his failure of every form of conservative treatment and continued symptoms, my recommendation was for a lumbar disc replacement at the L5-S1 level. By review of Dr. Reiss's IME performed in

> October of 2021, this request was denied. Dr. Reiss sites his reasoning including that the pain generator has not been identified and that Mr. Warren has not completed all conservative care**.** I respectfully disagree with Dr. Reiss. Mr. Warren has completed an extensive amount of conservative care over the past eleven months. This has included several months of both workman's compensation sponsored physical therapy, and physical therapy funded by Mr. Warren. Dr. Reiss also sites that the pain generator has not been identified. Based on our review of Mr. Warren's imaging, his L5-S1 disc appears to be his only source of pathology. There is no evidence of significant degenerative changes to any other level or any facet degenerative changes present. Mr. Warren has temporarily responded to epidural steroid injections targeting his L5-S1 level. While we certainly understand that a response to a lumbar epidural steroid injection is not an indication for disc replacement, Mr. Warren does meet the indications for a lumbar disc arthroplasty.
>
> My recommendation for a lumbar disc arthroplasty at L5-S1 is a reasonable and indicated procedure to address Mr. Warren's continued and worsening pain and symptoms. He has attempted and failed now approaching eleven months of conservative care with no sustained symptomatic relief.

See Claimant's Exhibit Tab 16, BS 200A.

39. The ALJ finds Dr. Pehler's opinion and rationale for surgery to be credible and persuasive because his opinion is consistent with Claimant's underlying medical records and statements to his medical providers regarding his pain and disability as well as Claimant's completion of conservative medical treatment – which did not help.

40. Claimant credibly testified he understands the risk of lumbar surgery and desires to pursue it.

41. The opinions of Dr. Reiss and those of ATP Pehler could not be more divergent. Dr. Reiss' opinion is based on his conclusion that Claimant's condition has returned to baseline and that Claimant merely needs to improve his core strength. But such opinion is inconsistent with the underlying records, Claimant's testimony, and the opinions of his ATPs. Before the work injury, Claimant could perform his regular job duties and was not suffering from chronic pain. At this point in time, he cannot. In the end, Dr. Reiss' opinion does not appear to offer reasonable medical treatment to improve Claimant's condition. It also appears Dr. Reiss' opinion ignores Claimant's pain complaints and current disability. On the other hand, Dr. Pehler, in his medical judgement, has determined that the surgery he has recommended offers Claimant the best option to cure and relieve him from the effects of his work injury.

42. While the medical records submitted at hearing reveal Claimant has had very little physical therapy, he has undergone other conservative treatment. As noted by Dr. Alvarez, Claimant's conservative treatment has consisted of physical therapy, anti-

inflammatories, pain medicines, rest as well as multiple cortisone injections to the lumbar spine without improvement of his symptoms.

43. Claimant remains under the care of ATP Alvarez who has not yet released Claimant at maximum medical improvement ("MMI") and who noted on September 29, 2021, that:

> Pain in his L-spine is worsening and becoming more constant. Now has constant burning pain in his R hip that radiates down to his calf and foot. Taking ibuprofen and Tylenol with minimal relief. The back surgery is still not scheduled yet. He expresses frustration with his pain the how he has not been able to have surgery, states it is affecting his mood and he feels depressed because he is always fighting the pain. Discussed coping strategies and will f/u 2-weeks.
>
> *See* Claimant's Exhibit Tab 6, BS 109.

44. Based on Dr. Alvarez' September 29, 2021, report, Claimant has not returned to baseline and continues to have chronic and disabling pain that has not been relieved by any of the treatment provided to date. The ALJ finds such conclusions to be credible and persuasive since it is supported by Claimant's testimony and the opinions of the ATPs.

45. On December 8, 2021, Claimant returned to ATP Alvarez who noted "no change overall but with some worsening of symptoms. Court date in week of January 19. Continue HEP." *See* Claimant's Exhibit Tab 6, BS 111J.

46. ATP Alvarez's WC164 forms have consistently maintained that Claimant's injuries are consistent with a history of a work-related mechanism of injury. *See for example,* Claimant's Exhibit Tab 6, BS 39, 58, 75, 80 and 93. ATP Alvarez has concluded that the left knee and low back symptoms are related.

47. ATP Schnell has contended that although Claimant's ACL may have been preexisting, he was asymptomatic before the events of February 19, 2021, and Claimant's testimony is consistent in that regard. Claimant has been symptomatic in the knee since that time and the ALJ finds that the pain and instability Claimant suffers was caused by his work injury.

48. Medical records reflect that Claimant has consistently complained of low back pain shooting into his right leg and down and that those symptoms were not present before February 19, 2021, even though he had had back pain which he contends was related to pancreatitis. Except for some bilateral calf pain, such back pain did not go past his back level.

49. Since the work accident, Claimant has consistently complained of pain in his left knee. Claimant credibly testified at hearing that he wants to undergo the surgery recommended by ATP Schnell on his knee and the surgery recommended by ATP Pehler. He just wants to get back to work. Before this event, Claimant "never missed work."

50. Claimant's testimony and statements to his medical providers mostly tracks the underlying medical records. As a result, the ALJ finds Claimant's statements to his medical providers and testimony to be credible and persuasive.

51. The ALJ finds the opinions of Claimant's ATPs to be credible and persuasive because the ALJ finds their opinions are supported by the underlying medical records and Claimant's statements to them as well as his testimony about his pain and disability since the work accident.

52. The ALJ finds that before the work accident, neither Claimant's back nor knee were disabling and neither required any active medical treatment. But the ALJ further finds that after the accident, both Claimant's knee and back required medical treatment and that both conditions were disabling. As a result, the ALJ finds that Claimant's work injury caused the need for medical treatment – including the surgeries recommended.

53. The ALJ further finds that the surgeries are reasonably necessary to treat Claimant's knee instability and back pain, with radicular symptoms, which were caused by his work accident. Thus, the need for surgery is also related to his work accident.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion

of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the May 19, 2021, request by authorized treating provider ("ATP") Lucas Schnell, D.O., for a left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medical meniscectomy is reasonable and necessary as well as related to Claimant's admitted industrial injury.

II. Whether Claimant established by a preponderance of the evidence that the proposed L5-S1 lumbar disc arthroplasty requested by authorized treating provider ("ATP") Stephen Pehler, M.D., on August 19, 2021, is reasonable and necessary as well as related to Claimant's admitted industrial injury.

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42--101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company, W.* C. No. 4-445-060 (February 22, 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*: Section 8-43-201(3), C.R.S.

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians and medical providers, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra.* The ALJ Also considered the Medical Treatment Guidelines.

Respondents contend that the left knee surgery recommended by ATP Schnell is not necessary or related because the symptoms did not develop immediately following the injury. This is in fact not the case as the ALJ has found that the symptoms have been present since Claimant's injury.

Respondents contend that the lumbar surgery recommended by ATP Pehler is not necessary or related as Claimant had a temporary aggravation of his low back condition and returned to baseline and that all he needs is some core strengthening. As found, the medical records reflect that Claimant has not returned to baseline, that the condition he now has is separate and distinct from that suffered when he had pancreatitis and intermittent back pain and that physical therapy, medications, injections, and massage therapy, or Claimant's own therapy, have not resolved the symptoms from that condition. The Respondents also contend the back surgery is inconsistent with the Medical Treatment Guidelines. The ALJ, however, does not find the Medical Treatment Guidelines to be persuasive in this case.

Additionally, ATP Alvarez has confirmed the progression of Claimant's symptoms from the date of injury and they are consistent with the care now being recommended by ATP Schnell and ATP Pehler. There is credible and persuasive evidence that Claimant had no symptoms in either his left knee or low back that required medical treatment or caused any disability just before his admitted industrial injury and Claimant credibly testified away the prior episodes of back pain in 2020 from lifting at work and differentiated the back pain related to his pancreatitis.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In this case, the evidence leads the ALJ to conclude that while Claimant may have had underlying asymptomatic conditions, it was the admitted industrial injury that caused his symptoms and the need for medical treatment.

The ALJ finds and concludes that the surgeries recommended are reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes Claimant has satisfied his burden by a preponderance of the evidence with regard for the left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy and the L5-S1 lumbar disc arthroplasty. The proposed surgeries are reasonable, necessary, and causally related to his work accident.

ORDER

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

1. Respondent shall pay the cost, pursuant to the Colorado Medical Fee Schedule, of the left knee arthroscopic ACL reconstruction with soft tissue allograft with partial medial meniscectomy recommended by ATP Schnell on May 19, 2021.

2. Respondent shall pay the cost, pursuant to the Colorado Medical Fee Schedule, of the L5-S1 lumbar disc arthroplasty, recommended by ATP Pehler on August 19, 2021.

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

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

DATED: February 22, 2022.

/s/ Glen Goldman

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

ISSUES

➢ Whether Claimant has proven by a preponderance of the evidence that the recommended ketamine treatment is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant is a 60-year-old female who was employed with Employer as a dental biller. Claimant sustained a work injury on January 5, 2017 when she slipped on a sidewalk while at work after a snowstorm. Claimant testified she tripped when she did not see where the sidewalk ended, and rolled her right ankle.

2. Claimant was referred to Dr. Robert J. McLaughlin with St. Mary's Occupational Medicine for medical treatment. Claimant subsequently was referred to Dr. Christopher Copeland for orthopedic evaluation on March 2, 2017. Dr. Copeland eventually performed ankle surgery on July 5, 2017.

3. Due to lingering symptoms, burning and shooting pain, and discoloration. Dr. McLaughlin began to discuss the possibility of complex regional pain syndrome ("CRPS") with Claimant. On October 12, 2017 the doctor referred Claimant to Dr. Brittany Matsumura for pain management. Dr. Matsumura initially evaluated Claimant on November 9, 2017. Dr. Matsumura reviewed Claimant's medical records which were noted in Dr. Matsumura's medical report, obtained a medical history and performed a physical examination. Dr. Matsumura recommended Claimant be referred for a CRPS workup.

4. Claimant underwent the CRPS testing under the auspices of Dr. J. Tashof Bernton on February 26, 2018. Dr. Bernton reviewed the triple-phase bone scan, Autonomic Testing Battery, and Stress Theromography, and opined that Claimant was within diagnostic limits for CRPS. Dr. Bernton recommended sympathetic blocks to determine the extent of CRPS.

5. Claimant underwent right L3 lumbar sympathetic blocks on March 29, April 3, and April 12, 2018 under the auspices of Dr. Kenneth Lewis. Claimant was eventually referred to Dr. Giancarlo Barolat for consideration of a nerve stimulator trial.

6. Claimant consulted with Dr. Barolat on May 9, 2018. The doctor noted the sympathetic blocks gave Claimant good, but short term, pain relief, and that she had

tried many different medications with mixed results. Dr. Barolat opined Claimant was had chronic, severe neuropathic pain syndrome with the characteristics of CRPS type 1, and had failed all conservative treatment modalities. Dr. Barolat recommended the nerve stimulator trial.

7. Claimant returned to Dr. Bernton on June 14, 2018, who noted that since Claimant did not have long-term symptom control from the sympathetic blocks, either a nerve stimulator trial or ketamine infusions should be considered.

8. Respondent initially denied the request of the nerve stipulator trial. Dr. Barolat noted in an appeal letter dated August 30, 2018 that ketamine infusions could be attempted prior to a spine surgery, but instead he opined that the nerve stimulator was reasonable treatment.

9. Respondent subsequently approved the nerve stimulator trial and Claimant began the nerve stimulator trial on July 9, 2019. Claimant eventually underwent the implantation of the peripheral nerve stimulator ("PNS"). Claimant testified that the PNS improved her "stabbing" nerve pain, but other CRPS symptoms persisted.

10. Claimant consulted with Dr. Matsumura on October 22, 2019. The doctor noted that although Claimant had improved with the nerve stimulator, Claimant's activities were limited by pain and she was having periodic pain issues. Dr. Matsumura also noted that Claimant reported that following her PNS implant, she had signficant pain which was improved with ketamine. Dr. Matsumra noted Claimant did have a hallucination with the ketamine as it was given as a quick bolus instead of slowly over time.

11. Dr. Matsumura recommended additional ketamine therapy, noting that Claimant continued to have periodic pain issues. Dr. Matsumura noted that ketamine provided after her surgery was significantly helpful for intense pain. Dr. Matsumura recommended a trial of ketamine compounded neuropathic cream which could incorporate several medications that would assist with Claimant's pain.

12. Claimant testified that the topical ketamine compound cream helped with the burning and pins and needles sensations in her toes. Claimant testified that she thought the ketamine might help with her symptoms and would allow her to bake food and do things around the house. Claimant testified she does not wear shoes due to the pain in her feet and only wears slides.

