**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-141-704-001**

## ISSUE

1. Whether Claimant substantially complied with the statutory requirements for objecting to the Final Admission of Liability (FAL) and requesting a Division IME (DIME).

## FINDINGS OF FACT

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

1. Claimant works as a signal technician supervisor for Employer. (Tr. 41:19-20). Claimant sustained an admitted injury to his lower back on June 27, 2019. (Ex. A).

2. Authorized Treating Physician (ATP) Joan Mankowski, M.D., placed Claimant at maximum medical improvement (MMI) on June 22, 2020. Respondent filed a FAL admitting for the MMI date and permanent partial disability benefits consistent with the impairment rating and apportionment. The FAL was mailed to Claimant on July 10, 2020. (Ex. A).

3. [Redacted, hereinafter LLH] was an insurance adjuster for Respondent. On July 13, 2020, Ms. LLH[Redacted] left a voicemail message for Claimant regarding the FAL. According to the note in her file, she "explained MMI, PP award, maintenance, apportionment of rating, 30-day objection period, advised injured worker to read through the final admission, once received, and to call if he has any questions." (Tr. 27:3-12).

4. On or about August 5, 2020, Claimant called Ms. LLH[Redacted] and left a voice message regarding the paperwork he received, including the FAL. (Ex. 2).

5. Claimant credibly testified that Ms. LLH[Redacted] called him back and they spoke. He told Ms. LLH[Redacted] that he objected to the MMI determination and wanted to get another opinion. Ms. LLH[Redacted] told Claimant he would be responsible for the payment to the DIME physician, and that he had to fill out the paperwork and send her a copy.[1] (Tr. 47:16 – 48:2)

6. The ALJ infers that by early August 2020, Ms. LLH[Redacted] knew Claimant objected to the MMI date and planned to request a DIME.

7. On August 8, 2020, Claimant, who was not represented by counsel at the time, mailed a handwritten letter to the Division of Workers' Compensation (Division), which read: "I, Fernando Hurtado would like a re-evaluation of MMI. I feel that the current MMI is inaccurate. Any questions please feel free to contact me any time. Greatly

[1] During the hearing, Respondent's counsel made a Motion to Strike Claimant's testimony, which the ALJ took under advisement. The ALJ denies the Motion to Strike Claimant's testimony.

appreciated!!!" Claimant attached the Notice and Proposal, and Application for DIME. (Exs. B and 3).

8. Claimant testified that he emailed the letter, Notice and Proposal, and Application for DIME to Ms. LLH[Redacted]. (Tr. 48:6-12). Claimant presented no documentary evidence of this email.

9. Claimant further testified that he sent the email to Ms. LLH[Redacted] from his work email address. (Tr. 59:4-10). Despite this testimony, Claimant presented no documentary evidence of ever using his work email to communicate with Ms. LLH[Redacted] at any other time.

10. The Division received Claimant's objection and DIME request. On September 1, 2020, the Division wrote to Claimant, copying Respondent via U.S. Mail, and advised Claimant that the Notice and Proposal, and Application for DIME he filed was incomplete. The Division gave Claimant 20 days to refile the documents correctly. (Ex. E).

11. Claimant timely refiled a corrected Notice and Proposal, and Application for DIME on or about September 17, 2020. In the corrected Notice, Claimant listed LLH[Redacted] as the adjuster, and identified her email as, [Redacted]. (Ex. 6). The ALJ infers that Claimant and the Division used this email address when emailing Ms. LLH[Redacted]. Claimant testified he emailed the Notice to Ms. LLH[Redacted]. (Tr. 49:6-15). Claimant presented no documentary evidence of this email.

12. In relation to this litigation, Respondent's IT Department did a search on Ms. LLH's [Redacted] email, [Redacted]. They looked at three specific parameters: Claimant's name, Claimant's personal e-mail address, and the WC number of the case for the time period from July 10, 2020 to December 31, 2020. (Tr. 23:20-24:12). Respondent did not use Claimant's work e-mail address as a parameter for the search. Respondent recovered multiple emails from Claimant and the Division related to the DIME process, addressed to [Redacted]. (Ex. R). The ALJ infers that both [Redacted] and [Redacted] were active emails for Ms. LLH[Redacted].

13. On October 22, 2020, the IME Unit of the Division designated a physician panel and sent it to Respondent, via email, to [Redacted]. (Ex. 7). This email was delivered to Ms. LLH's[Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

14. The IME Unit sent a DIME Physician Confirmation and invoice to Respondent on November 9, 2020, via email, to [Redacted]. (Ex. 8). This email was delivered to Ms. LLH's [Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

15. On December 17, 2020, Claimant's counsel filed an Entry of Appearance. (Ex. J). Respondent's counsel filed an Entry of Appearance on December 23, 2020. (Ex. K)

16. Claimant scheduled an appointment with the DIME physician, Joseph Morreale, M.D., for January 15, 2021, and provided notice to the IME Unit and Respondent, via

email. Claimant sent the notice of the appointment to [Redacted] on December 7, 2020. (Ex. 9). This email was delivered to Ms. LLH's[Redacted] email account and was recovered by Respondent's IT Department. (Ex. R).

17. Counsel communicated on or about January 19, 2021. Claimant's counsel advised Respondent's counsel that a DIME had taken place with Dr. Morreale and that Dr. Morreale was requesting the records. On January 20, 2021, Respondent agreed to produce the records to Dr. Morreale so that he could complete his report, but Respondent clarified that the production of medical records to Dr. Morreale was not a waiver of Respondent's right to challenge the jurisdiction of the DIME. (Ex. L).

18. Dr. Morreale examined Claimant on January 15, 2021, and issued a DIME report on February 4, 2021, finding Claimant not to be at MMI. (Ex. M). The Division issued a "Not-at-MMI" notice on June 25, 2021. (Ex. N).

19. [Redacted, hereinafter AH] is Employer's Claims Manager. Mr. AH[Redacted] reviews claims that come to his office, assigns them to staff, and manages the process of claims handling. (Tr. 19:15-22).

20. Ms. LLH[Redacted], the only claims adjuster with whom Claimant communicated, retired from Employer on August 31, 2020. (Tr. 20:24-25).

21. Mr. AH[Redacted] testified that he and a few other adjusters monitored Ms. LLH[Redacted]'s files after her retirement. He did not assign a new adjuster to handle Claimant's matter until late September 2020, approximately a month after Ms. LLH[Redacted] retired. (Tr. 21:1-8). Mr. AH[Redacted] assigned Claimant's claim to adjuster [Redacted, hereinafter TM]. (Tr. 22:24-23:8)

22. Mr. AH[Redacted] further testified that no one monitored the emails sent to Ms. LLH[Redacted] after her retirement on August 31, 2020. (Tr. 21:9-11). The ALJ infers that Respondent did not see the emails delivered to Ms. LLH[Redacted]'s email account from the Claimant and the Division regarding the DIME because no one monitored Ms. LLH[Redacted]'s email after her retirement.

23. Mr. AH[Redacted] testified that an autoreply was set up on Ms. LLH[Redacted]'s email after her retirement. (Tr. 21:9-22). The autoreply was attached to the email: [Redacted]. The autoreply stated: "LLH[Redacted] is no longer with the City and County of Denver. If you need assistance, please call 720-913-3330 and you will be redirected." As of January 19, 2021, the autoreply associated with this email was functioning. (Ex. D).

24. Claimant credibly testified that he never received this autoreply when he emailed Ms. LLH[Redacted]. There is no evidence that Respondent attached an autoreply to the email, [Redacted], which is the email address Claimant and the Division used.

25. Mr. AH[Redacted] testified that he received a copy of the September 1, 2020 letter from the Division regarding Claimant's incomplete objection and DIME request and made a note in Claimant's claim file. (Tr. 22:3-13). He entered a note on September 8, 2020 that read: "we received copy of letter dated 9/1/20 addressed to clt from the DOWC DIME

Unit stating that they had received an incomplete request for a DIME . . . the letter givem [sp] him 20 days to remedy this. I put letter out to file. It's up to clt to fix this if he wants to proceed." (Ex. 5).

26. Mr. AH[Redacted] testified he took no other action after receiving the September 1, 2020 letter from the Division because it was Claimant's responsibility to correct the deficiencies in the objection to the FAL and DIME request. (Tr. 22:3-23). He testified he had no thoughts to investigate or retrieve the items from Ms. LLH[Redacted]'s email account after she retired because an autoreply email was sent out stating that Ms. LLH[Redacted] was no longer employed and provided a telephone number to call for additional assistance, if needed. (Tr. 34:15-25).

27. WCRP 5-13 requires Respondent to notify the Division and Claimant of any change in the adjuster handling a claim within 30 days of the change. Despite having notice that Claimant objected to the FAL and requested a DIME, Respondent never advised Claimant, nor the Division, nor the DIME Unit that Ms. LLH[Redacted] retired or that Claimant's claim had been assigned to Ms. TM[Redacted]. (Tr. p. 31:18-25).

28. Mr. AH[Redacted] further testified that Respondent was not aware that Claimant was objecting to the FAL and requesting a DIME until sometime in late December 2020, or January 2021. (Tr. 27: 18-23). The ALJ does not find this testimony credible. The ALJ infers that Mr. AH[Redacted], who was monitoring Claimant's claim, knew on or about September 1, 2020, that Claimant was objecting to the FAL and requesting a DIME.

29. Claimant credibly testified that to the best of his knowledge he emailed Ms. LLH[Redacted] his objection to the FAL and request for a DIME, and the subsequent refiling of these documents. Claimant credibly testified he did not receive an autoreply notifying him that Ms. LLH[Redacted] was no longer working for employer.

30. The ALJ finds that Respondent's failure to notify Claimant that Ms. LLH[Redacted] retired, and that his claim had been reassigned, along with Respondent's failure to monitor Ms. LLH[Redacted]'s email, directly led to Respondent not seeing the communications from Claimant and the Division regarding the DIME.

31. The ALJ finds that Respondent had notice in early September 2020 that Claimant objected to the FAL and requested a DIME.

32. The ALJ finds that that Claimant substantially complied with the requirements of § 8-43-203(2)(b)(III), C.R.S.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

***Substantial Compliance***

Where a party wishes to challenge the ATP's findings as to MMI, the Act sets for the following procedure:

> If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this

> subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

§ 8-42-107.2(2)(b), C.R.S. (2020).

While the requirements of the statute may be characterized as a jurisdictional prerequisite to obtaining a DIME, courts have recognized that requirements may be met by substantial compliance. *Lockyear v. May's Concrete, Inc.*, W.C. No. 4-623-424 at *3 (November 4, 2008). Substantial compliance with the statute can be sufficient to prevent closure of a claim. *See Stefanski v. Indus.Claim Appeals Office, 128 P.3d 282 (Colo. App.2005)* (any pleading which adequately notifies employer that claimant does not accept FAL constitutes substantial, if not actual, compliance with statutory obligation to provide written objection), *aff'd Sanco Indus. v. Stefanski,147 P.3d 5 (Colo. 2006)*; *see also EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Office, 74 P.3d 516 (Colo.App.2003)* (concept of *substantial compliance* has been applied to various *notice* requirements in workers' compensation proceedings). "To determine whether there has been substantial compliance with a statute, a court will consider whether the allegedly complying acts fulfill the statute's purpose." *Koontz v. Bowser Boutique, Inc.*, W.C. No. 4-359-795 at *6 (January 13, 2012). The purpose of section 8-42-107.2(2)(b) of the Colorado Revised Statutes is to ensure that the party requesting the DIME provides timely notice to the non-requesting party of the request for a DIME. There must be evidence that Claimant made a genuine effort to comply with the statutory requirements. *See Pinon v. U-Haul*, W.C. No. 4-632-044 (April 25, 2007), *aff'd sub. nom. Pinon v. Indus. Claim Appeals Office* (Colo. App. 07CA0922, April 3, 2008) (NSOP) (substantial compliance requires party intent or to actually make good faith or colorable effort to comply with statutory requirements).

The ALJ finds that Claimant made a good faith effort to comply with the requirements of section 8-42-107.2(2)(b) of the Colorado Revised Statutes, and Respondent had timely notice of Claimant's request for a DIME. Claimant spoke with Ms. LLH[Redacted] in early August 2020, and discussed what he needed to do to object to the FAL and request a DIME. (Findings of Fact ¶ 5). Claimant timely filed his objection to the FAL and request for a DIME with the Division on or about August 8, 2020. *Id.* at ¶ 7. The Division received Claimant's objection to the FAL and his request for a DIME, and notified Claimant it was incomplete. *Id.* at ¶ 10. The Division sent a copy of this letter to Respondent, and Respondent made a note in the file, but took no other action. *Id.* at ¶¶ 25-26. Claimant timely refiled the corrected objection to the FAL and request for a DIME with the Division on September 17, 2020. *Id.* at ¶ 11. Over the next several months, Claimant and the Division sent emails to [Redacted] regarding the DIME process. *Id.* at ¶¶ 13-14 and16. Respondent received these emails, but no one was monitoring Ms. LLH[Redacted]'s email following her retirement. *Id.* at ¶ 22. Claimant continued to attempt to communicate with Ms. LLH[Redacted] regarding the DIME because Respondent never notified him, as required by WCRP 5-13 that Ms. LLH[Redacted] retired and his claim had been reassigned. ¶ 27.

## ORDER

It is therefore ordered that:

1. Claimant substantially complied with the statutory requirements for objecting to the Final Admission of Liability and requesting a Division IME.

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: January 3, 2022

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

## ISSUES

- Did Claimant prove a right total knee arthroplasty (TKA) recommended by Dr. Vanmanen is causally related to his March 30, 2015 admitted work accident?

## FINDINGS OF FACT

1. Claimant has worked for Employer in various capacities since 1997. He currently works as a loader. The job is physically demanding, requiring heavy lifting and prolonged standing and walking. Claimant is currently 63 years of age.

2. Claimant suffered an admitted injury to his right knee on March 30, 2015. He was helping a customer in the plywood aisle when another customer asked for assistance. When he turned to address the second customer, he felt a sharp pain in his right knee and had difficulty walking.

3. Claimant was referred to CCOM for authorized treatment. He was diagnosed with a right knee strain and given a knee brace.

4. A right knee MRI was completed on April 23, 2015. It showed: (1) mild to moderate osteoarthritis along the medial femoral condyle, (2) grade 3 patellar chondromalacia, (3) a small joint effusion, and (4) a small tear in the posterior horn of the medial meniscus.

5. Respondents' expert, Dr. Fall, credibly testified the meniscal tear could have been acute or degenerative, but nevertheless was likely the primary pain generator.

6. Claimant was referred to Dr. Shawn Nakamura, an orthopedic surgeon. At his initial appointment on June 1, 2015, Claimant described "intermittent" 3/10 sharp, aching pain in the right knee. The knee had relatively good range of motion and no instability. X-rays showed "mild" tricompartmental degenerative changes with "very mild" narrowing of the medial compartment and "mild" narrowing of the patellofemoral joint. Claimant had some medial joint line tenderness and pain with McMurray testing. Dr. Nakamura recommended an arthroscopic medial meniscectomy.

7. The surgery was denied after a Rule 16 peer review by Dr. Frank Polanco. He opined surgery was premature because Claimant had not done any physical therapy.

8. Claimant was subsequently referred to PT.

9. Dr. Nakamura gave Claimant a cortisone injection on September 18, 2015. He did not recommend surgery at that time. He recommended Claimant continue with his exercises and follow up "as needed."

10. On November 16, 2015, Dr. Merchant at CCOM documented Claimant was improving with exercise and modified duty. He stated, "[Claimant] is still not interested in surgery." Physical examination was largely benign with relatively good range of motion and minimal medial joint line tenderness.

11. Dr. Merchant put Claimant at MMI on November 23, 2015. Dr. Merchant assigned a 16% lower extremity rating for the meniscal tear and range of motion deficits. He opined Claimant required no ongoing medications and no additional surgery was anticipated. He indicated Claimant may need additional injections in the future.

12. Respondent filed a Final Admission of Liability on January 5, 2016 based on Dr. Merchant's rating. The FAL admitted for reasonably necessary medical treatment after MMI.

13. Claimant sought no further treatment for his right knee for almost three years. He returned to Dr. Nakamura on October 18, 2018. Claimant stated the previous injection in September 2015 was "extremely helpful," but he was currently experiencing 5/10 stabbing and burning pain in the knee. X-rays of both knees now showed "moderate" narrowing in the medial compartments bilaterally and a possible lose osteochondral body on the right. This represents a progression of the medial joint space narrowing on the right as compared to the 2015 x-ray findings. Dr. Nakamura diagnosed "degenerative joint disease" in the right knee and gave Claimant another cortisone injection. No surgery was recommended.

14. Claimant returned to Dr. Nakamura on April 18, 2019. He was having difficulty with prolonged walking and standing, particularly after a long day of work. Dr. Nakamura noted "these injections do work well for him, but they start to lose their efficacy about 2 months prior to his [next] injection." Dr. Nakamura discussed the possibility of a knee replacement for Claimant's "advanced arthritis," but Claimant was "not quite ready for surgery at this time."

15. Claimant saw PA-C Brandon Madrid at CCOM on June 17, 2020. Claimant told Mr. Madrid he received cortisone injections "for about a year and a half and they stopped working." He felt the knee had worsened and believed it was related to the March 2015 work accident. Claimant described 10/10 pain 100%. Mr. Madrid ordered x-rays and an MRI and prescribed a Medrol Doespak.

16. X-rays on June 17 showed moderately severe medial joint space narrowing that "has progressed bilaterally" since the October 2018 imaging.

17. A right knee MRI on June 29, 2020 showed a complex degenerative tear involving the anterior and posterior horns of the medial meniscus, an intra-articular loose body, and full-thickness cartilage loss with subchondral edema over the medial femoral condyle and tibial plateau.

18. Claimant was referred back to Dr. Nakamura for further evaluation. Dr. Nakamura had moved out of town in the interim, so Claimant saw Dr. Michael Vanmanen instead. Claimant told Dr. Vanmanen his knee pain had never improved after the March

2015 work accident. He was becoming increasingly frustrated with his daily activities and difficulty engaging in activities because of the knee pain. Physical examination findings were largely identical on both knees, including positive medial McMurray test, 1+ effusion, patellofemoral crepitus, and weakness of the quadriceps and hamstrings. Dr. Vanmanen documented,

> We had a lengthy discussion regarding the patient's previous MRI, as well as x-rays and physical exam today. He does have end-stage arthritis of both the right and left knee with severe medial tibiofemoral joint arthritis. Both knees are painful throughout the knee. . . . [H]is daily activities are severely compromised [and] he wants bilateral total knee replacements. We said we would start with the right and then do the left.

19. Claimant saw Dr. Centi at CCOM on July 22, 2020. Dr. Centi thought it was questionable whether the proposed TKA was causally related to the March 2015 work accident.

20. Claimant filed a Petition to Reopen on January 14, 2021 based on a change of condition.

21. Dr. Allison Fall performed an IME for Respondent on May 5, 2021. She issued a report and testified at hearing. She opined the recommended right TKA was reasonably necessary but not causally related to the work accident. Dr. Fall emphasized Claimant has end-stage degenerative joint disease in both knees. She noted the original accident involved no significant impact or trauma but merely involved "turning" to the left. At the time, Claimant had early degenerative changes, but the primary pain generator was presumed to be the meniscal tear. Claimant subsequently developed severe "end-stage" osteoarthritis in both knees, which is the reason he now needs bilateral TKAs. She thought the end-stage degeneration in Claimant's uninjured left knee is strong evidence the degeneration in the right knee was unrelated to any trauma. Dr. Fall concluded the work accident did not cause, aggravate, or accelerate the severe osteoarthritis that now necessitates bilateral TKAs.

22. Dr. Fall's opinions regarding causation of the recommended right TKA are credible and persuasive.

23. Claimant failed to prove the proposed right TKA is causally related to the March 2015 work accident.

## CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Medical benefits can continue after MMI if additional treatment is reasonably needed to relieve the effects of the injury or prevent deterioration of a claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if the respondents admit liability for medical benefits after MMI, they retain the right to dispute the relatedness of any particular

treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As an initial matter, although Claimant filed a Petition to Reopen, the medical portion of his claim remains open based on the January 5, 2016 FAL. Therefore, reopening is not a prerequisite to an award of additional medical benefits. Nevertheless, Claimant still must prove a causal nexus between the requested treatment and the original injury.

There is no doubt the proposed right TKA is reasonably necessary. But Claimant failed to prove it is causally related to the March 2015 work accident. Claimant appears to be an affable fellow, and by all accounts is a dedicated, hardworking employee. But the outcome in this case does not hinge on Claimant's credibility. Rather, it involves a causation determination primarily based on medical factors. In that regard, Dr. Fall's analysis and conclusions are persuasive regarding the absence of any causal relationship between the work accident and the current need for a right TKA. The initial accident was minor and involved no significant force or trauma. At the time, Claimant had early osteoarthritis, but his symptoms were related to the meniscal tear. Claimant was put at MMI and returned to full duty less than 9 months after the accident. He thereafter sought no additional treatment for almost three years. When Claimant returned to Dr. Nakamura in October 2018, the degenerative changes had progressed and were similar in both knees. Claimant's osteoarthritis continued to worsen and was at "end-stage" in both knees by June 2020. Dr. Vanmanen now recommends replacing both knees, and the decision to start with the right knee appears to be based primarily on administrative concerns or convenience, rather than relative severity. As Dr. Fall explained, the uninjured left knee serves as a control and confirms that Claimant would have required a right knee TKA regardless of the March 2015 work accident. The need for a right TKA reflects the natural progression of Claimant's underlying osteoarthritis, without contribution from the work accident.

## ORDER

It is therefore ordered that:

1. Claimant's request for a right total knee arthroplasty under his workers' compensation claim is denied and dismissed.

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

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

DATED: January 6, 2022

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

## STIPULATIONS

During the November 4, 2021 hearing, the parties agreed to specifically place the medical billing for Claimant's September 30, 2020 lumbar MRI conducted at Colorado Springs Imaging before the ALJ for resolution should the claimed injury be found compensable. The parties further stipulated that the amount billed for the aforementioned MRI was $1,742.00. (Resp's. Exh. T, p. 490). Finally, the parties agreed that if it were determined that Respondents were liable for this bill, the actual amount owed would be determined pursuant to the workers' compensation fee schedule. These stipulations are approved.

## REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his low back on July 16, 2020.

II. If Claimant established that he sustained a compensable injury to his low back on July 16, 2021, what medical benefits are reasonable, necessary and related to this injury.

III. If Claimant established that he sustained a compensable low back injury, what temporary disability benefits are owed.

IV. If Claimant established that he sustained a compensable low back injury and his entitlement to temporary disability benefits, whether Respondents are entitled to the imposition of late reporting penalties pursuant to C.R.S. § 8-43-102(1) (a).

V. Claimant's Average Weekly Wage (AWW).

Because the ALJ concludes that Claimant failed to establish that he suffered a low back injury arising out of his employment with Respondent, this order does not address issues II-V as outlined above.

## FINDINGS OF FACT

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

1. The record in this matter is voluminous and the testimony presented is substantially conflicting.

2. Claimant is a former ranch hand for Respondent-Employer. He began working for Employer on June 3, 2020. (Resp's Exh. C, pp. 7, 22) (10/12/21 Hrg. Tr. p. 34, ll. 8-13; p. 91, ll. 3-8). Claimant's job duties included moving irrigation sprinklers and hose reels using a tractor or a four-wheel ATV (quad), mowing and performing some equipment maintenance. (10/12/21 Hrg. Tr. p. 34, ll. 14-25; p. 91, ll. 16-23). Claimant's job was full time, but seasonal in nature, encompassing the summer and early fall with the actual end date depending on the weather. (10/12/21 Hrg. Tr. pp. 91-92, ll. 24-5).

3. [Redacted, hereinafter KB] is the ranch foreman for Respondent-Employer. He was Claimant's supervisor during the time that he was employed at the ranch. (10/12/21 Hrg. Tr. pp. 90-91, ll. 2-11). Mr. KB[Redated] testified that all ranch hands had Saturdays off and that Claimant had two additional days of the week off. (10/12/21 Hrg. Tr. p. 92, ll. 6-12). He testified further that both he and Claimant were scheduled to work on Sundays. (10/12/21 Hrg. Tr. p. 92, ll. 13-14). According to Mr. KB[Redated], weather could cause the work hours to vary, sometimes causing a workday to be shorter than scheduled, and sometimes resulting in Claimant not reporting to work at all for one or more days at a time. (10/12/21 Hrg. Tr. pp. 92-93, ll. 20-5; p. 115, ll. 11-18). During his testimony, Claimant agreed that weather-related issues sometimes affected his work hours and work schedule. (10/12/21 Hrg. Tr. pp. 75-76, ll. 22-13). Claimant also testified that he did not work seven days a week and that he believed he had Saturdays off. (10/12/21 Hrg. Tr. p. 75, ll. 6-17).

4. Claimant testified that his last job prior to beginning work for Respondent-Employer was as a car mechanic for Meinecke Car Care Center (Meinecke) in approximately 2010. (10/12/21 Hrg. Tr. p. 35, ll. 17-21). During the course of his employment with Meinecke, Claimant suffered a work related injury to his low back while lifting a transmission in December 2010. Claimant was unable to return to work after this injury. Rather, he was approved for social security disability and did not work for a number of years before returning to work for Respondent-Employer on June 3, 2020. (10/12/21 Hrg Tr. pp. 35-36, ll. 22-17) (Resp's Exh. O, pp. 482-489).

5. Claimant alleges that he sustained a compensable injury to his low back on July 16, 2020, while driving a tractor with an attached mower 1-2 miles per hour down a dirt road when a dog or coyote jumped out in front of him prompting him to swerve and go down an embankment adjacent to the roadway. (10/12/21 Hrg. Tr. pp. 43-44, ll. 23-1). The tractor came to a rest on the side of the ditch with the attached mower high centered on the ground. Claimant presented photographs demonstrating the position of the tractor and mower after the incident occurred. (Clmt's. Exh's. 1-2). The photographs show that the tractor upright and parked on the side of the ditch. (Clmt's Exh. 2) (10/12/21 Hrg. Tr. pp. 44-45, ll. 13-5). Claimant also acknowledged the following details regarding this incident:

- The incident occurred at approximately 9:00 in the morning while he was driving 1-2 miles mph down the roadway. (10/12/21 Hrg. Tr. p. 43, ll. 11-13).

- The mower that the tractor was pulling was not in operation;

Claimant was merely transporting it and was not actually mowing anything at the time. (10/12/21 Hrg. Tr. pp. 73-74, ll. 14-1).

- Immediately prior to the incident, Claimant was driving the tractor and attached mower down the middle or center part of the road. (10/12/21 Hrg. Tr. p. 73, ll. 17-19).

6. During cross-examination, Claimant conceded that he had an extensive history of low back problems and had undergone multiple surgeries directed to the low back prior to the July 16, 2020 tractor incident. (10/12/21 Hrg. Tr. p. 71-72, ll. 23-1; pp. 72-73, ll. 19-1). Despite surgery, Claimant continued to have low back problems and pain following his December 2010 injury at Meinecke Car Care Center. (10/12/21 Hrg. Tr. pp. 72-73, ll. 19-5). Indeed, Claimant testified, and the medical records support a finding that he continued to obtain low back treatment for his December 2010 lifting injury, which included injections and the use of medication up to the July 16, 2020 tractor incident. (Id. at p. 73, ll. 2-5) (See, also, Resp's. Exh. G).

7. Claimant testified that he experienced an increase in low back pain following the July 16, 2020 tractor incident, and that he first sought treatment for his alleged July 16, 2020 injury about 2-3 weeks after the incident. (10/12/21 Hrg. Tr. p. 48, ll. 13-20; p. 49, ll. 9-13; pp. 54-55, ll. 24-22). Careful review of the evidentiary record fails to establish any contemporaneous medical records referencing an evaluation of or treatment directed to the low back for an injury purportedly caused by a July 16, 2020 injury arising out of running a tractor into a ditch. Rather, the medical records contemporaneous with Claimant's alleged July 16, 2020 injury include an August 4, 2020 report from Physician Assistant (PA-C) Joshua Stoneburner, and an August 8th and August 31, 2020 report authored by PA-C Kristen Viehman whom Claimant regularly sees for chronic pain management stemming from his 2010 low back injury. (Resp's Exh. G). The aforementioned reports support a finding that Claimant was following up with his chronic management providers for care associated with lumbar post laminectomy syndrome. During these appointments, Claimant reported 8-9/10 pain across his back that radiates down his legs to the bottom of his feet for which he was provided with prescription refills. As noted, these records are devoid of any reference to an increase in Claimant's pain or his having suffered a new low back injury as a consequence of running a tractor off the road on July 16, 2020. (See Resp's. Exh. G, pp. 130-140). Careful review of the medical record evidence supports a finding that no medical provider has issued an opinion that a July 16, 2020 tractor accident caused or contributed to Claimant's ongoing back problems in any way.

8. Although Claimant testified that increased pain caused his inability to perform his work duties following the tractor incident (10/12/21 Hrg. Tr. pp. 54-55, ll. 24-22), PA-C Viehman's August 31, 2020 follow up report indicates that Claimant was enjoying his work in the fields on the ATV. (Resp's Exh. G, p. 132).

9. Claimant testified that his last day of performing work tasks for Respondent-Employer was sometime in mid-August 2020. (10/12/21 Hrg. Tr. p. 48, ll.

21-23; p. 51, ll. 7-9; p. 84, ll. 15-17). He testified further that he was told by Mr. KB[Redated] to not come to work if he was physically unable to do the job, and that he missed more than three days of work prior to September 18, 2020 because of the July 16, 2020 tractor injury. (10/12/21 Hrg. Tr. p. 51, ll. 10-23). The following evidence contradicts Claimant's testimony regarding his lost time from work:

- Claimant's time sheets and wage records reflect that he continued to work, and be paid for such work, through September 18, 2020. (Resp's Exh. C, pp. 7-11, 13-21). Claimant testified that he had no reason to believe that he would get paid by the Employer for hours or days that he did not actually work supporting an inference that he actually worked after mid-August 2020. (10/12/21 Hrg. Tr. p. 85, ll. 12-16). Moreover, Claimant's unemployment compensation form (completed by the Employer) also indicates that his last day worked was September 18, 2020. (Resp's Exh. C, pp. 22-23).

- Claimant's testimony regarding his purported inability to work as a result of the July 16, 2020 tractor incident is also contradicted by the testimony of Mr. KB[Redated]. Mr. KB[Redated] testified that, when he first spoke with Claimant about the tractor incident at approximately 11:00 a.m. on July 16, 2020 (approximately two hours after the accident occurred), Claimant advised him that he was not hurt. Claimant then returned to work and completed his full shift with no apparent problems. (10/12/21 Hrg. Tr. pp. 95-96, ll. 3-17; p. 101, ll. 10-17; p. 109, ll. 22-24). Mr. KB[Redated] also explained that the time sheets – which reflect that Claimant worked 8 hours on July 16, 2002, 8 hours on July 17, 2020, 10 hours on July 19, 2020, and 9 hours on July 20, 2020 – were accurate and consistent with his recollection of the actual hours that Claimant worked immediately following the July 16, 2020 tractor incident. (Resp's Exh. C, p. 9) (10/12/21 Hrg. Tr. p. 109, ll. 13-18). Mr. KB[Redated] also testified that Claimant did not say anything to him about having injured his back or wanting to see a doctor, even though they discussed the tractor incident again on July 19, 2020. Mr. KB[Redated] also testified that he did not observe anything to suggest that Claimant was having problems with his back in the days immediately following the July 16, 2020 incident. (10/12/21 Hrg. Tr. pp. 102-103, ll. 19-15).

- Mr. KB[Redated] spoke to the information on the time sheets that indicates that Claimant did not work from July 29, 2020 through August 12, 2020. According to Mr. KB[Redated], the reason Claimant missed work during this approximate 2 week period was because he was sick and had to wait for the results of a Covid test before he was able to return to work. Regarding the nature of his

illness, Mr. KB[Redated] testified that Claimant advised him that he was experiencing symptoms such as a fever and a cough, without mention of any problems with his back at the time. (Resp's Exh. C, pp. 9-10) (10/12/21 Hrg. Tr. pp. 103-104, ll. 22-9).

- Mr. KB[Redated] further testified regarding the information on the time sheets reflecting that Claimant did not work between September 5, 2020 and September 10, 2020, a period of six days. (Resp's Exh. C, p. 11). Mr. KB[Redated] testified that this time off (to the extent it exceeded Claimant's regularly scheduled days off) was due to weather issues and did not have anything to do with problems surrounding the condition of Claimant's low back. (10/12/21 Hrg. Tr. p. 104, ll. 10-18).

- In addition to the above referenced evidence, Claimant's testimony regarding his post July 16, 2020 work history is inconsistent with and contradicted by his subsequent testimony during cross-examination. Despite his testimony that he had an increase in pain following the tractor incident that caused his inability to work beyond mid-August 2020, Claimant later acknowledged that he sent a text message to Mr. KB[Redated] in September 2020 advising that he could not come into work as scheduled because he had hurt his back the day before. (10/12/21 Hrg. Tr. p. 74, ll. 10-17). Clearly, if Claimant had stopped working for the Employer in mid-August, there would have been no need for him to advise his supervisor on a day in September that he was not able to come to work that day. A screen shot of the text message reflects that it was sent by Claimant to Mr. KB[Redated] on September 20, 2020. In this text message, Claimant stated that he "jacked [his] back up pretty good" the day before (September 19, 2020), that he was making an appointment to see his doctor, and that he would not be able to make it in to work that day. (Resp's Exh. C, pp. 12) September 19, 2020 was a Saturday, Claimant's day off.[1] Claimant acknowledged sending this text message to Mr. KB[Redated] and initially testified that he had "re-jarred" his back the day before. (10/12/21 Hrg. Tr. p. 74, ll. 12-14). He then denied that any incident occurred on September 19, 2020 resulting in his inability to work. Rather, he testified, he was just being "jarred around" at work and there were fewer and fewer days he felt that he could actually work. (10/12/21 Hrg. Tr. pp. 74-75, ll. 18-5).

- Mr. KB[Redated] confirmed that since September 19, 2020 was

[1] The ALJ took administrative notice that both July 18, 2020 and September 19, 2020 were Saturdays. (10/12/21 Hrg. Tr. p. 121, ll. 8-11)

a Saturday, Claimant was not scheduled to work that day. (10/12/21 Hrg. Tr. p. 104, ll. 19-23). Mr. KB[Redated] further testified that Claimant was scheduled to work on September 20, 2020 but did not come to work that day. (10/12/21 Hrg. Tr. pp. 104-105, ll. 24-3). Instead, Mr. KB[Redated] testified, he received Claimant's text message stating that he had "jacked [his] back up pretty good yesterday", after which he called Claimant to check on him. Mr. KB[Redated] spoke to Claimant on September 20, 2020 after receiving the aforementioned text message. Mr. KB[Redated] testified that during their September 20, 2020 conversation, Claimant advised him that he had tripped on a sidewalk and hurt his back. (10/12/21 Hrg. Tr. p. 105, ll. 4-25; pp. 106-107, ll. 15-4).

- Mr. KB[Redated] testified that Claimant was also scheduled to work on September 21, 2020. (10/12/21 Hrg. Tr. p. 107, ll. 5-7). Mr. KB[Redated] testified that he called Claimant again on September 21, 2020 to see how his back was doing. According to Mr. KB[Redated], Claimant advised him that his back was still hurting and that he did not know when he would be able to come in to work. (10/12/21 Hrg. Tr. p. 107, ll. 8-21). Mr. KB[Redated] testified that he then advised Claimant that since they were at the end of the season and the weather was changing, he could exercise the option of taking his lay off, so that he would not have to come to work with a sore back. (10/12/21 Hrg. Tr. p. 107-108, ll. 22-2). The time records and unemployment compensation form support Mr. KB[Redated] recollection that the last day Claimant actually worked for Respondent-Employer was September 18, 2020, the day before the Saturday (September 19, 2020) when Claimant tripped over a sidewalk and "jacked" up his back. (Resp's Exh. C, pp. 11, 22) (10/12/21 Hrg. Tr. p. 108, ll. 3-6). Mr. KB[Redated] testified that Claimant's early lay off had nothing to do with the July 16, 2020 tractor incident, but rather was due to the back injury that occurred on September 19, 2020 on Claimant's day off when he tripped on the sidewalk. (10/12/21 Hrg. Tr. p. 122, ll. 3-23).

10. Mr. KB[Redated] testified that, up through the time that Claimant left his employment at the ranch, he never said anything to about having suffered a back injury as a result of the July 16, 2020 tractor incident. Moreover, he testified that he never observed Claimant demonstrate any signs consistent with having back problems following that incident. (10/12/21 Hrg. Tr. p. 108, ll. 9-19; p. 111, ll. 6-10). Mr. KB[Redated] also testified that, *other than in connection with the September 19, 2020 injury that occurred on his day off*, Claimant did not request any time off work because of problems with his back. (10/12/21 Hrg. Tr. p. 108, ll. 20-23). Mr. KB[Redated] testified that he did not become aware that Claimant was alleging to have sustained an

injury to his back as a result of the July 16, 2020 tractor incident until Claimant filed the "lawsuit" regarding this claim, weeks after all the seasonal employees had been laid off. (10/12/21 Hrg. Tr. p. 111, ll. 11-22).

11. The evidence presented, including Claimant's time records, persuades the ALJ that Mr. KB[Redated]' testimony regarding Claimant's work schedule and ability to work after the July 16, 2020 tractor incident is more credible and persuasive than the testimony of Claimant.

12. Regarding the occurrence of the July 16, 2020 tractor incident, Mr. KB[Redated] testified that he learned of the incident soon after it had happened when another employee who worked directly under him texted him about it. (10/12/21 Hrg. Tr. p. 95, ll. 1-8). Mr. KB[Redated] testified that, although he was scheduled to be off that day, he went in to work to check everything out. Mr. KB[Redated] testified that he went straight to where the tractor was where he met with and spoke to Claimant. (10/12/21 Hrg. Tr. pp. 95-96, ll. 9-3). Mr. KB[Redated] testified that first he asked Claimant if he was okay and Claimant responded that he was fine, albeit a little embarrassed. Claimant did not say anything about having injured his back. (10/12/21 Hrg. Tr. p. 96, ll. 4-12). Mr. KB[Redated] further testified that during this conversation, he discussed with Claimant what happened to cause the tractor to go into the ditch. According to Mr. KB[Redated] , Claimant told him that a fox or a dog ran out in front of him, causing him to swerve to the side of the road and into the ditch. (10/12/21 Hrg. Tr. p. 96, ll. 18-22).

13. Mr. KB[Redated] testified that he did not believe that this is what happened. Mr. KB[Redated] testified that coming from the middle of the road, it would have taken quite a bit of speed in order for someone to jerk the wheel and move the tractor as far off the road as it was positioned when he arrived on scene. (10/12/21 Hrg. Tr. pp. 98-99, ll. 17-8). Mr. KB[Redated] testified that based on the tracks in the dirt, it appeared that Claimant had driven straight off the road onto the side of the embankment, rather than having swerved to avoid an animal running in front of the tractor. (10/12/21 Hrg. Tr. p. 100, ll. 4-16) Mr. KB[Redated] further testified that, based on the position of the tractor and attached mower and what he observed at the scene of the accident, it appeared that Claimant had high centered the mower on the side of the roadway, and that this would not have jarred him at all. (10/12/21 Hrg. Tr. p. 111, ll. 14-17). Mr. KB[Redated] testified that later that day he asked Claimant again about the tractor incident, and Claimant maintained his explanation that a fox/dog ran out and caused him to swerve into the ditch. (10/12/21 Hrg. Tr. pp. 101-102, ll. 18-5)

14. Mr. KB[Redated] testified that on July 19, 2020, Claimant confessed to him that contrary to his earlier indication, no fox or dog had run in front of the tractor causing him to swerve onto the side of the ditch. Rather, Mr. KB[Redated] testified that Claimant admitted that he had simply not been paying attention and had just driven off the road. (10/12/21 Hrg. Tr. pp. 102-103, ll. 19-3; pp. 120-121, ll. 18-3). Nonetheless, Mr. KB[Redated] testified that Claimant did not report any injury to his back and did not request an opportunity to see a doctor at that time. (10/12/21 Hrg. Tr. p. 103, ll. 4-9). Based upon the position of the tractor in the pictures admitted into evidence, the ALJ

credits the testimony of Mr. KB[Redated] to find that Claimant probably simply drifted to the side of the road toward the ditch and when the mower made contact with the ground and high centered, Claimant shut the tractor down. Indeed, it does not appear from the pictures that the tractor abruptly swerved off the roadway into the ditch. The tractor is not actually in the ditch. Rather, it is positioned on the side of the embankment with its nose and wheels parallel to the roadway. (Clmt's Exh. 1-2). Based upon the totality of the evidence presented, the ALJ is not convinced that a four-legged animal darted in front of Claimant's tractor causing him to suddenly and unexpectedly to swerve into the ditch.