13. Dr. McLaughlin placed Claimant at MMI on November 21, 2019 and provided Claimant with an impairment rating that included a rating for her CRPS condition, in addition to a rating for her ankle and mental impairment. Dr. McLaughlin recommended post-MMI medical care, including follow up with Dr. Barolat and Dr. Matsumura and continued medications.

14. Respondent filed a Final Admission of Liability on December 18, 2019, admitting to the impairment rating and the post MMI medical treatment.

15. Claimant continued to treat with Dr. Matsumura on January 21, 2020. The doctor noted ongoing issues, including progressive sensitivity of the thigh near the surgical site, calf cramping, skin sensitivity, "bone pain," and weakness. Dr. Matsumura noted Claimant was using a topical cream including ketamine, which was noted to be quite helpful in her pain exacerbations and allodynia complaints. Dr. Matsumura noted that ketamine compound cream was the most effective topical analgesic. Dr. Matsumura noted that Respondent had declined to further authorize that cream. Dr. Matsumura noted that the ketamine cream had been quite effective in maintaining Claimant's function for her severe exacerbations of pain.

16. Claimant returned to Dr. Matsumura on September 15, 2020. Dr. Matsumura noted that Claimant still had pain flares even with the PNS, and had consulted with Dr. Barolat about whether the PNS could be adjusted. Dr. Matsumura noted Claimant had been through extensive conservative treatment for her pain. Dr. Matsumura noted that they had tried a topical ketamine compounded cream which had been helpful in the past, but was denied by the carrier Dr. Matsumura noted that following her stimulator placement, Claimant was given a bolus of ketamine quickly and had symptoms of hallucinations, anxiety, breathing difficulties, however, she has had ketamine with past surgeries without issues. Dr. Matsumura discussed ketamine infusion with Claimant and noted that the ketamine infusion was typically a last resort treatment for ongoing pain despite appropriate conservative efforts.

17. Claimant indicated she was interested in pursuing ketamine infusions, and Dr. Matsumura discussed Claimant's ketamine reaction following the PNS surgery, and discussed the possibility that Claimant's bad reaction was due to the quick administration of the bolus. Dr. Matsumura noted Claimant had ketamine administered following other surgeries before without incident.

18. Dr. Matsumura referred Claimant to Dr. William James at the Western Slope Ketamine Clinic for ketamine treatment. Dr. Matsumura noted Claimant had been through extensive treatment for CRPS with limited improvement and despite having the PNS had ongoing pain flares.

19. Claimant consulted with Dr. William James on October 29, 2020. Dr. James noted Claimant had been diagnosed with CRPS for three years prior, and had treated her symptoms with physical therapy, nerve blocks, sympathetic blocks, and a PNS. Dr. James noted Claimant had ongoing significant physical impairment due to pain. Dr. James opined it was medically necessary to proceed with intervention involving the recommended ketamine infusion.

20. Claimant testified she hoped the infusions would provide pain relief, even if only temporary. Claimant testified that she was aware that the infusions helped with pain for different times for different patients. She testified that even short time periods with no pain would be a great benefit to her, both physically and mentally. Claimant testified she hoped the infusions would help her perform basic tasks around her house on her own, which would be helpful because she needs so much help at home. Claimant testified that if she had the ketamine infusions, and they were effective, she may be able to have a normal outing with grandchildren or go for an extended walk: things she had not been able to do living with CRPS.

21. Claimant testified her physicians had advised her of side effects of ketamine including hallucinations, heart rate changes, blood pressure changes. Claimant testified that she had no side effects with the use of topical ketamine. Claimant further testified she had no side effects when anesthesiologists used ketamine during the two PNS procedures and a third personal surgery. Claimant testified she wished to pursue treatment that included the ketamine infusion because it may provide her with some pain relief.

22. Respondent obtained a records review independent medical examination ("IME") with Mark Paz, M.D. After reviewing Claimant's medical records, Dr. Paz issued a report dated April 14, 2021. Dr. Paz's opined that the ketamine infusion therapy recommended by Dr. James would not be reasonable, necessary treatment related to the CRPS diagnosis in this case. Dr. Paz noted in his report that the proposed ketamine infusion was not supported by Colorado Medical Treatment Guidelines, Rule 17, Exhibit 7. Dr. Paz noted the information from the Colorado Medical Treatment Guidelines indicates that, although low dose daily infusions may achieve some pain relief compared to placebo, the relief with infusion faded within a few weeks.

23. Dr. Paz further noted in his report that the fact that Claimant may have responded favorably to a topical compound that included ketamine the ketamine infusions were not comparable. Dr. Paz noted that the basis for the use of a topical compound pharmaceutical is to minimize a clinically insignificant level with the systemic absorption of the medication in the compound. Dr. Paz noted the compounding cream is utilized to achieve a local effect at the site of the injury (the nerve endings) without systemic side effects. The infusion of ketamine has the objective of achieving a systemic effect. Dr. Paz opined in his report that you cannot extrapolate a predictable benefit of infusions by pointing to prior reported benefit to the topical compound

24. Dr. Paz testified at hearing consistent with his IME report. Dr. Paz noted in his testimony that none of the studies involving ketamine documented any functional improvement in patients with CRPS. Dr. Paz testified that, per the Division Level II accreditation, the objective of treatment is a combination of reduction of pain and improvement in function.

25. Dr. Paz testified that the summary conclusion in the Medical Treatment Guideline references literature that documents ketamine is associated with the risk of potential harm which outweighed evidence of limited short-term benefit in patients with CRPS. Dr. Paz opined in his report that IV ketamine NMDA receptor antagonists were not recommended for treatment of CRPS. Dr. Paz testified that the reason ketamine is not a recommended treatment is based upon the probability of whether the treatment would be beneficial. Dr. Paz testified that if there is a greater than 50% probability that the treatment would be beneficial then the provider must consider the risk/benefit, whether the risks outweigh the benefit. Dr. Paz opined that with regard to the use of ketamine infusions in the treatment of CRPS, the Medical Treatment Guidelines determined the benefits do not outweigh the risks.

26. Dr. Paz also discussed in his report and testimony the issue of undesired side effects associated with ketamine infusion including the risk of emergence reactions which includes delirium accompanied by irrational behavior and cognitive impairment. With regard to Claimant, Dr. Paz noted that Claimant had a documented history of experiencing hallucinations associated with the infusion of a bolus of ketamine which she received following the July 16, 2019 operative procedure for placement of the nerve stimulator. Dr. Paz testified that in his opinion, this factor alone would warrant against consideration of ketamine infusion therapy for Claimant in this matter. Dr. Paz testified that despite Claimant's belief that the occurrence of the hallucinations related to the improper administration of the bolus of ketamine, the fact that a reaction occurred, even if Claimant may not have had a reaction previously, would point against use of ketamine infusion therapy in this case.

27. Dr. Paz discussed in his report Claimant's functioning level throughout her treatment course. Dr. Paz noted that when comparing the January 29, 2018 functional capacity evaluation results with those of February 17, 2020 there was little variation. Dr. Paz opined that by definition the medical maintenance is for the purpose of maintaining the level of function the patient achieved when they reached maximum medical improvement. Dr. Paz opined that Claimant's functioning level remains comparable as it was when Claimant was placed at MMI in November of 2019 and when Claimant completed the FCE on February 17, 2020.

28. The ALJ notes that the Medical Treatment Guidelines relating to CRPS indicate that there are contraindications to ketamine infusions, but the Guidelines also state as follows: "There is some evidence that in CRPS patients, low dose daily infusions of ketamine can provide pain relief compared to placebo."

29. The ALJ finds Claimant's testimony regarding her symptoms and the effectiveness of her medical treatment to be credible and persuasive and supported by the medical records entered into evidence at hearing.

30. The ALJ credits the medical reports from Dr. Bernton, Dr. James and Dr. Matsumura and finds that Claimant has demonstrated that it is more probable than not that the recommended ketamine injections are reasonable medical treatment necessary to maintain Claimant at MMI. The ALJ notes the contrary opinions expressed by Dr. Paz in his report and testimony at hearing, but finds the opinions expressed by Dr. James and Dr. Matsumura to be more credible and persuasive.

31. The ALJ credits the opinions of Dr. Matsumura and Dr. James, along with the testimony of Claimant, over the conflicting opinions of Dr. Paz and finds that Claimant has proven that it is more likely than not that ketamine infusion treatment with Dr. James is reasonable medical treatment necessary to maintain Claimant at MMI by preventing the deterioration of her condition as related to the admitted injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*,

759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

4. The Division's Medical Treatment Guidelines ("the Guidelines") are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. *See* Section 8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). The ALJ is not required to grant or deny medical benefits based on the Guidelines and the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

5. As found, Claimant has proven by a preponderance of the evidence that ketamine therapy injections recommended by Dr. Matsumura and Dr. James is reasonable medical treatment necessary to maintain Claimant at MMI.

6. As found, the opinions of Dr. Matsumra and Dr. James, the progress notes from various providers, and Claimant's testimony found to be credible and persuasive with regard to the issue of whether the recommended treatment is reasonable necessary and related to Claimant's work injury.

7. The ALJ therefore finds that Respondent ia liable for the reasonable medical treatment necessary to maintain Claimant at MMI and prevent the deterioration of her condition, including the ketamine infusion therapy recommended by Dr. James.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to maintain Claimant at MMI including the ketamine infusion therapy recommended by Dr. James.

2. Respondent's liability for the ketamine infusion therapy shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

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

DATED: February 22, 2022

Keith E. Mottram

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the recommended treatment included physical therapy and a referral to a physiatrist is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant is a 56-year-old female who sustained an admitted work injury on March 3, 2003 when she was taking laundry out of a dryer. Claimant was referred for medical treatment and eventually underwent a lumbar discectomy with Dr. Dwyer on May 21, 2003. Claimant later underwent a lumbar fusion surgery on December 12, 2003 after continued complaints of pain after the discectomy. Claimant testified she did pretty well following her lumbar fusion surgery.

2. Claimant was placed at MMI by Dr. Krebs on July 26, 2004 and provided with a 20% whole person impairment rating. Respondents filed and FAL on October 8, 2004 admitting for the 20% impairment rating. The FAL also admitted for reasonable and necessary maintenance care as recommended by an authorized treating physician.

3. Claimant testified she continued to receive maintenance medical care after the FAL was filed. Claimant testified she was in Oklahoma in 2007 through 2009 when she received medical treatment after her back gave out. Claimant testified she returned to Colorado and was treated at Valley View Hospital in 20012 for severe back pain after her back went out again.

4. Claimant testified she had two other injuries during this time. Claimant testified she injured her shoulder on August 4, 2014 when she was driving a transit bus. Claimant testified she also fell off a horse in July 2014. Claimant testified neither of these incidents involved an injury to her low back.

5. Following the incident with the horse in July 2014, Claimant was evaluated by Dr. O'Brien with Glenwood Medical Associates. Dr. O'Brien noted Claimant had multiple contusions and recommended Claimant have x-rays of her right shoulder and left knee to ensure she did not have fractures. Dr. O'Brien otherwise encourages her to stretch the best she can.

6. Claimant continued to treat with Dr. Lippman, Jr. in 2015. Claimant reported to Dr. Lippman, Jr. on September 15, 20015 that the topomax prescription was very effective in relieving her left leg pain down to 0, but she still reported having a back ache.

7. Claimant testified that she experienced a worsening of her condition in October 2019 that involved increased pain in her low back.

8. Claimant sought treatment on March 13, 2020 with Dr. Lippman Jr. Dr. Lippman Jr. diagnosed Claimant with likely facetogenic back pain and recommended a magnetic resonance image ("MRI") of the lumbar spine. Claimant underwent the MRI of the lumbar spine on May 19, 2020. The MRI showed marked loss of disc height at L34 and L4-5 along with desiccation at those two levels. A small left paracentral disc bulge at T11-T12 was also noted.

9. Claimant returned to Dr. Lippman Jr. on July 16, 2020. Dr. Lippman increased Claimant's work restrictions to limit her lifting/pushing/pulling/carrying to no more than 20 pounds. Dr. Lippman Jr. recommended Claimant be referred to Dr. Cole, a physiatrist to review the MRI and determine whether facet injections may be helpful and determine if Claimant should have physical therapy or possibly a rhizotomy.

10. Respondents obtained a medical record review independent medical examination ("IME") with Dr. Douglas Scott on August 22, 2020. Dr. Scott reviewed the medical records including the MRI report and opined that Claimant's current diagnosis was facet generated low back pain without radiculopathy.

11. Dr. Scott noted that the fusion at the L5-S1 level did not cause the facet dysfunction or pain. Dr. Scott noted, however, that the lumbar fusion places more shear stress on the disk levels above the fusion. Dr. Scott opined that this increased stress can accelerate progressive degenerative disk disease at the level or two levels above the fusion level in the lumbar spine leading to progressive desiccation and narrowing of the disk space at these levels. Dr. Scott noted that this may place greater shear and torsional stress of the facet joints.

12. Dr. Scott opined that it was possible that the L5-S1 fusion had accelerated the development of the degenerative disk disease at L3-L4 and L4-L5 and may have contributed to facetogenic pain in the lower back. Dr. Scott opined that it was reasonable to believe that but for the L5-S1 lumbar fusion, Claimant would not have facetogenic pain at this time.

13. Dr. Scott recommended that Claimant be referred for at least six to eight weeks of conservative treatment with physical and manual therapy. Dr. Scott opined that if Claimant was unresponsive to this treatment, she should have a psychosocial

screening before completing the referral to Dr. Cole for his evaluation to consider facet joint injections vs. medial branch block or more physical therapy.

14. Dr. Scott issued a follow up report on October 6, 2020 to clarify that while it was possible that the lumbar fusion may have contributed to the degenerative spondylosis in Claimant's back, it is just as possible that the degenerative spondylosis was caused by Claimant's age, smoking history and/or accelerated by riding horses.

15. Claimant testified at hearing that riding horses actually helped her back pain. This testimony is consistent with the medical records from Dr. Lippman and found to be credible.

16. The ALJ credits Claimant's testimony at hearing along with the medical records of Dr. Lippman Jr. and the August 22, 2020 medical report from Dr. Scott and finds that Claimant has established that it is more probable than not that the recommended medical treatment to Claimant's L3-L4 and L4-L5 disk levels is causally related to Claimant's L5-S1 fusion surgery that was related to her industrial injury.

17. The ALJ notes that following Claimant's shoulder injury while driving the transit bus and the injury when she fell of the horse in 2014, Claimant's medical treatment did not involve her lower back. Claimant treated for those injuries and recovered. However, Claimant sought additional medical treatment to her low back over a year later in September 2015. Claimant appears from the medical records to have had a favorable response to that treatment.

18. Claimant then developed a worsening of her low back condition in 2019 which resulted in the need for additional medical treatment. The ALJ credits the medical records from Dr. Lippman Jr. and Claimant's testimony at hearing and finds that this medical treatment is causally related to her March 3, 2003 work injury and necessary to maintain Claimant at MMI.

19. The ALJ further finds that the recommended medical treatment including the physical therapy and referral to Dr. Cole, the physiatrist is reasonable medical treatment necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

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

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, Claimant has proven by a preponderance of the evidence that recommended physical therapy and referral to Dr. Cole, a physiatrist, is reasonable medical treatment necessary to maintain Claimant at MMI.

5. As found, the medical records from Dr. Lippman Jr., along with the testimony of Claimant at hearing are found to be credible and persuasive with regard to this issue. Additionally, the ALJ credits the opinions expressed by Dr. Scott in his August 22, 2020 medical report in finding that Claimant has established by a preponderance of the evidence that the recommended treatment, including the physical therapy and referral to Dr. Cole, is reasonable, necessary and related to Claimant's work injury.

6. The ALJ therefore finds that Respondent's are liable for the reasonable medical treatment necessary to maintain Claimant at MMI and prevent the deterioration of her condition, including the recommended physical therapy and referral to Dr. Cole.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to maintain Claimant at MMI including the recommended physical therapy and referral to Dr. Cole, pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: February 23, 2022

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-170-051-001

STIPULATIONS

I. Following the presentation of evidence, the parties conferred and agreed to an average weekly wage (AWW) of $500.00.

II. The parties also stipulated that should the injury in question be determined compensable, Claimant's authorized treating physician is Douglas Bradley, M.D. at Concentra Medical Centers.

The above referenced stipulations are approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence that he sustained a compensable injury to his left shoulder while working as a line cook for Employer on April 13, 2021.

II. If Claimant established that he sustained a compensable left shoulder injury, whether he also established that he is entitled to all reasonable, necessary, and related care for his left shoulder, including, but not limited to, the April 13, 2021 emergency room visit to St. Mary Corwin and the left shoulder surgery performed by Dr. Jennifer Fitzpatrick on May 25, 2021.

III. Whether Claimant established that he is entitled to Temporary Total Disability (TTD) benefits beginning April 14, 2021 and ongoing.

FINDINGS OF FACT

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

1. Claimant is a former line cook for Employer.[1] He began his employment around July 17, 2020. On April 13, 2021, Claimant was reaching for a bowl above his workstation when he heard a pop followed by tingling and numbness in his left shoulder/arm.

2. Claimant testified that the incident in question occurred at approximately 6:45 p.m. while he was preparing to plate a food order. Claimant has a history of pain

[1] Claimant believes that his employment with Employer is ongoing because he was not terminated from his job and because he continues to receive correspondence from the company. Nonetheless, he has not returned to work due to his injury.

and treatment directed to his neck and right shoulder; however, he reportedly never had any left shoulder problems until he began working for Employer in 2020.

3. Claimant's primary care provider (PCP) is Southern Colorado Family Medicine (SCFM). The providers at SCFM have been treating Claimant since 2016. Claimant saw his PCP on August 13, 2020, shortly after starting his work for Employer and approximately eight months prior to the incident in question. Claimant presented to his PCP for evaluation of chronic back pain among other conditions, including GERD, and insulin dependent diabetes. There is no mention of shoulder pain in the note from this date of visit. As part of his treatment plan, Claimant was referred to pain management for his chronic back pain.

4. Claimant presented to Parkview Pain Management on October 5, 2020. During this encounter, he completed a detailed pain diagram that depicts back pain, neck pain, and right shoulder pain[2]. Claimant also checked the box indicating his right shoulder was symptomatic. Notably absent from this pain diagram is any indication that Claimant was experiencing left shoulder pain.

5. A medical report from Parkview Pain Management dated November 9, 2020 documents that Claimant had been working for Employer, which work required him to be on his feet for eight to ten hours per day doing "lots of bending, twisting, and heavy lifting" which activity was causing back pain prompting him to seek treatment. Again, there is no mention of left shoulder symptoms.

6. On April 6, 2021, Claimant presented to Parkview Medical Center in follow-up concerning the treatment of his back pain. During this encounter, Claimant reported a new complaint of a "recent onset of severe left-sided neck pain [with] radiation into the left shoulder and upper arm." Claimant noted that his symptoms were similar to the pain he reported five years earlier, which pain was felt to be emanating from his neck. Because Claimant demonstrated significantly limited cervical spine range of motion, he was referred for a cervical MRI.

7. Several hours later, Claimant presented to St. Mary Corwin Hospital for complaints involving acute pain in the left shoulder. Claimant reported cold, numbing pain, 9 over 10 in intensity. He described the pain as feeling similar to that which he experienced with a prior rotator cuff tear in the right shoulder." Claimant denied prior trauma to the left shoulder and advised that his primary care provider had ordered an MRI.

8. On April 8, 2021, Claimant presented to his primary care provider at SCFM for an evaluation of his "acute" left shoulder complaints. During this visit, Claimant reported experiencing anterior left shoulder pain of one month in duration. Claimant's physical examination was abnormal and an x-ray revealed slight elevation of the left distal clavicle suggestive of possible ligamentous damage. A left shoulder MRI

[2] *See* Resp. Ex. E, pp. 71-83. As noted, Claimant has a documented history of neck, back, and right shoulder conditions consistent with the October 5, 2020 pain diagram.

was ordered. Claimant attributed his symptoms to repetitive activity at work and stated that it felt like his pain was emanating from his rotator cuff. He also requested a "note" for the work he missed on April 6 – 7. Claimant testified returned to work with the note on April 8, 2021. He reportedly spoke to "Mike" (Mike Martinez), the general manager, about his left shoulder condition; however, he testified that no changes were made to his schedule or job duties as a result of the conversation.

9. Claimant testified that he returned to work for his shift on April 13, 2021 and was performing his usual job duties as a cook when the incident in question occurred around 6:45 p.m. He recalled specifically having an order of chicken Alfredo ready, so he pulled the chicken and reached for a pasta bowl to put the food in. Per Claimant, as soon as he reached his fully extended left arm an inch or two above eye level to grab the dishware, he heard a pop and felt tingling and numbing in his left arm. According to Claimant, he dropped the dish, walked away and put his head against the wall in pain." Claimant testified that he then reported the incident to management but was offered nothing more than Tylenol for pain. Claimant testified that he sat at work until he felt capable of driving himself to the Emergency Department (ED) at St. Mary Corwin Hospital.

10. Upon presentation to the ED, Claimant reported that he was "at work and reached out and up and left shoulder popped and went numb." By the time Claimant was evaluated, his left arm numbness had resolved but he was experiencing limited and painful range of motion in the arm/shoulder. Claimant reported having pain in the left extremity the week prior to the incident in question. The history of present illness indicates, "A few hours ago he reached up to grab a dish with his left arm and felt a pop with pain and numbness in the left shoulder." The mechanism is indicated as "overexertion from strenuous movement or load" as well as "overhead work." It is noted that Claimant had problems with the shoulder over the previous week and that an MRI was already scheduled. An x-ray taken as part of Claimant's treatment in the ED did not show acute findings. Claimant was placed in a shoulder immobilizer, counseled "on sprain vs. rotator cuff injury" and advised to keep the MRI appointment that had been scheduled previously. He was then discharged home with an excuse letter indicating that he had been seen in the ED and could return to work on April 15, 2021.

11. Prior to reporting for work on April 15, 2021, Claimant returned to SCFM at 9:40 a.m. During this appointment, Claimant reported that he felt a pop in his left shoulder while at work on Tuesday, April 13, 2021, after which he presented to the ED. Claimant also reiterated that he was having left shoulder pain prior to April 13, 2021 and at the time was "concerned that he was about to tear [the] rotator cuff because he was having symptoms in the shoulder which were similar to before when tore his right rotator cuff a few years ago." The report form this date of visit notes that "[Claimant] made this appointment to request a letter from doctor to his employer stating that they needed to open workman's comp case." Claimant was advised that he would need to see a workers' compensation provider and work with his employer to initiate a claim because SCFM did not treat work related injuries.

Employer documentation reflects that Claimant reported the injury to the Employer at 6:45 p.m. on April 15, 2021.

12. On April 20, 2021, Claimant was given a list of medical providers from which to choose pursuant to WCRP 8 by email. This list included providers at Concentra whom Claimant elected to see for treatment.

13. Claimant presented to Douglas Bradley, M.D., at Concentra on April 21, 2021. In a patient form filled out on this date Claimant indicated that, he reached for a plate and heard a pop and his left hand went numb. A physical examination reflected severely limited range of motion of the left shoulder but no abnormalities, tenderness, and full range of motion in the cervical spine. Dr. Bradley felt that Claimant might have suffered a brachial plexus injury. He prescribed Lyrica, ordered an EMG and recommended that Claimant move forward with the MRI of his left shoulder. Claimant was given "no use" restrictions for the left arm.

14. Claimant testified that he subsequently had a discussion with Mike Martinez, regarding modified work. According to Claimant, Mr. Martinez sat him down at a table and told him he could be a host. Claimant testified that he received nothing in writing regarding the modified duty, which would have clarified what the job duties of a "host" are.

15. On April 22, 2021, Claimant underwent an MRI of the left shoulder. The MRI demonstrated a partial thickness tear of the subscapularis and infraspinatus tendons and a full-thickness, partial width tear and additional partial-thickness and intrasubstance tear of the supraspinatus tendon.

16. On April 24, 2021, Dr. Bradley reviewed the MRI and referred Claimant for evaluation with orthopedist Jennifer Fitzpatrick, M.D. Claimant was evaluated by Dr. Fitzpatrick on May 10, 2021 for complaints involving the left shoulder and left-sided radiating neck pain. Claimant reported that his shoulder pain was interfering with his ability to perform activities of daily living. Dr. Fitzpatrick diagnosed Claimant with an "acute" traumatic complete tear of the left rotator cuff and recommended left shoulder arthroscopic rotator cuff repair with biceps tenodesis distal clavicle excision. Dr. Fitzpatrick sent a prior authorization request on May 12, 2021. The request was denied.

17. Surgery was performed by Dr. Fitzpatrick on May 25, 2021. Following surgery, Claimant was excused from work completely[3] by Dr. Fitzpatrick after the surgery and indicated he could return to work on June 3, 2021 with the restrictions of no use of the left arm and that he must wear a sling.