15. As noted above, Claimant had been evaluated at Comprehensive Pain Specialists shortly after the July 16, 2020 incident where he was evaluated by PA-C Viehman on August 8, 2020 and August 31, 2020. Claimant followed up with PA-C Viehman on December 8, 2020. During this encounter, PA-C Viehman noted that Claimant had just finished putting up the Christmas tree and decorations and was now having increased back pain. PA-C Viehman further noted that Claimant was planning to see spinal surgeon Dr. Lloyd Mobley after January 1 to discuss the next steps for surgery, as he would be having a change in his insurance plan. (Resp's Exh. G, pp. 105-111)

16. Claimant was evaluated by Dr. Mobley on January 14, 2021, during which appointment; Claimant reported that he had been having "severe difficulty with low back pain over the past year." (Resp's. Exh. F, p. 81). Dr. Mobley did not document a cause for Claimant's back pain other than to indicate that he "has a history of lumbar fusion L4-S1", has adjacent level disease at L3-4, and requires a lumbar fusion (Id.) Despite an exhaustive review of Dr. Mobley's January 14, 2021 report, the ALJ is unable to find any indication that Claimant's need for additional treatment, including the recommended L3-4 fusion, is related to an alleged July 16, 2020 injury after driving a tractor off the side of the road.

17. Claimant testified resolutely that, during the 2-3 years immediately preceding the July 16, 2020 tractor incident, no doctor had recommended additional back surgery, and he did not intend to undertake further surgery to his low back. (10/12/21 Hrg. Tr. p. 41, ll. 7-16; p. 42, ll. 4-18; p. 54, ll. 19-23; p. 69, ll. 5-7; p. 81, ll. 11-20). In this case, Claimant asserts that his disability and need for additional treatment/surgery was precipitated by jarring he experienced when he drove Respondent's tractor onto the side of the ditch on July 16, 2020. The ALJ finds Claimant's inference unconvincing. By report dated May 27, 2020 (approximately 7 weeks before the July 16, 2020 tractor incident), Dr. Mobley noted that Claimant had been having left lower back pain at about L4-5 or L3-4 and that it started after a car accident in February of 2019. (Resp's Exh. F, p. 89). Dr. Mobley further opined that Claimant had adjacent level degeneration at L3-4 for which he recommended a lumbar fusion at L3-4. Dr. Mobley noted that Claimant wished to consider undergoing such intervention but would not be able to proceed until the winter. (Resp's Exh. F, p. 90). The fact that Claimant had been diagnosed with adjacent level disease in May 2020 for which surgical correction had been recommended severely undermines his claim that

the need for this surgery is causally related to the July 16, 2020 tractor incident.

18. Claimant underwent an additional two part lumbar spinal surgery as performed by Dr. Mobley on March 1 and 3, 2021. The specific procedures performed were an anterior/posterior lumbar internal fixation and fusion at L3-4. (Resp's Hrg. Exh. F, pp. 73, 76).

19. Respondent sought the opinions of Dr. Timothy O'Brien as to whether Claimant's need for spinal surgery, as performed March 1st and 3rd was causally related to the July 16, 2020 tractor incident. Dr. Timothy O'Brien conducted an independent medical examination (IME) on July 16, 2021 and issued a report outlining his findings/opinions on September 17, 2021. (Resp's Exh. D).

20. As part of his IME, Dr. O'Brien performed a physical examination. He also completed a records review wherein he reviewed medical and imaging reports dating back to 2009. At the conclusion of his IME, Dr. O'Brien opined that Claimant did not suffer a work related injury as a consequence of driving his tractor into the ditch on July 16, 2020. Because there was a complete absence in the record of any historical input documenting that an injury occurred on July 16, 2020, which stood in sharp contrast to Claimant's consistent habit of reporting all prior injuries/symptoms involving the low back, Dr. O'Brien opined that it was virtually medically impossible that a low back injury occurred on July 16, 2020. (Resp's. Exh. D, p. 434).

21. Dr. O'Brien also opined that Claimant's pain score of 9/10 on July 7, 2020 (9 days before his alleged injury) versus his 9/10 pain score on August 4, 2020, approximately 3 weeks after his alleged July 16, 2020 injury supported a conclusion that he had no increase in his pain levels, which underscored the fact that Claimant did not injure himself at work on July 16, 2020. (Resp's. Exh. D, p. 43).

22. Dr. O'Brien also noted that there were no changes in Claimant's imaging studies obtained prior to and following the alleged July 16, 2020 injury. According to Dr. O'Brien, the absence of additional new radiographic findings serves to support a conclusion that no injury occurred on July 16, 2020. (Resp's. Exh. D, pp. 43-44).

23. Finally, Dr. O'Brien opined that secondary gain issues were driving Claimant's reports of increased low back pain following the July 16, 2020 tractor incident. According to Dr. O'Brien, Claimant was likely magnifying his pain in an effort to continue to obtain opioid pain medication. Dr. O'Brien went so far has to opine that Claimant was a narcotic drug seeker and had a history of "fabricating or manufacturing pain in order to 'seek more narcotics.'" (Resp's. Exh. D, p. 45). Accordingly, Dr. O'Brien questioned the reliability of Claimant's history and exam performance.

24. Dr. O'Brien also testified at hearing as a board certified, Level II Accredited retired orthopedic surgeon. Dr. O'Brien maintains a forensic practice only; he does not treat patients nor does he perform surgery. Dr. O'Brien testified consistently with his September 17, 2021 IME report. He testified that, although he reviewed "many

thousands" of pages of medical records as part of his IME, he did not outline every single medical record reviewed in his IME report. (11/4/21 Hrg. Tr. p. 26, ll. 7-15). Dr. O'Brien testified that Claimant's medical records reflect an extensive history of low back issues, including chronic pain and multiple treatments and surgeries, prior to July 16, 2020. (11/4/21 Hrg. Tr. p. 27, ll. 15-23). Dr. O'Brien testified that a December 20, 2011 ER report documents not only that Claimant sustained an injury to his low back while lifting a transmission the day before, but also that Claimant had spinal arthritis that had been symptomatic prior to this date. (Resp's Exh. O, pp. 482-489) (11/4/21 Hrg. Tr. pp. 28-29, ll. 11-12). In addition to the December 2011 transmission injury, Dr. O'Brien testified, that the medical records reflect numerous claimed back injuries, as well as episodes of increased back pain without specific injury, prior to July 16, 2020. (11/4/21 Hrg. Tr. p. 29, ll. 13-23).

25. Regarding Claimant's prior low back surgeries, Dr. O'Brien testified that the medical records reflect that he underwent the following procedures prior to July 16, 2020:

- February 7, 2012 - diskectomy and decompression at L4-5 by Dr. Ghiselli (Resp's Exh. N, pp. 293-295) (11/4/21 Hrg. Tr. pp. 35-37, ll. 25-19);

- July 20, 2012 – decompression and fusion at L4-5 by Dr. Jamrich, based on Dr. Jamrich's belief that the previous diskectomy and decompression at L4-5 had failed (Resp's Exh. N, pp. 293-294) (11/4/21 Hrg. Tr. p. 37, ll. 20-25; p. 38, ll. 16-24);

- November 12, 2014 – revision and extension of fusion at L4-5 and L5-S1 by Dr. Kuklo, based on Dr. Kuklo's assessment that there was a non-union of bone from L4-5 and a stenosis or constriction of the spinal elements around the spinal cord at the level of the cauda equina and the nerve roots at that level, causing ongoing radiculopathy (Resp's Exh. J, p. 243) (11/4/21 Hrg. Tr. pp. 39-40, ll. 1-7);

- October 12, 2016 – revision posterior arthrodesis/fusion at L4-S1 augmented with an anterior arthrodesis at those levels by Drs. Schoeff and Syre, due to an ongoing failure to heal at L4-5 and L5-S1 (Resp's Exh. J, pp. 239-242) (11/4/21 Hrg. Tr. pp. 40-41, ll. 8-15);

- January 15, 2018 – spinal cord stimulator implant by Dr. Mobley to try to relieve ongoing pain at the L4-S1 levels (Resp's Exh. O, pp. 300-301) (11/4/21 Hrg. Tr. pp. 41-42, ll. 19-23);

- December 26, 2018 – removal of spinal cord stimulator by Dr.

Mobley due to malfunctioning with shocking pains (Resp's Exh. O, pp. 296-297) (11/4/21 Hrg. Tr. pp. 42-43, ll. 24-25).

26. Dr. O'Brien testified that, based on what he saw in the medical records, there was never a period of time between 2012 and July 16, 2020 when Claimant did not have ongoing back pain and other symptoms, or when Claimant had stopped treating his low back pain. Rather, Dr. O'Brien testified, Claimant had a chronic condition that was unrelenting and has never let up since it started. (11/4/21 Hrg. Tr. pp. 44-45, ll. 19-6).

27. Regarding Claimant's reporting an "immediate" onset of pain following the July 16, 2020 tractor incident; Dr. O'Brien testified that this would not necessarily mean that any trauma or injury occurred at that time. Rather, Dr. O'Brien testified, within the backdrop of an extensive arthritic condition in the spine, an increase in pain could simply be the manifestation of an underlying condition, similar to when Claimant has pain when getting out of bed or when arising from a seated position.[2] (11/4/21 Hrg. Tr. pp. 83-85, ll. 21-1)

28. Dr. O'Brien testified regarding May 27, 2020 clinical note of Dr. Mobley. (Resp's Exh. F, pp. 87-90) Regarding Dr. Mobley's notation that Claimant was post-op fusion L4-5, L5-S1 "with good results", Dr. O'Brien testified that this could mean that the fusion had finally consolidated, such that there was a solid column of bone from L4-S1. Alternatively, Dr. O'Brien testified, the reference to "good results" could mean that there was pain relief. (11/4/21 Hrg. Tr. pp. 45-46, ll. 7-10). As it pertains to Claimant's situation, Dr. O'Brien questioned whether the reference was intended to indicate pain relief because Dr. Mobley wrote that Claimant had adjacent level degeneration at L3-4, which appeared to be indicating that there were still ongoing symptoms emanating from that spinal level. In addition, a spinal cord stimulator, which had been placed to relieve pain, had failed and had been removed. Consequently, Dr. O'Brien testified, he interpreted the reference to "good results" to indicate that there was solid arthrodesis but ongoing symptomatology. (11/4/21 Hrg. Tr. p. 46, ll. 10-17).

29. Regarding Dr. Mobley's assessment in his May 27, 2020 report of adjacent level degeneration at L3-4 (Resp's Exh. F, p. 90), Dr. O'Brien explained that this was the level above the prior fusion mass, and that Dr. Mobley was indicating that this level has gone on to degeneration. (11/4/21 Hrg. Tr. p. 47, ll. 14-16). Dr. O'Brien testified that this degeneration was expected and happens almost 100% of the time, because the removal of two motion segments – at L4-5 and L5-S1 – creates incredible stress above and below the fusion mass, causing the segments that remain mobile to have to do more work since the fused segments are no longer contributing. (11/4/21 Hrg. Tr. pp. 46-47, ll. 18-17). Dr. O'Brien also testified that in addition to stating that the L3-4 level had degenerated, Dr. Mobley was indicating that this level was causing symptoms leading to the recommendation for a L3-4 fusion to treat those symptoms. (11/4/21 Hrg. Tr. p. 47, ll. 17-20).

[2] Consistent with Dr. O'Brien's testimony, Claimant reported to PA-C Viehman on July 7, 2020, that moving aggravated his pain and that getting up and off the tractor caused pain. (Resp's Exh. G, p. 143)

30. As referenced, Claimant was seen at Dr. Drennan's office (Comprehensive Pain Specialists) on July 7, 2020, and again on August 4, 2020, i.e. 9 days *prior to* and 19 days *after* the July 16, 2020 tractor incident, respectively. (Resp's Exh. G, pp. 134-140, 140-145). When asked to compare Claimant's reported back symptoms on these two dates, Dr. O'Brien testified (as he had alluded to in his September 17, 2021 IME report), that the reports are identical, not only in terms of the pain score and reported level of pain, but also in terms of the characterization of where the pain is and where it goes. (Resp's Exh. G, pp. 138 and 143) (11/4/21 Hrg. Tr. pp. 52-53, ll. 17-18; p. 54, ll. 3-14; p. 81, ll. 20-25; p. 100, ll. 4-13).

31. Dr. O'Brien also reviewed the findings referenced in the May 21, 2020 lumbar MRI report completed approximately *3 ½ weeks prior to* the July 16, 2020 tractor incident with those of the September 30, 2020 lumbar MRI report completed approximately *9 ½ weeks after* the July 16, 2020 tractor incident. (Resp's Exh. P, pp. 490-491; pp. 493-494) Dr. O'Brien testified that the May 21, 2020 MRI report showed arthritis at nearly every level in the lumbar spine, post-surgical changes, ongoing disc protrusions, and facet arthropathy or facet degeneration. (11/4/21 Hrg. Tr. pp. 54-55, ll. 18-1) Dr. O'Brien testified that all the classic findings of spinal arthritis were present on this MRI, including disc bulging, annulus degeneration, and ligament and flavum degeneration. (11/4/21 Hrg. Tr. p. 55, ll. 20-22). In addition, Dr. O'Brien testified, the May 21, 2020 MRI report showed a retrolisthesis at L3-4 caused by that joint trying to compensate for the lack of motion at the fused levels at L4-S1. According to Dr. O'Brien, the L3-4 spinal segment was shifting on itself, or subluxating. (11/4/21 Hrg. Tr. p. 55, ll. 14-19).

32. When asked to compare the findings in the May 21, 2020 lumbar MRI report with those in the September 30, 2020 MRI report, Dr. O'Brien testified that the September 30, 2020 MRI showed the same post-surgical changes, the same arthritic changes, and was essentially saying the same things as the May 21, 2020 MRI report. (Resp's Exh. P, pp. 490-491; pp. 493-494) (11/4/21 Hrg. Tr. pp. 56-57, ll. 18-7). Dr. O'Brien testified that there were no significant changes noted in the September 30, 2020 lumbar MRI report as compared to the May 21, 2020 lumbar MRI report. (11/4/21 Hrg. Tr. p. 57, ll. 8-17). He testified further that the radiologist who interpreted the September 30, 2020 lumbar MRI expressly noted that he had a comparative study dated May 21, 2020, and that he used terms such as "similar to the prior study," "no significant interval change," and "retrolisthesis unchanged". Dr. O'Brien testified that this indicated that, when the radiologist was comparing the two studies and determining in his own mind whether something has changed, he opined that there was no significant change or no change at all. (11/4/21 Hrg. Tr. pp. 57-58, ll. 18-4).

33. On cross examination, Dr. O'Brien acknowledged that the September 30, 2020 MRI report used the language "broad based disc bulge" at L2-3 and L3-4, and that this particular terminology was not used in the May 21, 2020 MRI report. (11/4/21 Hrg. Tr. pp. 82-83, ll. 18-13). While he agreed that the September 30, 2020 MRI report used the term "broad based disc bulge", Dr. O'Brien did not agree that this meant that there was a change in Claimant's MRI between those two dates. (11/4/21 Hrg. Tr. p. 85, ll. 5-15).

Dr. O'Brien explained that there is no scientific definition for a disc bulge, and what one radiologist identifies as a disc bulge may be interpreted differently by another radiologist. (11/4/21 Hrg. Tr. p. 85, ll. 19-24). Moreover, Dr. O'Brien testified, in looking at the specific descriptions of the radiologists' findings in their MRI reports, the L2-3 disc bulge, the L3-4 disc bulge, and the mild bilateral foraminal impingement noted in the September 30, 2020 MRI report were all referenced in the May 21, 2020 MRI report, but stated in different words. Dr. O'Brien testified that the two radiologists were saying the same things with different nomenclature. (11/4/21 Hrg. Tr. p. pp. 100-102, ll. 23-9; pp. 107-108, ll. 9-12). Further, Dr. O'Brien testified, it was known from the September 30, 2020 MRI report that the radiologist had the May 21, 2020 MRI for comparison and in his mind found the two MRI studies to be similar or identical with no significant changes. (11/4/21 Hrg. Tr. p. 102, ll. 10-20). Dr. O'Brien testified that there were so many references in the September 30, 2020 MRI report to "no change" that, despite the use of different terminology, he believed the radiologists were seeing the same thing, and that if there were significant interval changes in the MRI's, those changes would have been referenced. (11/4/21 Hrg. Tr. p. 108, ll. 15-19).

34. The ALJ has carefully reviewed the MRI's reports in question and notes that the May 21, 2020 MRI references the following:

- L2-3: There is retrolisthesis measuring 4 mm. Central posterolateral, and foraminal protrusions and osteophytes are seen. There are also far lateral protrusions and osteophytes.

- L3-4: Thickening of the ligamentum flavum is present. There is retrolisthesis measuring 5 mm. A central, posterolateral, foraminal, and far lateral protrusion and osteophyte is identified. There is moderate left and mild right lateral recess narrowing. There is mild right and moderate left foraminal narrowing.

* * *

- IMPRESSION:

  2. There is retrolisthesis at L2-3 and L3-4.

  3. There are protrusions and osteophytes at the L2-3 and L3-4 segments. (Resp's. Exh. P, pp. 493-494).

35. The ALJ has also carefully reviewed the remaining imaging studies and finds the MRI report from August 24, 2018, particularly relevant to the question of whether the disc bulging referenced at L2-3 and L3-4 in the September 30, 2020 MRI represents an new finding and thus an interval change in the extent of pathology in Claimant's lumbar spine following the July 16, 2020 tractor incident. The August 24, 2018 MRI indicates that there is a "mild disc bulge" at L2-3 and L3-4. (Resp's. Exh. P, p. 498). Consequently,

there was objective evidence of disc bulging at L2-3 and L3-4 prior to Claimant's July 16, 2020 tractor incident and September 30, 2020 MRI. Based upon the imaging study reports the ALJ is sufficiently persuaded that the broad based disc bulging observed on the September 30, 2020 MRI is probably not a new finding. Indeed, it is likely that such bulging has been present since August 2018. While the May 21, 2020 MRI does not use the term "bulge", it does reference that there are "protrusions" at L2-3 and L3-4. Given the MRI findings of bulging at L2-3 and L3-4 on August 24, 2018 and September 30, 2020, the ALJ is convinced that the reference to "protrusions" at these levels in the May 21, 2020 MRI is describing similar pathology, i.e. bulges with different terminology. Accordingly, the ALJ is not convinced that the July 16, 2020 tractor accident caused new pathology in the lumbar spine, which gave rise to Claimant's disability and need for medical treatment, including the staged L3-4 fusion surgery performed by Dr. Mobley.

36.. Dr. O'Brien testified that the surgery Dr. Mobley recommended in his May 27, 2020 report consisted of the procedures he actually performed on March 1 and 3, 2021. (Resp's Exh. F, p. 90) (11/4/21 Hrg. Tr. p. 61, ll. 7-18). Dr. O'Brien further testified that the fact that the surgery had been recommended before the July 16, 2020 tractor incident occurred indicates that Dr. Mobley felt that all surgical indications – including the arthritis, the adjacent level degeneration, and the symptoms – existed in May 2020, prior to the July 16, 2020 incident. (11/4/21 Hrg. Tr. pp. 61-62, ll. 19-4). The ALJ credits the reports of Dr. Mobley and the testimony of Dr. O'Brien to find that, because all surgical indications existed as of May 27, 2020, it is improbable that the July 16, 2020 tractor incident aggravated, accelerated, or combined with Claimant's pre-existing low back condition causing his need for surgical intervention. To the contrary, the evidence presented supports a reasonable inference that Claimant's need for treatment/surgery was pre-existing and related to the natural and probable progression of a degenerative condition in his lumbar spine, which was significantly symptomatic in the weeks leading up to the July 16, 2020 tractor incident. Indeed, Claimant's condition had become so symptomatic by May 27, 2020 that Dr. Mobley recommended surgical correction to cure and relieve him of his ongoing pain.

37. Dr. O'Brien testified that Claimant's medical records show that, historically, he takes care of his pain when it occurs, whether due to a manifestation of his underlying arthritis or due to a new injury. He does not delay in reporting things and he does not delay in seeking medical attention. Rather, Dr. O'Brien testified, based on the medical records, Claimant either urgently or emergently gets care when he notes back pain that he feels is new or increased above his baseline. (11/4/21 Hrg. Tr. p. 49, ll. 19-23; p. 50, ll. 10-14). Furthermore, Dr. O'Brien testified that the medical records reflect that Claimant was seen at Dr. Drennan's office on August 4, 2020, and that there is no indication in this report, either historically or in the providers assessment, that there was an injury which had occurred on July 16, 2020. (Resp's Exh. D, pp. 134-40) (11/4/21 Hrg. Tr. pp. 50-52, ll. 15-16). Dr. O'Brien testified that Dr. Drennan and his physician assistants have, on numerous occasions, discussed Claimant's waxing and waning pain and the etiology of that pain, whether a manifestation, a minor injury or a more substantial injury. (11/4/21 Hrg. Tr. p. 92, ll. 19-23). Dr. O'Brien testified that Dr. Drennan and the providers in his office have proven to be meticulous and detailed historical recorders of facts, such that he

believed that if Claimant had reported an injury from the July 16, 2020 tractor incident, Dr. Drennan would not have failed to record it. (11/4/21 Hrg. Tr. pp. 92-93, ll. 23-3; p. 97, ll. 11-23). Based upon the evidence presented as a whole, the ALJ finds no record support to medical evidence to buttress Claimant's assertion that he sought treatment in connection with a back injury that occurred as a result of the July 16, 2020 tractor incident, or as found that he reported this incident to any of his medical providers.

38. Dr. O'Brien testified about his concerns regarding evidence of Claimant's addiction, drug-seeking behavior and secondary gain motives. Similar to other secondary gain situations, Dr. O'Brien testified, the needs caused by an addiction to narcotics can alter the way an injured person interacts in the workers' compensation system. (11/4/21 Hrg. Tr. pp. 65-66, ll. 4-3). Regarding the information in the medical records that indicated a history of addiction and drug-seeking behavior, Dr. O'Brien noted that there was documentation that Claimant had been fired from pain clinics and from orthopedic clinics because of addiction and drug-seeking behavior. (11/4/21 Hrg. Tr. pp. 66-67, ll. 24-14). Dr. O'Brien testified that there were many references in the records by a number of practitioners indicating that Claimant had a history of addiction, withdrawal, narcotic dependency, drug-seeking behavior, and conversion disorders. (11/4/21 Hrg. Tr. p. 67, ll. 15-20). Further, Dr. O'Brien noted, Claimant remained on narcotics and by definition is still addicted. Dr. O'Brien testified that the definition of addiction is whether a person has withdrawal symptoms if the substance is removed. Dr. O'Brien testified that Claimant's earlier medical records document previous episodes of withdrawal, and he would continue to have withdrawal symptoms right now as he has been on narcotics too long and his body has become too dependent. (11/4/21 Hrg. Tr. pp. 95-96, ll. 25-16).

39. Claimant does not dispute that due to his preexisting back injury he is prescribed and uses opioid medications to control his pain. Claimant testified he was taking pain medication during the year prior to the incident and this pain medication was prescribed by Dr. Drennan. (10/21/21 Hr. Tr. p. 48). Claimant testified he was taking 20-milligrams of oxycodone and Dr. Drennan is his pain management physician. (Id.) Careful review of Claimant's records from Comprehensive Pain Specialists fails to establish that Claimant in anyway is using the opioid pain medications prescribed to him inappropriately or improperly. (Resp's. Exh. G). To the contrary the records indicate Claimant has been utilizing the prescription medications as he has been directed to by his treating pain management physician. There is no reference in the records from Comprehensive Pain Specialists of drug seeking behavior or in the records of any other post July 16, 2020 medical provider. The only reference to the potential for the over use of narcotic medication was one note over five years prior to the July 16, 2020 injury, a fact which Dr. O'Brien admitted during his cross-examination.

40. Based upon the evidence presented, the ALJ agrees with Claimant that the stated concern surrounding Claimant's continued use of opioid medications to support Dr. O'Brien's claim of secondary gain constitutes a "Red Herring" in this case. The evidence presented fails to support a finding that Claimant filed his claim so he could continue to obtain opioid medication. While Dr. O'Brien concludes that secondary gain is playing a role in this case, the ALJ finds a dearth of evidence to support the

suggestion. Indeed, Claimant was already receiving narcotics for his admitted and well-documented low back problems prior to the July 16, 2020 tractor accident. Absent evidence of excessive use or diversion, the ALJ finds that Claimant probably would continue to receive opioids from his pain specialist providers removing the specter that fabrication of symptoms is at play here. Absent evidence of excessive medication use or misappropriation to support a conclusion that Claimant is magnifying his pain to secure additional opioid medication, the ALJ is disinclined to accept Dr. O'Brien's conclusion as anything other than his personal belief that Claimant is a drug seeker. The ALJ finds Dr. O'Brien's opinions/theories concerning the presence of secondary gain in this case gratuitous and irrelevant given the volume of other objective medical evidence that more persuasively establishes the probable cause of Claimant's increasing low back pain.

## CONCLUSIONS OF LAW

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

*General Legal Principals*

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant 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 must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

*The Alleged Mechanism of Injury (MOI) and Claimant's Credibility*

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). 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 presented. 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).

D. Here, a question exists regarding whether the MOI described by Claimant may be causative of his alleged increased pain and findings demonstrated on the September 30, 2020 MRI. As presented, the evidence establishes that Claimant most likely drifted off the edge of the road while driving tractor on July 16, 2020. The ALJ credits the testimony of Mr. KB[Redated] to conclude it unlikely that Claimant was jarred or tossed about violently in the cab of the tractor causing an increase in his symptoms based on the position of the tractor in the pictures admitted into evidence. Indeed, the medical records are devoid of any mention or indication that Claimant told any of his medical providers about the July 16, 2020 tractor incident, much less reporting that he sustained a back injury as a consequence of being tossed about inside the cab when he traveled toward the ditch. To the contrary, the report from PA-C Viehman dated August 31, 2020, approximately 2 weeks after the incident in question, indicates that Claimant continued to enjoy his work riding around the fields on an ATV. Consequently, the ALJ is not convinced that Claimant suffered debilitating pain as a consequence of the July 16, 2020 incident when the tractor in question drifted off the road.

E. Furthermore and as found, Claimant's testimony was contradicted a number of times throughout the hearing and he called his own credibility into question when he confessed that he did not swerve off the road to avoid a four legged animal and when he changed his testimony regarding tripping on a sidewalk on September 19, 2020. Such inconsistences and lack of candor cannot be reconciled with the balance of the competing evidence nor ignored by the court. Accordingly, the ALJ concludes that Claimant's testimony regarding the events he asserts caused a low back injury are unreliable and unpersuasive. Given the totality of the evidence presented, the ALJ agrees with Respondents to find/conclude that Claimant probably did not suffer an injury during the July 16, 2020 tractor incident.

*Compensability*

F. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I) (b), C.R.S.*

G. The phrases "arising out of" and "in the course of" are not synonymous

and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). 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). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). 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).

H. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury." 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. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

I. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). In this case, the following evidence supports the conclusion that Claimant failed to prove he suffered a compensable injury:

- Mr. KB[Redated] , Claimant's former supervisor, testified that Claimant advised him that he was fine and that at no time did Claimant ever indicate to him that he had injured his back or that he was in need of medical treatment for a back injury from the July 16, 2020 incident.

- The medical records are devoid of any mention or indication that Claimant told any of his medical providers about the July 16, 2020 tractor incident, much less reporting that he sustained a back injury as a result. To the contrary, according to a report

from PA Viehman dated August 31, 2020, Claimant reported that he was enjoying his work riding around the fields in an ATV.

- There is no credible evidence to indicate that any medical treatment was sought or necessitated as a result of the July 16, 2020 tractor incident. The medical records document that Claimant has a history of readily and expediently seeking treatment after experiencing a significant increase in his back pain, whether due to an injury such as a fall or due to a minor incident such as twisting while shopping at a grocery store. In stark contrast to this pattern of behavior, Claimant did not seek any treatment for several weeks following the July 16, 2020 incident. When he did seek treatment, he saw the same providers that he had been seeing prior to July 16, 2020 for routine follow up visits with no mention of the July 16, 2020 tractor incident. While Claimant did undergo an L3-4 fusion surgery by Dr. Mobley on March 1 and 3, 2021, Dr. Mobley had already recommended this surgery on May 27, 2020, approximately seven weeks before the July 16, 2020 tractor incident even occurred. At that time, Dr. Mobley noted that Claimant would not be able to proceed with the surgery until the winter. In a December 8, 2020 report, PA Viehman in Dr. Drennan's office noted that Claimant was planning to see Dr. Mobley after January 1 to discuss the next steps for surgery, as he will have a change in his insurance plan. The need for the the L3-4 fusion, and Claimant's decision to undergo the surgery at the time that he did, bear no causal relation to the July 16, 2020 tractor incident.

- As Dr. O'Brien explained, and as evidenced by the findings described and the language used by the radiologist in the September 30, 2020 lumbar MRI report, the September 30, 2020 lumbar MRI demonstrated no change compared to the May 21, 2020 lumbar MRI.
- 
- Claimant's subjective symptom report was also unchanged on August 4, 2020 as compared to July 7, 2020, based on the medical records from Dr. Drennan's office.

J. Not only does the evidence outlined above support the conclusion that no compensable injury occurred as a result of the July 16, 2020 tractor incident, this evidence also supports the conclusion that Claimant's employment related duties did not aggravate, accelerate or combine with his pre-existing low back condition so as to cause a disability or need for any treatment. Rather, the evidence presented supports a conclusion that Claimant's ongoing pain and subsequent need for treatment, including

surgery was, more probably than not, related to the natural progression of a chronic pre-existing degenerative condition in Claimant's lumbar spine.

K. 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 disability or the 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 employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

L. 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, as asserted by Respondents, the occurrence of symptoms at work may represent the result of 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). As found, the ALJ credits the opinions of medical records of Dr. Mobley and the testimony of Dr. O'Brien to find and conclude that Claimant's low back pain/dysfunction, more probably than not, is related to and emanating from the natural progression of a pre-existing condition rather than the duties of his employment. Accordingly, Claimant has failed to establish the requisite causal connection between his alleged injury and his work activities. Because Claimant has failed to establish he suffered a compensable injury, his claim must be denied and dismissed. Consequently, his remaining claims need not be addressed.

## ORDER

It is therefore ordered that:

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

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

That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 7, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-169-895-001**

## ISSUES

1. Whether Claimant established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery and post-surgical therapy and medications were reasonably necessary to cure or relieve the effects of an industrial injury.

2. Whether Respondents are responsible for payment and/or reimbursement of medical expenses associated with the surgery.

## FINDINGS OF FACT

1. On January 27, 2021, Claimant sustained an admitted injury to his right shoulder arising out of the course of his employment with Employer.

2. Claimant's injury occurred when he was moving a sheet of plate steel that had fallen from the bed of his work truck. Claimant lifted the steel, slipped on ice, and felt a sensation in his right shoulder. Claimant reported the incident to Employer on January 27, 2021. The record is insufficient to determine if Claimant indicated he wished to seek medical care, or if Respondents provided Claimant with a list of designated physicians at this time, although Claimant testified that no list was provided.

3. On February 3, 2021, Claimant went to UCHealth Family Medical Clinic for evaluation of his right shoulder. Claimant initially denied his injury was work-related, but accurately described his mechanism of injury. Claimant had decreased range of motion of the right shoulder, with pain on raising the arm higher than 60 degrees abduction or forward flexion, tenderness in the anterior deltoid and decreased strength. Claimant was diagnosed with a right shoulder injury and referred to the Orthopedic Center of the Rockies for further evaluation. (Ex. M).

4. On February 16, 2021, Claimant saw Jeffrey Ebel, D.O., at the Orthopaedic & Spine Center of the Rockies (OCR). Claimant reported he was initially seen by his primary care physician. After examining Claimant, Dr. Ebel recommended a right shoulder MRI, and noted that if Claimant were a candidate for surgical repair, he would be referred to one of the clinic's shoulder specialists. (Ex. 5, BS 400-401 & 411).

5. On February 17, 2021, Claimant underwent a right shoulder MRI at Loveland MRI, which showed "a massive rotator cuff tear with complete tearing of the supraspinatus and infraspinatus tendons," chronic degenerative tearing of the superior labrum, and several acromioclavicular joint arthrosis with joint space widening. (Ex. 3).

6. On March 2, 2021, Claimant saw Christopher Stockburger, M.D., at OCR, on referral from Dr. Ebel. Dr. Stockburger reviewed Claimant's x-rays and MRI study, and conducted an examination. He described Claimant's injury as a "large acute-on-chronic rotator cuff tear with some fatty infiltration and significant retraction," and noted that the

"majority of his joint is well preserved." He recommended surgery, to include a right shoulder arthroscopic rotator cuff repair, subacromial decompression, possible biceps tenotomy, and possible superior capsular reconstruction. (Ex. 5, BS 403-405). Claimant was initially scheduled to undergo surgery on March 18, 2021. (Ex. P, p. 62).

7. On March 16, 2021, Claimant informed Dr. Stockburger's office that his injury was work-related. Dr. Stockburger's office contacted Insurer and was advised that a worker's compensation claim had been filed that day. On March 16, 2021, Dr. Stockburger's office submitted a request for authorization of the surgery to Insurer. Insurer advised that Claimant had not seen an occupational medicine physician yet, and Dr. Stockburger's staff advised him to see a designated physician as soon as possible. (Ex. P, p. 62).

8. On March 19, 2021, Claimant saw Lori Long-Miller, M.D., at Concentra. Dr. Long-Miller was an authorized treating physician (ATP). Dr. Long-Miller examined Claimant and diagnosed a superior labrum anterior-to-posterior (SLAP) tear of the right shoulder, and a traumatic complete tear of the right rotator cuff. Claimant reported he had seen his primary car provider and "then ortho OCP." The ALJ infers OCP is a reference to Orthopaedic & Spine Center of the Rockies and the "ortho" referenced is Dr. Stockburger. Dr. Long-Miller noted that Claimant was initially scheduled for surgery on March 18, 2021 but Claimant's health insurer denied the claim because it was a work-related injury. Dr. Long-Miller indicated that Clamant needed a referral for surgery. In the WC 164 form Dr. Long-Miller completed, she noted that the "Treatment Plan" included only "Orthopedic specialist referral," and noted that the MMI date was unknown because of "surgery." She then referred Claimant to "OCR Ft. Collins" "to have surgery" and instructed Claimant to return 10 days after surgery or within 3 weeks. (Ex. 7). Dr. Long-Miller's referral to "OCR Ft. Collins" was a referral to Dr. Stockburger at the Orthopaedic & Spine Center of the Rockies.

9. On March 30, 2021, William Ciccone, M.D., conducted a medical record review at Insurer's request to opine on the reasonableness, necessity, and relatedness of the surgery requested by Dr. Stockburger. Based on his review of records, Dr. Ciccone opined that Claimant sustained a sprain/strain to the right shoulder and that his "rotator cuff tear is chronic, preexisting and is unrelated to the work event." Dr. Ciccone offered no persuasive rationale for this opinion, and did not address the Claimant's lack of prior symptoms. Dr. Ciccone's statement that "on 3/2/21 the orthopedist reviews the MRI scan and feels the claimant has a large chronic rotator cuff tear with fatty infiltration," is not an accurate characterization of Dr. Stockburger's 3/2/21 MRI review or his diagnosis. While Dr. Stockburger acknowledged that some of Claimant's pathology was chronic, he also indicated Claimant's rotator cuff tear was an "acute -on-chronic" injury, indicating that some portion of Claimant's pathology was acute. Dr. Ciccone also opined that the recommended surgery was not reasonable, necessary, or work-related, based on his opinion that Claimant's pathology was chronic. Dr. Ciccone's opinion regarding the Claimant's injury and the reasonableness, necessity and relatedness of the proposed surgery is not credible or persuasive. (Ex. A).

10. On April 7, 2021, Insurer notified Dr. Stockburger that authorization for surgery was denied based on Dr. Ciccone's opinion. (Ex. C)

11. On April 15, 2021, Claimant returned to Dr. Long-Miller. Dr. Long-Miller addressed Insurer's denial of surgical authorization as follows: "Pt reports surgery denied after ortho review of records, no pt interview or exam. Pt is very clear that he slipped and fell while moving plate and heard and felt shoulder pop on [date of injury]. Prior to injury no shoulder pain or problems or ROM difficulty. Regardless of any findings that ortho feels were pre-existing, this is an injury made worse by work related fall/injury and should therefore be covered." Dr. Long-Miller noted that Claimant was willing to participate in physical therapy and referred him for physical therapy. Dr. Long-Miller further noted "I feel that this is a work-related injury regardless of any chronic findings on MRI because pt reports no pain and full function prior to work fall." She again noted that Claimant was not at MMI because he required surgery. (Ex. 7).

12. Claimant returned to Dr. Long-Miller on April 22, 2021, at which time she noted that Claimant's condition was unchanged and that he was in constant pain. She noted that physical therapy gave a few hours of relief. Finally, Dr. Long-Miller indicated "this is a work-related injury, needs surgery." (Ex. 7).

13. On May 10, 2021, Insurer filed a General Admission of Liability admitting only for medical benefits. (Ex. A).

14. On May 19, 2021, Claimant returned to Dr. Stockburger. Dr. Stockburger described the findings on Claimant's MRI as follows: "He eventually had an MRI demonstrating a large[,] retracted tear with some proximal migration and some evidence of fatty infiltration consistent with some of this being chronic, but clearly had an acute injury at work with significant weakness." He noted that Claimant and done physical therapy, activity modification, anti-inflammatories and continued to have significant functional deficits with a massive rotator cuff tear in a young, health patient without significant arthritis, which I consider a major problem and he certainly is indicated for surgical intervention for this." Dr. Stockburger's impression was "acute-on-chronic massive rotator cuff tear with near pseudoparalysis on exam." Again, he reiterated that he believed surgery was reasonable. Claimant then decided to proceed with surgery. (Ex. 1).

15. On June 3, 2021, Dr. Stockburger performed surgery on Claimant's right shoulder. The procedures performed were a right shoulder rotator cuff repair, right shoulder biceps tenotomy and right shoulder acromia decompression. (Ex. 1).

16. At follow up visits, Dr. Stockburger indicated that Claimant was doing well with physical therapy at ProActive physical therapy, and that he was receiving therapy multiple times per week. (Ex. 1). By September 29, 2021, Dr. Stockburger noted that Claimant had weaned out of therapy and was progressing with strength and motion., with no major concerns. He was scheduled for a final follow up visit six weeks later, which would have occurred sometime in mid-November 2021. (Ex. 1).

17. Claimant credibly testified that before January 27, 2021, that he had no prior injuries to his right shoulder, and no prior shoulder treatment. Claimant's medical records from before January 27, 2021, show no prior injuries to Claimant's shoulder, although he did have some prior issues with pain radiating to his shoulder from a cervical spine injury. Claimant testified that on January 27, 2021, he felt a pop in his shoulder and felt immediate symptoms. Claimant also had difficulty raising his arm above his head. Claimant testified that after Insurer denied prior authorization for his surgery, he went to OCR for surgery, and that a claim was submitted to his personal insurer. He testified that after surgery, his shoulder rapidly improved. Following surgery, Claimant had twenty-two physical therapy visits until authorization by his personal health insurance expired. Claimant paid co-pays for physical therapy and surgery, and paid for medications. Claimant testified he would like to continue therapy if warranted.

## CONCLUSIONS OF LAW

### *Generally*

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

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

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

## SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). “The claimant bears the burden of proof to establish that a need for medical treatment was proximately caused by an injury arising out of and in the course of employment.” *In re Claim of Daniely*, W.C., No. 5-124-750 (ICAO, Feb. 26, 2021), citing 8-41-301(1), C.R.S,. and *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), “Further, treatment necessitated by an industrial aggravation or acceleration of a pre-existing condition is compensable.” *Id*. Whether medical treatment is reasonable and necessary is a question of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In addition to being “reasonable and necessary,” treatment must be “authorized.” “‘Authorization’ and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 (“authorized medical benefits” refers to legal authority of provider to deliver care). All treatment provided by an “authorized treating physician” is “authorized.” *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). “However, treatment is not compensable unless it is also ‘reasonable and necessary’ to cure or relieve the effects of the industrial injury.” *Id*.

An employer is liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm’n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not “authorized,” a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Claimant has established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery was reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant’s ATP, Dr. Miller, opined that Claimant “needs surgery” on his right shoulder and that the need for surgery was the result of his industrial injury. Further Dr. Stockburger also opined that the surgery was reasonable and necessary

and was the result of an "acute-on-chronic" injury. Dr. Ciccone's opinion that Claimant sustained only a strain/sprain of his right shoulder is not credible or persuasive. Given the fact that Claimant was asymptomatic and fully functional prior to his industrial injury, and experienced significant symptoms and limitations not relieved by conservative treatment, the ALJ concludes that the surgery was reasonable and necessary to cure or relieve the effects of Claimant's work injury. Moreover, the ALJ concludes that post-surgical therapy and medications were also reasonable and necessary to cure or relieve the effects of Claimant's work injury.

Respondents appear to argue that Claimant's surgery was not "authorized" for two reasons. First, that Dr. Stockburger was not an ATP, and second, that Insurer denied prior authorization under W.C.R.P. 16. The ALJ concludes that Dr. Stockburger was an "authorized treating provider" as of March 19, 2021, and therefore the treatment was "authorized." On that date, Dr. Miller referred Claimant to Dr. Stockburger for surgery. By virtue of this referral, Dr. Stockburger became an ATP. Thus, any treatment Dr. Stockburger provided after March 19, 2021 was "authorized."

That Claimant underwent surgery after Insurer's denial of prior authorization under W.C.R.P. 16 does not lead to a different conclusion. The purpose of "prior authorization" under W.C.R.P. Rule 16, is to "offer[] protection to the authorized treating physician from providing treatment which the insurer considers non-compensable. In the absence of pre-authorization, a treating physician's treatment expenses are not protected." *Repp, supra.* "However, nothing in [Rule 16] precludes a claimant from proving the disputed treatment is reasonable, necessary, and authorized at a subsequent evidentiary hearing." *Id*. Even where a physician fails to comply with Rule 16 and seek prior authorization for a procedure, a claimant is not precluded from having the issue of medical treatment adjudicated by an ALJ and obtaining an order which requires respondents to pay for treatment. *Arszman v. Target Corp.*, W.C. No. 4-798-406 (ICAO Dec. 15, 2011).

Because the June 3, 2021 surgery was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury, and Dr. Stockburger was an ATP within the chain of referral from Dr. Miller, Respondents are responsible for reimbursement of the surgery and post-surgical therapy. Pursuant to § 8-42-101(6)(a), C.R.S., Claimant, and his health insurer, are entitled to reimbursement for amounts paid for treatment rendered by Dr. Stockburger after March 19, 2021, Claimant's post-surgical therapy and post-surgical medications.

## ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that his June 3, 2021 right shoulder surgery and post-surgical therapy and medications were reasonably necessary to cure or relieve the effects of an industrial injury.

2. Respondents are responsible for payment and/or reimbursement of medical expenses associated with Claimant's June 3, 2021 surgery, including post-surgical therapy and medications.

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

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

DATED: January 7, 2022

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

## ISSUE

Whether Claimant has proven by a preponderance of the evidence that the left L5-S1 Artificial Disc Replacement (ADR) surgery requested by Stephen Pehler, M.D. is reasonable, necessary and causally related to his May 11, 2020 industrial injury.

## FINDINGS OF FACT

1. Claimant is a 23 year old male who worked as a concrete finisher for Employer. On about May 11, 2020 Claimant was picking up a concrete form and dragging it over a grassy area at work. He lost his balance, stepped into a hole with his right foot and twisted his lumbar spine to the left side. He immediately experienced lower back pain.

2. Claimant continued to work for about one week before seeking medical treatment. On May 18, 2020 he visited Denver Health and reported that about one week earlier he had stepped into a hole and twisted. He immediately suffered lower back and left leg pain.

3. On May 21, 2020 Claimant visited Lutheran Medical Center. He reported left leg pain for the previous five days and worsening back pain for the past 10 days. Claimant was diagnosed with acute bilateral lower back pain with left-sided sciatica.

4. On May 27, 2020 Employer completed a First Report of Injury. Under the mechanism of injury section, Employer noted Claimant "stepped wrong." Claimant then began treatment at Workwell Occupational Medicine with Authorized Treating Physician (ATP) Brenden Matus, M.D.

5. On June 10, 2020 Claimant underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion mildly indenting the dural sac and markedly deforming the left S1 root sleeve. Dr. Matus referred Claimant for physical therapy and to Samuel Chan, M.D. Dr. Chan administered two sets of lumbar Epidural Steroid Injections (ESIs). Dr. Matus remarked that the ESIs provided a diagnostic response. On August 14, 2020 Dr. Matus referred Claimant to Stephen Pehler, M.D. for an orthopedic surgical evaluation.

6. Dr. Pehler reviewed Claimant's lumbar imaging. He noted that the x-rays revealed mild spondylosis and the MRI reflected a left-sided disc herniation at L5-S1 that compressed the descending S1 nerve root. Based on the failure of conservative care and the imaging findings, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

7. On November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. Dr. Pehler documented an extreme amount of pressure from the disc herniation that was causing severe compression of the descending S1 nerve root. He

also addressed a large disc herniation with an extruded fragment. Dr. Pehler testified that there were no complications during the surgery.

8. After his microdiscectomy, Claimant continued to receive treatment through Workwell. Claimant acknowledged that his lower back condition improved for about five months following surgery. The medical records support Claimant's account of his recovery. For example, on December 2, 2020 Claimant notified Maria Kaplan, PA-C at Dr. Pehler's office that overall he was doing quite well and had experienced significant relief of both his lower back and left lower extremity pain. By December 17, 2020 Dr. Chan noted Claimant was feeling much better and no longer using narcotics. On December 23, 2020 Dr. Matus reported Claimant's overall pain had improved with less frequent leg symptoms. He assigned work restrictions of "lift and carry 5 pounds max and only around waist/chest area. No lifting from ground level. Avoid repetitive bending, twisting or stooping at the waist. Wear back brace with activity."

9. On January 8, 2021 Dr. Matus reported Claimant was being weaned from his back brace, his pain level was 3/10 and his work restrictions were decreased. By January 29, 2021 Claimant's restrictions were reduced to the following: "[l]imit lift and carry 15 pounds max and only around waist/chest area. Avoid repetitive bending, twisting or stooping at the waist."

10. On February 8, 2021 Claimant returned to Dr. Pehler for an examination. Claimant reported that overall he was feeling well, with significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On February 9, 2021 Dr. Chan also remarked that Claimant was doing quite well with pain levels of 3/10.

11. On February 12, 2021 Claimant again visited Workwell for an evaluation. Teresa Ayandele, PA-C noted Dr. Pehler had removed Claimant's work restrictions. PA-C Ayandele advised Claimant to continue physical therapy and home exercises. She remarked that Claimant should follow-up in two weeks with the possible "transition to work conditioning." Although PA-C Ayandele had noted that Dr. Pehler removed Claimant's work restrictions, she stated that the limitations remained unchanged as follows: "[l]imit lift and carry 20 pounds max and only around waist/chest area. Avoid repetitive bending, twisting or stooping at the waist."

12. On March 11, 2021 Claimant visited Dr. Chan for an evaluation. Dr. Chan recounted that Claimant had undergone a discectomy with Dr. Pehler on November 10, 2020 and was improving. Claimant had undergone physical therapy, massage therapy and chiropractic care. Dr. Chan commented that Claimant's work restrictions had been removed but he had not yet returned to work. He summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

13. Claimant testified that his condition significantly worsened following an incident at home while playing with one of his children in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twist, and immediately felt pain in his back.

14. On March 12, 2021 Claimant returned to Workwell for an examination. PA-C Ayandele noted that Claimant had increased his activities. However, he aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Jones Logan, D.O. of Workwell commented that Claimant had aggravated his condition playing with his kids a few weeks earlier. Dr. Logan referred Claimant for a new lumbar MRI.

15. On April 2, 2021 Claimant underwent a lumbar MRI. The imaging revealed a broad-based central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve.

16. On April 12, 2021 Claimant returned to Dr. Pehler for an evaluation. Dr. Pehler documented that a few weeks earlier Claimant was playing with his kids and suffered a twisting event. Claimant described a recurrence of symptoms in his left lower extremity. After reviewing Claimant's lumbar MRI, Dr. Pehler remarked that Claimant had a slight repeat disc protrusion at the left L5-S1 level. Dr. Pehler recommended conservative treatment.

17. On May 3, 2021 Claimant visited Emily Halla, PA at Dr. Pehler's office. PA Halla reported that Claimant had undergone a left-sided L5 microdiscectomy seven months earlier. She remarked that Claimant suffered an injury a couple months ago that caused a repeat protrusion at the left L5-S1 level. PA Halla recounted that Claimant's pain was located in his lower back and radiated to his left buttock through his legs down to his toes with associated numbness, tingling and burning.

18. On June 4, 2021 Claimant again visited Dr. Pehler for an evaluation. Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain. He explained that Dr. Chan had administered left L5-S1 ESIs that provided only minimal relief. Because of Claimant's fairly broad-based disc protrusion, Dr. Pehler requested a left L5-S1 Artificial Disc Replacement (ADR).

19. On June 16, 2021 orthopedic surgeon E. Patrick Curry, M.D. reviewed Dr. Pehler's surgical request. Dr. Curry recommended denial of the ADR because it did not meet the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). He explained that lumbar ADRs are only appropriate in cases where surgical fusion is an option. However, fusion surgery was not a consideration for Claimant. Moreover, ADRs are recommended for discogenic lower back pain rather than Claimant's radicular symptoms. On June 17, 2021, Insurer denied Dr. Pehler's ADR request based upon Dr. Curry's opinion.

20. On August 19, 2021 Claimant applied for a hearing asserting that Dr. Pehler's L5-S1 ADR request was reasonable, necessary and related to the present claim. On August 27, 2021 Respondents filed a response to the application for hearing contending that Dr. Pehler's ADR request was not reasonable, necessary and related to his May 11, 2020 work injury.

21. On November 3, 2021 Claimant underwent an independent medical examination with orthopedic spine surgeon Brian Reiss, M.D. Dr. Reiss reviewed Claimant's medical records, performed a physical examination and considered Claimant's April 2, 2021 lumbar MRI. Based upon his evaluation and experience, Dr. Reiss determined that a L5-S1 ADR was not reasonable, necessary or causally related to Claimant's industrial injury. He further noted that a repeat microdiscectomy was the best surgical option.

22. Dr. Pehler testified at the hearing in this matter. He explained that Claimant substantially improved following his November 10, 2020 microdiscectomy, but then suffered a recurrence. Dr. Pehler specified that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. He acknowledged that he would not have recommended the ADR absent the incident at home. The recurrent herniation and larger, broader protrusion caused the need for the ADR.

23. Dr. Pehler remarked that, based on Claimant's mechanism of injury in which he re-herniated his disc at home, his chances of an additional herniation were very high. Replacing the disc through an ADR would remove any chance of another disc herniation and was the best and quickest method to return Claimant to full function. Dr. Pehler explained that Claimant is a good candidate for an ADR. He emphasized that Claimant's April 2, 2021 MRI clearly demonstrated a larger, broad-based protrusion that affects his right side with a recurrence on the left side.

24. Rule 17, Ex. 1 (G)(11)(a), addresses the criteria for a lumbar ADR. Notably, the patient must meet fusion criteria, and "if the patient is not a candidate for a fusion, a disc replacement should not be considered." Dr. Pehler initially testified that Claimant satisfied the criteria delineated in the *Guidelines* for an ADR. He specified that Claimant has single level disease, has no facet arthropathy or arthritis, has failed conservative treatment, continues to be symptomatic, has a single pain generator, has a component of spondylosis, and has some degeneration at the L5-S1 level. However, he also acknowledged that Claimant is not a candidate for fusion surgery.

25. Dr. Reiss maintained that the ADR proposed by Dr. Pehler is not reasonable and recommended a microdiscectomy as the proper surgical procedure. He explained that a lumbar ADR is a much more aggressive, complex, risky procedure than a microdiscectomy. In a young patient like Claimant, an ADR will cause additional stress and issues with the structures around the artificial disc, the device will not last forever, and removing or revising an artificial disc is very difficult. Dr. Reiss noted that Claimant's central disc bulge was present prior to the first surgery, still contained within the annulus and was not on the verge of exploding. He thus concluded that a repeat microdiscectomy would be sufficient to address Claimant's condition. Dr. Reiss detailed that there was only a 5-10% possibility of a re-herniation following a repeat microdiscectomy. He thus strongly disagreed with Dr. Pehler's opinion that Claimant has a "high probability" of a recurrent herniation if he undergoes a repeat microdiscectomy.

26. Dr. Reiss agreed that Claimant was doing well prior to his early March, 2021 accident at home. However, Claimant likely suffered a recurrent L5-S1 disc herniation

when twisting while playing at home with his children. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not had the prior microdiscectomy.

27. Claimant has failed to prove that it is more probably true than not that the left L5-S1 ADR surgery requested by Dr. Pehler is reasonable, necessary and causally related to his May 11, 2020 industrial injury. Initially, on about May 11, 2020 Claimant stepped into a hole and twisted his lumbar spine to the left side while working for Employer. He immediately experienced lower back pain. After receiving conservative care, he underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion. Based on the failure of conservative care and the imaging studies, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

28. On November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. By February 8, 2021 Claimant reported significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On March 11, 2021 Dr. Chan remarked that Claimant was still improving after his microdiscectomy. Claimant had received physical therapy, massage therapy and chiropractic care. Dr. Chan summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

29. Claimant testified that his condition significantly worsened following an incident at home in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twisting movement, and immediately felt back pain. On March 12, 2021 PA-C Ayandele noted that Claimant had aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Dr. Logan commented that Claimant had aggravated his condition while playing with his kids a few weeks earlier and referred him for a new lumbar MRI. The April 2, 2021 lumbar MRI revealed a broad-based, central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve. On June 4, 2021 Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain when he suffered a twisting event while playing with his children. He remarked that Dr. Chan had administered left L5-S1 ESIs and Claimant obtained only minimal relief. Because Dr. Pehler was concerned that a revision microdiscectomy would only provide minimal relief, he recommended an L5-S1 ADR.

30. Dr. Reiss explained that Claimant suffered a recurrent L5-S1 disc herniation while at home playing with his children in early March, 2021. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent

disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not undergone the prior microdiscectomy. Dr. Pehler also noted that, following the November 10, 2020 microdiscectomy, Claimant substantially improved, but suffered a recurrent disc herniation. He agreed that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. Dr. Pehler remarked that he would not have recommended the ADR absent the event at home.

31. The record reveals that Claimant, Dr. Reiss and Dr. Pehler agreed the accident at home in early March, 2021 significantly changed Claimant's condition. Following his intervening accident, Claimant's lower back and leg symptoms substantially worsened, his pain level increased, he required extensive treatment not contemplated before the accident (an MRI, ESIs, and surgery), and his post accident lumbar MRI identified a recurrent disc herniation. In fact, Claimant's April 2, 2021 lumbar MRI revealed not only a broad-based, central disc protrusion that existed prior to his microdiscectomy, but also a right-sided disc protrusion. The incident at home in early March, 2021 triggered Claimant's need for additional surgery. Because of the intervening event at home Claimant's recurrent disc herniation was unrelated to his May 11, 2020 industrial injury.

32. Based on the medical records and persuasive medical opinions, the early March, 2021 accident constituted an intervening event that severed the causal connection to Claimant's original May 11, 2020 work-related accident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that his recurrent disc herniation is causally related to his May 11, 2020 work accident. Accordingly, Claimant's request for an L5-S1 ADR is denied and dismissed.

## CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAO, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

5. As found, Claimant has failed to prove by a preponderance of the evidence that the left L5-S1 ADR surgery requested by Dr. Pehler is reasonable, necessary and causally related to his May 11, 2020 industrial injury. Initially, on about May 11, 2020 Claimant stepped into a hole and twisted his lumbar spine to the left side while working for Employer. He immediately experienced lower back pain. After receiving conservative care, he underwent a lumbar MRI. The imaging revealed a broad-based, central and left-sided disc protrusion. Based on the failure of conservative care and the imaging studies, Dr. Pehler recommended a left-sided L5-S1 microdiscectomy.

6. As found. on November 10, 2020 Claimant underwent a left-sided L5-S1 microdiscectomy. By February 8, 2021 Claimant reported significant improvement in his lower back and leg symptoms. Because Claimant was progressing well three months after surgery, Dr. Pehler released him to full duty work without restrictions. On March 11, 2021 Dr. Chan remarked that Claimant was still improving after his microdiscectomy. Claimant had received physical therapy, massage therapy and chiropractic care. Dr. Chan summarized that there was no specific change to Claimant's current treatment plan and he should continue with postsurgical protocols.

7. As found, Claimant testified that his condition significantly worsened following an incident at home in early March, 2021. He specifically noted that, while he was playing with his daughter, he picked up a ball, made a sudden twisting movement, and immediately felt back pain. On March 12, 2021 PA-C Ayandele noted that Claimant had aggravated his lower back and leg pain while playing with his children in the yard. Claimant's pain increased to 5/10 and PA-C Ayandele characterized the incident as a "set-back." Similarly, on March 26, 2021 Dr. Logan commented that Claimant had aggravated his condition while playing with his kids a few weeks earlier and referred him

for a new lumbar MRI. The April 2, 2021 lumbar MRI revealed a broad-based, central and right-sided disc protrusion mildly indenting the dural sac and the left S1 nerve root sleeve. On June 4, 2021 Dr. Pehler noted Claimant had complete symptom recurrence with progressive right-sided buttock pain when he suffered a twisting event while playing with his children. He remarked that Dr. Chan had administered left L5-S1 ESIs and Claimant obtained only minimal relief. Because Dr. Pehler was concerned that a revision microdiscectomy would only provide minimal relief, he recommended an L5-S1 ADR.

8. As found, Dr. Reiss explained that Claimant suffered a recurrent L5-S1 disc herniation while at home playing with his children in early March, 2021. Claimant was susceptible to easily herniating his disc with loading and twisting even before his work injury. Specifically, Claimant initially injured his lower back on May 11, 2020 by simply stepping into a small hole and twisting. Dr. Reiss thus reasoned that it is more probable than not that the loading and twisting incident at home in early March, 2021 caused the recurrent disc herniation. Furthermore, Claimant likely would have herniated his disc during the event at home even if he had not undergone the prior microdiscectomy. Dr. Pehler also noted that, following the November 10, 2020 microdiscectomy, Claimant substantially improved, but suffered a recurrent disc herniation. He agreed that the recurrent herniation was caused by Claimant's accident at home in early March, 2021 while playing with his children. Dr. Pehler remarked that he would not have recommended the ADR absent the event at home.

9. As found, the record reveals that Claimant, Dr. Reiss and Dr. Pehler agreed the accident at home in early March, 2021 significantly changed Claimant's condition. Following his intervening accident, Claimant's lower back and leg symptoms substantially worsened, his pain level increased, he required extensive treatment not contemplated before the accident (an MRI, ESIs, and surgery), and his post accident lumbar MRI identified a recurrent disc herniation. In fact, Claimant's April 2, 2021 lumbar MRI revealed not only a broad-based, central disc protrusion that existed prior to his microdiscectomy, but also a right-sided disc protrusion. The incident at home in early March, 2021 triggered Claimant's need for additional surgery. Because of the intervening event at home Claimant's recurrent disc herniation was unrelated to his May 11, 2020 industrial injury.

10. As found, Based on the medical records and persuasive medical opinions, the early March, 2021 accident constituted an intervening event that severed the causal connection to Claimant's original May 11, 2020 work-related accident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that his recurrent disc herniation is causally related to his May 11, 2020 work accident. Accordingly, Claimant's request for an L5-S1 ADR is denied and dismissed. *See Vargas v. United Parcel Service*, W.C. No. 4-325-149, (ICAO Aug. 29, 2002) (where the claimant underwent a spinal fusion and was involved in a motor vehicle accident six months after reaching MMI that worsened his symptoms and required additional back surgery not previously contemplated, the motor vehicle accident constituted an intervening event that severed the causal connection between the claimant's initial fusion surgery and need for additional medical treatment); *Wingstrom v. Wal-Mart Stores, Inc.*, W.C. No. 4-633-188 (ICAO July 14, 2010) (where the claimant reached MMI for her admitted lower back injury in October 2004, throwing a blanket onto her bed in 2008 was an intervening event

because the claimant's condition was stable until August 2008 and her work injury related to the left side of her lower back while her complaints after August 2008 involved the right side of her lower back). *Compare Reynal v. Home Depot USA, Inc.*, W.C. No. 4-585-674-05 (ICAO June 25, 2012) (where the claimant suffered a lower back injury in 2003 while working for one employer and developed additional back pain in 2011 while working for a different employer, the 2011 injury was not an intervening event and the claimant was entitled to permanent total disability benefits based on his 2003 work injury because the 2011 incident was a "temporary exacerbation [that] did not result in . . . a new injury.").

## ORDER

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

1. Claimant's request for an L5-S1 ADR is denied and dismissed.

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

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

DATED: January 7, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

## ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the Claimant suffered a right knee injury and is entitled to a lower extremity scheduled impairment.

## STIPULATIONS

The parties stipulated that Claimant's average weekly wage was $559.79. The parties further stated that Respondents would be filing an admission with regard to the impairment of the cervical spine provided by the Division or Workers' Compensation Independent Medical Examiner, Dr. Stephen Lindenbaum of 17% whole person impairment.

## FINDINGS OF FACT

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

1. Claimant was 68 years old at the time of the hearing and was working for Employer as a shuttle driver, until approximately April 2020 when his Employment was terminated due to the COVID-19 pandemic. His job duties included escorting customers, driving customers to and from the dealership, shoveling snow off the sidewalks, throwing down deicer, cleaning off snow from the vehicles and driving them to the service areas.

2. Claimant testified that he had had a prior work related injury to his left knee, including treatment, but never had any problems with the right knee prior to the admitted work related accident.

3. On February 7, 2020 he was exiting the west door of the service building, which was the door used by the employees. He proceeded to cross a parking lot that had a slight incline. There was a dusting of snow on the ground and Claimant slipped and fell. He testified that his legs went out from under him, hyperextending the right knee and landed on his right side, hitting his head on the concrete, which knocked his hat and hearing aids off. Claimant continued to work the rest of the day, mainly sitting in the waiting area, but did not report the injury that day. He reported the injury to his supervisor the following Monday, February 10, 2020, his next scheduled shift. Claimant stated that he had initial pain in his right knee, neck, right shoulder and back. He requested medical care and was sent to Concentra.

4. Claimant was first seen on February 10, 2020 by Dr. Nancy Strain at Concentra Medical Centers in Lakewood. Dr. Strain documented that Claimant presented with a slip and fall, right knee and shoulder pain, and hit his head. She reported that Claimant was not sure what happened to his knee but that it "pops and clicks very

loud with certain movements." He reported that he had no prior right knee problems. Dr. Strain further noted that the pain in the knee was moderate, had clicking and stiffness, no decreased range of motion, no swelling, and was exacerbating by using the stairs. On exam she noted that there was tenderness over the medial joint line, had pain with range of motion, and had a positive medial Apley's grind test.[1] She assessed an internal derangement of the right knee; ordered x-rays and an MRI of the right knee; and returned Claimant to full work duties.

5. The First Report of Injury was completed on February 12, 2020 and specifically noted that the body part affected was the lower extremities—knee, falling backwards hitting his right side shoulder.

6. Claimant retuned to see Dr. Strain on February 13, 2020 and she changed restrictions to lift, push and pull up to 20 lbs. occasionally but was awaiting the MRI results.

7. An MRI read by Dr. Michael Otte performed on February 24, 2021 showed posterior horn medial meniscus tear through the root ligament implantation and debris in the posterior joint line, as well as fibrillation in the posterior horn lateral meniscus root implantation. Claimant had osteoarthritis in all three compartments and intact ligaments and was developing osteophytes along the extensor mechanism from the patella. Dr. Otte noted particularly that the medial collateral ligament was intact and free from sprain pattern. He found no edema in the lateral collateral ligament or conjoined tendon and that the soft tissue and neurovascular structures were unremarkable. The only moderate edema was in the soleus muscle.[2]

8. Claimant was evaluated by Dr. Kathryn Bird, of the Littleton Concentra office, on March 4, 2020. Claimant reported that any symptoms of the right knee were getting better as his wife was doing massage as she was a massage therapist and he continued working modified duty. On exam she found a positive lateral McMurray test and positive medial McMurray test and positive Thessaly's.[3] She diagnosed a right knee strain. However, she noted that the knee was getting better so they would be focusing on his right shoulder complaints. She continued the prior restrictions at that time. She referred Claimant to physical therapy.

9. Claimant saw physical therapist Kenneth Marshall on March 4, 2020. Mr. Marshall noted Claimant was diagnosed with a right knee strain and recommended therapy to address the strain and improve range of motion and proceeded with neuromuscular reeducation, exercise, hot packs and electrical stimulation.

[1] Apley's grind test or Apley Compression test is used to evaluate patients for problems of the meniscus in the knee.
[2] Soleus muscle is located on the back of the lower leg from the shin bone to the heel bone as part of the Achilles tendon.
[3] Tests that assess detection of meniscal tears.

10. Dr. Bird rechecked Claimant on March 16, 2020 and noted that Claimant was taking no medications at that time. There was no notation of Claimant complaining of knee pain during this visit.

11. On March 19, 2020 Claimant was evaluated by Dr. Failinger primarily for the right shoulder and on exam showed mild crepitus and focal medial joint line pain. Minimal and benign physical examination findings were found by Dr. Failinger during his examination of the right knee. Dr. Failinger assessed medial compartment degenerative joint disease, with meniscus tear. At that time Dr. Failinger suggested cortisone injection for the right knee, which Claimant declined, in exchange for ongoing therapy.

12. Claimant returned to see Dr. Failinger on April 16, 2020 and Claimant advised that he thought his knee was better and that both therapy and time were helping with his knee symptoms.

13. On April 17, 2020 Dr. James Linberg, an orthopedic surgeon performed a medical records review and assessed that Claimant had significant preexisting arthritis and a posterior horn tear, which were not caused by the slip and fall injury but by wear and tear with age.

14. On April 20, 2020 Dr. Bird examined the right knee and stated that the appearance of the right knee was normal, had normal strength, palpation and tone, though had some tenderness over the lateral joint line.

15. On April 21, 2020 Dr. Allison Fall examined Claimant and stated that Claimant's right knee was doing better. The remainder of the three page report concerned only other body parts.

16. Dr. Failinger examined Claimant on April 23, 2020 but only focused on the right shoulder complaints.

17. On May 12, 2020 Claimant reported to Dr. Bird some pain in the right knee with a similar evaluation as the last. The majority of the evaluation and complaints involved the right shoulder and neck. She continued to recommend physical therapy.

18. Claimant was attended by Dr. Robert Kawasaki, a physiatrist, who only mentions in passing Claimant's right knee injury and specifically reported that Claimant reported his right knee was doing much better and was "not problematic." There is also mention that Claimant had difficulty with toe walking and heel walking related to balance related to the head and neck injury, as well as right foot pain from an old injury. Subsequent reports are equally limited regarding any mention of right knee problems. For, example on February 16, 2021, Dr. Kawasaki stated that Claimant had treated for right knee pain. Dr. Kawasaki noted that symptoms were as indicated in the history and physical. "Otherwise negative for other joint pain, need for walking aids, muscle cramps, joint stiffness, fractures, pain elsewhere." The report only addressed pain in the shoulder and neck.

19. Claimant made no complaints of knee problems on August 31, 2020 when he was evaluated by Dr. Bird. Most of that evaluation involved the shoulder and neck complaints and denials of care for them. The only diagnosis was for the right shoulder. He returned for assessment with Dr. Bird on October 1, 2020. While he did complain of right knee pain at that time he reported to Dr. Bird that his knee problems had improved with physical therapy. Again, she did not provide an assessment or treatment recommendations for the knee. On October 20, 2020 Dr. Bird again evaluated Claimant, failed to examine or diagnose any right knee condition, and reviewed the plan for treatment and diagnosis with Claimant, who expressed understanding.

20. Claimant was placed at maximum medical improvement by Dr. Bird on November 11, 2020. She assigned an impairment rating for loss of range of motion of the lower extremity, though she stated that the right knee MRI findings cannot be attributed to this work injury. She provided restrictions with regard to the upper extremity injury including lifting ten pounds constantly and no lifting overheard. On February 17, 2021 Dr. Bird stated, because Claimant reported he was quite functional with the right knee, that an impairment was inappropriate, revising the impairment to only rate the cervical spine.

21. On April 21, 2021 Claimant underwent a DIME with Dr. Stephen Lindenbaum. He noted that Claimant's main complaint was his cervical spine. The DIME physician noted on exam that Claimant had full extension and some limitation on flexion of the right knee, but no instability and Claimant had measurements of both thighs at equal distance above the knee with no difference in circumference and no evidence of effusion. Dr. Lindenbaum stated that the MRI showed evidence of chronic chondromalacia of all three compartments that contributed to his meniscal abnormality as well as the fact that Claimant is grossly overweight. He stated that he provided an impairment of the right lower extremity based on the fact that Claimant had no history of prior injury to the right knee.

22. The ALJ credits the Claimant's testimony and reports of Dr. Bird and Dr. Failinger that Claimant sustained a strain of the right knee on February 7, 2020. Claimant proved by a preponderance of the evidence that he sustained a right knee strain when he hyperextended his right lower extremity when he slipped and fell on ice in the course and scope of his employment with Employer.

23. The ALJ credits the reports of Drs. Bird, Dr. Failinger, and Dr. Kawasaki that physical therapy and the massage therapy provided by Claimant's wife improved the right knee strain, over the contrary report of Dr. Lindenbaum. The ALJ further credits the report of Dr. Lindberg (in part) that the significant preexisting arthritis and a posterior horn tear, were not caused by the slip and fall injury but by wear and tear with age. Claimant failed to show by a preponderance of the evidence that Claimant is entitled to an impairment rating for the right lower extremity.

24. Evidence and inference contrary to these findings were not credible and persuasive.

## 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 *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 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. Permanent Impairment

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.

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in Sec. 8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of Sec. 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). In *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) the court, citing *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996), noted that whether a particular component of the Claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the *AMA Guides*. Therefore, the *Egan* court determined that in order to challenge and overcome the causation conclusion by the DIME physician, a party must present clear and convincing evidence. However, the *Egan* court further explained that the statutory scheme, requiring causation questions to be challenged through a DIME, applies only to injuries resulting in whole person impairment. When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ continues to have jurisdiction to resolve the dispute. The Division IME physician's causation determination is not afforded any special weight in a scheduled disability and the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. The determination of the impairment rating by the DIME physician regarding a scheduled impairment is thus not entitled to presumptive effect, including any prerequisite findings of relatedness. *Yeutter v. Industrial Claim Appeals Office*, 487 P.3.d 1007 (Colo. App. 2019); *Morris v. Olsen Heating & Plumbing Co.*, No. 4-980-171-002 (ICAO, July 6, 2018).

Claimant has the burden to establish causation of a scheduled injury, as a scheduled impairment is not a DIME determination referenced by Sec. 8-42-107.2(4)(c). *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007). In *City Market v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003) the court acknowledged that the question of whether the claimant sustained a scheduled or whole person rating is one of fact for the ALJ, and is not determined by the "rating physician." See also *Morris v. Olson Heating and Plumbing*, ICAO, W.C. No. 4-980-171-02 (July 6, 2018). A rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with

which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

With regard to an extremity impairment, the claimant bears the burden to prove a scheduled rating by a preponderance of the evidence. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). 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).

Here, Claimant had the burden of proving that the lower extremity injury was causally related to the work-related fall and that he is entitled to an impairment rating. Addressing the work-related fall and the question of causation, it is found that Claimant did have an admitted slip and fall which caused a strain of the right lower extremity. Claimant credibly testified that when he slipped on the ice, his legs went from under him, and his right knee hyperextended. This caused the Claimant's right knee strain as initially diagnosed by Dr. Strain. Claimant reported the right knee pain at the initial appointment with the designated provider and subsequent providers including Dr. Bird, Dr. Failinger, Dr. Fall, Dr. Kawasaki, and therapist Marshall.

As found, Claimant has failed to show by a preponderance of the evidence that he is entitled to receive Permanent Partial Disability (PPD) benefits for a right knee injury. Even if Respondents had the burden of proof to show that the DIME physician's opinion was incorrect by a preponderance of the evidence, as may be suggested by several ICAO non-binding opinions, Respondents have done so. The totality of the evidence in this case shows that Claimant's knee complaints related to the strain of the right knee diminished and resolved as evidenced by Dr. Kawasaki's credible remarks that the right knee was not problematic, which is credible, and in contrast with the less persuasive report of Dr. Lindenbaum. The strain was treated and the strain resolved. This is supported by Dr. Bird's records of therapy improving the knee condition as well as Dr. Failinger and Dr. Fall's reports. Dr. Bird persuasively explained that he had been able to return to functional status. Claimant received significant physical therapy at Concentra, which improved the strain. This is shown in multiple reports by Dr. Bird as well as in the other provider records. Claimant also declined treatment, including injections offered by Dr. Failinger. Further, the MRI of the right knee failed to show significant effusion, edema or signs of an acute injury that was a result of the strain, only osteoarthritic and degenerative changes that can be expected give the Claimant's age and body habitus. Neither did the medical records reflect persuasive evidence of swelling or other trauma following the incident. As found, the bulk of the persuasive medical evidence reflects that a rating for Claimant's right knee is not warranted. Accordingly, Claimant has failed to show by a preponderance of the evidence that he is entitled to an impairment rating of the right lower extremity and is not entitled to any additional impairment rating for the right knee.

## ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for an impairment rating of the lower extremity is denied and dismissed.

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

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

DATED this 11th day of January, 2022.

Digital Signature

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-108-612-003**

## ISSUES

1. Whether Claimant established by a preponderance of the evidence that the April 30, 2021 surgery performed on Claimant's left ankle was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

## FINDINGS OF FACT

1. Claimant was a correctional officer employed by Employer. Claimant reported that on May 17, 2019, he sustained an injury in the course and scope of his employment while descending stairs, when he twisted his right ankle. Respondents contested that Claimant sustained a compensable injury and the matter was adjudicated at a hearing before ALJ Edwin Felter on November 6, 2019. On November 27, 2019, ALJ Felter issued an Order in which he determined that Claimant sustained a compensable injury to his right ankle in the form of an aggravation and acceleration of a pre-existing right ankle condition. ALJ Felter further ordered that Respondents are responsible for the cost of all authorized, causally related, and reasonably necessary medical care and treatment related to Claimant's May 17, 2019 right ankle injury. (Ex. 1).

2. Following Claimant's injury on May 17, 2019, Claimant was initially seen at North Suburban Medical Center emergency room where x-rays of his right ankle were negative.

3. Claimant then received treatment from Karen Hill, D.O., at Concentra. The ALJ infers that Dr. Hill was Claimant's authorized treating provider. Claimant was then referred to for an orthopedic consult and saw resident Henry Yu, M.D., and Robert Leland, M.D. at the UC Health Foot and Ankle Center, on August 1, 2019. Claimant testified that Dr. Leland is a foot and ankle specialist. (Ex. F).

4. Initially, Drs. Yu and Leland diagnosed Claimant with a sprain of the deltoid ligament of the right ankle and closed ankle fracture. Claimant was placed in a lace-up brace and recommended to participate in a home exercise program focusing on ankle strength, range of motion and proprioception. (Ex. D).

5. At his October 17, 2019 visit, Claimant reported that he had reinjured his right ankle in early September 2019. Claimant continued to have medial ankle pain which he reported had been persistent since his injury. On examination, Dr. Leland noted that Claimant was tender in the region of his deltoid ligament, and opined that Claimant had a probable medial ankle impingement secondary to a deltoid ligament tear. He recommended an MRI to better delineate the deltoid ligament, and instructed Claimant to follow up after the MRI for further evaluation. (Ex. D).

6. Claimant did not undergo an MRI as recommended by Dr. Leland, and did not return to Dr. Leland until December 10, 2020. At that time, he reported continued ankle

pain that had not improved. Dr. Leland's examination of Claimant's ankle demonstrated tenderness along the anterior medial aspect of the ankle with pain on dorsiflexion, but was otherwise normal. Dr. Leland's assessment was right medial ankle impingement. He recommended physical therapy with deep tissue mobilization and indicated that if the recommended treatment did not resolve his symptoms surgical debridement would be recommended. (Ex. D).

7. On February 11, 2021, Respondent scheduled Claimant for a demand appointment with Dr. Leland to take place on February 18, 2021. (Ex. 4).

8. Claimant returned to Dr. Leland on February 18, 2021, without improvement of his ankle symptoms. Dr. Leland opined that Claimant's pain was likely caused a hypertrophied deltoid ligament causing impingement in the ankle joint. Dr. Leland performed a steroid injection in the right ankle and indicated if it did not provide lasting benefit surgery would be scheduled. (Ex. D).

9. On March 4, 2021, in response to correspondence from Respondent's counsel, Dr. Leland indicated that physical therapy and possible arthroscopic debridement of the ankle would be reasonably necessary to cure or relieve the effects of Claimant's May 17, 2019 injury. (Ex. 4). The ALJ finds Dr. Leland's statement credible.

10. Claimant received approximately two weeks of improvement with the steroid injection, but the pain ultimately returned. On April 8, 2021, Dr. Leland indicated that Claimant had "essentially exhausted his nonsurgical treatment options" and that an ankle arthroscopy and debridement would be considered.

11. On April 30, 2021, Dr. Leland performed an arthroscopic evaluation and limited debridement of Claimant's right ankle. During the procedure, Dr. Leland noted that "Examination of the joint revealed some hypertrophic tissue both anterolateral and anteromedial consistent with the patient's impingement symptoms. With dorsiflexion of the ankle, there was noted to be evidence of impingement on the talar dome." After tissue was debrided, Dr. Leland noted there was no sign of any further impingement. (Ex. E).

12. On May 26, 2021, Claimant underwent an independent medical examination (IME) with Timothy S. O'Brien, M.D. At the time of the IME, Dr. O'Brien had not yet reviewed Dr. Leland's operative report, and indicated that he was not certain as the precise procedure performed. He did note "As Dr. Leland suggested, an arthroscopic debridement and removal of any medial impinging lesions was performed …" Dr. O'Brien further noted that "[t]his is a very limited surgery and is not highly traumatic." Dr. O'Brien did not opine on the reasonableness or necessity of the surgery in his IME report. (Ex. F). Dr. O'Brien was testified at hearing as an expert in orthopedic surgery. He testified that the procedure performed by Dr. Leland was not reasonable or necessary, and characterized the procedure as "bad medicine." Dr. O'Brien testified that Dr. Leland should not have performed surgery because no MRI was performed prior to surgery, no "differential injections" were performed, that Claimant's pain was "migratory." and that Claimant's pain generator was not clearly identified prior to surgery.

13. He further state that there was no scientific basis for using an arthroscopic scope as an investigative procedure in an ankle. Dr. O'Brien testified that there is no medical literature, or reported double-blind clinical studies, to support an arthroscopic investigation of the ankle. He referenced the lack of double-blind studies, which compare the results of a proposed "real" procedure to a placebo procedure to determine the effectiveness of the "real" procedure. He testified that he is not aware of any such studies being performed.

14. Dr. O'Brien's testimony is not persuasive. As Dr. O'Brien testified, there is little anatomic distance within the ankle. Claimant's ankle pain was described throughout his treatment as tenderness to the anterior medial aspect of his ankle. Although there were slight variations in the area of reported tenderness, given the anatomy of the ankle, the ALJ does not find these variations significant. The steroid injection performed by Dr. Leland in February 2021 did provide relief for two weeks, following which Dr. Leland determined that surgery was appropriate. During surgery, Dr. Leland indicated that he identified and debrided hypertrophic tissue that was consistent with the Claimant's impingement symptoms. The lack of clinical trials for arthroscopic evaluation of the ankle as no credible evidence was presented to indicate how such a procedure would be amenable to a double-blind study, or whether investigatory surgeries are routinely subjected to clinical trials.