18. Physician Assistant (PA-C) Catherine Fitzgerald examined Claimant during a post-surgical appointment on June 2, 2021 at Parkview Orthopedics. Claimant reported an eagerness to start physical therapy. Claimant was documented as doing

[3] Claimant had previously requested a leave of absence from work but that work was not able to accommodate.

well. Consequently, he was referred to therapy for his shoulder at Momentum Physical Therapy.

19. On June 30, 2021, Claimant returned to Dr. Fitzpatrick for a post-operative follow-up. Claimant indicated that he felt that some of his pain might be coming more from his neck versus his shoulder. Dr. Fitzpatrick recommended an MRI of the cervical spine.

20. An MRI of the cervical spine was completed on July 8, 2021. The study was compared with a CT of the neck done on August 30, 2015. The impression of the radiologist was multilevel and multifactorial degenerative changes greatest at C6-7 resulting in moderate left and mild right foraminal narrowing.

21. On July 23, 2021, Dr. Fitzpatrick referred Claimant back to Dr. Bradley for treatment. It is indicated by Dr. Fitzpatrick that Claimant's physical therapist believed that his ongoing pain might be coming more from the neck versus the shoulder. An x-ray of the shoulder showed no abnormalities beyond a mild widening of the acromioclavicular joint presumed secondary to the resection of the distal clavicle.

22. On July 23, 2021, Dr. Bradley noted that Claimant still had pain in the collarbone and lateral shoulder with weakness and persistent numbness. The diagnosis included clavicle pain, brachial plexus neuropathy of the left shoulder, and traumatic incomplete tear of the left rotator cuff.

23. Dr. Fitzpatrick reviewed the cervical MRI on August 25, 2021 and indicated degenerative changes contributing to mild left and right foraminal narrowing.

24. On August 27, 2021, Claimant returned to Dr. Bradley with reports of continuing left arm weakness and numbness into his fingertips. Claimant had a nearly fully frozen shoulder after surgery. Claimant remained off work with restrictions of no lifting or carrying more than four pounds, no pushing and pulling more than six pounds.

25. Claimant underwent an independent medical examination (IME) with Dr. Jack Rook at the request of his attorney on September 20, 2021. Claimant reported that he was doing fine with the job until several weeks prior to "an acute injury" that occurred on April 13, 2021. Claimant explained that he started experiencing mild discomfort in the left shoulder that progressively worsened, causing him difficulties with his job duties. He stated that his job involved repeatedly lifting pots, pans, trash and water buckets - frequently greater than 50 pounds. When the activities became extremely painful to perform, Claimant went to the ER and then followed up with his primary care physician, who recommended light duty and referred him for an MRI. Claimant stated that he sustained an acute injury while "reaching above the shoulder level with his left arm, attempting to grab a pasta bowl, he felt and heard a pop in his shoulder that was associated with severe pain." Claimant stated he was unable to use his left arm and could not continue working.

26. Following a records review and physical examination, Dr. Rook diagnosed Claimant with left shoulder pain, status post arthroscopic rotator cuff repair, distal clavicle resection, and biceps tenodesis; incomplete post-operative recovery with ongoing pain and shoulder weakness and limited range of motion; and surrounding myofascial pain involving left-sided paracervical and upper trapezius musculature. Dr. Rook opined that Claimant's initial symptoms were the result of an occupational disease resulting from the physical requirements of the job, including cleaning the grill with a wire brush, performing frequent heavy lifts, repetitive reaching below, at and above shoulder level, and mopping the floor at the end of each work shift. Dr. Rook further opined that, on April 13, 2021, Claimant sustained an acute rotator cuff tear superimposed on the chronic left shoulder pain. Dr. Rook opined that, in light of the lack of prior history of left shoulder problems or alternative mechanism, Claimant sustained an occupational injury to the shoulder.

27. Claimant underwent an IME with Dr. Carlos Cebrian at Respondents' request on October 21, 2021. Claimant provided a history of injury to Dr. Cebrain consistent with that he had reported to Drs. Bradley, Fitzpatrick and Rook previously. Specifically Claimant informed Dr. Cebrain that his left shoulder had begun bothering him weeks prior to April 13, 2021, that he asked his employer to modify his duties without success and that on April 13, 2021, while reaching at approximately eye level for a porcelain bowl, he heard a pop and felt a tearing sensation in his left shoulder. Claimant stated he told his supervisor about his injury before he left work and went to the ED. Per Dr. Cebrain's report, Claimant endorsed pain and numbness in the shoulder as well as jolting sensations in his neck. Dr. Cebrain also documented Claimant's prior history of neck pain[4], right shoulder problems, and diabetes.

28. Dr. Cebrian opined regarding causation for both an occupational disease as well as the acute injury alleged by Claimant. Dr. Cebrian concluded that it was not medically probable that Claimant sustained an acute injury on April 13, 2021 because the mechanism of injury (MOI) was minimal. He explained that simply reaching with an extended arm at shoulder level to lift an empty bowl would not involve sufficient force to cause a traumatic injury or aggravate any preexisting pathology. Dr. Cebrian further indicated that Claimant's job duties were insufficient to satisfy the criteria in the Medical Treatment Guidelines (Guidelines) for development of a cumulative trauma injury. Dr. Cebrain cited the risk factors for the development of cumulative trauma from the Guidelines to include: overhead work of at least 30 minutes per day for a minimum of 5 years; work requiring shoulder movement at the rate of 15-36 repetitions per minute with no 2 second pauses for 80% of the work cycle; and work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle. In concluding that Claimant did not meet the criteria for the development of a cumulative trauma disorder in the left shoulder related to his work duties, Dr. Cebrian noted that Claimant performed limited work about the shoulder level. Dr. Cebrain concluded that Claimant's left shoulder pain, dysfunction and rotator cuff tearing was a result of degeneration, not any work activity. In support of his opinion, Dr. Cebrian noted that Claimant had pre-existing AC joint arthropathy, a

[4] Despite Claimant denial of prior neck complaints.

prior tear in the right rotator cuff in the absence of trauma, a history of tobacco dependence and a history of diabetes, which was poorly controlled at times.

29. Robert Messenbaugh, M.D., a board certified orthopedic surgeon with experience in treating shoulder injuries, performed a review of Claimant's medical records at the request of Respondents on October 31, 2021. Dr. Messenbaugh reviewed both Dr. Rook's IME report as well as the opinions of Dr. Cebrian. Dr. Messenbaugh opined that the mechanism of the reported left shoulder injury was inconsistent with the creation of an acute rotator cuff tear. Dr. Messenbaugh opined that Claimant did not sustain an acute injury to his left shoulder as described. Dr. Messenbaugh also opined that Claimant did not sustain any injury to his cervical spine. Dr. Messenbaugh indicated that he was in full agreement with Dr. Cebrian that there was no acute injury to the left shoulder and that the need for left shoulder treatment, including surgery, was not related to Claimant's alleged April 13, 2021 claim.

30. [Redacted, hereinafter BG] testified as an assistant manager for the Employer. Per a request from Respondents, Mr. BG [Redated] measured the distance between the floor and the shelf where the dishes are stored, where Claimant would have been reaching to grab the pasta bowl in question. Mr. BG [Redated] took the measurements at multiple locations on the shelf across the line. He testified that the height was consistently 66 inches from the floor to the top of the shelf. Mr. BG [Redated] testified that the height to reach the top of the dishes stacked on the shelf could vary by up to six inches depending on how high the dishes are stacked. Mr. BG [Redated] testified that he is 6'1" (73 inches) and Claimant is two to three inches taller, or 6'2" or 6'3". Mr. BG[Redated] testified that his own shoulder was approximately the same height as the shelf (66 inches). With dishes being stacked as high as 6" up from the 66" mark the height of some dishes could be as high as 72", or 6'. Based upon the evidence presented, the ALJ finds that Mr. BG [Redated] would have had to reach his arm up to grab a bowl stacked 6 inches high. If Claimant is 2" to 3" taller than Mr. BG[Redated], the ALJ finds that he too would have had to reach above shoulder height, closer to eye level as Claimant has maintained from the beginning, to grab the bowl in question.

31. Mr. BG [Redated] further testified regarding Claimant's work after the injury. He testified he was instructed to offer Claimant light duty and offered Claimant a job as a greeter. He admitted that he did not consult with Claimant's ATP regarding the job duties and his restrictions. He also did not go over with Claimant what his specific duties as a greeter would be. The Court asked a clarifying question to Mr. BG [Redated] as to whether a modified job offer was provided to Claimant in writing. Mr. BG [Redated] confirmed no written offer was made.

32. Dr. Cebrian testified at hearing as a Level II accredited expert in occupational medicine. During his testimony, Dr. Cebrian reiterated his opinion that Claimant's left shoulder rotator cuff tear and need for treatment was due to degeneration rather than an acute injury or cumulative trauma disorder. According to Dr. Cebrain, the threshold for sustaining cumulative trauma to the shoulder is quite high

and something more common to assembly line workers as opposed to someone performing Claimant's work duties. Dr. Cebrian testified that there must be consistent work above shoulder level for at least five years, repetitive and forceful activity without breaks for at least 80% of the shift or heaving lifting for several years. Dr. Cebrian testified that, based on the duties described by Claimant; there was not a significant amount of overhead activity involved in his work. Therefore, Dr. Cebrian testified that Claimant did not meet the minimum threshold for cumulative trauma of the shoulder.

33. Concerning Claimant's assertion that he sustained a traumatic injury to the left shoulder while reaching to grab a bowl at or slightly above eye level, Dr. Cebrian repeated his opinion that the MOI was "very minor" and insufficient to cause an acute injury. Dr. Cebrian testified that reaching away from the body with the arms is an activity most people do on a regular basis. He then reiterated that there were comorbid factors contributing to degeneration of the tendons of the shoulder, which lead to the tearing in this case. Per Dr. Cebrain, the presence of osteophytes on imaging supported his belief that Claimant's rotator cuff tear was degenerative in nature rather than traumatically induced. He explained that osteophytes caused by degeneration protrude into the subacromial space where the rotator cuff tendons lay and over time cause fraying and tearing with movement of the shoulder. He also testified that Claimant's poorly controlled diabetes and smoking history was a factor in the degeneration and tearing of Claimant's rotator cuff tendons. According to Dr. Cebrain, uncontrolled/poorly controlled diabetes disrupts and weakens tendon function over time creating a predisposition to tearing. Moreover, Dr. Cebrain noted that smoking degenerates tendons more easily than in a nonsmoker. Dr. Cebrian cited Claimant's 2016 right shoulder tear in 2016 in the absence of any trauma or work activity as support that Claimant's left rotator cuff tear was spontaneous (only indicated by the development of pain) and degenerative in nature.

34. During cross-examination, Dr. Cebrian was asked if Claimant's left shoulder condition was degenerative, what caused it to become symptomatic. Dr. Cebrian responded, "So, short of any unknown trauma that occurred that we're not aware of, the degeneration, at some point, became symptomatic and can be something that can cause problems." Upon further questioning, Dr. Cebrian acknowledged Claimant became symptomatic while working.

35. The ALJ has carefully considered Dr. Cebrain's opinions and has weighed them against the balance of the competing evidence, including Claimant's testimony and the reports of Dr. Rook and Dr. Fitzpatrick. Based upon the totality of the evidence presented, the ALJ finds Dr. Cebrain's and Messenbaugh's opinions less persuasive than those of Drs. Rook and Fitzpatrick. In this case, the ALJ credits the medical records as a whole, the opinions of Drs. Rook and Fitzpatrick and Claimant's testimony to find that he probably suffered acute tears of the tendons of the rotator cuff as a direct consequence of reaching away from his body with the left arm to retrieve a bowl on a shelf at about eye level.

36. As presented, the record supports a finding that Claimant sought treatment as a direct result of the pain, numbness and tingling in his left shoulder precipitated by his work related activities on April 13, 2021. Accordingly, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that his left shoulder condition/injury is compensable. As found above, the contrary opinions of Dr. Cebrain are unpersuasive.

37. Based upon the evidence presented, including Claimant's testimony concerning his functional abilities and the reports of Dr. Fitzgerald, the ALJ finds that the left shoulder surgery she performed on May 25, 2021 was reasonably necessary and causally related to Claimant's April 13, 2021 work duties.

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 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).