## CONCLUSIONS OF LAW

### *Generally*

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*,

183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

## SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the April 30, 2021 surgery was reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Leland credibly opined in March 2021 that arthroscopic debridement was reasonably necessary to cure or relieve the effects of Claimant's injury. Dr. Leland, a foot and ankle specialist, deemed it appropriate to perform surgery on Claimant's ankle after Claimant experienced ongoing symptoms for approximately two years. Although no MRI was performed, Dr. Leland was able to identify pathology in the ankle during surgery to which he attributed Claimant's impingement symptoms. When considering all the evidence, the ALJ finds it more likely than not that the surgery was reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

## ORDER

It is therefore ordered that:

1. Claimant's April 30, 2021 left ankle surgery performed by Dr. Leland was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

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: January 13, 2022

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

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injury.

3. Whether Claimant's right knee treatment was provided by an Authorized Treating Physician (ATP).

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

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reimbursement for out-of-pocket expenses related to the medical treatment and surgery on his right knee.

## FINDINGS OF FACT

1. Employer is a global corporation that focuses on aerospace, arms, defense, information security and technology. Claimant is a 59 year old male who works for Employer as an assembler and electrical tester. His typical job duties are mostly sedentary in nature involving sitting and handling small computer components.

2. Claimant earned $27.97 per hour and worked 40 hours per week. His shifts commenced at 5:00 a.m. and generally ended at about 3:30 p.m. over four days each week. Claimant thus earned an Average Weekly Wage (AWW) of $1,118.80.

3. At approximately 11:30 a.m. on February 9, 2021 Claimant realized he and a co-worker needed office supplies. Office supplies are stored downstairs in an older section of the building. Claimant noted that the stairs are different from those he uses to go to lunch or enter and exit the building. The steps Claimant used to retrieve office supplies are about 75 yards from his workstation and steeper than those he regularly uses in the newer part of the building. He remarked that he obtains office supplies from downstairs about once every two months.

4. On February 9, 2021 Claimant went down the steps and picked up lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a "pop" and experienced immediate pain in his right knee. As soon as Claimant returned to his workstation he reported the injury to his supervisor.

5. Approximately one hour after the injury Claimant visited Erika Spadafora, NP at Employer's medical clinic. Claimant told NP Spadafora that at 11:30 a.m. earlier in the day he had been walking from lunch back to his office when he "felt a pop" in his right knee. NP Spadafora noted Claimant was not carrying anything at the time of his injury and there were no hazards on the stairs. She recommended using ice packs three times per day for 15-minute intervals in addition to taking Motrin and Tylenol. NP Spadafora concluded that Claimant's injuries were likely not related to his work activities based on his history of present illness. She commented that Claimant would follow-up in one week for re-evaluation.

6. Claimant disagreed with the history of present illness as recorded by NP Spadafora. He specifically noted that he was carrying items at the time. Furthermore, he commented that he was on a specific errand to retrieve office supplies and not returning from his lunch break.

7. On February 15, 2021 Claimant returned to Employer's medical clinic and visited Authorized Treating Physician (ATP) Andrew Plotkin, M.D. for an examination. On the date of the injury, Claimant had signed a Notice of Designated Provider, pursuant to the requirements of W.C.R.P. 8-1(C)(2), acknowledging his awareness that Dr. Plotkin was the designated provider for his work injury. Dr. Plotkin recorded that on February 9, 2021 Claimant was ascending stairs at work when he felt a pop in his right knee. Claimant remarked that nothing unusual, such as twisting or stepping incorrectly, had occurred during the incident. Dr. Plotkin noted Claimant had visited his Primary Care Provider (PCP) and obtained right knee x-rays. The x-rays revealed degenerative changes in the patellofemoral compartment. Dr. Plotkin concluded that Claimant's injury was not compensable because there was no work-related mechanism of injury or hazard and the "activity [was] a normal life activity." He commented that Claimant "understands this is not considered work-related and is going to follow-up with his PCP after the MRI scan."

8. Dr. Plotkin testified at the hearing in this matter and maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. He remarked that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

9. Robert Michael, M.D. was Claimant's PCP. At the referral of Dr. Michael, Claimant underwent an MRI of his right knee on February 19, 2021. The MRI revealed "horizontal tear posterior horn of medial meniscus with parameniscal cyst formation." He was referred to Panorama Orthopedics for a surgical consultation.

10. On April 29, 2021 Claimant underwent a surgical repair of the complex tear over the posterior horn of his medial meniscus, extending from the posterior middle to the anterior horn, with James Johnson, M.D. at Panorama Orthopedics. The procedure was covered through Claimant's private health insurance policy Cigna. All of the treatment Claimant received related to his right knee pathology documented by the MRI has been covered under his private health insurance policy. The payments Claimant made for treatment of his right knee totaled $5,145.32.

11. After undergoing surgery, Claimant missed two weeks of work. During the two week period Claimant received short-term disability benefits.

12. On August 10, 2021 Claimant underwent an independent medical evaluation with John R. Burris, M.D. He reviewed Claimant's medical records and performed a physical examination. Dr. Burris recounted that on February 9, 2021 Claimant was walking up a set of stairs between the supply area and his workstation. On approximately the fourth step Claimant felt a pop in his right knee and immediately experienced pain. He was not carrying anything heavy at the time and there were no hazards or obstacles on the stairs. Based on Claimant's account, Dr. Burris reasoned that the February 9, 2021 work incident "represent[ed] an activity of daily living and not a unique or special hazard of employment." Dr. Burris remarked that, because Claimant's normal work activities are sedentary and mostly seated, they "would not introduce a risk for a knee condition." He explained that Claimant's right knee symptoms were thus likely "independent and unrelated to his employment." Therefore, Claimant's right knee condition was not work-related.

13. On December 9, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Burris. Dr. Burris maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus.

14. Dr. Burris explained that the Division of Workers' Compensation discussion of a proximate cause requires an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to

have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

15. Claimant has failed to establish that it is more probably true than not that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of her employment with Employer. Initially, on February 9, 2021 Claimant went down a flight of stairs to retrieve lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a "pop" and experienced pain in his right knee. He immediately reported the injury to his supervisor. After initially receiving medical treatment through ATP Dr. Plotkin, Claimant had a right knee MRI through his PCP that revealed a meniscus tear. He subsequently underwent arthroscopic surgery on April 29, 2021.

16. Although Claimant maintained that he injured his right knee while performing his job duties on February 9, 2021, the persuasive medical evidence reveals that the mechanism of injury did not cause his right knee meniscus tear. Approximately one hour after the injury Claimant visited NP Spadafora at Employer's medical clinic. NP Spadafora determined that Claimant's injuries were likely not related to his work activities based on his history of present illness. Furthermore, Dr. Plotkin persuasively maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. Claimant was ascending stairs at work when he felt a pop in his right knee. Nothing unusual, such as twisting or stepping incorrectly, occurred during the incident. Dr. Plotkin commented that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

17. Dr. Burris also persuasively maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal

tear of the posterior horn and body of the medial meniscus. Dr. Burris explained that proximate cause contemplates an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

18. Based on Claimant's right knee x-rays and MRI he suffered from degenerative, pre-existing pathology in his right knee. The persuasive medical opinions reveal that Claimant's activity of ascending stairs at work would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Claimant's assertion that his symptoms arose after the performance of a job function does not create a causal relationship based solely on temporal proximity. The mechanism of injury was insufficient to constitute the proximate cause of Claimant's right knee medial meniscus tear. Accordingly, Claimant's work activities on February 19, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

## CONCLUSIONS OF LAW

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

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

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

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

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

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

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of”

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

9. Claimant asserts that the matter should be analyzed under the “employment risk” or first category of injuries delineated in *City of Brighton*. He specifies that at the time of his injury he was in the process of carrying office supplies upstairs as required to complete his job duties. The action of climbing stairs thus proximately caused his injury, necessitated the need for medical treatment and resulted in disability. However, Claimant’s appeal to the *City of Brighton* analysis fails because the decision was not concerned with the question of whether an injury occurred. The decision instead involved whether and when an injury "arises out of” the course and scope of employment. In *City of Brighton* there was no dispute the claimant fell down a set of stairs and suffered injuries. Here, however, the persuasive medical evidence reveals that the specified mechanism of injury did not cause Claimant’s meniscal tear or aggravate his pre-existing condition. Because Claimant did not suffer an injury, there is no question of whether the injury “arose out of” employment. Accordingly, the *City of Brighton* analysis is not instructive in the present matter.

10. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable right knee injury on February 9, 2021 during the course and scope of her employment with Employer. Initially, on February 9, 2021 Claimant went down a flight of stairs to retrieve lightweight office supplies. As he was ascending the stairs and reached the fourth step, he felt a “pop” and experienced pain in his right knee. He immediately reported the injury to his supervisor. After initially receiving medical treatment through ATP Dr. Plotkin, Claimant had a right knee MRI through his PCP that revealed a meniscus tear. He subsequently underwent arthroscopic surgery on April 29, 2021.

11. As found, although Claimant maintained that he injured his right knee while performing his job duties on February 9, 2021, the persuasive medical evidence reveals that the mechanism of injury did not cause his right knee meniscus tear. Approximately one hour after the injury Claimant visited NP Spadafora at Employer’s medical clinic. NP Spadafora determined that Claimant’s injuries were likely not related to his work activities

based on his history of present illness. Furthermore, Dr. Plotkin persuasively maintained that Claimant did not suffer an industrial injury to his right knee on February 9, 2021. Claimant was ascending stairs at work when he felt a pop in his right knee. Nothing unusual, such as twisting or stepping incorrectly, occurred during the incident. Dr. Plotkin commented that Claimant's right knee MRI on February 19, 2021 revealed a horizontal meniscal tear. The imaging also reflected degenerative changes including thinning of the cartilage and a parameniscal cyst. Non-occupational factors including aging, wear and tear over time, and obesity are risks for the development of degenerative knee changes. Claimant arrived at work on February 9, 2021 with pre-existing knee pathology. Dr. Plotkin thus reasoned that Claimant's pre-existing knee condition precipitated his pain at work on February 9, 2021. After conducting research, he also explained that walking up stairs does not create an increased risk for a meniscus tear. Instead, twisting is a key risk factor for developing the injury. Accordingly, Claimant's mechanism of injury of climbing stairs on February 9, 2021 did not likely cause his right knee injury.

12. As found, Dr. Burris also persuasively maintained that Claimant's right knee injuries were not related to his work activities for Employer on February 9, 2021. He remarked that x-rays taken by Claimant's PCP revealed degenerative spurring of the superior patella. The findings take months or years to develop. The x-rays also did not reveal any acute bony abnormalities. In addressing Claimant's February 19, 2021 right knee MRI, Dr. Burris noted the imaging revealed degenerative changes, including thinning of the cartilage, that can take months or years to develop. Furthermore, the horizontal tear revealed in the MRI could have been acute, but was more likely degenerative in nature based on the additional finding of a parameniscal cyst. Dr. Burris thus determined that Claimant arrived at work on February 9, 2021 with .with pre-existing pathology in his right knee. He summarized that the imaging findings, in conjunction with Claimant's mechanism of injury, did not likely proximately cause his right knee condition. Although he acknowledged that walking up steep stairs without twisting puts additional pressure across the patella area of the knee, the mechanism would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Dr. Burris explained that proximate cause contemplates an event that is the "a final straw" aggravating or accelerating a pre-existing condition. He emphasized that "you can have a pre-existing condition, and then something happens that is the event that tips it over, but you have to have a specific event and a mechanism that's consistent with causing that. This mechanism is not consistent with a meniscal injury."

13. As found, based on Claimant's right knee x-rays and MRI he suffered from degenerative, pre-existing pathology in his right knee. The persuasive medical opinions reveal that Claimant's activity of ascending stairs at work would not likely cause a horizontal tear of the posterior horn and body of the medial meniscus. Claimant's assertion that his symptoms arose after the performance of a job function does not create a causal relationship based solely on temporal proximity. The mechanism of injury was insufficient to constitute the proximate cause of Claimant's right knee medial meniscus tear. Accordingly, Claimant's work activities on February 19, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

## ORDER

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

Claimant did not suffer a compensable injury while working for Employer on February 9, 2021. Accordingly, his claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: January 14, 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. 5-161-549-001**

## ISSUES

I. Whether Respondents overcame the opinion of the Division Independent Medical Examiner, Dr. Macaulay, that Claimant is not at MMI.

II. Whether the medical treatment recommended by the Division Examiner is reasonable and necessary and whether the ALJ can order Respondents to pay for the medical treatment recommended by the DIME physician.

## FINDINGS OF FACT

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

1. On October 16, 2020, Claimant sustained a compensable work-related injury to her nose.
2. Claimant reported a paper towel dispenser cap fell and hit her on the nose. Claimant testified, "Well, I put my hand in to check the towels, and the lid fell off, and it fell on my nose." Hrg. Tran. pg. 73, lines 17-20.
3. Claimant reported the accident to her supervisor, "Cecelia", within 20 minutes after the event. Cecelia completed some paperwork, but she told Claimant that she did not recommend that Claimant go to the doctor because they would administer a coronavirus test and would not let her return to work for two weeks. She did not give Claimant any names of clinics or physicians (Hg. Tr., pp. 75-76)
4. Claimant experienced pain at the 8-9 level in the area of the bridge of her nose the day after the and she felt "pins and needles as if [I] had ants [in the nose]." (Hg. Tr., pp. 76-77).
5. After requesting medical care from her supervisor "Cecelia," for months after the injury without a referral, Claimant ultimately went to human resources. A human resources representative finally sent Claimant to Dr. Sadie Sanchez at Midtown Occupational. (Hg. Tr., pp. 77-78).
6. One of the reasons Claimant did not go to a doctor during the months after the accident is that the doctors she contacted only gave telemedicine visits due to the COVID pandemic. As a result, Claimant did not seek any medical treatment from October 16, 2020, through January 10, 2021. Hrg. Tran. pg. 51, lines 11-18 and pg. 79.
7. On January 11, 2021, Dr. Sadie Sanchez evaluated Claimant. Claimant reported she was restocking a paper towel container when the lid fell onto her nose. She stated her nose swelled. She denied loss of consciousness, but "her pain was so

bad, she blacked out for a minute." She denied any nose bleeding or lesions on her nose. Claimant reported the next day she had a brown mucus discharge from her nose. Claimant further complained of headaches, poking pain at 4-5/10, body fatigue, daily headaches, and vision changes. There were further times where she felt she could not breathe. Dr. Sanchez noted, "The patient has not returned to work at the company of record due to confusion regarding COVID testing and this injury with her employer. She has been working full duty with another employer (she had this job at the time of injury and continues to work there)." Respondents' Ex. I at pgs. 100-101.

8. Dr. Sanchez referred Claimant for x-rays. The x-rays were normal. Respondents' Ex. J, pg. 105. *See also Respondents' Ex. I, pg. 101*.

9. Following review of the x-rays, Dr. Sanchez opined,

> The patient's objective findings do not correlate with subjective complaints and she exhibited mild pain behaviors at today's visit. I explained to the patient that the MOI would have suggested at least a nasal contusion and possibly a fracture. However, the x-ray taken today does not demonstrate concern for nasal fracture. Furthermore, without an abrasion or laceration or any evidence of a more serious injury, it is difficult to entertain that any internal derangement occurred due to the injury. The intermittent swelling cannot easily be explained…. To summarize, I would not expect long-term sequela from this type of injury without a fracture, and therefore, I am not able to offer the patient any further treatment.

   Dr. Sanchez concluded, "She does not require any work restrictions or impairment rating. She was encouraged to see her PCP to consider non-work-related diagnosis." Dr. Sanchez opined Claimant was at MMI with no impairment. Respondents' Ex. I Pg. 102, 103.

10. Based on the evidence submitted at hearing, the ALJ finds that Claimant was hit on the nose when the cap or lid of a paper towel dispenser fell and hit her.

11. On February 11, 2021, a Final Admission of Liability was filed consistent with Dr. Sanchez's MMI report. The Final Admission of Liability denied any permanent impairment or maintenance care. Respondents' Ex. A, pgs. 2-10.

12. Before the work-incident, Claimant sought medical treatment from 2012 through 2017 for a myriad of issues. Respondents' Ex. L, pgs. 125-148.

13. On March 8, 2012, Claimant sought treatment for eyestrain and headaches. *Id.* at pgs. 128-130.

14. On October 3, 2012, Claimant underwent a lung check due to a history of tuberculosis. *Id.* at pgs. 131-133.

15. On December 11, 2012, Claimant sought treatment for having left ear pain, arm pain and headaches. *Id.* at pgs. 135-136.

16. On August 6, 2014, Claimant sought treatment for blurred vision. *Id*. at pgs. 139-140.

17. On March 21, 2017, Claimant returned to her PCP complaining of frontal, bilateral and temporal headaches over the last two months. Her physician noted, "She almost always had headaches after 4:00, but sometimes wakes up with headaches. Further, her vision is sometimes very blurry, occurs at any time of day and not always associated with headaches." Claimant was diagnosed with tension headaches. *Id.* at pgs. 144-145.

18. On July 11, 2017, Claimant returned to her PCP. She complained of blurry vision and frontal headaches. She also noted eye watering. *Id.* at pgs. 146-147.

19. Between July 11, 2017, and October 16, 2020, over a three-year period, Claimant did not actively treat on a regular basis for blurry vision or headaches.

20. On June 15, 2021, Dr. Hugh Macaulay performed a Division Independent Medical Examination (DIME). Claimant reported while working with a paper towel dispenser the device struck her on the nose. She stated she felt like her nose was going to fall into pieces. She admitted her nose did not bleed but reported that "liquid came out of both sides of her nose." She stated she did not seek medical treatment due to potential COVID issues. Respondents' Ex. K, pg. 108.

21. Claimant further reported she could not breathe out of the right side of her nose. This caused her fear and anxiety. She noted she felt she would stop breathing and die and a choking sensation. Despite having a history of headaches, Claimant asserted she had no problems with headaches before the incident. *Id.* at pg. 108-109.

22. Claimant admitted she had been working full-duty and full-time at her job of cleaning. *Id.* at pg. 110.

23. Dr. Macaulay's HEENT, neurological and cognitive examination were all normal. He noted, "Ms. Gonzalez has a normal neurological examination. She does have evidence for moderate anxiety secondary to concerns that she feels have not been addressed and may result in her death. Her nasal passages appear patent and the tissues without evidence of significant inflammation." *Id.* at pg. 116.

24. Dr. Macaulay noted,

> The medical records indicate prior events of headaches, nasal congestion and blurring of vision and occasional symptoms associated with upper respiratory infection. Most of her treatments have been for health maintenance without reflection of symptoms similar to those associated with her industrial accident…Ms. Gonzalez does not feel that she has been evaluated and has significant fears associated with the potential long-term effects of her industrial event.

Dr. Macaulay concluded claimant was not at MMI. He recommended an ENT and neuropsychological evaluation to assist in determining Claimant's current condition and the cause of such. *Id.* at pg. 112. *See also pg. 116*.

25. On September 16, 2021, Dr. Allison Fall performed an Independent Medical Examination (IME). Claimant reported her nose was swelling and "it feels like there are small ants in her nose." Respondents' Ex. J. pg. 118.

26. Claimant testified the day following the incident, "I feeling right where I was injured, pins and needles as if I had ants." Hrg. Tran. pg. 76, lines 9-13.

27. The medical records indicate, Claimant did not report a feeling of "ants in her nose" to Dr. Sanchez or Dr. Macaulay.

28. As to the reporting of the incident, Claimant reported she was offered to go to human resources but did not go because she would have had to take a COVID test. Respondents' Ex. K, pg. 108; Respondents' Ex. J pg. 119.

29. Claimant reported despite Dr. Sanchez's recommendations she did not get her eyes checked because the vision clinic was closed. *Id.*

30. Claimant testified that she obtained new glasses in October 2020 for reading, but yet also wears them while driving. Hrg. Tran. 83, lines 13-19; pg. 90, lines 8-9.

31. Claimant reported to Dr. Fall before the accident she had no problems with headaches. Dr. Fall noted, "Records indicate otherwise." Respondents' Ex. J, pg. 121.

32. As to her complaints related to vertigo and throat, Dr. Fall noted, "She did not complain of this to me, nor would it be related." *Id.*

33. After evaluating Dr. Macaulay's provisional 10% whole person impairment rating, Dr. Fall opined,

> I would concur that blunt nasal trauma was work related but would not relate headaches or dizziness to the contusion. This is out of proportion to objective findings and not supported by the medical documents. Also, she had preexisting headaches, and the etiology of the headaches has not been determined. Certainly, they are not from a head injury.

*Id.* at pg. 121.

34. As to Dr. Macaulay's opinion Claimant was not at MMI, Dr. Fall opined,

> Given no loss of function, this additional workup would not be indicated.
>
> In my opinion the only diagnosis related to the incident is a nasal contusion. There is no objective medical evidence to support her ongoing complaints. In fact, she is erroneously attributing complaints to the nose which are not related such as her throat, breathing, vision changes and headache pain. Records document prior similar complaints for other reasons. Being struck on the nose would not cause ongoing breathing problems or vision problems, headaches, vertigo, dizziness and/or choking. Her complaints are out of

> proportion to the evidence and out of proportion to the fact that she did not pursue immediate medical treatment. There are likely psychosocial issues playing a role in her issues given that there was the issue of her being off work after the COVID test and then being told there was no longer a position for her.

*Id.* at pg. 122.

35. Dr. Fall concluded that:

> There is no evidence that her headaches are impeding her function. In fact, she is working full duty at her primary job cleaning houses. Also, Dr. Macaulay only finds her [not] at MMI based upon subjective complaints without correlating objective findings. He himself indicates he did not know the etiology of her subjective complaints. She is at MMI for the nasal contusion which did not require any treatment. The surveillance video is consistent with one leading a normal functional life without limitation from a remote nasal contusion, which is what would be anticipated.

*Id.*

36. Claimant testified that on several occasions a brown substance came out of her nose. "It came out the day of the injury, also the next day, and it kept coming out for, I don't remember if it was 15-days or 22-days." Hrg. Tran. pg. 80, lines 23-25.

37. Claimant's testimony is inconsistent with the medical records as she told Drs. Fall and Dr. Sanchez she had brown discharge the next day, not for an ongoing period of time. Respondents' Ex. J, pg. 119; Ex. Respondents' Ex. I, pg. 101.

38. Respondents took the evidentiary deposition of Dr. Macaulay on October 5, 2021. The Respondents went through the medical record in detail with Dr. Macaulay. The Respondents addressed with Dr. Macaulay:

- The minor nature of the accident.
- The various inconsistencies in the medical record.
- The extent of Claimant's preexisting headaches.
- The change in symptoms as time went on.
- The extent of the global symptoms reported by Claimant for what appeared to be a very minor accident.

39. In order to show the minor nature of the accident, Respondents showed Dr. Macaulay a short video of what purported to happen during the accident. The video apparently demonstrated the lid of a paper towel dispenser hit another person on the head.[1] Dr. Macaulay was also made aware that when Claimant was evaluated by Dr. Sanchez, Claimant denied any nose bleeding or any visual

[1] The video was not admitted into evidence at the hearing.

lesions to her nose. As for the inconsistencies in the medical records, Respondents went through the discrepancy regarding Claimant's description of when – and for how long – she noticed a brownish colored discharge from her nose. Respondents also went through Claimant's prior records from 2012 through 2017 that demonstrated Claimant sought medical treatment for headaches, but yet denied having prior headaches to Dr. Macaulay. Respondents also went through the extent of Claimant's symptoms, and how Claimant started to complain about different symptoms as time went on. For example, Claimant did not complain of vertigo when she was evaluated by Dr. Sanchez or Dr. Fall, but she did complain about vertigo when she was evaluated by Dr. Macaulay. Lastly, Respondents went through the global nature of Claimant's symptoms for what appeared to be a very minor accident. For example, Respondents went through the various symptoms Claimant contends were caused by the accident. These symptoms include headaches, breathing problems, vertigo, vision problems, a choking sensation and throat issues.

40. Dr. Macaulay was also asked whether he believed Claimant's injury was minor. He answered, "Well, it depends on how one defines 'minor,' but it would not appear to be a life-threatening or significant injury that would involve the structure of the nasal pyramid." Respondents' Ex. F, pg. 41, lines 14-19.

41. He was also asked as to whether he agreed Dr. Sanchez's physical examination was normal. He replied, "Yes. For what was evaluated, yes it was." *Id.*, lines 20-22.

42. Dr. Macaulay was asked whether Claimant complained of any issues with her vision, breathing or throat when she presented to Dr. Sanchez. He replied:

> She did note an issue associated with her vision that was attributed to her glasses or some issue, we don't know what, noting that her prescription was changed about three months prior to the evaluation by Dr. Sanchez, and that she did have some problems with breathing in the morning, though it is not clear whether that was due to nasal or distal pulmonary issues.

Dep. Trans. pgs. 41-42, lines 23-8.

43. When asked whether ongoing drainage would be associated with the work-incident, Dr. Macaulay replied, "I would say that it would be relatively unlikely. I won't go so far as to say it is medically improbable. But, you know, just on the by-and-by, I would say that it would be relatively unlikely." *Id.* at pg. 19, lines 2-9.

44. As to whether mild traumatic brain injuries typically improve and not deteriorate over time as the case here, Dr. Macaulay testified, "That would be the normal progression. Normally, it will get better, usually within 90 to 120 days. Sometimes, however, when you have a concussive-type event, it can persist for years." *Id.* at pg. 47, lines 4-10.

45. Dr. Macaulay testified he did not see any visual or nasal issues on his physical examination. He also confirmed his examination of claimant's tongue and throat

were normal. Lastly, her cognitive examination was "rather good." *Id.* at pgs. 47-48, lines 16-9.

46. Dr. Macaulay testified it was unlikely Claimant sustained any brain damage as a result of the work incident. *Id.* at pg. 79, lines 9-11.

47. Dr. Macaulay was asked whether Claimant's ongoing complaints were possibly psychological. He testified, "Yes." *Id.* lines, 21-23.

48. Despite bringing all of these issues to the attention of Dr. Macaulay, he still concluded that Claimant is not at MMI. Dr. Macaulay is of the opinion that Claimant is not at MMI because she needs additional medical treatment to determine the extent of her injuries, if any, that flow from the accident, and whether further active treatment is necessary. Dr. Macaulay concluded that Claimant needs to be seen by an ear nose and throat (ENT) doctor to determine whether Claimant has an injury to her nose that requires additional medical treatment. He also concluded that an ENT evaluation is required to assess whether Claimant's vertigo might have been caused by the accident by performing a series of studies that can help determine whether there is a disturbance to Claimant's balance mechanism that is either peripheral or central. And, based on those findings, the ENT should be able to diagnose the cause of Claimant's vertigo, whether it was caused by the accident, and whether additional medical treatment is warranted.

49. He also concluded that Claimant's symptoms might be caused by anxiety. But, to determine whether Claimant's symptoms are due to anxiety, or the work-related trauma, a neuropsychologist should assess Claimant and make that determination.

50. Thus, Dr. Macaulay concluded that Claimant needs additional medical treatment to determine the extent of her injuries, if any, and whether additional medical treatment is necessary to cure and relieve Claimant from the effects of her injury and is therefore not at MMI.

51. Dr. Macaulay concluded that the initial – and only – medical appointment Claimant had under this claim with Dr. Sanchez was insufficient. In other words, based on her report, he could not tell whether Dr. Sanchez adequately addressed the extent of Claimant's work accident. As a result, he concluded that Claimant needs additional evaluations to determine the extent of her injury and whether she needs additional treatment before she can be placed at MMI.

52. Dr. Macaulay's opinion is a reasonable interpretation of the underlying medical records combined with Claimant's reported symptoms. While the ALJ agrees that the mechanism of injury seems very inconsequential, Claimant does have some complaints that arguably warrant an evaluation by a physician that specializes in nasal symptoms – such as an ENT. Moreover, while Claimant's global symptoms seem to be out of proportion to the mechanism of injury, and may be related to an underlying psychological disorder, Dr. Macaulay's opinion that Claimant should be evaluated by a neuropsychologist is also not unreasonable. Claimant did get hit on her nose/head and is reporting symptoms

that Dr. Macaulay said are consistent with a mTBI (mild traumatic brain injury). As a result, the ALJ finds Dr. Macaulay's opinion that Claimant is not at MMI to be credible and persuasive.

53. Dr. Fall testified at the hearing. Dr. Fall testified regarding Claimant's report of a brown discharge the day after the injury, Dr. Fall testified, "Well it wouldn't typically cause a bloody nose that would show up the next day. Hrg. Tran. pg. 20, lines 20-22. So I don't know what that accounts for. I don't know what to make of that." *Id.* at lines 22-23.

54. When addressing Claimant's failure to seek medical treatment for months, Dr. Fall testified, "If her situation was that dire, she would have gone in for treatment. There was access to treatment. She could have received treatment. Treatment was available for her." Hrg. Tran. pg. 52, lines 22-25.

55. As to her vision, Claimant testified, "So I went to get glasses made. At the health clinic they suggested that I get glasses made so that my head wouldn't hurt and things like that." Hrg. Tran. pg. 83, lines 13-19.

56. Claimant testified that "I told the doctor that about 2-months before – I don't remember, but I had gone to get the lenses about five months before maybe, and she said that's why I had headaches and I felt a little disoriented." Hrg. Tran pg. 86, lines 16-19.

57. Claimant was asked when she received new glasses. She testified, "In October." Hrg. Tran pg. 90, lines 8-9.

58. Dr. Fall further testified Claimant's poor eyesight and/or new prescription glasses could be the cause of her ongoing complaints of headaches and visual issues. Hrg. Tran pg. 21, lines 18-20. *See also pg. 30, lines 5-8*.

59. Dr. Fall reviewed the x-rays and Dr. Sanchez's report. Dr. Fall testified that:

> I mean, the x-rays don't rule out every abnormality, but Dr. Sanchez did a thorough, you know, explanation of how she came to her conclusions that she couldn't account for those symptoms having been caused by the reported mechanism of injury and that she didn't see any evidence of a fracture of the nose where it had been hit. So there was really no treatment to be offered.
>
> So you know, there weren't any objective findings at that point in time that could be attributed or at that time, and the symptoms couldn't be attributed to the nasal contusion.

Hrg. Tran pg. 22, lines 4-17. *See also pgs. 28-29, lines 20-4*.

60. Dr. Fall testified Claimant was properly placed at MMI by Dr. Sanchez, did not require further medical treatment and or require any impairment rating. Hrg. Tran pp. 22-23, lines 18-2.

61. When reviewing the DIME report, Dr. Fall noted the DIME took place nearly one-year after the injury. She testified:

> That is, you know, another piece of information, which you know is consistent with my opinion. That fact that she's you know, showing up to meet with Dr. Macaulay and telling him there's new symptoms even as of, you know, two weeks ago and worsening with other symptoms would not be consistent with, you know, these normal examinations of Dr. Sanchez, myself and Dr. Macaulay all have.

Hrg. Tran. pg. 29, lines 9-20.

62. When asked whether Claimant admitted to preexisting conditions to Dr. Macaulay, Dr. Fall testified, "No she denied any preexisting conditions. Q. Is that true to the medical records? A. No. When you look at the medical records, she did have the complaints of the, you know, blurry vision and headaches, and you know, possibly prediabetes." *Id.* at pg. 30, lines 9-17. *See also Respondents' K pg. 109, 110*.

63. Dr. Fall was asked whether Claimant would have sustained injuries of this magnitude based on the mechanism of injury, Dr. Fall testified,

> Not that would be consistent with the symptom's she's currently reporting. I think she could have had a lot of pain when that piece hit her nose. It can be really painful, but there wouldn't be any, you know, ongoing – there was no evidence even when Dr. Sanchez saw her earlier on of any structural or physical change that occurred.

Hr. Tran. pgs. 30-31, lines 18-2.

64. Dr. Fall testified Dr. Macaulay's physical examination was normal. She testified, "Yes. I even read through his deposition earlier today, and that was gone through, and everything he checked was normal." *Id.* at pg. 31, lines 3-10.

65. Following review of Dr. Macaulay's deposition testimony where he testified Claimant's complaints could be psychological, Dr. Fall testified:

> I would agree that her complaints are likely expounded, if that's the right word -- confounded by psychological complaints. So, you know, who knows. Maybe when she feels nasal stuffiness, in her mind it, you know, escalated into something bigger like, 'I can't breathe.' And so yeah, I do think psychological issues are playing a role. Whether that's the underlying reason why she has headaches and vision problems, I don't know.

Hrg. Tran. pgs. 32-33, lines 16-1.

66. Dr. Fall testified Dr. Macaulay erred in his DIME report for several reasons. She testified:

    a. The first error that is at the top of my head that I'll start off with is in the impairment rating when he assigned a 10% for episodic neurological impairment for the headaches. We are taught in our Level II

reaccreditation that we can use that category for headaches when they're caused by a head injury. He testified that he thought it was unlikely that she sustained a head injury, traumatic brain injury, concussion. So he is incorrect in using the brain injury portion of the guidelines to rate a subjective complaint of a headache given that the headache was not caused by a brain injury.

b. He erred in causation. So he is attributing these symptoms to the incident when he's kind of having to go around four back doors to come up with some kind of explanation when if you look at actually what happened and how she was able to function normally after, it's just not medically plausible that the incident caused the complaints she's currently having…The psychological testing may show that she has anxiety and tends to be, you know, a somatic compliant, that's not going to help us with the actual incident and what it caused. If the ENG notes that she has chronic sinusitis, that's not going to change the issue of causation…So nothing they're going to find is going to be caused by the piece of metal hitting her nose.

*Hrg. Trans.* at pgs. 33-34, lines 6-14. *See also pgs. 60-61, lines 18-13*.

67. As to her function, Claimant testified she could go to work, cook, clean, and take care of her children. *Id.* at pg. 93, lines 11-23. But merely being able to perform her job does not mean she was not injured and that she does not require additional medical treatment to determine the extent of her injury that was caused by the accident.

68. Claimant was asked, "Q. So mainly bending is your issue? A. Yes. When I bend down I feel as if my nose is going to fall off, as if something's loose in there. Q. But otherwise you do the things you typically do correct? A. Well, when I sleep, I can't sleep facedown because my nose hurts. When I was my face, I can't touch my nose that much or be rough with it because my nose hurts a lot." *Id.* at pg. 94, lines 5-12.

69. Claimant testified she had sought no medical treatment after seeing Dr. Sanchez as they were only allowing telehealth appointments and she wanted to be seen in person. Claimant testified she was seen in person by Drs. Sanchez, Macaulay and Fall. *Id.* at pgs. 95-96, lines 5-11. The ALJ finds that Claimant's explanation for not seeking medical treatment right after the accident is credible.

70. Overall, the ALJ finds Claimant's testimony to be credible to the extent that she is honestly reporting her symptoms – as she perceives them – and as she remembers them developing. While there are some inconsistencies, the inconsistencies do not rise to a level of finding the Claimant not credible. For example, although Claimant stated to Dr. Macaulay that she did not have any prior headaches – and the records demonstrate otherwise - Claimant had not actively treated on a regular basis for headaches for approximately 3 years before the accident. Thus, Claimant was arguably not having headaches for a reasonable period of time before the accident.

71. Dr. Fall testified Claimant sustained a nasal contusion and there was no objective evidence to support Claimant sustained a head injury as previously concluded by Dr. Macaulay. Hrg. Trans. pg. 25, lines 19-23; pgs. 26-27, lines 22-4.

72. When comparing Claimant's complaints from her IME report to Dr. Macaulay's DIME report, Dr. Fall testified Claimant did not report any chest pain, swallowing issues, breathing issues or dizziness during the IME, unlike her complaints to Dr. Macaulay. Hrg. Trans. pg. 23, lines 3-23.

73. Dr. Fall also testified Dr. Macaulay erred in finding Claimant had not reached MMI and that Claimant's work incident resulted in an impairment rating.

74. The ALJ finds Dr. Fall's opinions to be founded on a reasonable interpretation of the evidence. That said, the ALJ does not find her opinions to represent clear and convincing evidence that Dr. Macaulay erred and that his conclusion regarding MMI is wrong.

75. The evaluation by an ENT and a neuropsychologist consists of diagnostic treatment that offers a reasonable prospect for defining Claimant's condition and suggesting further treatment. As a result, such treatment is inconsistent with a finding that Claimant is at MMI.

76. The evaluation by an ENT and a neuropsychologist are not found to be tests that are essential for the DIME physician to solely render an impairment rating. As found, the tests are essential to define Claimant's condition and suggest further treatment and are inconsistent with a finding of MMI.

## CONCLUSIONS OF LAW

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

### General Provisions

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

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

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

**I. Whether Respondents overcame the opinion of the Division Independent Medical Examiner that Claimant is not at MMI.**

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing

evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

The ALJ must focus on the evidence submitted in this case. As found, Claimant was involved in an accident in which the lid or cap of a paper towel dispenser hit Claimant on the nose. Based on the accident, Claimant reports a myriad of symptoms. While the extent of her symptoms, and the global nature of her symptoms, seems out of proportion to the event, Dr. Macaulay, the DIME physician, is of the opinion that Claimant is not at MMI. His opinion is based on his conclusion that the medical treatment provided to date – a single evaluation by Dr. Sanchez – failed to address Claimant's complaints which Claimant attributes to her work accident. As a result, he is of the opinion that Claimant needs additional medical treatment in the form of an evaluation by an ENT and a neuropsychologist to define the extent of Claimant's work accident, the conditions which flow from the accident, if any, and to determine whether additional medical treatment is reasonably necessary to cure and relieve Claimant from the effects of her work injury. As found, Dr. Macaulay's conclusion is a reasonable interpretation of the evidence.

Respondents had Claimant evaluated by Dr. Fall. Dr. Fall concluded that the accident could not have caused anything more than a mere contusion and that Claimant's complaints and symptoms – which Claimant associates to the accident – are unrelated. As a result, she determined Claimant is at MMI with no impairment. She also concluded that Dr. Macaulay erred in his assessment of this case. The court also found that Dr. Fall's conclusions were a reasonable interpretation of the evidence in this case. The court further found, however, that her opinion does not rise to the level of clear and convincing evidence.

The ALJ also found Claimant to be credible regarding her perception and reporting of her symptoms. In other words, the court found that Claimant is honestly reporting her symptoms and the timing of such to the best of her ability – regardless of whether they are related to the industrial accident. It is, however, the symptoms that need to be evaluated by other physicians in order to determine causation and whether additional treatment is reasonably necessary and related to the industrial accident. While there are some inconsistencies in Claimant's testimony, it must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event. *See People v. Brassfield*, 652 P.2d 588, (Colo. 1982).

As a result, the ALJ finds and concludes that based on the entire record, Respondents have failed to present clear and convincing evidence that Dr. Macaulay erred, and that Claimant is at MMI. In reaching this conclusion, the court has considered WCRP 11-5(D). Rule 11-5(D) provides that the DIME physician can order tests that are essential to providing an impairment rating. In this case, it is arguable that the testing suggested by Dr. Macaulay will assist in determining Claimant's impairment rating. However, in this case, the tests are not being recommended to merely assist in providing Claimant an impairment rating. In this case, the medical treatment is being recommended to define the extent of Claimant's work accident and define future treatment, if any. Then, after Claimant has been provided the proper medical treatment, Dr. Macaulay can assess Claimant for an impairment rating. Thus, the ALJ finds and concludes that applying Rule 11-5(D) in this case would result in Claimant receiving pre-MMI medical treatment after being placed at MMI. The ALJ therefore finds and concludes that the treatment being recommended by Dr. Macaulay is inconsistent with a finding of MMI based on the facts and circumstances of this case.

As a result, the ALJ finds and concludes that Respondents have failed to overcome the opinion of Dr. Macaulay that Claimant is not at MMI by clear and convincing evidence. Therefore, the ALJ finds and concludes that Claimant is not at MMI.

**II. Whether the medical treatment recommended by the Division Examiner is reasonable and necessary and whether the ALJ can order Respondents to pay for the medical treatment recommended by the DIME physician.**

The ALJ has found that Claimant is not at MMI. Claimant, however, has requested the ALJ to order Respondents to pay for the treatment recommended by Dr. Macaulay.

Rule 11-5(D) does allow an ALJ to order Respondents to pay for testing that is essential for an impairment rating. However, as found here, the treatment recommended by Dr. Macaulay is not merely essential for Dr. Macaulay to determine Claimant's impairment rating. The treatment recommended by Dr. Macaulay is to define the extent of Claimant's work accident and define future treatment, if any, before Dr. Macaulay can determine MMI and provide an impairment rating. The treatment is therefore necessary to obtain MMI and inconsistent with post MMI treatment necessary to perform an impairment rating as allowed under Rule 11-5(D).

Moreover, an ALJ cannot order Respondents to provide specific diagnostic testing, evaluations, or both, which have not been prescribed by an authorized treating physician or when such treatment is inconsistent with Rule 11. *See* WCRP 11-5(D) *and Potter v. Grounds Service Co.,* W.C. No. 4-935-523-04 (August 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018.) As a result, Claimant's request for an order that orders Respondents to pay for an assessment by an ENT and a neuropsychologist, which have been recommended by Dr. Macaulay – the DIME physician - is denied. If, however, an authorized treating physician prescribes an evaluation by an ENT and/or a neuropsychologist, that is a separate issue and is not addressed in this order.

## ORDER

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

1. Respondents have failed to overcome the opinion of the DIME physician by clear and convincing evidence. Claimant is thus not at MMI.

2. Claimant's request for an order for Respondents to pay for an evaluation with an ENT and a neuropsychologist, as recommended by the Division Examiner, is denied.

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: January 18, 2022.

/s/ Glen Goldman

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

## ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his March 29, 2021 industrial injury.

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 March 29, 2021 until terminated by statute.

## STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $702.62.

## FINDINGS OF FACT

1. Employer is a tree care company. Claimant is a 63-year-old male who worked for Employer as a Groundsman. His job duties involved cleaning debris from beneath trees as his co-worker trimmed branches.

2. Claimant testified that on March 29, 2021 he went to a job site with tree trimmer [Redacted, hereinafter DW]. He detailed that at approximately 11:30 a.m. Mr. DW[Redacted] cut a 20-30 foot long crabapple tree limb that was about 6-8 inches in diameter. Claimant remarked that the limb fell, struck him on the head and knocked him to the ground. He experienced significant neck pain and reported his symptoms to Mr. DW[Redacted]. Claimant continued to work with Mr. DW[Redacted] until they returned to Employer's office at approximately 7:30 p.m. Claimant noted that at Employer's office he reported his injury to supervisor [Redacted, hereinafter MP].

3. The record reflects that Claimant has a long history of cervical spine and neck issues. Claimant testified that he suffered a neck injury due to a motor vehicle accident when he was 15 years old. He also had a prior Workers' Compensation claim from an incident on April 22, 2020 that involved his cervical spine and radicular pain in his left arm. A cervical spine MRI on May 26, 2020 revealed degenerative changes at C4-5, C5-6, and C6-7. John P. Ogrodnick, M.D. determined that Claimant's cervical condition was not work-related. On July 7, 2020 he reasoned that Claimant had reached Maximum Medical Improvement (MMI) without impairment or work restrictions. Claimant reported a 75% improvement in his condition upon reaching MMI.

4. Claimant explained that, prior to his March 29, 2021 work accident he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant remarked that he was unsure about how long he was unconscious. He did not seek medical attention after the fall.

5. Claimant's coworker [Redacted, hereinafter BE] testified that he and Claimant went out drinking on March 16, 2021. He remarked that, when he dropped Claimant off at home, Claimant was "buzzed." Mr. BE[Redacted] saw Claimant enter his residence through the garage but did not witness a fall.

6. Claimant acknowledged that he told numerous coworkers about his fall at home. Coworkers DW[Redacted], Mr. MP[Redacted], and Mr. BE[Redacted] all commented that Claimant showed them a laceration on his head and a picture of a pool of blood on his garage floor on the work day after the incident. Claimant also told his coworkers he was knocked unconscious as a result of the fall.

7. Mr. DW[Redacted] and Mr. MP[Redacted] also disputed Claimant's account regarding the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue until they returned to Employer's office at approximately 7:30 p.m. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury.

8. Owner of Employer [Redacted, hereinafter O] testified that the jobs Claimant and Mr. DW[Redacted] completed on March 29, 2021 involved pruning and shaping crabapple and ash trees. However, there was no reason to remove a large limb, such as the one described by Claimant, from the trees.

9. Claimant testified that on March 30, 2021 he attended an appointment with his primary care physician (PCP) for a physical examination. He remarked that his PCP immediately noticed a problem with his neck and referred him to a Workers' Compensation provider for an evaluation.

10. Later on March 30, 2021 Claimant visited Dr. Ogrodnick at SCL Health Medical Group. Claimant reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. He believed he was unconscious for hours because when he woke up it was dark and his face was "slimy" with blood. Claimant told Dr. Ogrodnick he was beginning to improve, but on March 26, 2021 at work a heavy crabapple tree branch fell across the chipper, hit him in the head and knocked him to the ground. Claimant noted that he suffered pain throughout his

entire body, but finished his shift. Furthermore, Claimant commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Claimant reported to Dr. Ogrodnick that he suffered a headache, blurred vision and loss of balance. Dr. Ogrodnick determined that Claimant had significantly limited cervical range of motion. He diagnosed Claimant with a traumatic head injury and a neck strain. Dr. Ogrodnick restricted Claimant from working and referred him for an MRI. The MRI revealed only degenerative changes.

11. On March 31, 2021 Claimant visited the emergency department at Lutheran Medical Center after his PCP notified him that he was anemic. Claimant reported "moderate constant aching neck pain since a slip and fall approximately 10 days ago, also states tree limbs fell and dropped on his head on March 17." Imaging revealed an acute nondisplaced fracture of the right C2 lateral mass and right C2 transverse process. Claimant then saw neurosurgeon Mark Edward John Magner, M.D. for a consultation. Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck on the head by a heavy tree branch on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Dr. Magner diagnosed Claimant with a C2 fracture that was structurally stable and recommended a cervical collar.

12. On April 2, 2021 Claimant returned to Dr. Ogrodnick for an evaluation. After reviewing the imaging findings from Lutheran Medical Center Dr. Ogrodnick determined "[i]t is not clear when [Claimant] sustained [his] cervical fracture. "[T]ransverse process fracture not typical with axial load from tree branch on top of head."

13. On May 12, 2021 Claimant was involved in a single vehicle automobile accident. He explained that he was not feeling well and was driving to the hospital when he rolled his van. Claimant commented that he did not sustain any injuries in the crash, but awoke in an oxygen "tent" at the hospital due to a COVID-19 diagnosis. At the emergency department Claimant was intubated and assessed with numerous rib fractures, a left pleural effusion, a scalp hematoma/laceration, lactic acidosis, alcohol intoxication with a blood alcohol of .317 and an "old" C2 fracture.

14. On November 18, 2021 Albert Hattem, M.D. conducted a records review of Claimant's claim. Dr. Hattem explained that on March 31, 2021, when Claimant visited the Lutheran Medical Center emergency department as recommended by his PCP for an evaluation of anemia, he also reported neck pain. Claimant attributed his neck pain to the slip and fall 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant told Dr. Ogrodnick that, when he fell, he struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. Finally, Dr. Hattem agreed with Dr. Ogrodnick that the tree branch incident did not likely cause Claimant's cervical spine fractures.

15. Dr. Hattem also testified at the hearing in this matter. He maintained that the March 29, 2021 tree branch accident did not likely aggravate, accelerate or combine with Claimant's pre-existing condition to cause his cervical spine fracture. Dr. Hattem explained that the following factors are considered in performing a causation analysis: (1) whether the diagnosis is consistent with the mechanism of injury; (2) pre-existing injuries; (3) subsequent injuries; (4) consistency of complaints relating to the mechanism of injury; and (5) credibility of the injured worker. After considering the preceding factors, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely cause of his cervical spine fracture. Notably, Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. In fact, a transverse process fracture is more consistent with a bad fall.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021. Initially, Claimant explained that, while working for Employer on March 29, 2021, he was struck in the head and knocked to the ground by an approximately 20-30 foot long, 6-8 inch diameter crabapple tree limb. He was subsequently diagnosed with a cervical spine fracture. Despite Claimant's assertion, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of his account. Moreover, the persuasive medical opinions reflect that Claimant more likely suffered his cervical spine fracture in an injury at home on March 16, 2021 and the mechanism of injury of a falling tree branch was unlikely to cause a cervical spine fracture. Accordingly, the March 29, 2021 accident did not likely aggravate, accelerate, or combine with Claimant's pre-existing condition to produce a need for medical treatment.

17. Claimant's description of the cause of his cervical spine injury is internally inconsistent. Although Claimant testified that he was injured by a falling branch on March 29, 2021, the medical records provide multiple accounts regarding the cause of Claimant's injury. Claimant explained that, prior to his March 29, 2021 work accident he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant did not seek medical treatment after the fall. When Claimant visited Dr. Ogrodnick on March 30, 2021 he reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. Claimant told Dr. Ogrodnick he was beginning to improve, but on March 26, 2021 at work he was struck in the head by a heavy crabapple branch that hit him in the head and knocked him to the ground. Claimant also commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Moreover, in a visit with Dr. Magner on March 31, 2021 Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck by a heavy tree branch on his head at work on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Based on Claimant's three different descriptions to medical providers and pre-existing history, it is speculative to attribute his cervical spine injury to a March 29, 2021

accident at work. As Dr. Ogrodnick noted after reviewing Claimant's imaging findings "[i]t is not clear when [Claimant] sustained [his] cervical fracture."

18. Mr. DW[Redacted] and Mr. MP[Redacted] also credibly disputed Claimant's description of the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury. Finally, Mr. O[Redacted] testified that there was no reason why large limbs, such as the one described by Claimant, would have been removed from the trees on March 29, 2021.

19. The medical records reveal that the most likely cause of Claimant's cervical spine fracture was his slip and fall at home on March 16, 2021. On March 31, 2021 at Lutheran Medical Center Claimant attributed his neck pain to a slip and fall that had occurred approximately 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. After performing a causation analysis, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely case of his cervical spine fracture.

20. The medical records also reflect that a falling tree branch on March 29, 2021 did not likely cause Claimant's cervical spine fracture. Specifically, a tree branch falling on top of the head is not a mechanism of injury typically associated with a cervical spine fracture. Dr. Ogrodnick noted "transverse process fracture not typical with axial load from tree branch on top of head." Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. The numerous internal inconsistencies in Claimant's account, conflicts with credible witnesses and persuasive medical opinions reveal it is unlikely Claimant suffered a cervical spine fracture while working for Employer on March 29, 2021. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on March 29, 2021. Initially, Claimant explained that, while working for Employer on March 29, 2021, he was struck in the head and knocked to the ground by an approximately 20-30 foot long, 6-8 inch diameter crabapple tree limb. He was subsequently diagnosed with a cervical spine fracture. Despite Claimant's assertion, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of his account. Moreover, the persuasive medical opinions reflect that Claimant more likely suffered his cervical spine fracture in an injury at home on March 16, 2021 and the mechanism of injury of a falling tree branch was unlikely to cause a cervical spine fracture. Accordingly, the March 29, 2021 accident did not likely aggravate, accelerate, or combine with Claimant's pre-existing condition to produce a need for medical treatment.

9. As found, Claimant's description of the cause of his cervical spine injury is internally inconsistent. Although Claimant testified that he was injured by a falling branch on March 29, 2021, the medical records provide multiple accounts regarding the cause of Claimant's injury. Claimant explained that, prior to his March 29, 2021 work accident, he suffered an injury at home on March 16, 2021. He specified that he had been shoveling snow at home, entered his garage, slipped, and struck his head on an antique steamer. The accident caused a head laceration and loss of consciousness. Claimant did not seek medical treatment after the fall. When Claimant visited Dr. Ogrodnick on March 30, 2021 he reported that his initial injury occurred at home on March 16, 2021 when he slipped and struck the top of his head on an antique steamer. Claimant told Dr. Ogrodnick he was

beginning to improve, but on March 26, 2021 at work he was struck in the head by a heavy crabapple branch that hit him in the head and knocked him to the ground. Claimant also commented that on March 29, 2021 a coworker cut a smaller branch that hit him in the head but did not knock him down. Moreover, in a visit with Dr. Magner on March 31, 2021 Claimant reported the following three recent injuries: 1) falling and striking his head at home on an appliance on March 16, 2021; 2) being struck by a heavy tree branch on his head at work on March 26, 2021; and 3) being hit by another tree branch on March 29, 2021. Based on Claimant's three different descriptions to medical providers and pre-existing history, it is speculative to attribute his cervical spine injury to a March 29, 2021 accident at work. As Dr. Ogrodnick noted after reviewing Claimant's imaging findings "[i]t is not clear when [Claimant] sustained [his] cervical fracture."

10. As found, Mr. DW and Mr. MP[Redacted] also credibly disputed Claimant's description of the March 29, 2021 tree trimming incident. Mr. DW[Redacted] testified that he has been a tree trimmer for almost a year and Claimant was not struck by any tree limbs while he was trimming crabapple trees. However, at about 1:30 p.m. on March 29, 2021 Mr. DW[Redacted] was trimming an ash tree when Claimant walked underneath him. Mr. DW[Redacted] cut a small branch, with a diameter about the size of a wrist that struck Claimant and knocked him down. Claimant stated he was all right and continued working without issue. Claimant never reported a neck injury to Mr. DW[Redacted]. Similarly, Mr. MP[Redacted] testified that he saw Claimant at Employer's office on March 29, 2021 at about 7:15 p.m. but Claimant did not report an injury. Finally, Mr. O[Redacted] testified that there was no reason why large limbs, such as the one described by Claimant, would have been removed from the trees on March 29, 2021.

11. As found, the medical records reveal that the most likely cause of Claimant's cervical spine fracture was his slip and fall at home on March 16, 2021. On March 31, 2021 at Lutheran Medical Center Claimant attributed his neck pain to a slip and fall that had occurred approximately 10 days earlier. Dr. Hattem determined that Claimant's "report clearly supports the conclusion that [his] neck pain began after the slip and fall at home and prior to the work related tree branch incident." He reasoned that the slip and fall at home on March 16, 2021 constituted a significant injury. In fact, Claimant struck his head on an antique steamer and lost consciousness for hours. Dr. Hattem remarked that the preceding mechanism of injury was consistent with a cervical spine fracture. After performing a causation analysis, Dr. Hattem determined that Claimant's March 16, 2021 accident at home was the likely case of his cervical spine fracture.

12. As found, the medical records also reflect that a falling tree branch on March 29, 2021 did not likely cause Claimant's cervical spine fracture. Specifically, a tree branch falling on top of the head is not a mechanism of injury typically associated with a cervical spine fracture. Dr. Ogrodnick noted "transverse process fracture not typical with axial load from tree branch on top of head." Dr. Hattem agreed with Dr. Ogrodnick that a tree branch falling on Claimant was unlikely to cause, aggravate of accelerate Claimant's pre-existing cervical spine fracture. The numerous internal inconsistencies in Claimant's account, conflicts with credible witnesses and persuasive medical opinions reveal it is unlikely Claimant suffered a cervical spine fracture while working for Employer on March 29, 2021.

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

## ORDER

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

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

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

DATED: January 21, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

## ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that the disc arthroplasty surgery recommended by Dr. Michael Janssen is reasonable, necessary and related to her admitted May 8, 2019 work injury.

II. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment on March 17, 2021, thus precluding wage loss benefits after this date.

## FINDINGS OF FACT

The evidence in this matter is voluminous. The parties submitted in excess of 800 pages of exhibits and testimony was taken over approximately 6 ½ hours. Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Employer operates an assisted living facility known as [Facility name redacted] Care Center. (Resp's. Exh. DDD). Claimant was working for Employer in her capacity as a certified nursing assistant (CNA) when she injured her low back on May 8, 2019, while transferring a resident to obtain her weight. According to Claimant, the resident wrapped her hands around her neck and then went "dead weight" causing her to strain her low back. (Resp's. Exh. A, WW).

2. Claimant was seen later that day by Terrence Lakin, DO at Southern Colorado Clinic ("SCC"), who diagnosed her with a lumbosacral strain. He assigned work restrictions that generally limited Claimant to 10-15 pounds occasional lifting. His report documented a past medical history that included fibromyalgia, arthritis, depression and multiple car accidents. Claimant also disclosed a prior lumbar injury which was treated with injections. (Resp's. Exh. A). On May 10, 2019, Claimant underwent lumbosacral x-rays that demonstrated only mild degenerative changes. (Resp's. Exh. B).

3. Over the next few weeks, Claimant treated at SCC reporting moderate (4/10) pain and functional improvement. Claimant reported at her first physical therapy (PT) session on June 12, 2019, that she did not have too many limitations with activity, and the therapist noted that she sat comfortably in the chair with no visible distress or gait deviations. (Resp's. Exh. D). She then went an entire week without *any* pain at all. (Resp's. Exh. F).

4. Claimant also reported to Dr. Lakin's Physician Assistant (PA) on June 27, 2019 – just seven weeks post-injury – that she was already walking 3-5 miles per day, was able to carry a one-gallon jug without pain and was performing "some yard work now." (Resp's. Exh. H). She then acknowledged to her therapist that she spent June 25 and June 26 performing yard work, which required "deep" and "repetitive" squatting, and

thereafter only had some muscle soreness, with no "actual pain" that next day, at which time she was able to perform all of her therapy exercises. (Resp's. Exh. G). She similarly reported to her therapist on August 1 that she spent two hours grocery shopping and lifted a lot of items from the shelf to the cart, and while she did have some soreness thereafter, she did not report "pain". (Resp's. Exh. I). Throughout this time, Claimant continued working for Employer with restrictions and repeatedly indicated that she was "having no issues" doing so, and described her pain generally at a level of 3-4/10. (Resp's. Exhs. C-R).

5. The content of the admitted medical records supports a finding that Claimant was making gains in her functional status over the first weeks and months following this strain injury. (See generally, Resp's. Exhs. R-W). This evidence provides important context to Claimant's later subjective reports, regarding her ability to perform modified duty in 2021, her need for surgery and the credibility of the extreme functional limitations that she is now claiming.

6. On August 19, 2019, a lumbar MRI demonstrated a "[d]esiccated degenerative bulging disc, osteophyte and loss of disc height at L5-S1 with severe foraminal narrowing, left greater than right" along with a "5 mm central disc protrusion at L4-L5 without significant canal stenosis. (Resp's. Exh. J).

7. On September 30, 2019, Claimant was evaluated by physiatrist Michael Sparr, MD, who noted that her most problematic issues seemed to be left sacroiliitis with a strong element of left L5-S1 greater than L4-L5 facet dysfunction and arthralgias and foraminal stenosis that may cause intermittent radiculitis. On November 6, he performed a left SI joint injection. (Resp's. Exh. K, M).

8. On December 11, 2019, Claimant reported to Dr. Sparr that she was resistant to undergo conservative modalities, and was concerned that chiropractic treatment could cause her headaches, although Dr. Sparr assured her that manipulation of the pelvis would not do so. She also wanted to avoid massage due to alleged hypersensitivity. (Resp's. Exh. N).

9. On December 16, 2019, Claimant complained to Dr. Lakin that she was not happy with her last appointment with Dr. Sparr because he "pressed" on her facets which she reported caused her to collapse onto the exam table.[1] Claimant suggested that if she had not fallen onto the exam table she would have fallen to the floor because Dr. Sparr was "not ready" to catch her. She then reportedly needed several minutes to regain her strength to continue with additional testing. Finally, Claimant expressed her "aversion" to starting any new medications as an adjunct to her treatment. It was hoped that additional facet injections would "calm her lumbar extension pain down" so that she could progress to maximum medical improvement (MMI) by January or February 2020. (Resp's. Exh. O).

[1] Dr. Barton Goldman would later explain that collapsing from a facet examination constituted a nonphysiologic examination response. (Hearing testimony of Dr. Goldman).

10. After Claimant underwent a first set of medial branch blocks (MBBs), she again told Dr. Sparr that she was wanted to defer chiropractic treatment due to her concern over headaches. On February 13, 2020, Dr. Lakin was considering a release to full duty, although Claimant expressed apprehension. He explained to her that if she continued to fail to report any consistent improvement, she would be at MMI. Repeatedly, he said, Claimant would "improve only to have exacerbation of pain and we start all over again." He believed that a psychological evaluation could be necessary. (Resp's. Exhs. P-U).

11. On May 19, 2020, after she was administered a second set of MBBs, Claimant underwent a psychological evaluation with Herman Staudenmayer, PhD, to whom she stated a belief that when she had been afforded a rhizotomy she would be "fully healed." Claimant expressed frustration concerning the timeliness of her treatment, noting that if she had received timely treatment her pain would have been resolved. Dr. Staudenmayer administered "The Battery for Health Improvement-2 (BHI-2) which revealed a moderately high (68% tile) score for somatic complaints, which was higher than the level of somatic complaints observed in the normal population. Dr. Staudenmayer noted that Claimant endorsed 16 of 26 somatic complaint items, leading him to conclude that it may be possible that Claimant was indirectly venting unrecognized psychological distress through physical complaints. He also noted that Claimant's tile score of 58% regarding her perceived level of dysfunction was also higher than what is commonly seen in the normal population. While not particularly unusual for medical patients, Dr. Staudenmayer noted that it (Claimant's functionality score) was not normal, adding that if Claimant seems to be "more functionally limited than would be expected given objective medical information, psychological factors could be contributing to [her] perceptions". Based upon the results of Claimant's testing battery, Dr. Staudenmayer concluded that '[s]he does indicate some aspects of somatization and focus on functional complaints and has a strong sense of perseverance, self-reliance, and emotional stability". (Resp's. Exh. V).

12. Dr. Staudenmayer recommended cognitive therapy and self-regulation/relaxation with EMG biofeedback. Claimant adamantly refused any psychological treatment, noting that she was "waiting for the rhyzotomy (sic) that [would] fix [her]". Dr. Staudenmayer then noted that "[Claimant's] resistance to psychological intervention [was] consistent with a belief that her only problem is physical and that a rhyzotomy (sic) will resolve her issues". Dr. Staudenmayer diagnosed an unspecified adjustment disorder and somatic symptom disorder. (Resp's. Exh. V).

13. On June 10, 2020, Claimant was evaluated by Dr. Lakin who liberalized her restrictions by allowing Claimant to lift up to 30 pounds on occasion. During this encounter, Claimant complained to Dr. Lakin that Dr. Sparr pushed very hard on her SI joint "every time" he evaluated her and that he had pushed hard again on June 1, resulting in her legs almost giving out. She complained that she usually had high pain for 3-4 days

after seeing him, and stated that she would not allow him to examine her again. (Resp's. Exh. X).[2]

14. Claimant underwent a radiofrequency ablation (rhizotomy or RFA) on June 18, 2020, which she described as "excruciating." (Resp's. Exh. Y). The ALJ notes that, while Claimant expressed certainty that "she [would] be fully healed," once she underwent rhizotomy, as she now believes will be the case with surgery, the RFA did not resolve her complaints as she predicted. Rather, the medical records support a finding that when Claimant returned to Dr. Lakin on June 24, 2020, she complained that she worse off following the procedure than before.[3] Claimant reported that she had been working with restrictions before her RFA and following this procedure was hardly able to perform any of her duties because of increased pain. She appeared frustrated and restful of Dr. Sparr for "pressing on her low back until she fell down". Claimant's restrictions were upgraded and Dr. Lakin raised concerns regarding the psychosocial aspects of the claim with Claimant again. Claimant indicated that she had no desire to see Dre. Staudenmayer again because he wanted to "delve into her past issues about abuse. According to Claimant, her life was "perfect" before the injury forming the basis for this claim and she did not want to "dredge up" old memories that had no bearing on her pain. Per Claimant, she had dealt with her past abuse memories prior to this injury and would deal with them "fine once her low back pain [was] better resolved. The ALJ finds it clear that Claimant sees no connection between her past abuse and current symptoms. (Resp's. Exhs. Y, Z).

15. Claimant returned to Dr. Sparr on July 8, 2020. As is the case with his other reports, he referenced nothing about Claimant's dramatic pain response or collapsing incidents from SI or facet palpation, or that she mentioned that she was dissatisfied with aspects of his examinations. Claimant reported an "extremely poor" response to the rhizotomy. She complained that it caused bruising on her thighs and back. She reported an increase in pain worse with flexion but better with extension. She reported that the RFA caused her legs to become weak and that she had numbness throughout her legs. Dr. Sparr advised that numbness involving the entire legs "would require compression on multiple nerves within her spine and spinal cord which is not possible after rhizotomy." He characterized these symptoms as "atypical," and he also commented that she had contacted his office earlier without mentioning such symptoms. Dr. Sparr again explained that rhizotomy would in "no way" cause bilateral lower extremity weakness, upon which Claimant corrected herself to report that her legs only felt "diffusely weak". (Resp's. Exh. AA). Dr. Sparr felt it reasonable to obtain a repeat MRI of the lumbar spine to "assure that there is nothing further causing compression and [Claimant's] noted weakness. He also scheduled an EMG of the bilateral lower extremities to "determine if there is any nerve damage of any sort. (Id.).

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[2] Dr. Goldman would later explain that this SI examination response was nonphysiologic. (Hearing Testimony of Dr. Goldman).

[3] Dr. Goldman would subsequently testify that an RFA procedure would not cause a long-term increase in pain or decrease in function. (Hearing Testimony of Dr. Goldman).

16. On July 14, 2020, Claimant again declined to see Dr. Staudenmayer or "any other psychologist to assist us with frustration and working through problems." Claimant indicated her belief that she and Dr. Sparr did not get along and voiced concern about further "interventions and has trepidation about pursuing any further steroid injections due to detrimental effects." She also reported that she was working with restrictions, but clarified her need to squat at work and "demonstrate[d] the ability to do that for times like tying her shoes or picking up her keys." She specifically wanted her ability to squat documented so that she did not get into trouble when squatting occasionally at work. Per Claimant's request, PA Schwartz loosened Claimant's restrictions to allow squatting. (Clmt's Exh. 7, p. 361, 364).

17. Claimant underwent an EMG on August 12, 2020. The results of this study were documented by Dr. Sparr as being "normal" with "no evidence of left or right lumbosacral radiculopathy, left or right sciatic or distal compression neuropathy and no evidence of generalized peripheral neuropathy, leading Dr. Sparr to note that Claimant's reported lower extremity weakness was not supported by the results of the EMG. **(**Resp's. Exh. BB). Dr. Goldman later agreed with Dr. Sparr that Claimant's report of lower extremity weakness caused by her rhizotomy was a nonphysiologic complaint. (Testimony of Dr. Goldman). Upon review of the results of Claimant's EMG study, Dr. Sparr revised his suggestion for a repeat MRI, noting that it was not necessary. (Resp's. Exh. BB, p. 119).

18. Claimant would subsequently claim that the EMG worsened her condition (Resp's. Exh. CC), prompting Dr. Goldman to again testify that such complaints represented non-credible symptom magnification. (Testimony of Dr. Goldman).

19. On September 24, 2020, Dr. Lakin called and spoke to Claimant at length about her use of Gabapentin and other medications. Dr. Lakin found Claimant's response to his question of whether Claimant was benefitting from Gabapentin "very unclear". He tried to assess whether the titrated dose Claimant was taking was helpful only to have her indicate "several times that [it was] not hurting her." The two apparently "went around in circles, without her telling me that she is clearly benefiting." He commented that she was "very concrete in her thinking" and that she declined his repeated suggestion to adjust the dosage down to see if she noticed a benefit from the medication only to have her indicate that she did not want to make any changes "until she sees orthopedic spine surgeon." Dr. Lakin stated that he would be performing an impairment evaluation on October 13, 2020. (Resp's. Exh. EE).

20. On September 30, 2020, Claimant underwent a MRI that references similar findings as the previous study performed 13 months earlier (when she was walking up to 35 miles/week and gardening with no pain, etc.). (Resp's. Exh. FF).

21. On October 8, 2020, Dr. Michael Janssen performed a spinal surgery evaluation. Dr. Janssen believed there to be "vertical instability" and a loss of structural integrity at L5-S1, but also remarked of normal age-related changes with a minimal bulge and no thecal sac compression at L4-L5. He recommended an L4-L5 and L5-S1

discogram. He noted that he was "very particular" about these tests. Consequently, he indicated that the discogram needed to be done by someone he was familiar with or he would not make treatment decisions." (Resp's. Exh. GG). In the meantime, Claimant continued to work modified duty "without issue." (Resp's. Exh. HH).

22. On November 4, 2020, Claimant underwent lumbar discography at L4-L5 and L5-S1 followed by post discography CT of the lumbar spine. Discography revealed a concordant pain response to disc provocation at L4-5. The L5-S1 disc was found to be completely incompetent and repeated attempts at provocation failed to provoke a concordant pain response. Post discography CT scan demonstrated the following findings:

> Trace retrolisthesis L5 on S1. Vertebral body height and alignment otherwise maintained. There is moderate disc height loss L5-S1 and mild disc height loss L4-5. Discogram was performed at L4-5 and L5-S1.
>
> Findings as follows:
>
> L4-5: Modified Dallas grade 3 tear at approximately the 6:00 position.
>
> L5-S1: There is circumferential extension of contrast to the annulus consistent with grade 4 tear.
>
> Soft Tissues: The visualized soft tissues are unremarkable.

(Resp's. Exh. II, JJ).

23. On November 19, 2020, Dr. Janssen recommended reconstruction at L5-S1 for what he considered discogenic symptomatology, loss of structural integrity of the disc and vertical instability. He noted that Claimant was only able to work part-time and that her pain had altered her quality of life and ADLs, in as s much as she "tried to do half marathons with her daughter" but was apparently unable to do so. He stated that she could not take care of all her customers because she had severe axial back pain, despite the fact that the medical records consistently indicated that she was performing her modified but full-time duties "without issue," and had been doing so for many months, since May 2019. Dr. Janssen also remarked that there was no psychological overlay concerns, despite the findings of Dr. Staudenmayer and the other magnification markers documented throughout the case. (Resp's. Exh. KK).

24. The ALJ finds that Dr. Janssen assumed several facts that are inconsistent with voluminous medical record and that he had an inaccurate understanding of the psychiatric indicators and contraindications to surgery, leading him to reach opinions based upon incomplete information.

25. On December 18, 2020, Claimant returned to Dr. Lakin and his NP, at which time she again requested that her restrictions be modified to be less onerous, as she had

done on July 14, 2020. The ALJ finds this to be further evidence that Claimant was able to perform her modified work activities without problems. She was thereafter permitted to lift 10-15 pounds and squat and bend when using "good judgment," with allowances for frequent rest and stretch breaks. (Resp's. Exh. LL).

26. On December 22, 2020, Claimant was provided alternative modified work at the [Third Party Employer redacted] in Pueblo for 40 hours/week at $12.00/hour ($480/week). Claimant's duties included folding and organizing lightweight items under 10-15 pounds with no bending/twisting at the waist and no prolonged standing. The ALJ notes that the duties associated with this job offer were actually less physically demanding than the restrictions she was assigned a few days earlier, which would allow for some bending. Dr. Lakin approved this job offer. Claimant presented to the [Third Party Employer redacted] on December 29, 2020, at which time she agreed, as evidenced by her signature, that she would not perform duties that are outside of her physical limitations . . . " (Resp's. Exh. DDD, p. 260).

27. On January 27, 2021, Claimant underwent an orthopedic examination with surgeon Dr. Brian Reiss at Respondents' request. Dr. Reiss noted that, from a psychological point of view, it was "quite concerning" that Claimant complained of a severe increase in symptoms after her examinations with Dr. Sparr and after her EMG and RFA procedures as evidenced in the admitted medical record. He reviewed the discogram and remarked that, when performing discograms, the "most important information comes from a pain response at the time of injection. According to Dr. Reiss, Dr. Janssen appeared to ignore the fact that Claimant failed to report a significant pain response to provocation at this level during the discogram, when recommending surgery at L5-S1, which he opined is inappropriate. Per Dr. Reiss, Dr. Janssen simply assumed that because there is significant degeneration at and the disc is incompetent at L5-S1, this is Claimant's source of pain, i.e. her pain generator. According to Dr. Reiss, this supposition ignores the results/findings of the discogram and amounts to pure speculation. Dr. Reiss went on to remark that discograms were "notoriously unreliable, but if one is going to proceed with [a] discogram then you cannot simply throw out the result." As stated by Dr. Reiss, Dr. Janssen, did exactly that by suggesting disc replacement at L5-S1 "simply based upon the fact that more degeneration is present at that level, even though the amount of degeneration does not correlate with that level being the pain generator." (Resp's. Exh. NN).

28. Dr. Reiss concluded that a disc replacement procedure was not supported by the Workers' Compensation Medical Treatment Guidelines (MTGs), because the pain generator had not been adequately identified, there was no true instability and the likelihood of surgical intervention providing a positive result was not better than continued non-surgical treatment. A total disc replacement, stated Dr. Reiss, was unlikely to decrease Claimant's pain or increase her function. He also remarked that conservative care had not been appropriately completed. Dr. Reiss ultimately determined that the work injury involved a lumbar strain with pain that was probably being perpetuated by deconditioning and the absence of an appropriate exercise program. Dr. Reiss recommended a physical therapy program focused on core strengthening. Finally, and

contrary to the conclusion of Dr. Janssen, he noted that there was evidence of psychological overlay in the record. (Resp's. Exh. NN).

29. On March 16, 2021, Dr. Lakin remarked that the results of Dr. Reiss' independent medical examination (IME) "made sense from an orthopedic standpoint." During this appointment, Claimant indicated that she was still working but with increased pain by the end of the day. Nonetheless, she did not mention anything about having to work beyond her restrictions while performing tasks at the [Third Party Employer redacted]. Similarly, there is no indication in this report that Claimant informed Dr. Lakin that she could not continue working in her modified position, or that Dr. Lakin questioned her ability to do so; indeed, he maintained her on restrictions substantially similar to those she had been assigned previously. (Resp's. Exh. OO).

30. The day after her March 16, 2021 appointment (March 17, 2021), Claimant left work after two hours because she was "not feeling well." This was documented contemporaneously by the employer. Claimant never returned to [Third Party Employer redacted]. (Resp's. Exh. DDD, pp. 264-265).

31. During the period that Claimant worked modified duty position at the [Third Party Employer redacted] (December 29, 2020 through March 17, 2021), Employer paid her wages pursuant to the modified duty job offer at $12.00 per hour, and the Insurer paid the difference between her modified wages and regular wages as temporary partial disability (TPD). The difference between Claimant's $579.60 AWW for Employer and the $480.00 in wages earned as part of her modified job with the [Third Party Employer redacted] is $99.60 ($66.40 TTD/TPD rate). Respondents have been paying TPD since Claimant's commencement of employment at the [Third Party Employer redacted] in late December, and continue to pay such amounts despite her failure to return to the [Third Party Employer redacted], pending a determination by the ALJ as to their liability for wage loss benefits. (Resp's. Exh. XX).

32. Although she had left the [Third Party Employer redacted] on March 17 and had not returned to work since, Claimant suggested to Dr. Lakin on April 7, 2021 that she was still working with restrictions, with "no issues." She reported that her surgery with Dr. Janssen had been denied, and complained that she was experiencing numbness and tingling in her back down her legs and spasms (although such complaints were rendered unreliable by the previous diagnostic testing), and that PT was not helping. She requested a second surgical opinion with Dr. Bee and indicated that she did not believe she could return to any productive work. Dr. Lakin elected to "place" Claimant off work completely until he could obtain some "definitive answer or until she has some improvement." (Resp's. Exh. PP).

33. In contrast to her April 7, 2021 statements to Dr. Lakin, Claimant reported to her physical therapist on April 20, 2021 that she had pain but had become more functional and was "able to do larger loads of laundry and get less leg cramps." (Resp's. Exh. QQ).

34. On May 19, 2021, Dr. Lakin suggested that Claimant had reached MMI and scheduled her for an impairment rating on June 22; however, Dr. Lakin left the Southern Colorado Clinic resulting in a change of provider to Dr. Thomas Centi. (Resp's. Exh. SS). While Dr. Centi had assumed Claimant's care by June 22, 2021 – after Dr. Lakin left the medical practice – and he did not perform the previously scheduled impairment rating evaluation. (Resp's. Exh. TT).

35. On July 9 and July 12, 2021, Claimant underwent an IME with physiatrist L. Barton Goldman, MD. Following his IME, Dr. Goldman opined that Claimant demonstrated a "very high somatic focus and concrete, linear, somewhat rigid problem solving," with a very "concrete, fix it" and oversimplified understanding of her pain generators. He documented a normal gait pattern without antalgia, and found 4/5 positive Waddell signs during his evaluation.

36. Dr. Goldman reviewed and commented on Claimant's MRI as follows: "The . . . MRI scan is notable for diffuse especially lower lumbar spondylosis and degenerative changes seen in more than 50% of individuals without low back pain over 30. He was impressed by the amount of fatty atrophy present in the core musculature adjacent to the lumbosacral structures which he felt was contributing to Claimant's core weakness and hypermobility on clinical examination. Based upon his observations, Dr. Goldman opined that Claimant's MRI was "consistent with likely multi-factorial pain generators primarily involving the surrounding lumbosacral musculature that generally are not dramatically amenable to specific surgical intervention . . ."

37. Dr. Goldman also reviewed Claimant's CT scan noting that it "implies that there may be some contribution of discogenic pain to a multifactorial chronic low back pain condition primarily due to a muscular or myogenic injury with secondary discogenic and facet pain generators." (Resp's. Exh. UU at p. 227). He went on to opine that this "type of chronic multifactorial biopsychosocial pain presentation generally responds very poorly to more aggressive surgical interventions such as are being contemplated at this time on . . . behalf of [Claimant]." (Id.).

38. Dr. Goldman provided claim-related diagnoses of chronic lumbosacral strain with mild secondary facet dysfunction, possible L5-S1 instability requiring confirmatory standing flexion/extension films. He felt that Claimant was deconditioned and would benefit from a generalized aerobic and core strengthening program and found it significant that she had "no specific clear-cut vocational re-entry goal at this time." (Resp's. Exh. UU). He noted that Claimant's "perception that just about all of her different treatments so far have made her worse in the presence of clear signs of unconscious somatization are additional relative but nevertheless strong contraindications . . . against her benefitting from more aggressive spinal surgery in general.

39. As to the specific disc arthroplasty procedure recommended by Dr. Janssen, Dr. Goldman found that Claimant's work-related condition did not meet the criteria outlined in Rule 17, Exhibit 1, page 106 of the Medical Treatment Guidelines because her pain generators had not been adequately identified and treated, and because she had pain

beyond the L5-S1 level, based on clinical examinations, MRIs and discography results. Furthermore, because her spine pathology was not limited to one level, as required per page 107 of Exhibit 1, and she exhibited symptomatic facet arthrosis, Dr. Goldman opined that disc replacement surgery was contraindicated under Rule 17. According to Dr. Goldman, Claimant's medical records demonstrated that she would have difficulty with the aggressive rehabilitation necessary to further improve her function or stabilize her pain levels following disc arthroplasty surgery. Accordingly, Dr. Goldman agreed with Dr. Reiss' analysis that Claimant was not a good candidate for surgery and that she did not meet Rule 17 criteria.

40. Dr. Goldman also raised concerns for unconscious somatization based upon Claimant's contention that her treatment (rhizotomy) and diagnostic testing (EMG) worsened her symptoms. While he felt that psychiatric issues were complicating Claimant's presentation, which represented a contraindication to aggressive surgery, he did think it appropriate, as noted above, to address Dr. Janssen's suggestion that Claimant had "vertical instability" by completing a series of standing lumbosacral flexion/extension x-rays. In the meantime, Dr. Goldman opined that Claimant could benefit from improved pain management education, counseling, and biofeedback, although she appeared to "not be open nor enthused about additional support and treatment in this regard", which according to Dr. Goldman, presented yet another "relative contraindication" to aggressive surgical intervention." (Resp's. Exh. UU).