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 his employment relationship with Employer, i.e. at the restaurant during his regularly scheduled shift. Moreover, the alleged injury occurred during an activity, namely plating a food order, which the ALJ concludes is expected of Claimant in his position as a line cook. 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" his employment must be resolved before the injury is 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 he 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 shoulder was symptomatic or required treatment before he began working for Employer. The evidence presented supports a conclusion that Claimant sought care in the emergency room and with his PCP for left shoulder pain in early April 2021, for symptoms he attributed to the repetitive nature of his work. Based upon the evidence presented, the ALJ is convinced that Claimant was able to continue working his job despite the onset of symptoms. Nonetheless, his duties were not modified and he continued using the left arm/shoulder to complete the duties required of a cook, which probably caused further injury to the rotator cuff on April 13, 2021, as he reached away from his body with the left arm to retrieve a bowl from a shelf above the grill line. Indeed, the MRI unequivocally establishes that Claimant has full and partial thickness tears of several tendons within the left rotator cuff that Dr. Fitzpatrick opined were traumatic in nature. As found, the ALJ credits the opinion of Dr. Fitzpatrick over Dr. Cebrain to conclude that the aforementioned tearing was probably acute, which conclusion is supported by the severity of symptoms and disability Claimant described immediately after the MOI occurred.

G. While the ALJ is persuaded that Claimant may have suffered from pre-existing degeneration in the left shoulder, 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 increased

symptoms and disability Claimant experienced on April 13, 2021 were a consequence of an aggravation and the industrially based acceleration of his underlying left shoulder degeneration causing tearing of the left rotator cuff. As found, the ALJ rejects Dr. Cebrain's contrary opinions as unpersuasive.

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*, (outside of the involvement of a different body part) and found here, the discrete injury to Claimant's left shoulder arose out of his involvement in work activity rather than being precipitated by an idiopathic condition he 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 his 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. Cebrain, 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 reaching up and outward from the body, which is 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 Dr. Cebrain. 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. Cebrain's opinion that Claimant could not have injury his left shoulder because the force in reaching away from the body was minimal, the persuasive evidence supports a conclusion that Claimant suffered acute tearing of the left rotator cuff after reaching with his left arm to retrieve a bowl on the shelf above his workstation. While unusual, the ALJ is convinced that a logical connection exists between Claimant's reaching activities at work, his left shoulder symptoms and his 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 and 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). As found here, the evidence demonstrates that Claimant's medical care as provided at Concentra (Dr. Bradley) and his referrals, including the orthopedic evaluation and subsequent surgery performed by Dr. Fitzpatrick was reasonable, necessary and related to his acute left rotator cuff tears sustained April 13, 2021. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of his injury. The specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing disability surrounding function of the left shoulder/arm. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left shoulder surgery on May 25, 2021 was reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment, including Claimant's left shoulder rotator cuff repair performed by Dr. Fitzpatrick.

Claimant's Entitlement to Temporary Total Disability Benefits

M. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the

subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

N. 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). The impairment of the 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/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

O. Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(d)(I) which states: "The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

P. All written offers of modified duty shall clearly state "that future offers of employment need not be in writing" and that "benefits . . . will be terminated if an employee fails to respond to an offer of modified employment." C.R.S. § 8-42-105(d)(III)(A, C).

Q. In this case, Claimant has established that he was injured at work. The evidence presented also supports a conclusion that Claimant was given physical restrictions to include no use of the left upper extremity beginning April 21, 2021 by his authorized treating provider, Dr. Douglas Bradley. Nonetheless, the evidence presented persuades the ALJ that Claimant's restrictions were not accommodated. Consequently, he suffered a wage loss. While Respondents assert that Claimant was offered modified employment, the evidence presented supports a conclusion that Employer did not follow the statutory requirements that modified duty offers be extended in writing. Indeed, Mr. BG[Redated] conceded that nothing was ever offered to Claimant in writing, that the exact details of the modified duty he would be performing were not disclosed, and that the identified modified duty position was not approved by Claimant's ATP. Based upon the evidence presented, the ALJ concludes that Respondents have not provided Claimant with a bona fide modified job offer in compliance with the statue. Respondents contend that because Claimant rejected the verbal offer of modified duty, he is not entitled to TTD benefits. The ALJ is not convinced, determining instead that Claimant's rejection of the verbal offer of modified duty was reasonable considering the fact that Claimant's ATP did not approve the offer and Mr. BG[Redated] did not disclose the specific duties Claimant would be expected to perform as part of his modified duties. Accordingly, Claimant has proven that he is entitled to indemnity benefits beginning April 14, 2021 through the present and ongoing until properly terminated by operation of law.

ORDER

It is therefore ordered that:

1. The parties' stipulation concerning Claimant's AWW is approved. Claimant's AWW is $500.00.

2. Claimant has established, by a preponderance of the evidence, that he sustained a compensable injury to his left shoulder on April 13, 2021, including, but not limited to, a tear of the left rotator cuff and injuries to the surrounding musculature.

3. Respondents are liable for Claimant's treatment with St. Mary Corwin ED, Concentra Medical Centers and all treatment based upon referrals therefrom, including but not limited to his care/surgery with Dr. Fitzpatrick.

4. Respondents shall pay temporary total disability benefits beginning April 14, 2021 and ongoing until terminated according to law.

5. Insurer 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 are reserved for future determination.

DATED: February 23, 2022

/s/ Richard M. Lamphere

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

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Respondents must file an amended final admission of liability ("FAL") admitting for maintenance medical benefits?

FINDINGS OF FACT

1. Claimant was employed by Employer as an automobile mechanic. Claimant sustained an admitted low back injury June 10, 2019 in the course and scope of his employment with Employer when he tripped over an object that was sticking out of the concreate floor.

2. Prior to Claimant's work injury, Claimant had a prior injury to his hip from a motor vehicle accident that occurred when he was 19 years old. Claimant is currently 36 years old as of the date of hearing. Claimant testified at hearing that he did not have medical treatment to his low back prior to the work injury.

3. The medical records establish that as of May 16, 2019, Claimant was receiving medical treatment related to his hip injury with Dr. Kanopsic Jr. Claimant reported at this time that he was having spasms of sharp pain that typically last for a few seconds. Claimant was taking Cyclobenzaprine (Flexeril) at this time. While Claimant reported low back pain at the time of the examination, Dr. Kanoposic opined that given the duration of Claimant's symptoms, he did not believe the etiology of Claimant's complaints were related to a herniated disc.

4. Following his work injury, Claimant was examined on June 10, 2019 by Dr. Utt. Dr. Utt noted Claimant reported no history of back problems, but did have a history of pain into the right buttock and thigh, but not beyond the knee. Claimant returned to Dr. Utt on June 12, 2019 and was diagnosed with a lumbar radiculopathy. Dr. Utt continued conservative treatment which included physical therapy, and medications including Flexeril, Tylenol, and Ibuprofen. Claimant eventually underwent surgery on his lumbar spine consisting of bilateral laminectomy, microdiscectomy, facetectomy, and foraminotomy at the L4-5 with Dr. Agrawal on September 20, 2019.

5. Following Claimant's back surgery, Claimant was released by the neurosurgical physicians' assistant ("PA") Laura Fox on January 2, 2020. PA Fox noted

in her January 2, 2020 report that she recommended physical therapy if Claimant's back started to bother him more.

6. Claimant returned to Dr. Utt on January 10, 2020. Dr. Utt noted Claimant had mild decreased right foot inversion strength. Dr. Utt released Claimant to return to work full duty. Claimant returned to Dr. Utt on February 21, 2020 with reports of numbness, but reported his back pain was improving. Dr. Utt noted Claimant had good lumbar flexion with mildly decreased side bend and extension. Claimant was encouraged to continue stretching and core strength exercising.

7. Claimant returned to Dr. Utt on March 16, 2020 for an evaluation for an impairment rating. Dr. Utt listed Claimant's date of MMI as March 5, 2020[1]. Dr. Utt noted Claimant had been released to return to work without restrictions. Dr. Utt provided Claimant with an impairment rating of 20% whole person. Dr. Utt noted that as of his last visit, Claimant felt he could lift up to 100 pounds rarely with frequent bends, squats, kneel, and climb. Dr. Utt further noted that Claimant needed no further maintenance care and no ongoing medications.

8. Claimant testified at hearing that as of March 2020, he was continuing to take Flexeril, Tylenol, and Ibuprofen for ongoing back and radicular symptoms including numbness into his bilateral feet.

9. Claimant underwent a Division-Sponsored Independent Medical Examination ("DIME") July 30, 2020 under the auspices of Dr. Elfenbein. Claimant reported to Dr. Elfenbein that he was much better after his surgery. With regard to his current complaints, Claimant reported continued low back pain rated 7 out of 10 at its worst with 2-3 out of 10 at it's best and 4-5 out of 10 on average. Dr. Elfenbein provided Claimant with an impairment rating of 16% whole person. Dr. Elfenbein noted in his report that no maintenance care was necessary with relation to the work injury of June 10, 2019.

10. Respondents filed an FAL admitting for the 16% whole person impairment rating and denied maintenance medical treatment.

11. On August 28, 2020 Claimant saw his personal provider, Dr. Dana Patton at St. Mary's Family Practice. Dr. Patton noted that Claimant reported he still had muscle spasms in his low back. Claimant testified at hearing that these muscles spasms were related to his low back injury. Claimant returned to Dr. Patton on October

[1] Dr. Utt's medical report providing the impairment rating does not appear to have a date listed on it. However, the range of motion worksheet lists March 16, 2020 as the date of the exam at the top of the sheet, and the ALJ adopts this date as corresponding to the medical report that provides Claimant's impairment rating.

30, 2020 and reported he continued to take medications including Tylenol, Ibuprofen, and Cyclobenzaprine for pain management.

12. Claimant testified that he attempted to follow up with Dr. Utt's office for continued post-MMI care but told the case was closed.

13. Claimant testified he was evaluated by St. Mary's neurosurgery on January 27, 2021 and was referred for physical therapy. The January 27, 2021 St. Mary's neurosurgery clinic progress note states that claimant presented to the office with a complaint of back pain with radiation to the right lower extremity which had been ongoing and was getting worse. The note references the L4-5 bilateral laminectomy and bilateral discectomy performed September 21, 2019 by Dr. Agrawal.

14. Respondents obtained a records review independent medical examination ("IME") with Dr. Cebrian on February 5, 2021. Dr. Cebrian summarized Claimant's medical records and noted that the L4-5 disc hearnation and resultant lumbar surgery were work related conditions. Dr. Cebrian opined the Claimant was at MMI as of March 5, 2020 and no maintenance care was indicated.

15. Claimant was evaluated by nurse practitioner Crick on April 8, 2021. Ms. Crick noted Claimant continued to complain of low back pain with radiation down into his right lower extremity and numbness/tingling in both feet. Claimant had a new MRI on April 8, 2021 which demonstrated an L5-S1 disc extrusion with right greater than left foraminal narrowing. Ms. Crick recommended a right sided L5-S1 epidural steroid injection.

16. Claimant underwent the L5-S1 epidural steroid injection on April 23, 2021 under the auspices of Dr. Steury.

17. Claimant testified at hearing that after the surgery and being placed at MMI he remained symptomatic from the back injury. Claimant testified he sought medical treatment through his personal physician which was billed through his personal health insurance and received a lumbar spine injection. Claimant testified his symptoms improved after the April 23, 2021 injection. Claimant testified he continues to experience symptoms including tingling into his toes and the bottom of his feet. Claimant testified these symptoms are distinct from his sporadic right hip symptoms from the prior motor vehicle accident.

18. Dr. Cebrian testified at hearing consistent with his report. Dr. Cebrian opined that Claimant's April 8, 2021 MRI showed a new finding at the L5-S1 level. Dr. Cebrian testified that Claimant's previous back surgery involving a microdiscectomy and foraminotomy would not cause a disc herniation at the level below the affected area.

19. Claimant testified on rebuttal that Dr. Argawal had said his surgery could make the disc underneath the surgical site weaker. The ALJ notes that this testimony is not supported by the records from Dr. Anrgawal and does not credit this portion of Claimant's testimony.

20. In addition to the physical therapy Claimant testified he continues to receive medications, including Neurontin and Gabapentin. Claimant testified it had been recommended that Claimant switch to Amitriptyline.

21. The ALJ notes that Claimant's medical records document that Claimant was taking Flexeril prior to his work injury along with other over the counter medications. The ALJ finds that there is insufficient evidence to find that the recommended prescription medications Claimant testified to at hearing, including the Neurontin and Gabapentin are related to Claimant's workers' compensation injury as these ongoing medications are consistent with Claimant's prescriptions from prior to the work injury.

22. Additionally, the ALJ notes that Claimant's most recent MRI shows new findings that were not present initially following his work injury. There is insufficient evidence to establish that Claimant's ongoing complaints for radicular symptoms are related to his work injury and not the new findings referenced in the April 8, 2021 MRI.

23. The ALJ notes that no physician has opined that Claimant's new findings at the L5-S1 level are related to Claimant's June 10, 2019 work injury. The ALJ further credits the opinion of Dr. Cebrian that the findings at L5-S1 are not related to Claimant's work injury and finds this opinion to be persuasive with regard to the need for Claimant's ongoing treatment. The ALJ further finds that the April 23, 2021 right sided L5-S1 epidural steroid injection is likewise not related to Claimant's June 10, 2021 work injury.

24. The ALJ credits the opinions of Dr. Utt, Dr. Elfenbein and Dr. Cebrian and finds that Claimant has failed to demonstrate by a preponderance of the evidence that his need for ongoing medical treatment is related to his June 10, 2019 injury. Insofar as Claimant requests relief in the form of an amended FAL being filed admitting for maintenance medical treatment, the ALJ determines that Claimant has failed to prove that it is more likely than not that Claimant would need post-MMI medical treatment necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

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

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, Claimant has failed to prove by a preponderance of the evidence that Claimant needs medical treatment related to the June 10, 2021 work injury in order to maintain Claimant at MMI.

5. As found, the medical reports from Dr. Utt, Dr. Elfenbein and Dr. Cebrian are found to be credible and persuasive with regard to the issue of whether Claimant needs ongoing medical treatment to maintain himself at MMI.

6. The ALJ therefore finds that Claimant has failed to meet his burden of proof and Claimant's request for an admission of liability for ongoing maintenance medical treatment should be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for an amended FAL that admits for maintenance medical treatment is denied.

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

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

DATED: February 23, 2022

Keith E. Mottram

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received at Memorial Regional Hospital is reasonable and necessary to cure and relieve him from the effects of the occupational disease.

3. 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 beginning June 12, 2020,

4. If the claimant is awarded TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment with the employer, thereby ending TTD benefits.

STIPULATION

If the claim is found compensable, the parties have stipulated to an average weekly wage (AWW) of $1,603.05.

FINDINGS OF FACT

1. The employer operates a mine. The claimant began his employment at the mine as a contractor. After one year as a contractor, the claimant was hired as a permanent employee in the position of Mechanic III.

2. The claimant's job duties included driving a large fuel truck around the mine property to fuel various pieces of equipment. The claimant testified that the truck has a 10,000 gallon tank and a two inch hose that runs between 30 and 40 feet.

3. The claimant further testified that for each fuel stop, he would park the fuel truck, and then place a chock block behind one of the tires. The way in which this task is accomplished was that the chock block is lifted off a pole on the side of the truck. Then the chock block is placed on the ground behind the tire. The claimant estimates that the chock block he used weighted 50 to 60 pounds. In addition, during the winter months, the chock block can become covered in ice and frozen debris, resulting in additional weight.

4. The claimant testified that the next part of the fueling process would be to pull the hose from the fuel truck to the receiving vehicle. At times it would be necessary to pull the entire length of the hose. The claimant would then connect the hose, turn the fuel on, and then disconnect, and retract the hose. The claimant testified that for some vehicles he had to reach above his head. At other times, it was necessary to climb onto the vehicle to connect the hose.

5. Once a fuel stop was completed, the claimant would lift the chock block and return it to the post on the truck. The claimant testified that he made between 20 and 30 stops during a 12 hours shift.

6. It is the claimant's position that the repetitive nature of these work activities resulted in an injury to his right shoulder and four bulging discs in his neck.

7. The claimant first sought treatment for his neck and shoulder symptoms on June 12, 2020. The claimant did so on that date, because he was in severe pain. On June 12, 2020, the claimant sent a text message to his direct supervisor, Mr. [Redacted, hereinafter Mr. K], stating that he would be using a sick day because "shoulder is killing me". The claimant did not report to Mr. K[Redacted] that he believed his work activities were the cause of his shoulder symptoms.

8.On August 18, 2020, [Redacted, hereinafter Ms. AS] HR Business Partner for the employer, prepared an Employer's First Report of Illness or Injury regarding the claimant. That form lists the onset of the claimant's illness or injury as "unknown". That same form also stated that the cause of the injury was "[U]nknown. Employee didn't provide a report of injury to his supervisor. Employee contacted Employee Services after his paid leave was exhausted, and indicated on his short-term disability paperwork that the injury was work-related."

9.On September 15, 2020, the claimant completed an Injured Employee's Report for the insurer. That document indicates that the date of the claimant's injury was February 15, 2019 through June 20, 2020. The claimant also identified the injured body parts as his right shoulder and neck. Under "accident facts" the claimant identified "frequent heavy lifting over a period of time".

10.At the request of his attorney, on May 17, 2021, the claimant attended an independent medical examination (IME) with Dr. Gary Zuehlsdorff. In connection with the IME, Dr. Zuehlsdorff reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Zuehlsdorff opined that the claimant's job duties resulted in cumulative trauma to his cervical spine and right shoulder. Dr. Zuehlsdorff also identified that claimant's condition as "a form of repetitive motion injury".

11.At the request of the respondents, on July 8, 2021, the claimant attended an IME with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Failinger opined that the claimant's work

activities did not cause the claimant's neck and shoulder pain. Dr. Failinger noted that the claimant denies any specific incident that initiated the onset of his symptoms. Dr. Failinger also noted that the right shoulder MRI did not reflect "significant shoulder pathology". Dr. Failinger reviewed whether the claimant's symptoms were the result of cumulative activities. Dr. Failinger opined that the claimant's job activities did not meet the criteria for repetitive movement.

12. Dr. Failinger's deposition testimony was consistent with his written report. Dr. Failinger testified that the claimant's job duties did not rise to the level of creating cumulative trauma. Dr. Failinger also noted that the claimant's job duties were not repetitive in nature. Dr. Faillinger opined that the claimant's arm use was "pretty rare and intermittent". In support of his opinion, Dr. Failinger noted that the claimant would fill a truck once every 40 to 45 minutes, or 16 trucks in a 12 hour shift. Dr. Failinger also noted that there is no clear diagnosis of the claimant's condition. Finally, Dr. Falinger testified that the claimant's symptoms are coming from a degenerative condition in his neck. Dr. Failinger does not believe that the claimant's job duties caused an aggravation or acceleration of that pre-existing condition.

13. [Redacted, hereinafter Mr. K], Maintenance Supervisor, was the claimant's supervisor. Mr.K[Redacted] testified that it was the claimant's job to run the lube truck to fuel mobile equipment. During a normal shift, an employee in the claimant's position would make approximately 20 stops. Mr. K[Redacted] testified that the fuel hoses are not connected while "charged". Although there will always be some residual fuel in a hose, while moving and connecting a hose, it is not charged. No fuel connections are done overhead.

14. [Redacted, hereinafter SM] Maintenance Supervisor for the employer testified regarding the claimant's job duties. Specifically, Mr. SM[Redacted] testified that the process for filling a vehicle starts with parking the lube truck near the receiving vehicle. Then the driver of the lube truck places the chock block for the lube truck. The hose is then pulled from the lube truck to the receiving vehicle. During this process the hose is not pressurized with fuel. Once the connection is made, the hose is pressurized to fill the receiving vehicle. When fueling is completed, the hose is depressurized and disconnected from the receiving vehicle. The hose is then returned to the lube truck via a hydraulic winder. At times, multiple vehicles will be driven to the location of the lube truck. In that instance, the lube truck chock block is not moved. Mr. SM[Redacted] estimated that the claimant would fill a total of 16 vehicles during one 12 hour shift. This does not mean 16 stops per shift, as explained above regarding multiple vehicles receiving fuel at the same location.

15. Ms. AS[Redacted] testified via deposition. Ms. AS[Redacted] confirmed that she spoke with the claimant on June 19, 2020. During that telephone conversation, the claimant told Ms. AS[Redacted] that he was reporting "an occupational illness". When Ms. AS[Redacted] requested additional information, the claimant reported that he had hurt his shoulder during a prior job, and he aggravated that injury. Ms. AS[Redacted] testified that she was not given the impression that the claimant was claiming this aggravation happened at work. Ms. AS[Redacted] also testified that she prepared the First Report of

Injury in August 2020 because the claimant had begun to claim that his condition was work related. Ms. AS[Redacted] testified that she attempted to assist the claimant with FMLA leave, and short term disability. However, the claimant was not compliant in providing requested information. The claimant's employment was terminated by the employer on December 23, 2020. Ms. AS[Redacted] testified that the claimant's employment was terminated because he failed to comply with her requests for information, and the claimant had stopped communicating with the employer.

16.The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the testimony of Mr. K[Redacted], Mr. Marshall, and Ms. AS[Redacted]. The ALJ specifically credits the testimony of Mr. K[Redacted] and Mr. SM[Redacted] regarding the claimant's job duties and the equipment utilized to perform those duties. The ALJ credits the opinions of Dr. Fallinger over the contrary opinions of Dr. Zuehlsdorff. The ALJ specifically credits the opinions of Dr. Fallinger that 1) the claimant's job activities did not meet the criteria for repetitive movement and 2) that the claimant's job duties did not cause an aggravation or acceleration of the claimant's pre-existing condition. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

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. 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).

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 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.

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. Vicory, 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 worker 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. *Cotts 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. *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. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer. As found, the opinions of Dr. Fallinger, and the testimony of Mr. K[**R**edacted], Mr. SM[**R**edacted] and Ms. AS[**R**edacted] are credible and persuasive.

ORDER

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

Dated this 25th day of February 2022.

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

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable occupational disease, entitling her to reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 64-year-old woman who worked for Employer as a security guard since June 28, 2016. Claimant's regular shift was from 6:00 a.m. to 2:00 p.m. five to six days per week. Claimant occasionally worked overtime. Claimant spent the entirety of her shift in a guard shack with windows. One window had minimal tinting at the top of the window.

2. Claimant credibly testified at hearing. Claimant testified she experienced exposure to sunlight while working in the guard shack which caused a burning sensation in her eyes. Claimant acknowledged she is also exposed to sunlight outside of work. Claimant alleges her exposure to sunlight while at work caused or worsened her bilateral cataracts. Claimant alleges she suffered an occupational disease with a date of onset on or around November 4, 2020.

3. Claimant's co-worker, [Redacted, hereinafter WG], credibly testified by telephone on behalf of Claimant. He testified that the windows to the guard shack are not tinted and he experiences sun exposure in the guard shack. Mr. WC[Redcted] testified the security guards stay in the guard shack throughout their shifts and that he has also had problems with the sun exposure.

4. On November 3, 2020, Claimant presented to Optometrist Nicole Ramos, O.D. at the Colorado Eye Center with complaints of blurry vision at a distance and near-sightedness out of her right eye. Claimant reported her belief that the sun was causing her cataracts and a burning sensation in her eyes. Dr. Ramos noted that Claimant worked in front of a window with direct sunlight for most of the day. She diagnosed Claimant with age-related bilateral nuclear cataracts and referred Claimant for a surgical evaluation with Ophthalmologist Howard Amiel, M.D.

5. Claimant first presented to Dr. Amiel on November 19, 2020 with complaints of decreased vision bilaterally, which began approximately one year prior. Dr. Amiel's record contains no mention of sunlight exposure and does not address potential occupational relatedness. Dr. Amiel also diagnosed Claimant with age-related bilateral cataracts. He recommended Claimant proceed with cataract surgery.

6. Employer filed a First Report of Injury on November 27, 2020.

7. Claimant underwent right-sided cataract surgery on December 8, 2020 and left-sided cataract surgery on December 22, 2020. Both surgeries were performed by Dr. Amiel.

8. Claimant subsequently attended multiple post-operative evaluations with Dr. Ramos. On December 9, 2020, Dr. Ramos noted, "Will call Workman's Comp to verify that cataracts are not age related." (R. Ex. C, p. 25). Dr. Ramos' medical notes do not otherwise address or discuss the causality of Claimant's condition.

9. Insurer filed a Notice of Contest on December 18, 2020 denying liability for Claimant's injury/illness for not being work-related.

10. Claimant continued to see Dr. Ramos for multiple follow-up appointments until January 26, 2021, at which time she was discharged from care.

11. On April 7, 2021, Chester T. Roe III, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Roe performed an evaluation and medical records review. Claimant reported to Dr. Roe she worked in a guard shack with a window in front of her. She reported the sun burned her eyes while at work and that in May 2020 her right vision worsened. Dr. Roe opined that it is not medically probable the sunlight exposure Claimant experienced at work is casually related to the development or progression of Claimant's bilateral cataracts or her need for cataract surgery. He opined that nothing in his records review or his examination indicated Claimant sustained anything other than age-related cataract etiology.

12. Dr. Roe credibly testified at hearing on behalf of Respondents as a Level II expert in ophthalmology. Dr. Roe explained the difference between an ophthalmologist and an optometrist, stating an ophthalmologist is a medical doctor licensed to treat disorders of the eye while an optometrist, who is not a medical doctor, focuses on correcting vision using lenses. Dr. Roe testified that an ophthalmologist would have more expertise than an optometrist regarding the causation of cataracts. Dr. Roe explained that age is the number one risk factor for developing cataracts and that cataracts are one of the most common age-related eye diseases in the United States, with an average surgical age of 69 years. Dr. Roe testified that, at her age, Claimant is not outside of the norm for developing vision-impairing cataracts requiring surgery.