41. On September 28, 2021, Claimant underwent the aforementioned flexion/extension x-rays. This imaging revealed "mild degenerative lumbar facet arthropathy" only. Lumbar alignment was normal and there was no evidence of any acute findings, fractures or instability on flexion or extension. (Resp's. Exh. VV). Dr. Centi indicated thereafter that Claimant would be placed at MMI on November 23, 2021. (Id.). As part of his IME, Dr. Goldman also noted that if "gross instability" was not present on Claimant's standing flexion/extension films, Claimant would be "considered at maximum medical improvement. (Resp's. Exh. UU at p. 229).

42. On November 15, 2021, Claimant was evaluated by Dr. Scott Primack. Although he did not have all of Claimant's records for review (he did not reference Dr. Goldman's findings, acknowledged that he did not have the most recent MRI study and remarked that Claimant simply "told me" about the discogram), Dr. Primack came to the same conclusion as explicitly reached by Drs. Goldman and Reiss (and at least implicitly found by Drs. Lakin and Centi): that "people who have multilevel spondylosis are not good candidates for [a disc replacement] procedure." Claimant and Dr. Primack spoke about counseling for "coping skills" and her "sleep-wake cycle", but she, once again, expressed that she did not think counseling was necessary. (Resp's. Exh. EEE).

43. Claimant filed an Application for Hearing on May 25, 2021, endorsing the issues of authorization of the surgery recommended by Dr. Janssen and TTD from March 17, 2021 and continuing. (Resp's. Exh. YY). Respondents filed a response to Claimant's hearing application on June 7, 2021 contending that Claimant did not leave work due to the injury and voluntarily resigned and was therefore, responsible for the termination of her

employment. Respondents also endorsed offsets and overpayments. (Resp's. Exh. ZZ). As noted above, the matter proceeded to hearing on November 4, 2021 and November 24, 2021.

44. At the hearing, Claimant acknowledged that she worked full-time modified duty from May 2019 to December 2020 with the Employer, during which time she was not performing transfers but would occasionally push patients who weighed up to 100 pounds in wheelchairs. Additionally, Claimant testified that she would perform passive range of motion on the residents Assigned to her caseload. She stated that she had no issues performing her job duties over the 19 to 20 months after the injury "as long as [she] stayed within [her] restrictions." As referenced above, Claimant was transferred to a modified duty position at the [Third Party Employer] which she testified required her to bend and reach down into bins to grab items to tag. She claims that this aggravated her low back condition. She characterized her work at the [Third Party Employer] as "repetitive," but also acknowledged that she could take as many breaks as she wanted. She also acknowledged that she agreed not to perform duties that were outside of her limitations. She alleged that she told "Ms. K[Redacted[]" (later clarified to be [Redacted]) about difficulties she was having performing her tasks. According to Claimant, Ms. K [Redacted] responded by indicating that Claimant's tagging job was "all that they had." Claimant testified that she was having significant problems performing ADLs up to the day of the hearing, but acknowledged that she did her own laundry and "some" yardwork, including planting and weeding, and also her own shopping.

45. Ms. K[Redacted] testified as the Assistant Manager of the [Third Party Employer]. She explained the stores' modified duty process. She testified that workers referred to the store for modified duty are told at orientation that they are not to work outside of their physical restrictions. She also testified that she would frequently ask workers referred to the store how they were doing with their assigned duties and that she asked Claimant how she was doing/feeling "all the time." She believed that the store had provided "dozens" of modified duty position to injured workers, and stated that the store could provide work to a variety of injured workers with wide ranging limitations. Ms. K[Redacted] was provided with Claimant's work restrictions in advance of her job placement, and confirmed the correct restrictions before assigning her to a specific position. Ms. K[Redacted] testified that Claimant was initially provided a position in the men's department that she believed was within her abilities, but Claimant complained after a short time – which she recalled was after a day or maybe a few days – that the tasks were too onerous so she was moved, and "never hung another item." According to Ms. K[Redacted], she transitioned Claimant to the break room to prepare lightweight items, such as hats, ties, purses, sunglasses and scarves for resale. She stated that the heaviest item Claimant would lift would probably be a purse, and that Claimant could sit or stand "at her convenience." She explained that the materials to prepare were on a cart at table height, on springboards in yellow bins, so the bins are "always floating right on top", meaning that the position required no bending or twisting. She also testified that the job had no production expectations. Rather, it "would just take you however long it took you" to prepare the items for the sale floor.

46. Ms. K[Redacted] disputed Claimant's assertion that she reported difficulties performing her job duties after her very short stint in the men's department, because as Ms. K[Redacted] testified, she "check[s] on people all the time," and asks how they are doing "all the time, probably every day." Ms. K[Redacted] testified that she saw Claimant "several times a day, all day, every day" and other than in the first day or two when she was in the men's department, she "never had a complaint from [Claimant] …" She also disputed Claimant's contention that she reported that her duties exceeded her restrictions. Instead, Ms. K[Redacted] recalled, that Claimant reported that she was not feeling well on March 17, and that she left after working for two hours, and never returned. Ms. K[Redacted] testified that if Claimant had indicated that she was having difficulty performing her tasks, she would have been assigned less onerous work – which Ms. K[Redacted] testified that the [Third Party Employer Redacted] routinely provides under such circumstances. Ms. K[Redacted] also disputes Claimant's assertion that she stated that there were no other jobs available. Instead, Ms. K[Redacted] testified that the [Third Party Employer redacted] can accommodate a wide variety of restrictions.

47. Dr. Goldman testified at both the November 4 and November 24, 2021 hearings. Dr. Goldman is a Board Certified, Level II Accredited expert in the area of Physical Medicine and Rehabilitation (RM&R) who teaches the accreditation course and helped develop the MTGs.

48. Dr. Goldman described the "dramatically different" presentation Claimant demonstrated in the first three months of the claim when compared to the time she began modified duty at the [Third Party Employer redacted]. According to Dr. Goldman such a difference would most likely be related to a specific physical change, such as a new or exacerbated pain generator, or the result of psychosocial issues. Based upon his examination and records review, Dr. Goldman opined that Claimant's change in presentation was not physiologic. Indeed, Dr. Goldman noted that the objective findings demonstrated no change in the pathology, as per the MRIs, the EMG was normal and the CT showed only common age-related issues. Dr. Goldman also noted that Claimant's response to the facet examination by Dr. Sparr was not physiologic. Rather, he opined that Claimant's response to Dr. Sparr pressing on her SI joints demonstrated symptom magnification which he concluded was also supported by her response to several interventions, including the rhizotomy.[4] Her claim that the EMG caused weakness in her legs was "another sign of somatization", according to Dr. Goldman. He remarked that the psychological evaluation by Dr. Staudenmayer confirmed that Claimant suffered from an adjustment reaction and mistook psychological stress for physical symptoms, but she declined the recommended psychological treatment.

49. As to surgery, Dr. Goldman raised several misconceptions held by Dr. Janssen. First, Dr. Goldman agreed with Dr. Riess that the discogram was not diagnostic. Second, the radiology and examinations confirmed that her problems stemmed from more than one level. Consequently, he opined that the suggested disc replacement surgery

[4] Dr. Goldman acknowledged that a rhizotomy could be painful, but qualified that such would not cause pain or disability beyond a few days, and that Claimant's claim of lower extremity weakness from it was not physiologic

would probably not be successful for that reason. He stated that the record indicated that Claimant would likely not submit to the aggressive rehabilitation that would be necessary to derive any benefit from the surgery, and that Claimant herself indicated that she would not be "enthused" about committing to such a program. He thought without such rehabilitation, the proposed surgery would fail and Claimant could suffer iatrogenic disability, as she had already exhibited based upon her nonphysiologic response to the rhizotomy. Thus, he opined that Claimant would probably not only fail to improve following the recommended surgery, but that she would likely worsen. He testified that while somatization is not an automatic disqualifier for surgery, Claimant's reluctance or refusal to undergo counseling to address it was problematic.

50. Dr. Goldman clarified that the work restrictions provided by Dr. Lakin were reasonable and safe, and would not cause any injury or aggravation. Based upon the evidence presented, the ALJ finds it improbable that Claimant's modified job duties, as described by Ms. K[Redacted] would have aggravated or exacerbated Claimant's condition. Indeed, Dr. Goldman reiterated during his testimony that Claimant's disability at [Third Party Employer redacted] was inconsistent with what she demonstrated in the period just after her injury, in her 19-20 months or employment post-injury with the Respondent-Employer and even with her recent activities since she left [Third Party Employer redacted].

51. The ALJ finds Dr. Goldman's testimony credible and more persuasive, both in establishing that the requested surgery is unlikely to result in any improvement (and could very well do harm), and that Claimant presents with significant psychosocial overlay than the contrary reports of Dr. Janssen and Claimant's testimony.

52. The ALJ does not find Dr. Janssen's surgical opinion to be persuasive. In assessing weight, the ALJ finds that his opinion is outdated, not supported by any other doctor and based on incorrect facts, including that Claimant did not exhibit psychological overlay, and he relied on a non-diagnostic discogram. His recommendation is not consistent with the MTGs. Perhaps most significantly, he based his recommendation on the assumption that Claimant had spinal instability, but subsequent flexion/extension x-rays objectively established this was not correct.

53. The ALJ finds Ms. K[Redacted] credible, and her unambiguous testimony persuasive. The record supports a finding that Claimant was provided work within her restrictions that required no bending, and that the [Third Party Employer redacted] could and would have provided further accommodations if it had been requested. The record also supports a finding that Claimant never requested further accommodation after she was moved from the men's department nor did she complain to any that she was being asked to work beyond her given restrictions. Indeed, one day before Claimant left work early (March 16, 2021) she saw Dr. Lakin whose report from this date of visit is devoid of any indication that Claimant's pain symptoms were worse *because* she was having to work beyond her given restrictions. Given Claimant's propensity to report any increase in her symptoms, even those she believed were caused by her treatment/examinations or diagnostic testing, the ALJ finds it improbable that she would not have reported to Dr.

Lakin that her pain was worsened because she was made to work beyond her restrictions. Simply put, if Claimant was having difficulty performing her modified duty tasks or was experiencing increased pain because she was worked beyond her restrictions, she would have reported it timely.

54. In this case, the ALJ credits the testimony of Ms. K[Redacted] that, when Claimant reported difficulties in the men's department, she was promptly moved. While Claimant asserts that she complained about her work and difficulty performing it, the ALJ looks, as noted above, to the contemporaneous records, which do not support her claims, as she did not contemporaneously report to Dr. Lakin that she was working outside of her restrictions – either on March 16, the day before she left work, or on April 7, the next time she saw him. Ms. K[Redacted] was clear and persuasive in her denials, which are supported by Employer's records that document that Claimant went home on March 17 because she was "not feeling well." Ms. K[Redacted] presents as a witness with no bias, prejudice or interest in the outcome of the proceedings. Accordingly, the ALJ credits Ms. K[Redacted]'s testimony over that of Claimant's, where conflicting.

55. The Medical Treatment Guidelines, specifically WCRP Rule 17, Exhibit 1, guide the principles surrounding the care and treatment of low back pain. Rule 17, Exhibit 1(G) addresses the general clinical and diagnostic indicators that should be considered before surgical intervention concerning the low back, including artificial disc replacement, is undertaken.

56. As noted, artificial lumbar disc replacement is a surgical procedure addressed by the MTGs. Regarding disc replacement surgery WCRP Rule 17, Exhibit 1(G)(11)(a) provides:

> General selection criteria for lumbar disc replacement includes symptomatic *one-level* degenerative disc disease. The patient must also meet fusion surgery criteria[5], and if the patient is not a candidate for fusion, a disc replacement procedure should not be considered. Additionally, the patient should be able to comply with pre-and post-surgery protocol. (Emphasis added).

[5] Rule 17, Exh. 1(G)(4)(d) notes that the diagnostic indication for spinal fusion includes the following: "i, Neural Arch Defect usually with stenosis or instability: Spondylolytic spondylolisthesis, congenital unilateral neural arch hypoplasia. It should be noted that the highest level of success for spinal fusions is when spondylolisthesis grade 2 or higher is present. ii. Segmental Instability: Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability. iii. Primary Mechanical Back Pain/Functional Spinal Unit Failure: Multiple pain generators objectively involving two or more of the following: (a) internal disc disruption (poor success rate if more than one disc involved), (b) painful motion segment, as in annular tears, (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. Because surgical outcomes are less successful when there is neither stenosis nor instability, the requirements for pre-operative indications must be strictly adhered to for this category of patients. iv. Revision surgery for failed previous operation(s) if significant functional gains are anticipated. v. Other diagnoses: Infection, tumor, or deformity of the lumbosacral spine that cause intractable pain, neurological deficit, and/or functional disability.

57. Based upon the evidence presented, Claimant may technically meet the diagnostic criteria for a fusion surgery as she appears to have primary mechanical back pain involving multiple pain generators with objective evidence of internal disc disruption and has a painful motion segment (annular tearing) and facet syndrome. (See Rule 17, Exh. 1(G)(4)(d)(iii)). Nonetheless, the MTGs raise several concerns for proceeding with disc replacement surgery in this case, including the following:

- The evidence presented supports a finding that Claimant has more than one-level of symptomatic degenerative disc disease in the lumbar spine. Indeed, Claimant's imaging (MRI) revealed a "desiccated degenerative bulging disc, osteophyte and loss of disc height at L5-S1 with severe foraminal narrowing, left greater than right" along with a "5 mm central disc protrusion at L4-L5 without significant canal stenosis." Moreover, her discogram revealed annular tearing at both L4-5 and L5-S1 and while she demonstrated concordant pain at L4-5, Claimant's L5-S1 was deemed to be completely incompetent. Accordingly, the ALJ credits Dr. Goldman's testimony to find that Claimant has objective evidence of more than one level of degenerative disc disease in the lumbar spine making her a poor candidate for disc replacement surgery even if she did not exhibit clear signs of somatization.

- The evidence presented supports a finding that not all of Claimant's potential pain generators have been adequately defined and treated. As with any fusion procedure, all pain generators must be adequately defined and treated for those persons for whom disc replacement surgery is being recommended. Here, the evidence supports a finding that Claimant's discogram is probably non-diagnostic in terms of supporting Dr. Janssen's conclusion that a disc replacement procedure is reasonable and necessary at L5-S1. Indeed, repeated attempts at L5-S1 provocation failed to produce a concordant pain response at this segment leading Dr. Reiss to note that Dr. Janssen seemingly ignored this finding and recommend a disc replacement at L5-S1 "simply based upon the fact that more degeneration [was] present at [this] level, even though the amount of degeneration [did] not correlate with that level being the pain generator." While discography may prove useful in evaluating morphological abnormalities of the disc, including annular tearing, the MTGs provide, as opined by Dr. Reiss, that the presence of an annular tear does not necessarily identify the tear as the pain generator. In this case, the evidence presented persuades the ALJ that Claimant has pathology at multiple disc levels along with facet joint arthritis. While it is possible that Claimant's

symptoms could be emanating from the L5-S1 disc, the ALJ credits Dr. Goldman's opinions to find that the cause of Claimant's pain is probably multifactorial. The ALJ is also convinced that there has not been an adequate effort to define and treat Claimant's specific pain generator(s), which the ALJ finds will be difficult to accomplish in light of the unreliable nature of Claimant's subjective reporting given the degree of somatization and psychological overlay she exhibits.

- The evidence presented supports a finding that while a psychosocial evaluation that provided clear signs of unconscious somatization and psychological overlay has been performed, Claimant has refused to address the psychiatric issues/conditions that may be driving or impacting many of her physical complaints. The ALJ credits the opinions of Drs. Staudenmayer and Goldman to find that without the recommended biofeedback and cognitive therapy, Claimant's psychiatric diagnoses pose a significant threat to her post-surgical recovery raising the strong probability that the surgery will fail, which could lead to the development of iatrogenic disability.

58. Based upon the evidence presented, the ALJ is not convinced that Claimant has demonstrated that the requested L5-S1 disc replacement procedure recommended by Dr. Janssen is reasonable and necessary. Indeed, the ALJ credits Dr. Goldman's opinion to find that the evidence demonstrates that "[a]t the very least [Claimant] has multifactorial reasons for her chronic pain that cannot be addressed by a disc arthroplasty in the presence of contraindicated symptomatic facet joint arthritis and more than one level of degenerative disc disease as discussed on pages 106-107 of Rule 17, Exhibit 1." When considered in its totality, the evidence presented persuades the ALJ that the proposed disc replacement surgery does not meet the criteria set forth in the MTG's and that deviation from the guidelines would not be appropriate in this case in light of the evident psychological overlay exhibited by Claimant.

59. Based upon the evidence presented, the ALJ credits the testimony of Ms. K[Redacted] to find that Claimant did not leave work due to her injury, but rather made a volitional decision to no longer appear for modified duty as provided by Employer and approved by Dr. Lakin. Consequently, the ALJ is persuaded that Claimant is responsible for her wage loss and not entitled to wage loss benefits after March 17, 2021.

## CONCLUSIONS OF LAW

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

*Generally*

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its entirety, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that while Claimant suffers from pathologic changes in the lumbar spine that are probably causing her pain, the proposed L5-S1 disc replacement surgery does not meet the medical treatment guidelines given the multilevel nature and extent of her disc disease and confounding psychological issues. As found, the opinions of Dr. Goldman and Reiss are credible and more persuasive than the contrary opinions of Dr. Janssen and the testimony of Claimant. Accordingly, Claimant has failed to make a convincing case that the L5-S1 disc replacement procedure is reasonable and necessary.

*Medical Benefits- The L5-S1 Disc Replacement Surgery*

D. A 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).

E. The MTG's enumerated at WCRP, Rule 17 are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). WCRP Rule 17-2(A) provides: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Moreover, the Court is not bound by the MTGs in deciding individual cases based on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

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

F. While the Court is not required to utilize the medical treatment guidelines as the sole basis when deciding whether specific medical treatment is reasonable, necessary or related to an industrial injury or occupational disease, the Guidelines carry substantial weight as accepted guidance in the assessment and treatment of low back pain. Concerning the medical issue presented, the MTG's, specifically WCRP Rule 17, Exhibit 1 (G) provides that in order to qualify for an artificial disc replacement surgery, the patient should exhibit spine pathology limited to one level and have undergone a psychosocial evaluation which addresses confounding issues, including somatization and other clear indications that there may be a translation of psychological distress into physical symptomatology.

G. In this case, Claimant's imaging studies, including the MRI and discogram clearly indicate that she has multi-level degenerative disc disease, annular tearing and facet joint involvement. Moreover, Claimant has refused to address the psychological factors which are probably affecting her interpretation and reporting of pain. The presence of multi-level disc disease coupled with the chronicity of Claimant's low back pain and her failure to address the potential that confounding psychosocial issues are playing a role in her pain and response to treatment make her a poor surgical candidate. Indeed, such factors pose as strong contraindications to proceeding with artificial disc replacement surgery. Because Claimant's pain is probably multifactorial and could be emanating from facet arthritis, myogenic changes, disc disruption or annular tearing, the ALJ questions whether addressing the single L5-S1 spinal segment is going to relieve cure and relieve Claimant's intransigent discomfort. Based upon the evidence presented, the ALJ is not convinced that the results of Claimant's discogram point to L5-S1 being her pain generator. Simply put, the ALJ is not persuaded that all of Claimant's potential pain generators have been adequately defined and treated as required by the MTG's, nor is the ALJ convinced that there is a reasonable probability that Claimant will significantly benefit from the proposed disc replacement surgery given her current physical capacity (core strength/aerobic condition) and her strongly held believe that her only problem is physical in nature.

H. As noted above, the MTG's provide that a psychosocial evaluation, which addresses confounding issues be completed before moving to artificial disc replacement. This is true because there is "some evidence that depression is a more accurate predictor of the development of low back pain than many common MRI findings, such as disc bulges, disc protrusions, Modic endplate changes, disc height loss, annular tears, and facet degeneration, which are common in asymptomatic persons and are not associated with the development of low back pain." (Rule 17, Exh. 1(E)(2)(c)). In this case, the record submitted establishes that Claimant has been treated for reactive depression and has a past history of physical abuse. (Resp's. Exh. V). While Claimant has undergone past psychological treatment, the record demonstrates that treatment to be remote. As noted, Claimant has refused to participate in any therapy to address her evident somatization leading Dr. Goldman to opine that her "understandable desire 'to be fixed' via external interventions (surgery) as compared to rehabilitated and healed (more of an internal and time demanding process) again paradoxically undermines the likelihood that she will benefit from surgical intervention. (Resp's. Exh. UU p. 230).

I. As demonstrated by WCRP 17-5(C) the MTG themselves recognize that deviations from the guidelines are reasonable in individual cases. *Madrid v. TRTNET Group, Inc*., WC 4-851-315-03 (ICAO April 1, 2014). Consequently, evidence of compliance or non-compliance with the assessment protocols of the MTG have not been considered dispositive when determining whether medical treatment is reasonable and necessary. *Madrid v. TRTNET Group, Inc*., *supra*. The ALJ may weigh evidence of compliance or non-compliance with the MTGs and assign such evidence an appropriate weight 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). Here, the ALJ has "[considered] the medical treatment guidelines adopted under § 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the MTGs and as found above, the ALJ concludes that while Claimant's current condition is directly related to her industrial injury, she does not meet the surgical indications to proceed with artificial disc replacement, nor has she presented sufficient evidence that would substantiate that a deviation from the MTGs is warranted in this case. Indeed, the evidence presented strongly supports a reasonable inference that given the multitude of contradictions to the recommended procedure, Claimant would not likely benefit from the surgery which raises the real potential for the development of iatrogenic disability. Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that she is a candidate for artificial disc replacement surgery or that the procedure is otherwise reasonably necessary. Accordingly, her request for authorization to proceed with surgery must be denied and dismissed.

*Claimant's Wage Loss & Termination for Cause*

J. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding her continued entitlement to lost wage benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo.App. 2000).

K. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In this case, Claimant contends that she left her modified duty job because of increased symptoms related to her having to work beyond

her given restrictions. Respondents contend that Claimant voluntarily quit her job, and as such, committed a volitional act barring her entitlement to wage loss benefits after March 17, 2021.

L. Even if Claimant voluntarily quit her job, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (ICAO, November 3, 2003), held that a claimant's voluntary resignation is not dispositive of the issue of whether the claimant was responsible for the termination of employment. The *Blair* Court held that the pertinent issue is the reason claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO, April 24, 2002). According to *Blair,* "if the claimant was compelled to resign from . . . employment such that it can be said the termination was a necessary and a natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination." Here Claimant argues that she left her modified duty position because of her injury. As noted, Claimant contends that she experienced increased symptoms as a consequence of being made to work beyond the restrictions imposed on her due to her injury. Accordingly, she asserts that she is not responsible for her wage loss. The ALJ is not convinced.

M. In this case, Claimant worked for the Respondent-Employer for about 20 months, through late December 2020, after which she began transitional employment at [Third Party Employer redacted]. She was provided a Rule 6-compliant work offer that was approved by her authorized treating provider (ATP), Dr. Lakin. She commenced employment in a position consistent with those limitations (and also consistent with her work restrictions over the 20 months prior), which restrictions Dr. Goldman clarified were reasonable, safe and unlikely to cause aggravation. She completed paperwork explicitly agreeing that she would not work outside of these restrictions, and acknowledged that she was directed by her supervisor, Ms. K[Redacted], to not do so.

N. Based upon the evidence presented that ALJ concludes that Claimant's job duties in January to March 2021 were to prepare lightweight items that were within her lifting capacity and that her position required no bending or twisting. Indeed the credible/convincing testimony of Ms. K[Redacted] persuades the ALJ that Claimant was provided a table at which she could sit and stand as needed to complete her modified duty tasks and that the bins from which she picked items from were on spring-loaded carts that maintained the items at table-height. Thus, no bending or twisting was necessary. Claimant insists that she had to bend to retrieve items, and, thus, that she was assigned work that was beyond her restrictions. However, in crediting Ms. K[Redacted]'s contrary testimony, the ALJ considers the surrounding evidence. Most notably, Claimant did not contemporaneously indicate that she was being worked beyond her restrictions. While Claimant testified that several other employers witnessed the problems she was having at work, she presented no independent verification from Jan, Wendy, Jerry, Roxanne or Chole that she was being made to work beyond her restrictions. Moreover, the day before she left work early, Claimant was evaluated by Dr. Lakin who maintained her on the same restrictions. The medical report from this date of visit is devoid of any indication that

Claimant was having increased symptoms because she was asked to work beyond her restrictions nor did she report such an allegation to Dr. Lakin on April 7. Given the frankness with which Claimant has reported the alleged cause of increased symptoms in this case, the ALJ agrees with Respondents that the absence of documentation in the medical record to support Claimant's allegations bolsters a reasonable conclusion that no such complaints were made either on March 16, 2021 (one day before Claimant left work early allegedly because she was assigned work that was beyond her restrictions causing increased pain) or April 7, 2021 after she left work. As found, the ALJ credits the testimony of Ms. K[Redacted] and the contemporaneous notation in the employment records to conclude that Claimant left work early on March 17, 2021 because she was feeling ill not because she was having increased pain from performing work outside of her restrictions.

O. In concluding that Claimant is responsible for her wage loss, the ALJ is convinced that Ms. K[Redacted] would have been provided different tasks if she indicated that she needed it. Indeed, Ms. K[Redacted] had previously done so, after Claimant indicated that her initial position with the store over the first day or few days was causing her increased symptoms, even though that position was within her restrictions and was explicitly approved by Dr. Lakin. The ALJ also finds it notable that at the time Claimant left the [Third Party Employer redacted], she had worked her prior position and then the transitional work position for over 19 months. The evidence presented supports a conclusion that that the activities Claimant was performing in 2021 at [Third Party Employer redacted] were less physically demanding than those duties Claimant performed prior to starting at [Third Party Employer redacted], which makes her claim that these limited activities were aggravating her symptoms incredible and unconvincing. Indeed, just a few weeks after the initial injury, Claimant was walking 3-5 miles/day, was performing physical yardwork "all weekend" and was able to walk through a grocery store and lift items for two hours. The intervening medical records document no new objective injury or aggravation or any change in pathology that would explain how or why Claimant would become more disabled. Claimant thereafter engaged *for months* in activities that were more physical than those she described and Ms. K[Redacted] confirmed she was performing at the [Third Party Employer redacted]. The ALJ also notes Claimant's admission after she left work she was lifting loads of wet clothes – an activity beyond what was required at [Third Party Employer redacted], and her admission of current-day ADLs, such as weeding. Based upon the evidence presented, the ALJ is convinced that Claimant probably did not leave work because of the industrial injury[6]. Rather, the ALJ is convinced that Claimant simply abandoned her modified duty job. Because her termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for her job separation. Accordingly, her wage loss following March 17, 2021

[6] Respondents' suggestion that Claimant alleged increased symptoms as a pre-text to leaving the [Third Party Employer redacted] because she felt aggrieved that the request for surgery was denied is probable and consistent with Dr. Staudenmayer's findings concerning somatization. The ALJ concludes it likely that Claimant is indirectly venting unrecognized psychological distress through physical complaints for purposes of obtaining some emotional relief. This well-documented psychological overlay makes her claims of subjective worsening unreliable.

is not attributable to her on the job injury. *Blair v. Art C. Klein Construction Inc., supra.; Longmont Toyota, Inc.*, *supra*.

## ORDER

It is therefore ordered that:

1. Claimant's request for additional medical treatment in the form of a L5-S1 artificial disc replacement is denied and dismissed.

2. Respondents have proven, by a preponderance of the evidence, that Claimant is responsible for the termination of her employment. Accordingly, her wage loss after March 17, 2021 is not attributable to her on the job injury. Respondents may terminate payment of temporary partial disability (TPD) benefits as of March 17, 2021 and take credit for all amounts of TPD paid after March 17, 2021.

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

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

DATED: January 21, 2022

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

## ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the reverse total shoulder arthroplasty performed by Dr. John Papilion on March 31, 2021 was reasonably necessary and related to the admitted March 2, 2020 work related injury.

## FINDINGS OF FACT

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

1. Claimant was a sixty eight year old commercial delivery truck driver for Employer at the time of the hearing who drove a Maxim ten speed tractor trailer. He had worked for Employer for approximately eight years and continued to be employed by Employer. The last day worked was July 9, 2020. He worked full time as a truck driver, which involved delivering lumber and other materials as both a local driver and a long haul driver, including to Wyoming and Nebraska, though the bulk of the driving was locally. He had from one delivery up to ten per day. He would drive same the tractor generally. He was not required to unload the materials. Claimant would work from approximately 5:00 a.m. up to ten to twelve hours a day, five days a week.

2. Upon arriving at work Claimant would perform a pre-trip examination of the tractor and the trailers before using either to make sure they were both safe to be on the road and drive, entering it into the on board electronic computer. He would also do a post trip upon returning to the yard. They involved multiple check lists. Claimant would drive two different types of trailers. The flatbed and a curtain-side trailer. The curtain trailer had rubber leather-like sides that would have to be pulled back and to the side so that they would protect the merchandize or materials from exposure. The curtains weighted approximately 150 to 200 lbs. and would slide on metal bars at the top. They were 45 to 50 foot long and approximately eight foot tall. Sometimes the curtains were stiff and hard to open or close due to poor maintenance. They curtains would get hung up on the slide, so Claimant would have to jerk the curtain to make them open or close. It was very heavy and very awkward. They had no handle but had two straps at the bottom, which he would pull one in each hand, bracing himself when doing it. The straps were approximately two to three feet apart.

3. On March 2, 2020, during the last delivery, Claimant had to open the curtain for the forklift to get to the materials to unload the truck. As he was pulling the curtain open, he grabbed the straps and pulled at about chest height, when he felt a tear and ripping sensation in his right shoulder, as well as a lot of pain. He was able to complete his delivery and reported the injury to his supervisor when he returned to the Employer yard.

4. On March 3, 2020 Claimant sought medical attention because of the pain. He was having difficulty raising his arm and was in a lot of pain. He took over the counter medication to help.

5. He was attended by Jonathan Joslyn, PA-C at Concentra on March 3, 2020 and reported that Claimant felt a rip in his right shoulder and upper arm, was having difficulty with sleeping at night, was now hard to move the arm above the shoulder level and any use was exacerbating his shoulder pain. He provided a history of pulling a curtain side trailer curtain that got caught pulling right arm, injuring his right shoulder, reporting constant pain. On physical exam Claimant had tenderness in the lateral shoulder and in the posterior shoulder and though he had full range of motion, it was with pain. He was diagnosed with a right shoulder strain, provided with medications and ordered physical therapy. Mr. Joslyn stated that the mechanism of injury appeared to be consistent with the mechanism of injury and returned Claimant to modified duty. Dr. Amanda Cava approved the report. Dr. Cava also completed a Physician's Report of Workers' Compensation Injury on March 6, 2020, continuing the same restrictions.

6. On March 5, 2020 physical therapist Darwin Abrams documented right shoulder pain with weakness, moderate tenderness in the infraspinatus muscle and tender points over the infraspinatus..

7. Dr. Theodore Villavicencio of Concentra evaluated Claimant on March 7, 2020, who documented the same history and continued medical restrictions. On exam he found tenderness in the lateral shoulder and in the posterior shoulder, full range of motion with pain, forward flexion with pain, abduction with pain, external rotation with pain and pain in the lateral shoulder.

8. Therapist Joshua Strough also documented tenderness over the infraspinatus and some soreness and achiness on March 12, 2020. He noted that Claimant had been given work restrictions by the treating medical provider which limited his participation in one or more essential job functions, only achieving up to fifty percent of his physical therapy goal. Claimant reported that he had some decrease in symptoms with therapy which included massage therapy, reeducation, therapeutic exercises and instruction with a TheraBand.

9. Claimant was evaluated by PA-C Lisa Grimaldi on March 13, 2020 who noted Claimant had tenderness in the lateral shoulder and in the posterior shoulder, with abnormal flexion at 105 degrees with pain, abduction of 95 degrees with pain, external rotation with pain and pain in the lateral shoulder. Claimant reported that he was 40% better since starting PT, but he still had a difficult time moving or lifting his arm above his shoulder.

10. Dr. Kenneth Birge documented on March 20, 2020 that Claimant was continuing to improve, and had more movement, attributing it to the therapy he was receiving. However, he documented that Claimant had abnormal flexion, extension, abduction and adduction of the right shoulder. The notes do not indicate whether this is passive or active range of motion. Dr. Birge stated that Claimant was only fifty percent

towards his goals at this point, which was also reported by therapist Strough on March 26, 2020.

11. On March 27, 2020 Dr. Grimaldi stated that he had made good strides with physical therapy in reaching a full range of motion with pain at the extremes of motion. Again, this does not specify whether it was passive or active range of motion. She did report mild to moderate pain depending on position of the right shoulder. While she did release Claimant to full duty, she also prescribed pain medication on that day to be taken three to four times a day.

12. Therapist Natasha Shkrobor reported on March 27, 2020 Claimant was sore after the prior day's physical therapy and stated that Claimant had only reached 50% of his therapy goal. Claimant continued with therapy with Mr. Strough on April 2, 2020. Claimant continued to report aching in his shoulder, which Claimant was still very concerned about, though he felt stronger following therapy. Mr. Strogh continued to recommend continued therapy. On April 3, 2020 Claimant continued to state he was doing well but continued to have achiness during the day.

13. Claimant reported having to fasten straps over materials and was feeling soreness in the right shoulder on April 10, 2020. Despite that, he was discharged from physical therapy.

14. On April 14, 2020 Mr. Joslyn, the physician assistant, reported that Claimant continued to have constant pain in his right shoulder but that therapy was helping. Claimant continued to work but only on flat bed trailers and was concerned about returning to work using curtain trailers. He was still taking ibuprofen and using gel, which were helpful. While Claimant was able to perform the work and be functional, he continued to have achiness in the shoulder and was "not at end of healing." Dr. Cava reviewed the chart and agreed that Claimant was making progress.

15. On April 28, 2020 Mr. Joslyn reported that Claimant had improvement overall but was still feeling limited with pulling straps with a crowbar, which he used to do easily one handed. Claimant reported that now he was having difficulty performing the strap work even with both hands, was working almost full duty but had not tried a curtain truck yet. He reported constant ache in the right shoulder with a pain score of 5/10 level and on exam Mr. Joslyn found tenderness in the deltoid and in the lateral shoulder. Mr. Joslyn continued medications and stated that Claimant was progressing somewhat slower than expected, had pain with exertion and would consider an MRI or injection if Claimant did not show further improvement by the next visit.

16. Dr. Jeffrey Peterson reevaluated Claimant on May 12, 2020 for follow-up of the right shoulder strain. He noted Claimant was working but had deep aching pain during the day and especially at night which was disconcerting. Dr. Peterson discussed the mechanism of injury where he was closing a curtain, met resistance, and immediately had a sharp/searing pain in shoulder. This had not abated. He noted he was right handed and must switch to left hand use regularly due to the constant right shoulder pain. On exam, Dr. Peterson found abduction/adduction pain along the supraspinatus track as well

as the interface between the anterior and middle deltoid body. The rotator cuff evaluation showed external rotation pain with slight limitation but no gross deficits to ROM evaluation of the shoulder girdle. He noted that pain was constant and sharp. Dr. Peterson ordered an MRI of the right shoulder and returned Claimant to modified activities.

17. On May 19, 2020 Dr. Eduardo Seda of Health Images read the Claimant's MRI of the right shoulder, which revealed a full thickness tear of the infraspinatus and supraspinatus of 19 mm (less than 2 cm). It showed a bicep tendon tear, AC arthrosis and no significant muscle atrophy.

18. On May 22, 2020 Dr. Peterson stated that Claimant was awaiting a specialist evaluation. At that time he assessed a traumatic tear of the supraspinatus and infraspinatus tendons of the right shoulder.

19. On May 28, 2020 Claimant had his first visit with Dr. John Papilion, an orthopedic specialist, who documented that Claimant was pulling a curtain that caught, and he felt a tearing sensation in his right anterolateral shoulder. He reported that Claimant had constant ache as well as significant weakness lifting away from the body and overhead, and that it bothered him at night. Claimant reported some improvement with physical therapy but continued to have symptoms. He also documented Claimant's prior history of a bicep injury approximately 20 years prior, which resulted in a popeyed deformity. On exam, Dr. Papilion found that Claimant had a markedly positive drop arm test with significant weakness in the supra and infraspinatus. He reviewed the MRI films, which revealed a full-thickness tear of the supraspinatus with retraction to the mid humerus. There was no muscular atrophy or fatty infiltration indicative of a chronic tear and only minimal degenerative changes in the AC joint. Following discussion with Claimant he recommended proceeding with arthroscopic surgery including subacromial decompression, debridement of the labrum and biceps stump and rotator cuff repair. Dr. Papilion provided further limited work status.

20. Dr. Peterson reevaluated Claimant on June 9, 2020, stating Claimant was awaiting rotator cuff surgery. On July 6, 2020 Dr. Peterson documented Claimant's surgery was scheduled for July 13, 2020.

21. Claimant proceeded with the arthroscopic surgery of the massive rotator cuff tear of the right shoulder on July 13, 2020. Dr. Papilion noted that he performed an exam under anesthesia, including video arthroscopy, arthroscopic debridement of the biceps stump, superior labrum, and rotator cuff, an arthroscopic subacromial decompression wit release of coracoacromial ligament, and arthroscopic repair of the RCT, supraspinatus and infraspinatus. He noted in the operative report that the massive rotator cuff tear was of a large 5 cm tear that was retracted to the mid humeral head but was able to mobilize by dissecting all the way back to the scapular spine. He stated that the tissue quality was good and was able to achieve primary repair, did not require a graft augmentation, but due to the massive extent of the tear, the procedure took twice as long as expected.

22. Dr. Papilion reported on July 23, 2020 that Claimant was recovering post-surgery though was still in an immobilizer and was having difficulty sleeping but that his pain was under control. He noted that Claimant had had a large full thickness rotator cuff tear. He recommended passive range of motion therapy and cautioned Claimant against lifting and no use of the right arm.

23. Claimant had multiple sessions of physical therapy, all of which indicated that Claimant was progressing in therapy as anticipated with complaints of pain.

24. On August 20, 2020 Dr. Papilion stated also that he was to progress to more active therapy, but continued with the restriction of no use of the right arm.

25. Claimant returned to Dr. Peterson on September 4, 2020 for examination. He noted that there appeared to be supraspinatus atrophy at this point but no AC joint hypertrophy or distal clavicle or midshaft clavicle deformity, nor superior migration of the proximal portion of the clavicle, AC joint step-off, dislocation, ecchymosis, effusion, erythema, skin blanching, skin tenting, scapular winging or swelling. He found limited range of motion in all planes without pain and noted that Claimant would have significant difficulties with the physical requirements of his Job. Claimant continued with physical therapy.

26. On October 10, 2020 Dr. Papilion stated that Claimant continued to show some improvement post-surgery. He recommended continuing physical therapy, topical medications and lifted restrictions to light work, return to commercial driving with no overhead.

27. The October 13, 2020 therapy notes showed that Claimant's progress was slower than expected, with standing exercises bringing to light aberrant motion patterns that were addressed with verbal and tactile cues. Weight and resistance were introduced with gravity and tolerated well to fatigue. AROM improved in gravity minimized position. The therapist indicated that Claimant was tolerating the therapy well though overall progress was slower than expected.

28. Dr. Papilion examined Claimant on November 5, 2020 and stated that Claimant had persistent weakness in the supraspinatus with mildly positive drop-arm test with weakness in the infraspinatus and external rotation lag. He was concerned that there might be a recurrent tear or a residual tear. He ordered a follow up MRI to evaluate and discussed with Claimant the possibility of a reverse shoulder arthroplasty.

29. On November 7, 2020 Dr. Eduardo Seda read the Claimant's new MRI findings as re-tear of the interval rotator cuff repair at the supraspinatus without suture anchor distraction and moderate residual tendinosis in the subscapularis and infraspinatus.

30. Claimant was attended by Christian Updike, M.D. at Concentra on November 9, 2020 and found joint pain, muscle pain, muscle weakness and night pain. He stated that this patient was new to him and that the MRI was not yet available. He discussed that probability of re-tear of the right rotator cuff and counselled him on smoking

cessation. On exam Claimant had "POSITIVE can test, unable to ABDUCT above shoulder."

31. On November 12, 2020 Dr. Papilion advised Dr. Updike that the MRI "as expected reveals a large recurrent tear with retraction to the mid humeral head. There is early atrophy in the supraspinatus muscle. The subscapularis is intact. There is proximal migration of the humeral head consistent with early cuff arthropathy." On exam there was a markedly positive drop-arm test and significant weakness in the supra and infraspinatus. Dr. Papilion recommended a reverse shoulder arthroplasty.

32. Respondents sent Claimant's medical records for a record review by Dr. William Ciccone II, an orthopedic consultant who completed a report on November 23, 2020. Dr. Ciccone opined that Claimant had suffered a minor sprain/strain of the right shoulder and was at maximum medical improvement by April 28, 2020 as he had achieve his physical therapy goals, had full range of motion and the shoulder was only painful upon exertion. Dr. Ciccone was also under the mistaken belief that Claimant had returned to full duty without limitations. He conjectured that since Claimant had a prior bicep injury, there was history of prior shoulder injury. He stated that based on the operative report one could make an argument that since the RTC was stiff, the damage to the rotator cuff tendon was not an acute, but a chronic condition. He opined that the rotator cuff pathology was preexisting and not acute or caused by the work-related incident of March 2, 2020. Dr. Ciccone is not credible in this matter.

33. On December 3, 2020 Dr. Papilion appealed the denial of surgery stating as follows:

> Al though, there was a 2-month delay in getting an MRI. Once this MRI was performed, it revealed a full-thickness tear about 2 cm with retraction to the acromial edge. There was no evidence for muscular atrophy and this is all consistent with an acute full-thickness tear in the rotator cuff. This is even admitted by Dr. Ciccone in his review.
>
> In addition, Dr. Ciccone opines that [Claimant] is a. candidate for reverse shoulder arthroplasty due to the failed nature of his rotator cuff tear with evidence for now muscular atrophy and further retraction with proximal migration, all consistent with rotator cuff arthropathy.
>
> On exam today, wounds are all well healed. There are abnormal contours in the biceps, which are chronic. He can flex and abduct only to 70 degrees. Markedly positive drop-arm test. Significant weakness in the supra and infraspinatus with an external rotation lag of about 20 degrees. There is pain with attempted lifting.
>
> It is my opinion and clear in the medical records that [Claimant] sustained a significant injury in the work-related incident of 03/02/2020. This is evidenced by an MRI 2 months after the injury, which showed an acute large tear in the rotator cuff without evidence for chronicity. He underwent arthroscopy and rotator cuff repair, which has gone on to fail. I continue to recommend a reverse total shoulder arthroplasty as definitive treatment in this 67-year-old male with rotator cuff arthropathy.
>
> I respectfully request that you reconsider surgical authorization.

34. Dr. Ciccone authored a second report on December 18, 2020 disputing treaters' assessment of the work-related nature of the injury based, not on imaging, but on the clinical findings of the physician assistant and therapist indicating full or near full range of motion in the days following the injury, which he opined were not consistent with an acute tear but a chronic tear. He stated that the reverser total shoulder arthroplasty was not related to the work related incident. Again, Dr. Ciccone is not found persuasive.

35. Dr. Updike continued to follow up on December 30, 2020 noting that Dr. Papilion continued to recommend right total reverse arthropathy. He discussed workers' compensation process of denial of surgery. He was also advised to keep any upcoming appointments with Concentra, was returned to modified duty with no commercial driving. stated that the work-related mechanism of injury was consistent with the objective findings, and was referred to a second orthopedic opinion. This ALJ infers that the Concentra medical team agreed on the causation analysis that Claimant's RCT was related to the March 2, 2020 event.

36. Claimant returned to consult Dr. Papilion on January 5, 2021 with regard to the right shoulder. He noted that he recommended a total reverse arthroplasty, which had been denied and appealed without success. He documented Claimant continued to have weakness and loss of motion, and had been unable to return to work as a long haul truck driver. On functional testing on the right Claimant had a positive drop-arm test, positive empty can test and positive Jobe test.[1] He also had a positive Hawkins-Kennedy impingement test, (R) and positive Neer impingement test, (R). Dr. Papilion stated Claimant:

> .. has a massive recurrent rotator cuff tear in his right shoulder. He has failed conservative treatment. This is not felt to be a repairable rotator cuff. He has significant symptoms of weakness loss of motion. I believe he is an excellent candidate for reverse shoulder arthroplasty. This has been denied by his Worker's Comp. insurance company. He has a hearing pending. He is not able to work. We will proceed with putting this through his private health insurance and schedule for reverse shoulder arthroplasty. The risks and benefits of operative versus nonoperative treatment were discussed

37. On January 20, 2021 Claimant was seen by orthopedic surgeon, John Schwappach, who reviewed the records, including those from Cencentra, Dr. Updike and Dr. Papilion, both of whom continued to recommend a reverse total shoulder arthroplasty, and the MRI results. He noted that the November 7, 2020 images showed a re-torn rotator cuff repair at the supraspinatus tendon in a midsubstance tear without suture anchor distraction. There was moderate residual tendinosis in the subscapularis and infraspinatus. The biceps tendon had torn from the anchor and there was stable AC joint arthritis. On physical exam Claimant demonstrated an inability to actively abduct his right arm past 90 degrees. He had weakness in right shoulder internal rotation. Dr. Schwappach diagnosed traumatic re-tear of the supraspinatus tendon of his right shoulder. He further stated as follows:

[1] Tests to determine tendon and rotator cuff pathology.

> After discussing with Claimant the risks and benefits of both operative and nonoperative treatment, his current level of function and various ways he has tried to adapt, it becomes clear to me that he indicates for a reverse total shoulder arthroplasty of the right arm. This would be directly related to his failed rotator cuff repair, which was exquisitely done by Dr. Papilion. As such, this should be covered under workers ' compensation system. I believe that he reaches all of the State of Colorado Guidelines for reverse total shoulder and the same should be offered to him.

38. Multiple treating provider records continued to show recommendations for the right total shoulder arthroplasty despite denial and delay due to litigation. Claimant's restrictions were kept in place, continued to follow up and provide ongoing medications.

39. Claimant proceeded with the right shoulder arthroplasty on March 31, 2021 by Dr. Papilion. The operative report stated that the diagnosis was a massive recurrent rotator cuff tear with rotator cuff arthropathy of the right shoulder.

40. On April 7, 2021 Dr. Updike stated that Claimant was not at maximum medical improvement, continued to be unable to work, and that his objective findings were consistent with history of work-related mechanism of injury. On April 28, 2021 Dr. Updike reported that Claimant was status post-surgery, reported no new concerns, pain was better, performing physical therapy at Dr. Papilion's office, mostly passive and wearing a sling.

41. A last Supplemental Report authorized by Dr. Ciccone was issued on May 12, 2021. He opined that the presence of a tangent sign on the MRI of May 19, 2020 were confirmatory that Claimant had preexisting pathology as a positive "tangent sign" is a predictor of chronic irreparable rotator cuff tear, which would not be present if the tear had been acute. Dr. Ciccone further stated that "While I would agree that in a 67-year-old with a chronic rotator cuff tear that failed arthroscopic repair is a candidate for reverse arthroplasty, I do not believe that the potential need for the procedure is causally related to a work injury."

42. Dr. Cava took over care again as of May 27, 2021 and continued the prior care providers' recommended course of physical therapy, restrictions and stated that Claimant's objective findings were consistent with history of work-related mechanism of injury. This continued through at least October 4, 2021, when Dr. Cava stated that she did not anticipate Claimant reaching MMI for another three months approximately.

43. Claimant testified that, while therapy did help significantly in getting him stronger, the weakness did not go away when he was originally returned to full duty at the end of March, 2020. By the end of the day he would continue to feel weak and had a hard time raising his arms, especially when he had to throw the straps over the flat bed trailers and tie them down. Also, he stated that the doctors and therapists had no problems lifting his arm, but when he did it he could reach a certain point and then he could raise it no farther. And while he had a full release, he did not return to work with curtain trailers, only flatbed trailers as he would not have been able to open and close the curtains, so he was limited to local driving only, not long haul driving. Claimant assured that since the March 2, 2020 date of injury, he has not had one pain free day or recovered

his strength, neither has he returned to doing activities with his family in the same manner including sporting get-togethers and yardwork with his wife. Claimant is credible.

44. Dr. Papilion testified at hearing that over the last thirty one years he has evaluated thousands of patients with shoulder pathology, including acute injuries, acute on chronic as well as degenerative conditions. He has noted a variety of patient complaints in a wide range of reports with regard to strength, weakness and motion, from anywhere from completely debilitating small tears to full range of motion patients with large tears. Dr. Papilion testified consistent with his reports above regarding Claimant's weakness and drop arm tests, which were also consistent with a full thickness tear of the supraspinatus tendon.

45. He reviewed the diagnostic films himself, noting that the surrounding structures to the tear on the axial and coronal views, did not show atrophy, also called fatty infiltration, justifying his recommendation for the a arthroscopic repair of the rotator cuff. While he stated that the supraspinatus muscle was not attached and was not a normal muscle, neither was there any chronic rotator cuff tear, but an acute tear amenable to repair, as arthroscopic procedures are the first line treatment for a 2 cm tear.

46. However, Dr. Papilion confirmed that when he performed the July 13, 2020 arthroscopic procedure, he found that the tendon tear was actually 5 cm in length instead of the 2 cm tear he was expecting based on the MRI films. He also examined the area for arthritis and atrophy and found none, nor any pathology that would denote a chronic condition. Dr. Papilion opined that since Claimant progressed in physical therapy and returned to work, that it was possible that the initial acute tear caused by the March 2, 2020 incident grew from the time of the injury to the time of the MRI, and certainly from the time of the MRI to the time of the surgery.

47. Dr. Papillion explain that a reverse total shoulder procedure is a salvage procedure because it replaces the ball and socket with metal and plastic, putting the ball where the socket was and the socket where the ball normally resides, placing the majority of the function on the deltoid muscle to activate the movement of the arm. Dr. Papilion explained that it was not uncommon to have a failed arthroscopic repair. It happens and that is when one considers the more drastic total reverse arthroplasty, such as in Claimant's case. Dr. Papilion opined that it was nothing that Claimant did in the interim between the first surgery and the November 7, 2020 MRI. Re-tears just happen this way that the tissue is not strong enough and re-tears in approximately 50% of cases. During the March 31, 2020 procedure, Dr. Papillion now found atrophy as the muscle that had not been functioning for a long time. He found the suture knots there, the tear massive and was now retracted almost over to the glenoid rim, and probably had no chance of revision of rotator cuff re-tear.

48. He also explained that he thought the positive tangent sign that Dr. Ciccone referenced was present in the first MRI. But considering Claimant's exam, history, verbal interview, medical records, Dr. Papilion made a causation analysis based on the whole picture, not just the MRI, which is only one of the tools that needed to be considered. And while Claimant had a positive tangent sign, it in and of itself was not a complete predictor

of atrophy in this case as many individuals have a different anatomical composition and atrophy simply means “smaller than it used to be because it is not being used,” and Claimant had not been using the muscle due to the tear.

49. Dr. Papilion stated as follows:

> [Claimant] has done this work [commercial driver and deliveries] for 40 plus years. He's thrown those curtains on a daily basis. He could have had some rotator cuff pathology, but the fact is that he was fully functional and didn't have any symptoms, never sought medical care, performed his full duty, and he had an episode; a documented injury that he reported, and he had changes in his exam, changes in his symptoms. That all supports an acute injury, whether or not there was some underlying chronicity…. In this case, I don't think that was the effect, because I don't think this was a minor injury. I think it was a substantial injury.

50. Lastly, Dr. Papilion stated that the medical records following the work related incident are reflective of a Claimant that had conservative care in accordance with the Guidelines and the standard of care, probably had some bleeding of the tendon upon tearing but with anti-inflammatories, modified work and limiting overhead activities, exercise, mobilization, the inflammation abated and Claimant was able to achieve better or even full range of motion, none of which is uncommon for an individual with a rotator cuff tear. Dr. Papilion completely disagreed with Dr. Ciccone’s opinion that Claimant had returned to baseline by April 28, 2020 as he continued to have difficult with doing activities overhead and a substantial portion of his job, such as using curtain trailers, he was not back to his pre injury status, had not had a full trial back to full work, where he was using his shoulder to pull the curtains. Dr. Papilion opined that Claimant had clearly had a mechanism of injury consistent with an acute tear of the rotator cuff on March 2, 2020. He continued to benefit from the total reverse arthroplasty, though it was not a spectacular result, he continued to improve and was not at maximum medical improvement at the time of the hearing. Dr. Papilion is credible.

51. Dr. Ciccone testified during a deposition on November 23, 2020 post-hearing. He testified consistent with his three medical records review reports. Dr. Ciccone’s opinions that the July 13, 2020 and the March 31, 2021 surgeries were not related to the March 2, 2020 event are not credible. Neither is his interpretation of the diagnostic testing or testimony regarding preexisting atrophy.

52. Dr. Papilion’s opinion that Claimant suffered from a specific incident that caused the right rotator cuff full thickness tear on March 2, 2020 is credible.

53. The arthroscopy surgery performed on July 13, 2020 by Dr. Papilion to treat Claimant’s supraspinatus full thickness tear was reasonably necessary and related based on the circumstances and information both available and known at the time.

54. Dr. Papilion’s opinion that the March 31, 2021 right shoulder total reverse arthroplasty was reasonably necessary and related to the March 2, 2020 accident is persuasive and credible.

55. Claimant proved that the right shoulder total reverse arthroplasty was reasonably necessary and related to the March 2, 2020 incident in order to cure and relieve Claimant from the effects of the compensable injury.

## 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 *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 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. Medical Benefits:

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See*

*City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

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

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

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

Claimant alleged that surgery recommended and performed by Dr. Papilion for the right total shoulder arthroplasty was reasonably necessary and related to the work injury of March 2, 2020. Respondents argue that while it may be reasonably necessary it is not related to the March 2, 2020 injury as they alleged the injury involved only a minor strain. Respondents further argue that neither the arthroscopic surgery performed on July 13, 2020 nor the total shoulder arthroplasty performed on March 31, 2021 was related the accident of March 2, 2020 but were performed for the underlying preexisting or degenerative chronic condition.

However, a preexisting 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. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

As found here, Claimant was a sixty eight year old commercial delivery driver of a large tractor trailer performing heavy tasks such as tying down construction materials on flatbeds and opening and closing heavy side curtains on trailers for approximately eight years for Employer and many year before that. As further found, Claimant did not have any problems performing any of the jobs he was assigned prior to the March 2, 2020 work related injury. Whether, the rotator cuff pathology started as a small tear on March 2, 2020 and became increasingly worse over the subsequent months or Claimant had an asymptomatic underlying condition that became symptomatic and was aggravated when he attempted to pull the side curtains of the trailer is not a question that can be determined easily because there was no evidence of symptoms or medical records prior to March 2, 2020. What is clear, and is so found, is that Claimant is credible and did not have problems before the incident when he was pulling on the straps, felt a tear in his shoulder and started having pain symptoms in his right shoulder and had none before this time. What is also clear to this ALJ is that Claimant is a stoic gentleman that probably does not complain of pain easily or readily. Claimant is found credible.

The medical records as a whole also support Claimant's testimony. While Respondents' expert attempted to reason out the findings of the first month's initial examinations, loss of range of motion, findings on MRI, Dr. Papilion is vastly more persuasive and credible than the contrary opinions of Dr. Ciccone. Both Dr. Seda and Dr. Papilion interpreted the MRI film of May 19, 2020 as clearly showing a full thickness tear of the supraspinatus tendon of approximately 2 cm and no muscle atrophy. During the July 13, 2020 arthroscopy Dr. Papilion found a 5 cm supraspinatus full thickness tear, which he was not expecting based on the MRI films and did not detect any atrophy. Dr. Papilion, in fact, stated that the surgery took approximately twice what it was supposed to because of the massive tear but that he was able to mobilize the tendon nonetheless during surgery. While, in retrospect, had Dr. Papilion known about the massive tear he may have elected to perform the total reverse shoulder arthroplasty surgery instead of the arthroscopy initially, but it did not lessen the Claimant's need for the total reverse shoulder surgery. The subsequent November 7, 2020 MRI findings as read by Dr. Seda, Dr. Schwappach and Dr. Papilion clarified the need for the surgery because the Claimant had a retorn supraspinatus tendon which caused continuing and unremitting symptoms as documented in the Concentra records as well as by Dr. Papilion and Dr. Schwappach. Dr. Papilion was persuasive and credible. He looked at the whole picture, the clinical findings on exam, the films, and review of the records as well as the history provided by Claimant, Claimant's longevity on the job and the type of work he performed. Claimant has shown by a preponderance of the evidence that the right total reverse shoulder arthroplasty was reasonably necessary and related to the March 2, 2020 work related accident.

## ORDER

IT IS THEREFORE ORDERED:

1. The right shoulder total reverse arthroplasty surgery performed by Dr., John Papilion on March 31, 2021 was reasonable, necessary and related to the admitted March 2, 2020 injury.

2. Respondents shall pay for that reverse arthroplasty surgery procedure and related expenses incurred by Claimant and his authorized treating providers.

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 21st day of January, 2022.

Digital Signature

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

## ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on or about December 19, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left knee, including a left total knee replacement, is reasonable, necessary, and related to the work injury.

## FINDINGS OF FACT

1. The claimant has worked for the employer since September 2007. The claimant's current position is Operator 3. The claimant's job duties include operating a road grader and other equipment, digging culverts, replacing signs, and general road maintenance.

2. The claimant asserts that on or about December 19, 2020, he suffered a left knee injury at work. The claimant also provided testimony regarding an incident in November 2020[1]. The claimant testified that in mid-November 2020, he was getting down from the back of a service truck when he felt a pop in his left knee. The claimant also testified that this felt like a "sprain" and the pain went away. The claimant did not report the November incident to the employer.

3. On December 19, 2020, the claimant was shoveling snow during his shift. While shoveling, he slipped on the ice and caught himself with the snow shovel. During this slip, the claimant felt a pop and pain in his left knee. The claimant testified that this incident was different from the one in November and he reported this incident to his supervisors. He was then instructed to seek medical treatment for his knee.

4. The claimant's authorized treating provider (ATP) for this claim is Dr. Albert Krueger. The claimant was first seen by Dr. Krueger on December 28, 2020. The claimant reported that he injured his left knee when he slipped on ice and twisted his knee. On that date, Dr. Krueger opined that the claimant suffered a dislocation of the left patella. He recommenced the quadricep strengthening exercises and over-the-counter pain medication.

[1] The November incident is not at issue in this case. However, the ALJ includes a summary of the claimant's testimony regarding the November incident for clarification of the record.

5. On January 26, 2021, the claimant returned to Dr. Krueger. At that time, the claimant reported continued left knee pain. Dr. Krueger referred the claimant to Dr. Kevin Borchard for an orthopedic consultation.

6. The claimant was first seen by Dr. Borchard on January 29, 2021. On that date, the claimant reported that he injured his left knee when he slipped and twisted the knee. On exam, Dr. Borchard noted effusion, crepitus, and pain. Dr. Borchard opined that the claimant suffered an acute injury on top of chronic degenerative changes in the knee. On that date, Dr. Borchard administered a corticosteroid injection to the claimant's left knee.

7. The claimant testified that the injection provided more than four weeks of pain relief. However the pain returned and the claimant requested an additional injection from Dr. Bourchard.

8. On March 16, 2021, the claimant returned to Dr. Borchard. At that time, the claimant reported that his left knee pain was primarily along the lateral joint line. Dr. Borchard noted effusion, range of motion limited to 120 degrees, and lateral joint line tenderness. Dr. Borchard recommended that the claimant undergo a magnetic resonance image (MRI) of his left knee.

9. On March 23, 2021, the claimant underwent an MRI of his left knee. The MRI showed patellofemoral grade 4 chondromalacia with subjacent marrow edema and a cyst; a small joint effusion; and a radial tear at the medial meniscus posterior horn root junction.

10. On April 6, 2021, the claimant returned to Dr. Borchard. On that date, Dr. Borchard discussed the MRI findings and identified the claimant's left knee diagnoses as medial and lateral meniscus tears and patellofemoral osteoarthritis. Dr. Borchard recommended a left total knee arthroplasty.

11. During this same time period, Dr. Borchard was also providing care for the claimant's right knee. The right knee is not part of this claim. Dr. Borchard has recommended that the claimant also undergo a right total knee arthroplasty, outside of the workers' compensation system.

12. At the request of the respondents, on June 15, 2021, the claimant attended an independent medical examination (IME) with Dr. Timothy O'Brien. In connection with the IME, Dr. O'Brien reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his June 28, 2021 IME report, Dr. O'Brien opined that the December 19, 2020 incident was "a very minor, self-healing, self-limited knee strain or sprain". Dr. O'Brien further opined that the claimant was already a candidate for a left knee replacement prior to his minor December 19, 2020 injury. In support of these opinions, Dr. O'Brien noted that the claimant's left knee MRI is normal for his age.

13. On September 30, 2021, Dr. Borchard authored a letter in which he confirmed that the left knee MRI showed a lateral meniscus tear and a medial meniscus tear. Dr. Borchard opined that these tears were acute and caused by the twisting injury when the claimant slipped on ice. Dr. Borchard further opined that, given the condition of the claimant's left knee, a total knee replacement is the most reliable surgery to address the claimant's pain complaints from the meniscus tears.

14. On October 19, 2021, Dr. Kruger authored a letter in which he opined that when the claimant slipped on ice and twisted his left knee, that incident triggered the need for left knee surgery.

15. Dr. O'Brien's deposition testimony was consistent with his written report. Dr. O'Brien testified that the claimant suffered a minor left knee strain/sprain that had resolved. Dr. O'Brien further testified that the recommended knee replacement surgery is intended to address the arthritis in the claimant's left knee. Dr. O'Brien also testified that there are traumatic events that can accelerate an arthritic condition. The type of traumatic event would either be a high energy injury or an injury involving planting the foot and pivoting. It is Dr. O'Brien's opinion that the claimant's mechanism of injury does not fall into either of these categories.

16. The claimant testified that prior to the November and December 2020 incidents, he had no left knee issues and had not sought treatment for his left knee. The claimant has undergone prior treatment for his right knee, including injections and surgery.

17. The ALJ credits the claimant's testimony regarding the nature and onset of his left knee symptoms. The ALJ also credits the medical records and the opinion of Drs. Borchard and Kruger over the contrary opinions of Dr. O'Brien. The ALJ specifically credits Dr. Borchar's opinion that the claimant suffered an acute injury on top of chronic degenerative changes. The ALJ finds that when the claimant slipped on ice on December 19, 2020 and twisted his left knee, the pre-existing condition in his left knee was aggravated and accelerated, resulting in pain symptoms and the need for medical treatment. Therefore, the ALJ finds that the claimant has successfully demonstrated that it is more likely than not that he suffered an injury to his left knee while at work on December 19, 2020.

18. The ALJ further credits the medical records and the opinion of Drs. Borchard and Kruger over the contrary opinions of Dr. O'Brien. The ALJ finds that the claimant has demonstrated that it is more likely than not that treatment of the claimant's left knee is reasonable, necessary, and related to the work injury. Furthermore, the ALJ credits the opinions of Dr. Borchard and finds that a total left knee replacement is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the 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. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on December 19, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant's pre-existing degenerative left knee condition was aggravated and accelerated by his slip on December 19, 2020. As found, the claimant's testimony, the medical records, and the opinions of Drs. Bouchard and Krueger are credible and persuasive.

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

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that treatment of the claimant's left knee, including a total left knee replacement, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the opinions of Dr. Bouchard are credible and persuasive.

**ORDER**

It is therefore ordered:

1. The claimant suffered a compensable injury to his left knee on December 19, 2020.

2. The respondents shall pay for treatment of the claimant's left knee, including the recommended left total knee replacement, pursuant to the Colorado Medical Fee Schedule.

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

Dated this 24th day of January 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 has shown by a preponderance of the evidence Respondents violated W.C.R.P. Rule 5-5(C)(1) for failure to timely file an Amended General Admission of Liability following receipt of Administrative Law Judge Cannici's June 2, 2021, Findings of Fact, Conclusions of Law, and Order.

II. Whether Respondents have shown by a preponderance of the evidence, that that the violation was cured within 20 days of the claimant's Application for Hearing pursuant to section 8-43-304(4), C.R.S.

III. Whether Claimant has shown by clear and convincing evidence that Respondents knew, or reasonably should have known, that they were in violation.

IV. Whether Claimant proved by clear and convincing evidence that Respondents knew, or reasonably should have known, they were in violation, and what is the applicable penalty period and amount.

## PROCEDURAL HISTORY

Administrative Law Judge Peter J. Cannici issued, Findings of Fact, Conclusions of Law, and Order on June 4, 2021 holding Respondents failed to overcome the opinions of Division Examiner, Dr. Martin Kalevik. He determined that Claimant was not at MMI and required additional treatment for her admitted work related injuries of August 21, 2019.

Claimant filed an Application for Hearing on September 20, 2021listing the issues of penalties for Respondents' alleged failure to file a General Admission of Liability within thirty (30) days of Judge Cannici's June 2, 2021 Order per Rule 5-5(C)(1), requesting penalties pursuant to Sections 8-43-304, C.R.S and 8-43-305, C.R.S.

Respondents filed a Response to Application for Hearing on October 11, 2021 on issue of penalties.

The parties indicated that they attended a separate hearing on November 17, 2021 before Administrative Law Judge Steven R. Kabler and were awaiting an order on the issue of change of physician. The parties disputed that this ALJ should either await a decision in that matter or should review the order, if any, was issued in that matter.

Claimant also brought up a preliminary matter regarding unanswered discovery sent to Respondents' on September 30, 2021 and why Respondents failed to provide responses. Claimant noticed the failure to respond two days prior to hearing. Claimant

moved to extend the time to commence the hearing based on the failure to provide responses to discovery. Respondents' objected to the motion stating that Claimant failed to identify the failure to respond in connection with this hearing as Claimant had multiple claims and had had multiple hearing in connection with this particular claim, which also included multiple responses to discovery. Respondents stated that, had this been brought up in a timely manner, that Respondents would have been able to provide the requested responses. Respondents argued that pursuant to C.R.C.P. Rule 37(a) Claimant was required to file a motion to compel or set it for a prehearing in a timely manner, which did not take place. Further, Respondents state that the questions that Claimant submitted included requests for any testimony of witnesses, but they are not calling any witness, a request for exhibits, all of which are included in Claimant's Exhibit packet, questions that fall under Attorney-Client privilege, as well as requests for admission, which they dispute are appropriate under the Workers' Compensation Rules of Procedure. Claimant read into the record the types of questions that were specifically tailored to the issues set for hearing. This ALJ Considered the arguments of the parties, determined that there was insufficient basis for an extension and denied Claimant's motion for extension of time.

Respondents agreed that they received ALJ Cannici's Findings of Fact, Conclusions of Law and Order, and that the General Admission of Liability was not filed until September 27, 2021, well beyond 30 days after the order was issued.

## FINDINGS OF FACT

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

1. Claimant was injured in the course and scope of her employment with Employer on August 21, 2019.

2. She was placed at maximum medical improvement (MMI) on November 18, 2019 by Dr. Kathryn Bird at Concentra, the authorized treating physician (ATP).

3. Claimant challenged that decision by seeking a Division of Workers' Compensation Independent Medical Examination (DIME). Dr. Martin Kalevik was assigned as the DIME physician and conducted an examination, issuing a report dated August 27, 2020. Dr. Kalevik determined Claimant was not at MMI and required further medical care.

4. Respondents challenged the decision and ALJ Cannici found on June 4, 2021 Respondents had failed to overcome the determination of the DIME physician that Claimant was not yet at MMI. Respondents did not appeal the decision.

5. On July 1, 2021 Claimant requested Respondents schedule a follow up appointment with the ATP so that Claimant may resume care.

6. Claimant stated that she attempted to contact the ATP for medical care and was declined an appointment multiple times. She stated that the delay in care was a hardship in seeking medical care from an ATP. She stated that she was advised that her claim was closed and could not be provided an appointment.

7. Neither party provided the ATP with a copy of the DIME report issued by Dr. Kalevik to inform the ATP that further medical care was necessary in this matter.

8. Claimant testified that the insurance adjuster scheduled her for a September 7, 2021, demand appointment with Dr. Bird, but that the appointment date and time was sent to her by text messaging. This ALJ infers from the testimony and from counsel's statements that either the adjuster scheduled it or requested that the provider schedule the appointment after providing authorization.

9. Claimant attended the demand appointment on September 7, 2021.[1]

10. Claimant also attended an appointment with her primary care physician to address her work injuries on September 7, 2021. Following the September 7, 2021, demand appointment, Claimant failed to seek additional treatment from Concentra.

11. After September 7, 2021, Claimant sought treatment exclusively from her primary care provider New West Physicians and did not follow up with Dr. Bird or Concentra.

12. Claimant continued to work and lost no time from work.

13. On September 27, 2021 Respondents filed a General Admission of Liability for medical benefits only, as Claimant had no lost time. This was eighty seven days after a thirty day period the Order was issued, if there was a deadline.

14. Based on the facts presented in this case, the ALJ finds that Claimant has failed to show that Respondents were required to file a General Admission of Liability as ALJ Cannici determined that Claimant was not at maximum medical improvement and did not terminate or reduce, increase or change benefits being paid to Claimant in this matter.

15. Also found is that Respondents cured any potential claim for penalty by filing the General Admission of Liability within 20 days of the Application for Hearing.

16. Finally, it is found that the steps taken by Respondents in scheduling the September 7, 2021 follow up appointment with Dr. Bird were objectively reasonable. Respondents' conduct was rationally grounded in law and fact and in accordance with the order issued by ALJ Cannici.

[1] Neither party submitted medical records or other documents to dispute this statement, and a demand letter was not introduced into evidence.

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

## 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 *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 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. Violation of W.C.R.P. Rule 5-5(C)(1)**

Claimant argues that Respondents violated W.C.R.P. Rule 5-5(C)(1) as ALJ Cannici issued a final order on June 2, 2021 finding Respondents had failed to overcome the DIME physician's finding that Claimant was not at MMI and required further care.

W.C.R.P. Rule 5-5(1)(C) states as follows

> (C) Upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation on or prior to the next scheduled date of payment, regardless of the reason for the termination or reduction. An admission shall be filed within 30 days of any resumption or increase of benefits.
>
> (1) Following any order (except for orders which only involve disfigurement) becoming final which alters or awards benefits, an admission consistent with the order shall be timely filed.

W.C.R.P. Rule 5-5(C)(1) requires a new admission to be filed "upon termination or reduction in the amount of compensation." Those circumstances were not present here as Claimant continued to work and lost no time from work so no indemnity payments were due. Rule 5-5(C)(1) requires the filing of an admission after an order "which alters or award benefits" being paid under the WC Act.

The plain reading of the rule, including the phrase 'being paid' leads to the conclusion that no admission was required under the circumstances presented here. See *Miller v. Recob & Associates*, ICAO, WC, 5-001-904-02 (September 17, 2018). Even if Claimant argued the Order increased the amount of benefits being paid (since none were being paid as Claimant continued to work) and therefore an admission was required, no authority was provided in which a Colorado Court held that W.C.R.P. Rule 5-5(C) and 5-5(C)(1) requires an admission to be filed by the insurer or employer after action was taken which fully complied with the order issued by an Administrative Law Judge. Indeed, such an interpretation would require an employer or insurer to file an admission after every order. Claimant failed to show that Respondents were required to file an admission in this matter by an certain deadline.

**C. Penalties**

Under § 8-43-304(1), C.R.S. (2021), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004)

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty

under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with a rule. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo.App.2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]. *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The also ALJ has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, the ALJ was not persuaded there was a violation of the rules cited by Claimant. Stated another way, Claimant did not prove these rules mandated the filing of an admission in this case. The ALJ also considered the argument that the case of *Edward Flake v. JE Dunn Construction Co.,* W.C. 4-997-403-03 (ICAO September 19, 2017) provided a basis for penalties to be imposed in the case. That case was factually distinct in that Respondents initially provided medical benefits to Claimant then filed a Final Admission of Liability after being placed at MMI without impairment but no DIME was requested.

Even if Respondents were required to file an admission, Respondents acted reasonably in scheduling a follow up with Dr. Bird for September 7, 2021, which Claimant attended. The fact that Dr. Bird failed to understand the nature of the follow up appointment because neither party provided Dr. Bird with information that was critical,

including ALJ Cannici's order or the DIME report issued by Dr. Kalevik, does not detract from the reasonable steps taken by Respondents in this matter. Claimant had the same opportunity to provide the critical documentation to Dr. Bird as Respondents. Lastly, Claimant failed to follow up with Dr. Bird or Concentra after the September 7, 2021 appointment. Since there is no requirement to file a General Admission of Liability pursuant to W.C.R.P. Rule 5-5(C)(1), there is not circumstances that would require an allocation for a penalty.

Therefore, it is found and concluded that Claimant failed to prove that Respondents acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo.App. 1999). Claimant failed to prove by a preponderance of the evidence that a penalty is due. Therefore, Claimant's claim for penalties are denied and dismissed and all other issues set for this hearing are moot.

## ORDER

IT IS THEREFORE ORDERED:

1. Claimant's requests for penalties for violation of W.C.R.P. Rule 5-5(C)(1) pursuant to Sections 8-43-304 and 305, C.R.S. are denied and dismissed.

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

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DATED this 24th day of January, 2022.

Digital Signature

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 5-118-981-003 and 5-135-641-002**

## ISSUES

I. Consistent with the views expressed by the ICAO, whether Claimant established by a preponderance of the evidence that he sustained permanent impairment to his cervical spine – and if so – the extent of his impairment.

## PROCEDURAL HISTORY

In W.C. 5-118-981, Claimant sustained a work injury on September 7, 2019. The claim was at first denied and Claimant, through counsel, filed an application for hearing dated July 13, 2020, on various issues including, but not limited to, compensability. Respondents provided medical treatment and Claimant was placed at MMI by an authorized treating physician, Dr. Julie Parsons. Before the parties proceeded to hearing on the compensability dispute, Respondents requested a Division IME. Dr. James Regan was selected and confirmed as the DIME physician. Respondents subsequently filed a Final Admission of Liability (no permanent impairment) on October 14, 2020. The Final Admission of Liability was filed before the Division IME took place.

In W.C. 5-135-641, Claimant sustained a work injury on October 21, 2019. Respondents initially denied the claim and Claimant, through counsel, filed an application for hearing dated August 24, 2020, on various issues including, but not limited to, compensability. Again, respondents provided some medical treatment. On October 14, 2020, respondents filed a Final Admission of Liability (no permanent impairment). Claimant objected and requested a Division IME.

Pursuant to various prehearing orders, the claims were consolidated for purposes of the DIME and for the hearing. Therefore, the DIME physician addressed both claims and both claims were heard at the March 26, 2021, hearing.

This ALJ issued an order on May 15, 2021, that denied Claimant permanent partial disability benefits for his cervical and lumbar spine. Claimant only appealed that portion of the order that denied him permanent partial disability benefits for his cervical spine. The ICAO reviewed the May 15, 2021, order regarding the denial of benefits for Claimant's cervical spine. The ICAO set aside the appealed portion of the ALJ's order and remanded the matter for additional findings. The ICAO directed the ALJ to determine whether Claimant established, by a preponderance of the evidence, that he suffered permanent partial disability due to his cervical spine injury. Therefore, this order will only address Claimant's claim for permanent partial disability benefits regarding his cervical spine. Claimant's claim for permanent partial disability benefits for his lumbar spine, which was denied and not appealed, will therefore not be addressed in this order.

In light of the direction provided by the ICAO, the ALJ has reviewed and reweighed the evidence related to Claimant's injury to his cervical spine. In light of such

review and reweighing of the evidence, the ALJ is issuing new findings of fact and conclusions of law for Claimant's cervical spine.

## FINDINGS OF FACT

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

1. On September 7, 2019, Claimant was helping lift heavy equipment – a bucket of water - into the back of a truck which caused him to develop neck pain. (Claimant's Exhibit 6, p. 236)[1] (Respondents' Exhibit G, pp. 175B)

2. On September 12, 2019, Claimant was seen at Advanced Urgent Care by Katie Krueger, PA-C. His safety supervisor was present to provide translation. Claimant, through his supervisor, related that his injury occurred on September 7, 2019, when he was helping carry heavy equipment into a truck and he felt sudden pain in his neck and could not move his head from side to side. He also said that his neck pain continued and was described as shooting pain down into his back with numbness in his fingertips bilaterally. He also complained of symptoms of "pins and needles" and a pain level of 6/10. Claimant further complained that his upper back and shoulders ached. PA Krueger noted that Claimant's neck was stiff and had decreased range of motion. It was also noted that Claimant could not move his head from side to side and when moving his head to the left, he described his back pain increasing to 8/10. Lastly, Claimant denied any prior neck problems. PA Krueger's physical exam documented neck tenderness and pain with motion. Cervical X-rays were ordered and over the counter medication was prescribed. Claimant was instructed to apply heat and ice and to perform gentle stretching/ROM exercises. He was returned to full duty work but was advised to be self-limiting and work as tolerated. Ms. Krueger specifically diagnosed Claimant's neck with (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of cervical muscle of neck. (Claimant's Exhibit 13, pp. 827 - 828; p. 830)

3. On September 19, 2019, Claimant returned to Advanced Urgent Care and was again seen by Katie Krueger, PA-C. He reported that his neck pain continued but felt a little better. He also reported that he had been doing home exercises. On the other hand, turning his neck aggravated his neck and caused shooting pain. His range of motion had increased but remained limited when he turned his head to the left. He continued with "needles and tingling" in his fingers in the morning and sometimes up his left arm during the day. The physical exam showed tenderness of the trapezius and limited range of motion with lateral tilt and rotation. Claimant reported pain with left lateral tilt and rotation. Medical massage for his neck was ordered with continued over the counter medication. He was again returned to full duty work but was advised to self-limit as tolerated. PA Krueger continued to diagnose Claimant with a neck injury as a (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of cervical muscle of neck. (Claimant's Exhibit 13, pp. 833 - 837)

[1] Respondents ultimately admitted liability for the September 7, 2019, claim on October 14, 2020.

4. On October 2, 2019, Claimant was seen at Advanced Urgent Care by Julie Parsons, M.D., for his neck strain. Claimant again reported that his neck was feeling a little better but turning his neck caused shooting pain. The physical exam revealed neck pain with motion and a negative Spurling's maneuver. Physical therapy was ordered and Claimant was returned to full duty. Dr. Parsons reaffirmed Claimant's specific diagnoses of (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 850 - 853)

5. On October 21, 2019, Claimant returned to Advanced Urgent Care and was seen by Katherine Lindsey, NP, for a new injury. According to the medical records, Claimant had fallen that day getting off a truck ladder and rolled his left ankle, landing on his back, and bumping his head very lightly. His chief complaint was left ankle pain, but he also complained of worsening back pain – which he said was from a prior injury. He could not bear any weight on his left ankle. He was prescribed crutches for his ankle and was restricted with limited weightbearing. (Claimant's Exhibit 13, p. 859)

6. On October 23, 2019, Claimant returned to Advanced Urgent Care and saw Dr. Parsons for his neck and new ankle injury. In the WC164 form, she placed Claimant at maximum medical improvement for his October 21, 2019, ankle injury. (Claimant's Exhibit 13, p. 878) As set forth in a second WC164 form, she did not place Claimant at MMI for his September 7, 2019, neck injury. (Claimant's Exhibit 13, p. 874 and 878) His neck was feeling better with massage therapy. The medical notes show that Claimant remained with neck pain with motion. He was returned to full duty as tolerated. Dr. Parsons again diagnosed Claimant's neck injury as (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 871 - 874, p. 924)

7. On November 5, 2019, Claimant's Medical Massage of the Rockies notes state his neck felt better for three days after his last massage. The records indicate Claimant complained of neck pain and stiffness and that he continued to experience numbness and tingling in his hands. The records also say he was experiencing headaches with pain on the right side from his neck to his temple and dizziness. Under objective findings, the therapist noted hypertonicity in Claimant's trapezius and scalene muscles. (Claimant's Exhibit 13, p. 879)

8. On November 7, 2019, Claimant returned to Medical Massage of the Rockies. His complaints of neck pain and stiffness continued. He reported that his neck felt better until that morning. He also reported that his neck was more painful on the left than the right. Numbness, tingling in his hands and dizziness continued. His headaches had improved. It was also noted that the hypertonicity in his trapezius and scalene muscles continued. (Claimant's Exhibit 13, p. 880)

9. On November 11, 2019, Claimant was seen again at Medical Massage of the Rockies. The records state Claimant's neck pain and stiffness continued, but that the last massage improved his symptoms for a couple of days. Claimant still complained that the left side of his neck remained more painful than the right. The

physical examination still documented continued hypertonicity in Claimant's trapezius and scalene muscles. (Claimant's Exhibit 13, p. 881)

10. On November 12, 2019, Claimant returned to Dr. Parson's for additional treatment. It was again noted that his neck pain was improving with medical massage therapy. Claimant was, however, experiencing headaches and had full range of motion but pain with motion. Dr. Parsons continued her diagnoses of Claimant's neck injury as (1) strain of neck muscle, (2) neck pain and (3) muscle spasm of the cervical muscle of his neck. (Claimant's Exhibit 13, pp. 884 - 886)

11. On November 22, 2019, an MRI of Claimant's cervical spine was performed which showed at C6-7 a central disc protrusion with annular tear, moderate spinal stenosis and mild bilateral neural foraminal stenosis. (Claimant's Exhibit 13, pp. 922 – 923)

12. On November 23, 2019, Claimant returned for medical massage. Again, his neck pain had improved for a few days after the massage but the numbness and tingling in his hands continued. The therapist documented that the "insurance called and wants me to NOT work on the neck" anymore. (Claimant's Exhibit 13, p. 924)

13. On November 27, 2019, Claimant returned for follow up with Dr. Parsons for his neck pain. Claimant reported he had been let go from his job. He also stated that his neck felt better with massage, but that the numbness and tingling in his fingers continued as well as his headaches. Consistent with the massage therapy records, Claimant stated that the massage therapy had helped. On physical exam, Dr. Parsons reported decreased range of motion with pain in his neck and limited turning left to right. To the diagnosis of (1) neck strain, (2) neck pain and (3) cervical muscle spasm, Dr. Parsons added (4) spinal stenosis in the cervical region and (5) cervical radiculopathy. Based on the new diagnosis, which included cervical radiculopathy, she prescribed Claimant Prednisone. And based on the new diagnosis, Dr. Parsons referred Claimant to Ascent Medical Consultants for his cervical radiculopathy. (Claimant's Exhibit 13, pp. 927 - 928, 936)

14. On December 17, 2019, Claimant was seen by Dr. Eric Shoemaker at Ascent Medical Consultants. Dr. Shoemaker noted that Claimant's cervical symptoms began on September 7, 2019, while helping a worker lift a case of gallon jugs of liquid. He noted that Claimant reported that his neck pain symptoms were severe. Claimant also stated that prior to his September 7, 2019, injury, he did not have neck symptoms. It was also noted that Claimant's neck pain was located at the cervical thoracic junction radiating into the interscapular region and down his left upper extremity. It was also noted that Claimant's pain in his lateral deltoid and arm extended to his proximal radial forearm and included constant numbness and tingling involving the second and fourth digits. Claimant also complained of nausea, dizziness, and headaches, particularly when lying down. (Claimant's Exhibit 13, p. 939)

15. On that date, Dr. Shoemaker personally reviewed the cervical MRI, noting its low-quality imaging. He noted at the C6-7 level a shallow broad-based posterior

protrusion eccentric to the right. He also noted that assessment of the foramen was not possible due to the low-quality imaging. He stated that the MRI report described at C6-7 a central disc protrusion with annular tear, moderate spinal stenosis, but no abnormal cord signal. He also stated that the MRI report noted minimal diffuse bulge at C5-6 with mild bilateral foraminal stenosis and that there were similar findings at C4-5, but yet the remaining levels were unremarkable. Dr. Shoemaker also performed a physical examination. He noted that Claimant's cervical range of motion was moderately decreased in all planes with a positive right arm Spurling's maneuver indicating cervical radiculopathy from disc compression. Dr. Shoemaker recommended a left paramedian C7-T1 interlaminar epidural steroid injection and noted Claimant was taking gabapentin before work but should continue with the medication before bed instead. Dr. Shoemaker's specific diagnosis for Claimant's neck condition was left C7 radiculitis secondary to a C6-7 disc protrusion causing some canal stenosis and potentially some foraminal stenosis. (Claimant's Exhibit K, pp. 939 - 943)

16. On December 18, 2019, Claimant returned to Dr. Parsons. She recorded that Claimant's neck had limited extension and side to side movement but negative Spurling's maneuver. She assigned 30-pound restrictions. Dr. Parsons diagnosed (1) neck strain, (2) neck pain and (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, pp. 947 - 950)

17. On January 6, 2020, Claimant returned to Dr. Shoemaker for a left paramedian C7-T1 interlaminar epidural injection under fluoroscopy guidance and radiological images for his arm and neck pain. (Claimant's Exhibit 13, pp. 968 - 970)

18. On January 21, 2020, Claimant returned to Dr. Shoemaker. For a week after the injection Claimant stated that he had received 50% improvement overall with almost complete relief of his upper extremity symptoms; however, by the date of this January 21, 2020, visit, he was back at baseline with 0% sustained improvement from the injection. Dr. Shoemaker recommended bilateral upper extremity EMGs and advised Claimant to not drive while taking gabapentin and to only take it at night. (Claimant's Exhibit 13 pp. 1040 - 1043)

19. On January 28, 2020, Claimant returned to Dr. Parsons for additional treatment. He reported that his chief complaint was neck pain and that his numbness, tingling, and headaches continued. Claimant reported that he was working at a new job. A bilateral upper extremity EMG was pending. She returned Claimant to full duty. Dr. Parsons retained her specific diagnoses for Claimant's neck as (1) neck strain, (2) neck pain and (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, pp. 1055 - 1058)

20. On February 3, 2020, Respondents asked for a medical record review by Scott Primack, D.O. about Dr. Shoemaker's request for bilateral upper extremity EMGs. Dr. Primack found the request reasonable. (Claimant's Exhibit 13, pp. 1068 - 1069)

21. On February 15th and 16th of 2020, surveillance video was obtained of Claimant. (Respondents' Exhibit DD, via hyperlinks in the investigative report.) The video shows Claimant walking in a normal manner. Claimant was not walking in a guarded manner as described by Dr. Primack in his May 20, 2020, report. The video also shows Claimant moving his neck with no problems. (Respondents' Exhibit DD and K, p. 218)

22. On February 20, 2020, Claimant returned to Dr. Shoemaker. His EMGs documented moderate bilateral carpal tunnel symptoms, right greater than left but given that his upper extremity symptoms were worse on the left, Dr. Shoemaker suspected that Claimant's left upper extremity symptoms were related to Claimant's specific diagnosis of left C7 radiculitis secondary to left C6-7 disc protrusion causing some canal stenosis and potentially some foraminal stenosis. Dr. Shoemaker noted that Claimant's injury had occurred while doing heavy lifting, and to a reasonable degree of medical certainty Claimant's specific diagnosis of C7 radiculitis secondary to a C6-7 disc protrusion resulted from his work injury. He again instructed Claimant not to drive or operate heavy machinery or work at unprotected heights while taking gabapentin and to take it at night. (Claimant's Exhibit 13, p.1072 - 1074)

23. On February 24, 2020, Claimant returned to Dr. Parsons. His chief complaint was neck pain. She noted the cortisone injections had temporarily helped and that his range of motion had improved. She returned Claimant to full duty and prescribed gabapentin. Dr. Parsons again retained her specific diagnoses for Claimant neck of (1) neck strain, (2) neck pain, (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy. (Claimant's Exhibit 13, p. 1083 - 1086)

24. On March 17, 2020, Claimant returned to Dr. Shoemaker for a follow up evaluation. Claimant's chief complaint is listed as neck pain and Dr. Shoemaker noted Claimant's primary pain at this point is his neck with radiation into the left arm and shoulder. Due to Claimant's persistent radicular symptoms, Dr. Shoemaker recommended a left C7-T1 interlaminar ESI for diagnostic and potentially therapeutic benefit. He continued Claimant on gabapentin 300 mg 2 tablets before bedtime. (Claimant's Exhibit K, p.1165 - 1168)

25. On May 18, 2020, Claimant returned to Dr. Shoemaker. Again, his chief complaint was neck pain. Claimant reported that he had not seen Dr. Parsons since March because of COVID. His symptoms were the same as his last visit on March 17, 2020. His current pain level was a 6/10. His worst pain level in the last few weeks was a 7/10 and his best was 5/10. Claimant found gabapentin useful to manage his pain. He had to limit activities and was working less due to pain. His work was slower. The gabapentin made him drowsy. The cervical epidural steroid injection had been denied and was waiting for a Rule 16 IME review and hoped to be able to move forward with the injection. (Claimant's Exhibit K, pp. 1186 - 1188)

26. On May 20, 2020, Dr. Primack performed an independent medical examination regarding Claimant's neck and back. On physical examination of Claimant's neck, Dr. Primack noted Claimant had full cervical range of motion except with right lateral side bending. He also noted that Claimant walked in a very guarded and slow manner. Dr. Primack stated:

> On today's clinical examination, he does ambulate in a very guarded manner. He has a slowed gait cycle. He has difficulty going into heel strike and toe off bilaterally because of pain. I asked him if that "is how he normally walks." He states that he does not move that fast.

Based on his examination of Claimant's cervical spine and review of the surveillance video, Dr. Primack concluded that there were no clinical findings to support Claimant's claim of ongoing neck problems. Dr. Primack found "no problems whatsoever" regarding Claimant's cervical spine and did not indicate Claimant had any impairment regarding his cervical spine. (Respondents' Exhibit K, pp. 213-221.)

27. The description by Dr. Primack of Claimant's limited ability to move and walk is in stark contrast to the February 2020 surveillance video. The surveillance video of Claimant shows him moving his neck freely and without any limitation. The surveillance video also shows Claimant walking without any problems. (Respondents' Exhibit DD, via hyperlinks in report.)

28. On May 27, 2020, Claimant returned to Advanced Urgent Care after a three-month gap due to COVID and was seen by Laura Lunn McDonough, PA. He reported he made good progress during that time but had plateaued. She returned him to work without restrictions because Claimant believed that he could self-modify as needed. Ms. McDonough planned for Claimant to do full duty without taking gabapentin. (Claimant's Exhibit 13, pp.1200 -1205)

29. On June 16, 2020, Dr. Shoemaker issued a report in which he concluded that Claimant reached MMI for his neck injury on January 6, 2020 and assessed Claimant's impairment. In assessing Claimant's impairment, Dr. Shoemaker considered Dr. Primack's report in which Dr. Primack concluded Claimant did not have any cervical impairment based on his examination and the surveillance video. Dr. Shoemaker disagreed with Dr. Primack's conclusion. In support of his conclusion, Dr. Shoemaker stated that "consistent with Dr. Primack's clinical evaluation the patient has persistent rigidity with range of motion restrictions." But, Dr. Primack did not find decreased cervical range of motion in all planes, Dr. Primack only noted decreased range of motion consisting of "right lateral side bending." On the other hand, Dr. Shoemaker noted – and rated – cervical decreased range of motion in i) flexion, ii) extension, iii) right lateral flexion, iv) left lateral flexion, v) right rotation, and vi) left rotation.

30. Based on the AMA Guides, page 80, table 53.II.B, Dr. Shoemaker assigned Claimant a 4% whole person impairment. He assessed range of motion based on

bubble inclinometers in multiple planes and attached the impairment rating worksheets to his report. Using figure 81 cervical range of motion, page 82, he measured a maximum cervical flexion angle of 22 degrees. Based on table 55, page 88, that measurement translated to a 4% whole person rating. He measured a maximum cervical extension angle of 14 degrees. Based on table 55, page 88, that measurement translated to a 4% whole person rating. He measured a maximum cervical right lateral flexion angle of 20 degrees. Based on table 56, page 90, translated into a 2% whole person rating. He measured a left lateral flexion angle of 16 degrees. Based on table 56, page 90, this translated into a 2% whole person impairment. Dr. Shoemaker measured maximum cervical right rotation angle of 28 degrees was measured. Based on table 57, page 90, this results in a 3% whole person impairment. Maximum cervical left rotation angle of 25 degrees was measured. Based on Table 57, page 90, this gave Claimant a 3% whole person impairment. The range of motion impairments add up to 18% whole person impairment and combined with the Table 54 impairment due to specific disorder resulted in Claimant being provided a 21% whole person impairment. (Claimant's Exhibit 13, pp. 1221 - 1224)

31. When Dr. Shoemaker determined Claimant's impairment on June 16, 2020, Claimant did have more than 6 months of documented pain and rigidity of his cervical spine.

32. However, despite Dr. Primack mentioning the inconsistencies in his examination – and the surveillance video – Dr. Shoemaker did not sufficiently address the inconsistencies in Claimant's range of motion and did not ask to review the surveillance video – and did not review the surveillance video - before providing Claimant an impairment rating for his cervical spine. In other words, the record on which Dr. Shoemaker relied contains inconsistencies regarding Claimant's range of motion and the ALJ finds that Dr. Shoemaker did not adequately address those issues.

33. On September 11, 2020, Dr. Primack issued another report related to his review of the surveillance video. Dr. Primack concluded that the surveillance video showed Claimant moving his cervical spine from side to side. He also noted that Claimant could flex forward at the head without difficulty and that he showed adequate rotation. He also concluded that Claimant did not demonstrate any cervical impairment. Dr. Primack stated:

> I appreciate your need for my analysis of the Oscar Lopez surveillance videos. The first video is almost 60 minutes and the second video are 7 minutes. The first video is from 2/15/2020. Throughout the video, Mr. Lopez was able to ambulate without difficulty and move his cervical spine from side-to-side.
>
> He is able to flex forward at the head without difficulty. He was able to ascend and descend stairs without difficulty. He was able to ambulate with a bag at the level of his right shoulder. At 5:47pm he

> was able to check his truck out with a helmet on his head. At 6:20, he was able to demonstrate adequate rotation.
>
> On, 2/16/2020, he was able to walk without difficulty. He could also use his phone. With phone use there was side bending. Given the mechanism of injuries, the clinical examination, a review of the extensive medical records, and the surveillance videos, there is no evidence of any cervical spine or foot/ankle impairment. The patient does not demonstrate any restrictions or impairment whatsoever.

In the end, Dr. Primack credibly and persuasively concluded Claimant did not demonstrate any impairment or range of motion deficits or restrictions regarding his cervical spine in the surveillance video.

(Respondents' Exhibit K, p. 231)

34. The ALJ finds that the Table 53.II.B 4% impairment rating provided by Dr. Shoemaker is consistent with the AMA Guides and supported by the underlying medical records of Claimant's treating providers, but the range of motion deficits that were rated by Drs. Shoemaker and Regan are not supported by Dr. Primack's assessment and the surveillance video.

35. On October 14, 2020, Respondents filed a Final Admission of Liability for the September 7, 2019, work injury involving Claimant's neck. (Respondents' Exhibits, p. 133.) In support of their admission, Respondents attached the October 23, 2020, reports from Dr. Parsons. The detailed medical report from October 23, 2020, arguably places Claimant at MMI for all conditions, including his neck. (Respondents' Exhibit F, pp. 140-143) However, the October 23, 2020, WC164 form shows Claimant is only being placed at MMI for his October 21, 2019, ankle injury. (Respondents' Exhibit F, p. 144)

36. On December 4, 2020, James Regan, M.D. performed a DIME evaluation. He also considered Dr. Primack's opinion that Claimant had no problems whatsoever with his neck. Without reviewing the surveillance video – or asking to review it - Dr. Regan rejected Dr. Primack's opinion and assigned an impairment rating. Dr. Regan provided Claimant an impairment rating. Based on the AMA Guides, page 80, table 53.II.B, Dr. Regan assigned a 4% whole person impairment. He also assessed range of motion on attached impairment rating worksheets to his report. Using figure 81 cervical range of motion, page 82, he measured a maximum cervical flexion angle of 15 degrees translated to a 4% whole person impairment. Maximum cervical extension angle was 20 degrees which translated to a 4% whole person impairment. Maximum cervical right lateral flexion angle was 20 degrees which translated to 2% whole person impairment. Left lateral flexion angle was 15 degrees which translated to a 2% whole person impairment. Maximum cervical right rotation angle was 30 degrees which translated to a 3% whole person impairment. Maximum cervical left rotation angle was of 35 degrees which translated to 2% whole person impairment. These range of motion impairments add up to 17% whole

person impairment and combine with the Table 54 impairment due to specific disorder to give 20% whole person impairment. (Claimant's Exhibit 1, pp. 1 - 15).

37. Claimant called Dr. Regan to testify at hearing. Ultimately, Dr. Regan retracted his opinion regarding Claimant's impairment rating. At hearing, he concluded that based on the date Claimant was placed at MMI by Dr. Shoemaker, Claimant did not have pain and rigidity, with or without muscle spasm, for 6 months or more, and that an impairment rating was not appropriate under the AMA Guides. Thus, he ultimately concluded that Claimant's impairment rating for his cervical spine was 0%.

38. Respondents called Dr. Scott Primack to testify at hearing. Dr. Primack opined that the cervical injury never happened. He concluded that Dr. Shoemaker's treatment for the cervical spine was based on history and one "can't really treat someone for a neck problem when a neck problem never happened." To Dr. Primack, Claimant's problem with credibility and inconsistency was "most disturbing" and resulted in him not providing Claimant a rating for his cervical spine. (Tr.: p.61, l. 23 through p. 62, l. 6) The ALJ finds Dr. Primack's opinions to be credible and persuasive regarding Claimant's lack of credibility and inconsistencies.

39. Dr. Primack disagreed with any cervical impairment rating because in his opinion Claimant was malingering and consciously misrepresenting his physical capacity. He could not cite from the record any other doctor who agreed with his opinion of malingering and admitted that Dr. Regan did not note evidence of malingering or symptom exaggeration. Dr. Regan testified that "candidly," he did not see any malingering during his DIME examination. He considered Claimant had given an earnest effort and was honest. That said, Dr. Regan did not review the surveillance video or ask to review the surveillance video. (Tr.: p. 140, ll. 2 – 6) Alternatively, Dr. Primack disagreed with Claimant's cervical rating because it was significantly high when comparing the Claimant's level of functioning and referenced his job. (Tr.: p. 85, l. 17 – 23) (Tr.: p. 86, l. 15 through p, 87, l. 2) (Tr.: p. 88, l. 22 through p. 89, l. 10)

40. Claimant's counsel asked Dr. Regan about the significant rating for a cervical spine considering Claimant's supposed level of function at work. Dr. Regan answered that many of his patients are in pain but work because they have to feed their families so just because there is performance does not mean there is no pain. He believed that Claimant had the pain he described but did not have the financial leverage to not work. (Tr.: p. 143, l. l21 through p. 144, l. 8) Asked whether he had adopted Dr. Shoemaker's range of motion measurements, Dr. Regan testified his cervical rating was independent of Dr. Shoemaker's. (Tr.: p. 178, l. 21) Asked how he documented rigidity as required for permanent impairment, Dr. Regan testified that his range of motion is synonymous to rigidity and that Claimant definitely had pain and rigidity for a year and a half between his injury and his range of motion measurements on December 4, 2020. (Tr.: p. 198, ll. 12 – 16; p. 200, l. 18 – p. 201, l. 1)

41. Based on the medical records, Claimant did have documented cervical pain and rigidity for more than 6 months.

42. Based on Claimant's presentation to Dr. Primack - compared to his presentation in the surveillance video – the ALJ does not find Claimant credible as it relates to the extent of his cervical impairment based on any decrease in range of motion due to his work accident. The ALJ finds that Claimant has misrepresented his range of motion deficits. As a result, the ALJ does not find the cervical range of motion measurements obtained by Drs. Shoemaker and Regan to be a true and accurate representation of Claimant's medical impairment that was caused by the work accident.

43. The ALJ finds the difference between Claimant's presentation to Dr. Primack, the range of motion deficits measured by Drs. Shoemaker and Regan and his appearance in the surveillance video to be in stark contrast. It is as if the person Drs. Primack, Shoemaker, and Regan evaluated is different from the person in the video. Moreover, Claimant chose not to testify at the hearing. He therefore did not attempt to explain the stark difference regarding his range of motion as measured by Drs. Shoemaker and Regan and that contained in the video and observed by Dr. Primack. As a result, the ALJ finds that Claimant did not dispute the stark discrepancy between Claimant's presentation to Drs. Primack, Shoemaker, and Regan and his appearance during the surveillance video.

44. The AMA Guides state that in order to provide an impairment rating, the underlying medical record must support the conclusion that there is impairment, and that the impairment is permanent. The AMA Guides provide the following instructions:

> Before formal evaluation is carried out under the Guides, an analysis of the history and course of the medical condition, including the findings on previous examinations, the treatment and responses to treatment, and the impact of the condition on life activities, must support a conclusion that an impairment is permanent and stabilized.
>
> This information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the requirements of the Guides. Once this task is accomplished, the evaluator's findings may be compared with the clinical information already available about the individual. If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the Guides to determine the percentage of impairment
>
> If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until

> communication between the involved physicians or further clinical investigation resolves the disparity.

See AMA Guides, Section 1.2, Structure and Use of the Guides, pg. 3.

45. In this case, Dr. Primack's records and the surveillance video do not support the conclusion that Claimant has permanent impairment based on range of motion – as rated by Drs. Shoemaker and Regan. Moreover, neither Drs. Shoemaker nor Regan communicated with Dr. Primack in any way, or asked to see the surveillance video, to resolve the disparity regarding Claimant's cervical range of motion observed between the doctors and on the surveillance video.

46. As a result, the ALJ does not find the ultimate opinions of Drs. Shoemaker or Regan regarding the impairment rating provided for Claimant's decreased range of motion to be persuasive since their opinions are based on Claimant's presentation – which the ALJ does not find credible. It is self-evident that an opinion based on false information is unreliable and not persuasive.

47. The ALJ has reviewed and reweighed the evidence related to Claimant's cervical spine injury. The ALJ does not find Claimant's representations and presentation regarding his decreased range of motion involving his cervical spine at the time it was measured to be credible. As a result, the ALJ is not crediting the impairment rating associated with Claimant's decreased range of motion based on the opinions of Dr. Primack and the surveillance video.

48. On the other hand, the ALJ does find Claimant's statements to his medical providers about the cause of his cervical spine injury on September 7, 2019, and the duration of some stiffness – rigidity – to be credible. For example, Claimant alleges that before September 7, 2019, he did not have a preexisting neck condition that required medical treatment. A review of the medical records supports such a contention. Second, after his injury, Claimant underwent an MRI that demonstrated a herniated disc. Moreover, Dr. Shoemaker concluded that Claimant's radicular symptoms were consistent with the MRI findings. Third, there was no credible and persuasive evidence that Claimant suffered from a herniated cervical disc before the lifting incident on September 7, 2019, and that it required medical treatment.

49. The ALJ has also considered the fact that the record is not entirely consistent about what Claimant was lifting when he hurt his neck and when his pain developed. The ALJ, however, finds that the essence of Claimant's description is similar. He was lifting something on September 7, 2019, and developed neck pain.

50. The ALJ is mindful that some of these new findings about Claimant's cervical spine are contrary to the ALJ's prior findings. However, after further review, analysis, and reflection, the ALJ believes that Claimant's credibility issues surrounding his back injury and cervical range of motion overly obscured the ALJ's evaluation of the evidence regarding the circumstances surrounding Claimant's cervical spine injury. In other words, the ALJ finds that in this case, the Claimant's credibility is not an all or nothing proposition. Thus, while the ALJ did not credit all of Claimant's

statements to his medical providers regarding his back injury, and the extent of his impairment/disability regarding his back and neck, the ALJ does credit his initial statements to his medical providers regarding the cause of his September 7, 2019, neck injury.

51. After reviewing and reweighing the evidence, the ALJ credits the opinions of Dr. Primack over the opinions of Drs. Shoemaker and Regan as for that portion of the rating Drs. Shoemaker and Regan provided for Claimant's decreased range of motion.

52. The ALJ only credits that portion of Dr. Shoemaker's opinion that found Claimant's September 7, 2019, work related cervical injury resulted in a 4% whole person impairment rating under Table 53.II.B

53. Based on the evidence presented, the ALJ finds that Claimant's neck injury was caused by the September 7, 2019, work accident and not the October 21, 2019, work accident.

54. Claimant's cervical injury has several specific diagnoses: (1) neck strain, (2) neck pain, (3) cervical muscle spasm, (4) spinal stenosis in cervical region and (5) cervical radiculopathy.

55. Claimant's cervical injury has objective pathology; namely, the November 22, 2019, cervical MRI which shows at the C6-7 level a shallow broad-based posterior protrusion eccentric to the right, with annular tear, moderate spinal stenosis believed by Dr. Shoemaker to be the cause of Claimant's neck pain and left upper arm symptoms.

56. The medical evidence credited by the ALJ establishes Claimant's cervical injury resulted in an intervertebral disc or other soft tissue lesion, unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity which warrants a 4% rating under Table 53.II.B of the AMA Guides. But the ALJ further finds that Claimant did not suffer range of motion impairment under the AMA Guides based on the opinions of Dr. Primack and the surveillance video.

57. As a result, the ALJ finds that Claimant's September 7, 2019, work injury resulted in a 4% whole person impairment rating pursuant to 53.II.B of the AMA Guides.

## CONCLUSIONS OF LAW

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

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). 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).

In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI, and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not

mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

Where an ALJ determines that a DIME physician changed his opinion concerning MMI or impairment, the party seeking to overcome that new opinion bears the burden of proof by clear and convincing evidence. *Dazzio,* W.C. No. 4-660-149 (ICAO June 30, 2008); *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (ICAO November 5, 2004).

If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002)

**I. Consistent with the views expressed by the ICAO, whether Claimant established by a preponderance of the evidence that he sustained permanent impairment to his cervical spine – and if so – the extent of his impairment.**

In this case, the ICAO concluded that Dr. Regan's ultimate opinion – that Claimant did not have any cervical impairment based on Claimant being placed at MMI within 6 months of his injury - was legally incorrect and it was therefore overcome by clear and convincing evidence. Thus, the ALJ was directed to determine Claimant's cervical impairment rating, based on the preponderance of the evidence.

As found, on May 20, 2020, Dr. Primack performed an independent medical examination regarding Claimant's neck and back. On physical examination of Claimant's neck, Dr. Primack noted Claimant had full cervical range of motion except with right lateral side bending. Dr. Primack also noted that Claimant walked in a very guarded and slow manner.

As further found, on September 11, 2020, Dr. Primack issued another report related to his review of the surveillance video. Dr. Primack concluded that the surveillance video showed Claimant moving his cervical spine from side to side. He also noted that Claimant could flex forward at the head without difficulty and that he showed adequate rotation. He also concluded that Claimant did not demonstrate any cervical impairment.

Based on Dr. Primack's examination of Claimant's cervical spine and review of the February 2020 surveillance video, Dr. Primack credibly and persuasively concluded

that there were no clinical findings to support Claimant's claim of ongoing neck problems and any decreased range of motion. Dr. Primack found "no problems whatsoever" regarding Claimant's cervical spine and did not indicate Claimant had any impairment regarding his cervical spine.

As found, the description by Dr. Primack of Claimant's inability to move and walk freely, and the cervical range of motion deficits measured by Drs. Shoemaker and Regan, are in stark contrast to the February 2020 surveillance video. The surveillance video of Claimant shows him moving his neck freely and without limitation. The surveillance video also shows Claimant walking without any problems. The surveillance video does not show Claimant having the degree of impairment he exhibited when evaluated by Dr. Primack or when his cervical range of motion was measured by Dr. Shoemaker and Regan.

As a result, the ALJ does not find the range of motion measurements obtained by Drs. Shoemaker and Regan to be reliable and persuasive since their opinions are based on Claimant's misrepresentation of his cervical spine range of motion. It is self-evident that an opinion based on false information is unreliable and not persuasive. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a 4% whole person impairment of his cervical spine pursuant to Table 53.II.B. of the AMA Guides due to his September 7, 2019, work injury. The ALJ further finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered additional impairment based on any range of motion deficits.

## ORDER

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

1. Due to his September 7, 2019, work injury, Claimant suffered a 4% whole person impairment rating of his cervical spine.
2. Respondents shall pay Claimant permanent partial disability benefits based on a 4% whole person impairment rating.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

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

DATED: January 27, 2022.

/s/ Glen Goldman

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

## ISSUES

- Did Claimant prove that an L4-5 fusion surgery recommended by Dr. Castro is causally related to his December 19, 2018 industrial injury?

## FINDINGS OF FACT

1. Claimant worked in Employer's furniture department for approximately six weeks in November and December 2018. He suffered an admitted low back injury on December 19, 2018 while processing furniture donations.

2. Claimant had a history of low back pain related to osteoarthritis before the work injury. He sought treatment for back pain at Salud Family Medicine on March 25, 2014. Claimant attributed the pain to a fall in December 2013. Physical examination showed reduced range of motion and paraspinal tenderness to palpation. Claimant was given a Toradol injection and a prescription for Tramadol. On May 27, 2014, Claimant reported the Tramadol was not helping his pain and worried he was taking "too much" of it. The provider diagnosed generalized osteoarthritis and changed the prescription to Vicodin. Claimant returned three days later asking for a different pain medication because the Vicodin was not helping. Claimant described pain "everywhere," and cited his back as one of the "worst" areas. His pain medication was changed to MS Contin. At his next appointment on June 19, 2014, Claimant reported, "everything is getting worse." He was subsequently diagnosed with a chronic pain disorder and referred to a pain management specialist. In August 2014, he was diagnosed with peripheral neuropathy, presumably related to his longstanding diabetes, and prescribed gabapentin. On October 2, 2014, Claimant stated his pain was no better but he could not afford a pain clinic. The gabapentin dosage was increased. At his appointment on November 4, 2014, he reported ongoing pain in multiple areas, including his back. His doctor emphasized the need to get in with a pain clinic because "pt's OA [is] worsening." Over the next several months, he continued to receive Vicodin and gabapentin for pain while looking for to a pain clinic that would accept Medicaid. On February 6, 2015, Claimant's pain was 8-9/10 and he needed his Vicodin refilled because he could not get in with the pain clinic until the end of the month.

3. Claimant returned to Salud on December 16, 2015 for acute head and neck pain after being assaulted and kicked in the head four days earlier. He was diagnosed with a concussion, and later reported memory loss because of the assault. He also testified to ongoing memory problems at hearing. The next three Salud appointments were focused solely on his acute neck and head injuries. Claimant's last documented appointment was on February 1, 2016. He was referred for a repeat cervical CT because of continuing neck pain.

4. Although Claimant has numerous chronic medical issues, there are no records for any condition (including his diabetes) from February 2016 until the work accident.

5. Claimant testified, in the year before his work injury he had "small" pains in his back, but not as bad as the day after his work injury, with numbness and tingling in his feet.

6. On December 19, 2018, Claimant was putting unsellable donated furniture into a large trash compactor. While lifting a sofa into the dumpster, Claimant felt a "pull" in his low back. He "didn't think much about it at the time," and worked the remainder of his shift. He did not report an injury or request medical attention.

7. Claimant awoke the next morning with severe low back pain, and numbness and tingling in his feet. He went to work, but had to rest on a couch after his legs "gave out." He reported the injury to his supervisor and was referred for treatment.

8. Claimant saw Dr. Julie Parsons at Advanced Urgent Care on December 20, 2018. He denied any previous back injury. Physical examination showed limited ROM, right leg weakness, and limited tandem gait. X-rays showed only degenerative changes in the lumbar spine. Dr. Parsons diagnosed a low back strain and lumbar radiculopathy.

9. Dr. Parsons referred Claimant to Dr. Roberta Anderson-Oeser, a physiatrist. At his initial appointment on January 28, 2019, Dr. Anderson-Oeser noted Claimant lifted a couch and felt a "crack" in his low back and immediate sharp pain.[1] The next day he had difficulty getting out of bed and fell in the shower because of numbness in his legs. Claimant denied any prior low back issues. Physical examination showed palpable muscle spasms in the lower lumbar paraspinals. Straight leg raising was positive bilaterally. Sensation was decreased in an S1 distribution bilaterally and leg strength was reduced to 4-5/5 throughout both legs. Dr. Anderson-Oeser diagnosed a lumbar strain, muscle spasms, and lumbar radiculopathy. She ordered an MRI to evaluate a possible L5-S1 disc lesion or nerve root compression. Dr. Anderson-Oeser noted she would prescribe no pain medication because Claimant was an active marijuana user. Claimant stated the marijuana was helpful to manage his "chronic pain."

10. lumbar MRI was completed on February 21, 2019. There were no acute findings, and the radiologist described the observed pathology as "degenerative." The most significant findings were at L4-5, with grade I spondylolisthesis, a diffuse disc bulge, ligamentum flavum thickening, and bilateral facet arthropathy causing moderate bilateral neural foraminal narrowing, worse on the left. Lesser degenerative changes were noted at other levels. No herniated disc, central stenosis or nerve root compression was identified.

11. Dr. Anderson-Oeser oversaw conservative care over the next year, including massage therapy, osteopathic manipulation, acupuncture, facet injections, and

[1] At hearing, Claimant agreed the history documented by Dr. Anderson-Oeser was incorrect, as he did not experience a "crack" in his back; he simply felt a pull.

lumbar epidural steroid injections. Claimant received no appreciable benefit from any of the treatment, and his condition continued to deteriorate. Eventually, Dr. Anderson-Oeser referred Claimant to Dr. Bryan Castro, an orthopedic surgeon.

12. Claimant saw Dr. Castro on February 26, 2020. Dr. Castro noted some of Claimant's apparent clinical abnormalities were effort-dependent and improved with coaching. Dr. Castro found 4/5 weakness throughout the lower extremities, "which is a nonphysiologic exam as he is able to walk without neurologic deficits." Dr. Castro reviewed x-rays and the MRI, which highlighted "degenerative spondylolisthesis" at L4-5 and some facet joint "gapping" consistent with instability. Dr. Castro stated, "This is a degenerative process. I do not see any acute fracture, dislocation, or herniations." He recommended an updated MRI and an EMG. Regarding causation, he opined,

> He does not have acute radiculopathy. While he may need surgical intervention, I think it is somewhat debatable whether this is causally related to the accident in question as there are certainly pre-existing degenerative changes here, but as he reports he did not have the symptoms before and he did have them afterwards, than someone could assume it was related to the accident in question.

13. A new lumbar MRI was obtained on March 6, 2020. At L4-5, it showed grade I anterolisthesis, disc protrusion, ligamentum flavum hypertrophy, and facet arthropathy encroachment on both neural foramina. There was fluid in the facet joints. There was contact with and some compression of the L4 nerve roots, worse on the right.

14. EMG testing performed on May 6, 2020 was normal, with no evidence of lumbar radiculopathy.

15. Claimant returned to Dr. Castro on June 19, 2020. Dr. Castro noted the L4-5 spondylolisthesis did not appear grossly unstable based on flexion-extension x-rays. He recommended "a simple decompression" surgery at L4-5.

16. Dr. Castro reevaluated Claimant on December 9, 2020. Updated x-rays showed increased instability. As a result, Dr. Castro changed the recommendation from a decompression to a fusion.

17. Dr. Michael Janssen reviewed the surgery request for Insurer on December 14, 2020. He opined none of the pathology on the MRI was caused, accelerated, or exacerbated by the work accident. Dr. Janssen concluded,

> After reviewing all this information, and I reviewed both MRI scans in detail (02/21/2019 and 03/06/2020), it is my professional opinion this patient has a long-standing age-related degenerative spondylolisthesis secondary to facet arthropathy, facet erosion, and incompetence of the disc at his age. This is not a work-related, underlying condition, and despite the fact the patient may have had some myofascial back pain, the anatomical condition that is being recommended for surgery is clearly not occupation-related.

18. Claimant had a third lumbar MRI on December 22, 2020. It confirmed progression of the underlying degenerative changes at L4-5, including worsening of the central stenosis, ligamentum flavum hypertrophy, and facet arthropathy.

19. On January 28, 2021, Dr. Castro responded to an inquiry from Claimant's counsel regarding causation. He circled "yes" to a question asking whether the surgery was related to the work accident. He offered no analysis or explanation to support his opinions beyond that already stated in his February 26, 2020 report.

20. On February 2, 2021, Dr. Anderson-Oeser responded to a similar inquiry and opined the surgery was related to "an aggravation of a pre-existing condition caused by the injury." On August 16, 2021, Dr. Anderson-Oeser elaborated on her causation opinion, stating that because Claimant had "no prior history of low back pain preceding his work injury," and had no pain associated with the pre-existing degenerative changes before the injury, the work accident caused a "permanent aggravation" of his pre-existing condition.

21. Claimant saw Dr. Michael Rauzzino for an IME on April 19, 2021 at Respondents' request. Claimant again denied any prior low back issues. Dr. Rauzzino agreed an L4-5 fusion is reasonable, but opined it is not related to the work accident. He explained the initial post-injury imaging showed no acute structural changes to Claimant's lumbar spine that could be attributed to the injury, and the follow-up MRIs showed progression over time consistent with the natural and expected course of degenerative lumbar spine disease.

22. After completing his IME report, Dr. Rauzzino received and reviewed the medical records from Salud, which solidified his opinion that the proposed L4-5 fusion is not related to the work accident. The records show a pre-existing, severe, chronic pain syndrome affecting multiple areas including Claimant's low back. Dr. Rauzzino opined the low back symptoms documented in the Salud records would not be expected to resolve completely. He conceded that patients can have asymptomatic osteoarthritis, but explained that once it becomes symptomatic, it rarely resolves and suddenly reappears several years later. He was not persuaded the gap in Claimant's treatment records meant his multiple health problems resolved. Instead, he believed it more likely Claimant did not pursue medical care for financial and insurance reasons, and may have simply turned to marijuana to modulate his pain. Dr. Rauzzino clarified that the imaging showed only degenerative arthritic conditions, most severe at the L4-5 level, progressing on each successive MRI. He concluded,

> [L]ifting couches could have caused his back to hurt some, but the lifting of the couches is not what caused him to progress over the course of the next year to the point where Dr. Castro recommended surgery. That was due to the degenerative changes, and that would have occurred whether he lifted [ ] couches or not.

23. Dr. Rauzzino's causation opinions are credible and persuasive.

24. Claimant failed to prove the proposed L4-5 fusion surgery is causally related to the December 2018 work accident.

## CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove the L4-5 fusion is causally related to his industrial injury. The argument that Claimant was "asymptomatic" before the work accident is not persuasive. Claimant had severe degenerative spine disease, which developed over many years. He has suffered from chronic pain since at least 2014, severe enough to warrant prescriptions for Tramadol, Vicodin, MS Contin, and gabapentin, and referral to a pain specialist. During that time, Claimant identified his low back as one of his "worst" areas. The fact that there are no treatment records (for any condition) between February 2016 and December 2018 does not prove his back was symptom-free. As Dr. Rauzzino recognized, absence of evidence is not necessarily evidence of absence. Given the documented history and objective pathology, it is unlikely Claimant's back pain ever resolved. It is more likely he stopped pursuing treatment

because of financial reasons and because he found marijuana a more effective pain reliever than conventional medical options.la Claimant's repeated denials of prior back issues, coupled with his admitted memory loss from a head injury, substantially diminish his credibility. His lack of candor regarding his preinjury medical condition also undermines the causation opinions provided by his treating physicians. Dr. Anderson-Oeser's assessment is based on the faulty premise that Claimant had "no prior history of low back pain preceding the injury." Dr. Castro had a similar misunderstanding, and even with that same bad information, Dr. Castro was equivocal regarding causation ("someone could assume it was related to the accident").

Dr. Rauzzino and Dr. Janssen persuasively explained that the proposed surgery is not intended to treat any pathology or condition caused by the work accident. Claimant probably suffered a soft tissue injury while moving the couch, as evidenced by his reported back pain, palpable spasm in the paraspinal muscles, and tenderness to palpation around the lumbar spine. But there was no acute injury to the discs, facet joints, vertebra, or any other spinal structure. The accident did not cause or worsen the pre-existing spondylolisthesis. Dr. Rauzzino and Dr. Janssen are persuasive that none of the pathology on the post-injury MRI was caused, accelerated, or aggravated by the injury. Although the injury may have temporarily elicited pain from the underlying osteoarthritis, it did not accelerate or otherwise change the natural trajectory of the degenerative process.

Claimant appropriately received conservative interventions for his myofascial injury. He was not a candidate for a lumbar fusion immediately after the accident, because he had no identifiable nerve root compression and no spinal instability. In June 2020, Dr. Castro opined there was no gross instability and recommended only a "simple decompression." By December 2020