13. Dr. Roe further testified that there is no Level I peer-review evidence supporting the theory that excessive exposure to sunlight causes or worsens cataracts. He explained that, despite Colorado's high altitude and greater exposure to UV light, cataracts are not more frequently diagnosed in Colorado. He continued to opine that it is to medically probable Claimant's exposure to sunlight through windows while on the job caused, aggravated or accelerated her bilateral cataracts.

14. The ALJ finds the opinions of Drs. Roe and Amiel more credible and persuasive than the opinion of Dr. Ramos.

15. Claimant failed to prove it is more probable than not the hazards of her employment caused, intensified or aggravated her bilateral cataracts.

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

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 §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.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The 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 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

As found, Claimant failed to prove it is more probable than not she suffered a compensable occupational disease. While Claimant is credible regarding her exposure to sunlight and experience of symptoms while working in the guard shack, there is

insufficient evidence establishing such exposure as the proximate cause of Claimant's bilateral cataracts. At her initial evaluation, Dr. Ramos, an optometrist, noted Claimant's work exposure to sunlight but nevertheless diagnosed Claimant with age-related cataracts. Subsequently, in a December 9, 2020 medical note, Dr. Ramos noted she would "call Workman's Comp to verify that cataracts are not age-related." However, Dr. Ramos' notes contain no further discussion or causal analysis regarding Claimant's condition. Thus, Dr. Ramos did not specifically opine Claimant's condition is work-related. To the extent the ALJ can reasonably infer from Dr. Ramos' notes her opinion is that Claimant's condition is work-related, such opinion is less credible and persuasive than those of Drs. Amiel and Roe. Dr. Amiel and Dr. Roe, both ophthalmologists, credibly determined Claimant's condition is age-related. Dr. Roe credibly testified that ophthalmologists likely have more expertise than optometrists in determining the causation of cataracts. Furthermore, Dr. Roe is a Level II accredited expert in ophthalmology.

Dr. Roe credibly testified that, at Claimant's age, she is not outside of the norm for developing cataracts and requiring cataracts surgery. Importantly, no credible or persuasive evidence was offered establishing that excessive exposure to sunlight causes or worsens cataracts. Dr. Roe credibly opined it is not medically probable Claimant's exposure to sunlight through windows while on the job caused, aggravated or accelerated her bilateral cataracts. Based on the totality of the evidence, the preponderant evidence does not establish that the hazards of Claimant's employment caused, intensified or aggravated her bilateral cataracts and need for cataract surgery. As Claimant failed to prove it is more likely than not she sustained a compensable occupational disease, the remaining issue of medical benefits is moot.

ORDER

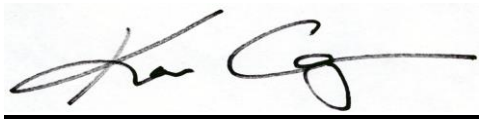
1. Claimant failed to prove she suffered a compensable occupational disease with a date of onset on or around November 4, 2020. Claimant's claim for benefits is denied and dismissed.

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

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

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

DATED: February 25, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' 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.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose Thomas Corson, M.D. at Concentra Medical Centers as his ATP through his words and conduct.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

5. Whether Claimant has demonstrated by a preponderance of the evidence that Respondents are financially responsible for medical bills he incurred at UC Health.

FINDINGS OF FACT

1. Claimant has worked for Employer as a Laborer for approximately 24 years. He testified that while at work on June 18, 2021 he fell off scaffolding from a height of approximately 12-13 feet onto his head and shoulder. Employer's General Supervisor transported Claimant to UC Health for emergency medical treatment.

2. At the emergency room at UC Health Claimant reported falling from scaffolding while performing his job duties for Employer. He suffered a head laceration and right shoulder pain. After conducting a physical examination and reviewing Claimant's medical history, Paul Douglas Mack, PA-C diagnosed Claimant with the following: (1) a laceration of the scalp; (2) a likely first degree separation of the right shoulder AC joint; and (3) acute right shoulder pain. Medical providers stapled Claimant's head wound.

3. Claimant submitted the following three medical bills from UC Health at hearing: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received the preceding medical bills associated with his visit

to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp.

4. Claimant remarked that Employer did not provide any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers pursuant to §8-43-404(5), C.R.S. and WCRP Rule 8-2.

5. Claimant did not immediately return to work. However, during the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that his light duty work aggravated his right shoulder condition. He noted that he requested medical treatment and Employer's owner was aware of his pain. However, Employer never provided medical information or a clinic location.

6. Because of his shoulder pain, Claimant stopped showing up for work in July of 2021 but did not notify Employer. He acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns. Finally, Claimant acknowledged that failing to call-in or show-up for work could result in the termination of employment.

7. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021.

8. Employer's Human Resources Officer and Account Manager NJ[Redacted] testified at the hearing in this matter. Her job duties include handling Employer's Workers' Compensation claims. Although she was apprised of Claimant's June 18, 2021 accident, she believed Claimant's injury were limited to a head laceration that was addressed in the emergency room. Ms. NJ[Redacted] was not aware of Claimant's shoulder injury as a result of the fall from scaffolding. She acknowledged that she did not provide Claimant with a list of at least four designated Workers' Compensation providers.

9. Ms. NJ[Redacted] explained that Claimant was injured on Friday, June 18, 2021, but returned to work for Employer on Tuesday, June 22, 2021. Employer assigned Claimant light duty work. Ms. NJ[Redacted] asked Claimant about how he was feeling and told him to reach out to her if he needed anything.

10. Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but she talked with Claimant during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] understood that Claimant was doing well while performing light duty work.

11. Ms. NJ[Redacted] testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

12. Claimant testified that his shoulder continued to deteriorate after he ceased working for Employer. Specifically, his shoulder pain continued to worsen. He thus sought legal counsel to obtain further treatment.

13. On July 21, 2021 Claimant's attorney filed a Workers' Compensation claim. Respondents' filed their own claim on July 22, 2021. The matters were subsequently consolidated.

14. On August 12, 2021 Claimant visited Thomas Corson, D.O. at Concentra Medical Centers to assess his Workers' Compensation injuries. Claimant reported that on June 18, 2021 he was performing his job duties on scaffolding approximately 15 feet high when he lost his footing and fell head first onto packed dirt. He noted that he injured his head and right shoulder and briefly lost consciousness. Claimant reported continuing head pain and limited right shoulder range of motion. He had not returned to work for Employer because he required medical clearance. Dr. Corson assessed Claimant with the following: (1) a closed head injury with concussion; and (2) a right rotator cuff tear. He prescribed medications, ordered a right shoulder MRI and recommended physical therapy. Dr. Corson determined that his objective findings were consistent with a work-related mechanism of injury. He assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position.

15. Ms. NJ[Redacted] commented that Employer would have been able to accommodate Claimant's work restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson. She remarked that there "is always something to do around the office."

16. On August 27, 2021 Claimant underwent an MRI of the right shoulder. The imaging confirmed the diagnosis of a right rotator cuff tear.

17. On November 29, 2021 Claimant returned to Dr. Corson for an examination. Dr. Corson noted that Claimant could return to modified duty employment with the following restrictions: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from the body and no working in a safety-sensitive position.

18. Based on a referral from Dr. Corson, Claimant visited surgeon Craig Davis, M.D. for an evaluation on September 15, 2021. Dr. Davis recommended surgical repair of Claimant's right Shoulder.

19. On December 17, 2021 Respondents filed a General Admission of Liability (GAL). Respondents approved right rotator cuff repair surgery.

20. On January 17, 2022 Claimant underwent right shoulder surgery. Respondents agreed to commence Temporary Total Disability (TTD) benefits as of the date of the surgery.

21. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at a different Concentra location on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician.

22. Claimant has established that it is more probably true than not that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' 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 June 18, 2021 Claimant suffered industrial admitted injuries when he fell off scaffolding at work. He received emergency medical treatment at UC Health. During the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work. Claimant noted that he requested medical treatment and Employer's owner was aware of his pain. However, Claimant remarked that Employer did not provide him with any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers. The record is also devoid of a written list of four designated providers. Finally, Respondents have 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 Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

23. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated that it is more probably true than not that Claimant chose Dr. Corson at Concentra as his ATP through his words and conduct. Claimant's conduct reveals that he exercised his right of selection and chose Dr. Corson at Concentra as his ATP. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at Concentra on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022.

24. In the days after the June 18, 2021 work accident Claimant signified through his words and conduct that he had selected Concentra to treat his injuries. Claimant's testimony and the medical records reveal that he chose Concentra and has received treatment through Dr. Corson since August 12, 2021 that has lasted in excess of five months. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician. Accordingly, Claimant selected Dr. Corson at Concentra as his ATP.

25. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022. On June 18, 2021 Claimant fell off scaffolding at work and visited UC Health for emergency care. During the week following the accident, Claimant performed some light duty tasks for Employer. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021. Claimant thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The June 18, 2021 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries 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.

26. However, Respondents have proven that it is more probably true than not that Claimant abandoned his position and was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. During the week following his accident, Employer provided light duty work for Claimant in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that the light duty work aggravated his right shoulder condition and he ceased showing up for work on July 16, 2021.

27. Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but talked with him during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] thus understood that Claimant was doing well while performing light duty work. Claimant acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns.

28. Claimant explained that, because of his right shoulder pain, he stopped showing up for work in July of 2021. He did not notify Employer but simply ceased working. Claimant acknowledged that failing to show up or call-in to work could result in the termination of employment. Ms. NJ[Redacted] credibly testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

29. Despite Claimant's contention that he suffered a worsening of his right shoulder condition, the record reveals that his shoulder condition has remained consistent from the time he stopped working until he underwent right shoulder surgery on January 17, 2022. Notably, on August 12, 2021 Dr. Corson assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position. On November 29, 2021 Dr. Corson reduced Claimant's restrictions to the following: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from body and no working in a safety-sensitive position. Ms. NJ[Redacted] credibly commented that Employer would have been able to accommodate Claimant's work

restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson on August 12, 2021.

30. Claimant ceased reporting to work on July 16, 2021, was aware that termination could follow and did not suffer a worsening of condition. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Claimant is thus precluded from receiving TTD benefits for the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

31. Claimant has failed to demonstrate that it is more probably true than not that Respondents are financially responsible for medical bills he incurred at UC Health. Initially, Claimant submitted the following three medical bills from UC Health: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received medical bills associated with his visit to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp. However, the medical bills submitted by Claimant do not include the dates of service correlated with his June 18, 2021 injury, his treatment or any records supporting that the care arose from his industrial injury. The bills simply do not provide the information required by Rule 16-9. Claimant or the providers must provide the information required by Rule 16-9 so Respondents can ensure the treatment relates to the industrial injury, If the additional documentation required by Rule 16-9 is provided, Respondents shall pay the preceding UC Health bills.

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).

Right of Selection

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(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 preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). 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 of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. In a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005). Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Bunch v. Indus. Claim Appeals Off.*, 148 P.3d 381, 384 (Colo. App. 2006).

6. Authorization to provide medical treatment refers to a medical provider’s legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC’s 4-

793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (determining that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

7. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. 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,* 148 P.3d at 383.

8. 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).

9. As found, Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' 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 June 18, 2021 Claimant suffered industrial admitted injuries when he fell off scaffolding at work. He received emergency medical treatment at UC Health. During the week following the accident he went to Employer's office and sought modified employment. Employer provided light duty work. Claimant noted that he requested medical treatment and Employer's owner was aware of his pain. However, Claimant remarked that Employer did not provide him with any information about a Workers' Compensation claim. Specifically, Respondents did not supply Claimant with a list of at least four designated medical providers. The record is also devoid of a written list of four designated providers. Finally, Respondents have 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 Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

10. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated that it is more probably true than not that Claimant chose Dr. Corson at Concentra as his ATP through his words and conduct. Claimant's conduct reveals that he exercised his right of selection and chose Dr. Corson at Concentra as his ATP. Claimant testified that he has continued to receive treatment from Dr. Corson since his first evaluation on August 12, 2021. The record includes documentation from three visits with Dr. Corson on the following dates: (1) August 12, 2021; (2) August 23, 2021; and (3) November 29, 2021. Based on a referral from Dr. Corson, Claimant also visited Dr. Davis at Concentra on September 15, 2021. Finally, Claimant remarked that he recently visited Dr. Corson on January 3, 2022 and had a follow-up appointment scheduled for January 24, 2022.

11. As found, in the days after the June 18, 2021 work accident Claimant signified through his words and conduct that he had selected Concentra to treat his injuries. Claimant's testimony and the medical records reveal that he chose Concentra and has received treatment through Dr. Corson since August 12, 2021 that has lasted in excess of five months. Claimant acknowledged that he has been pleased with his care, did not express any dissatisfaction with Dr. Corson. raise any concerns with the designation or request a change of physician. Accordingly, Claimant selected Dr. Corson at Concentra as his ATP. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks, the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917-514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

TTD Benefits and Responsible for Termination

12. 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.

13. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his 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. *In re of George,* W.C. No. 4-690-400 (ICAO, July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his 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 he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 2, 2021 through January 17, 2022. On June 18, 2021 Claimant fell off scaffolding at work and visited UC Health for emergency care. During the week following the accident, Claimant performed some light duty tasks for Employer. Employer's payroll records reflect that Claimant last received wages on June 25, 2021 based on the pay period ending June 20, 2021. Claimant did not receive wages in July, 2021. Claimant thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The June 18, 2021 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries 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.

15. As found, however, Respondents have proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. During the week following his accident, Employer provided light duty work for Claimant in the form of sweeping floors, changing light bulbs and other custodial duties. However, Claimant explained that the light duty work aggravated his right shoulder condition and he ceased showing up for work on July 16, 2021.

16. As found, Ms. NJ[Redacted] emphasized that she was not aware of Claimant's shoulder issues, but talked with him during the three weeks he returned to work. Claimant never discussed pain or the need for different work. Ms. NJ[Redacted] thus understood that Claimant was doing well while performing light duty work. Claimant acknowledged that he did not mention to Employer that he needed different light duty work because of his right shoulder pain. Claimant also recognized that Employer would have worked with him to accommodate his concerns.

17. As found, Claimant explained that, because of his right shoulder pain, he stopped showing up for work in July of 2021. He did not notify Employer but simply ceased working. Claimant acknowledged that failing to show up or call-in to work could result in the termination of employment. Ms. NJ[Redacted] credibly testified that Claimant stopped showing up to work on July 16, 2021. Because he was a no-call/no-show, Employer's policy was termination. The termination was effective July 19, 2021.

18. As found, despite Claimant's contention that he suffered a worsening of his right shoulder condition, the record reveals that his shoulder condition has remained consistent from the time he stopped working until he underwent right shoulder surgery on January 17, 2022. Notably, on August 12, 2021 Dr. Corson assigned temporary work restrictions including the following: (1) no lifting in excess of two pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead, crawling, squatting, climbing, use of the right upper extremity or working in a safety-sensitive position. On November 29, 2021 Dr. Corson reduced Claimant's restrictions to the following: (1) no lifting in excess of five pounds; (2) no pushing/pulling in excess of five pounds; (3) no reaching overhead or away from body and no working in a safety-sensitive position. Ms. NJ[Redacted] credibly commented that Employer would have been able to accommodate Claimant's work restrictions of no lifting in excess of two pounds pushing/pulling in excess of five pounds, and no reaching overhead, crawling, squatting or climbing as assigned by Dr. Corson on August 12, 2021.

19. As found, Claimant ceased reporting to work on July 16, 2021, was aware that termination could follow and did not suffer a worsening of condition. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Claimant is thus precluded from receiving TTD benefits for

the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

Medical Bills

20. Colorado Division of Workers' Compensation (DOWC) Rule of Procedure 16-9(A) specifies that the "treating provider shall maintain medical records for each injured worker when billing for the provided treatment." Rule 16-9(B) further provides that "all medical records shall legibly document the treatment billed" and "shall include at least the following information: (1) patient's name; (2) date of treatment; (3) name and professional designation of person providing treatment; (4) assessment or diagnosis of current condition with appropriate objective findings; and (5) treatment provided."

21. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Respondents are financially responsible for medical bills he incurred at UC Health. Initially, Claimant submitted the following three medical bills from UC Health: (1) statement date September 9, 2021 with a date of service of July 20, 2021 and provider David S. Braun, P.A. for a total of $53.40; (2) statement date December 5, 2021 for a total of $320.00 and (3) statement date December 5, 2021 for a total of $88.00. Claimant remarked that he received medical bills associated with his visit to UC Health for treatment following the injury and follow-up care to remove the staples from his scalp. However, the medical bills submitted by Claimant do not include the dates of service correlated with his June 18, 2021 injury, his treatment or any records supporting that the care arose from his industrial injury. The bills simply do not provide the information required by Rule 16-9. Claimant or the providers must provide the information required by Rule 16-9 so Respondents can ensure the treatment relates to the industrial injury, If the additional documentation required by Rule 16-9 is provided, Respondents shall pay the preceding UC Health bills.

ORDER

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

1. Because Respondents failed to provide Claimant with a written list of designated providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2., the right to select an ATP passed to him.

2. Claimant chose Dr. Corson at Concentra as his ATP to treat his June 18, 2021 industrial injuries.

3. Because Claimant was responsible for his termination from employment he is precluded from receiving TTD benefits for the period July 2, 2021 until he underwent surgery on January 17, 2022. However, Respondents agreed to commence TTD benefits as of the date of Claimant's right shoulder surgery on January 17, 2022.

4. Respondents are not financially responsible for Claimant's medical bills from UC Health. However, if the additional documentation required by Rule 16-9 is provided, Respondents shall pay the UC Health bills related to Claimant's June 18, 2021 industrial injuries.

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

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

DATED: February 25, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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. 5-177-672-001

ISSUES

The issues set for determination were:

- Is Claimant entitled to higher average weekly wage?

FINDINGS OF FACT

1. On May 15, 2021, Claimant was injured while working for Employer when she was assisting a coworker in carrying a 300lb bucket of potatoes up stairs.

2. Claimant worked two separate jobs for Employer, packer and process operator. Claimant's rate of pay at the time of her injury as a packer (her main job code) was $19.14 per hour. Claimant's rate of pay as process operator her (secondary job code) was $26.01 per hour.

3. [Redacted, hereinafter AN] testified as a representative of Employer, where she has worked for six years. She is the HR Manager, which is the position she has held for three months. In that capacity, she knew of Employer's practices/policies concerning pay rates based upon job codes and paid time off due to Covid-19.

4. Ms. AN[Redacted] testified Claimant could be scheduled or assigned to work either job code based on business need. Claimant could work in both positions in a given pay period or even in a given day. Claimant worked hours in both categories.

5. Ms. AN[Redacted] also testified that there were two ways in which employees could work overtime. Overtime was either voluntary and awarded based on seniority, or it was mandatory and required, based on reverse seniority. Overtime was not consistently offered or earned and would also vary day to day, and week to week.

6. Ms. AN[Redacted] stated when employees were paid for time off due to Covid-19, they were paid for forty (40) hours per week at their base pay rate. Ms. AN[Redacted] testified that pay at this rate was made pursuant to company policy. For Claimant that was $765.60 (40 hours X $19.14=$765.60).

7. Claimant's wage records were admitted at hearing.[1] These records covered the period for April 9, 2021 to May 15, 2021 and reflected the fact that Claimant worked overtime most weeks in 2020-2021. Specifically, the records showed the fact Claimant worked overtime forty-five (45) out of the fifty-two (52) weeks for the year. The weeks Claimant did not receive overtime included five (5) full weeks and two partial weeks Claimant was off due to Covid-19.

[1] Exhibits 4 and E.

8. Claimant also consistently worked hours as a process operator, at the higher rate.

9. On August 10, 2021, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for medical benefits.[2]

10. On September 16, 2021, an Application for Hearing ("AFH") was filed at the Office of Administrative Courts ("OAC") by Claimant listing the following issues: AWW, TPD, and TTD.

11. On October 1, 2021, a Response to Application for Hearing was filed by Respondents.

12. On October 21, 2021, Claimant received a letter stating that she had exhausted the transitional duty available to her under Employer's Transitional Duty Policy, which provided for temporary work restrictions resulting from occupational injuries. The letter informed Claimant that she would be placed on Workers' Compensation leave with benefits.[3]

13. On January 5, 2022, a GAL was filed on behalf of Respondents, admitting for medical benefits, TPD beginning June 17, 2021 through October 20, 2021, and TTD beginning October 21, 2021. The GAL admitted for an AWW of $1,149.59, which resulted in a TTD rate of $766.39 per week. Respondents calculated the AWW by using Claimant's earnings for one year (52 weeks) leading up to the injury.[4]

14. Claimant was off work for one partial week and four full weeks for pay periods beginning June 21, 2020 and ending July 25, 2020 due to COVID-19. Claimant was off work for one partial week and one whole week again due to COVID-19 for pay periods beginning October 18, 2020 and ending October 31, 2020.[5]

15. Claimant's pay for the weeks she was off work due to COVID-19 was capped at $765.60/week and was calculated using her rate of pay for her main job code per Employer's COVID-19 policy. No overtime was paid during the weeks Claimant was off for Covid-19.

16. The admitted AWW did not fairly compensate Claimant for her wage loss, as using the weeks when she was out for Covid-19 had the effect of lowering the calculated AWW.

17. Claimant is entitled to a higher average weekly wage.

---

[2] Exhibit A.

[3] Exhibit G.

[4] Exhibit D.

[5] Exhibit E.

18. The ALJ determined that calculating Claimant's AWW using the 20 (twenty) weeks leading up to her injury more fairly represented her AWW. Claimant was therefore entitled to a higher AWW of $1,302.05 per week. Claimant's TTD rate was $868.03 per week.

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

CONCLUSIONS OF LAW

Generally

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. (2022) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

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

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

AWW

§ 8-42-102(2), C.R.S. (2022) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2022) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair

approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979" and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage." *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), the issue of how to fairly calculate AWW arose where Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bar, Respondents argued the default method for calculating Claimant's AWW was the appropriate methodology for this determination. Specifically, Respondents asserted that calculating Claimant's AWW using the preceding year, which included five full weeks and two partial weeks where Claimant did not receive her full pay, was a fair determination of her AWW ($59,778.92/52=$1,149.59). Respondents contended that Claimant's pay was variable from week to week.

Claimant argued the method used by Respondents did not fairly establish Claimant's AWW. Claimant argued that because of the decrease in pay for the weeks she was out the entire week or part of the week due to COVID-19, the AWW was not an accurate calculation of her AWW. Claimant averred her AWW should be calculated using the 20 (twenty) weeks preceding her injury. Using this calculation, Claimant argued that her AWW was $1,302.05, resulting in a TTD rate of $868.03 per week. The ALJ was persuaded that Claimant met her burden of proof and was entitled to higher AWW.

As determined in Findings of Fact Nos. 2–4, Claimant worked two different positions for Employer. Claimant's rate of pay as a packer was lower ($19.14/hour) than for her work as a process operator ($26.01/hour). Claimant's pay records documented she worked hours in both pay categories from April 9, 2021 to May 15, 2021 (Finding of Fact 4). The ALJ also found that Claimant worked overtime hours prior to her work injury. (Finding of Fact 7). In fact, Claimant's pay records reflected the fact that she worked overtime hours a total of 45 out of the 52 weeks for that period of time. *Id.* The weeks Claimant did not work overtime hours were ones when she was off work taking leave due to Covid-19.

Respondents admitted AWW included those weeks when Claimant was off work due to Covid-19. The ALJ concluded that the admitted AWW was not a fair calculation of Claimant's AWW, as the inclusion of those weeks had the effect of lowering Claimant's AWW. (Findings of Fact 14-16). This was not representative of Claimant's AWW, as she consistently worked hours at a higher pay rate. The pay records admitted at hearing showed Claimant worked not only overtime hours, but also was paid at the higher position rate, which was not included in the Covid-19 wages paid. (Finding of Fact 7).

The ALJ considered Respondents' argument that using the whole period of 52 weeks was the fairest calculation of AWW. As found, this contention did not address the fact that the wages paid while Claimant was off due to Covid-19 did not incorporate either overtime wages of the pay at the higher rate. Accordingly, the ALJ concluded Claimant met her burden of proof and established she was entitled to a higher AWW. (Finding of Fact 17). This comports with the Court of Appeals' holdings in *Campbell* and *Pizza Hut.* The ALJ concluded that an AWW of $1,302.05 per week was a fairer calculation of Claimant's AWW and diminished earning capacity. *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

ORDER

IT IS HEREBY ORDERED:

1. Claimant established she was entitled to a higher AWW of $1,302.05 per week, which gives a TTD rate of $868.03 per week.

2. Respondents shall pay TTD and TPD benefits based upon a TTD rate of $868.03 per week.

3. Respondents shall pay interest at the statutory rate on all benefits not paid when due.

4. Issues not expressly decided 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: February 28, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts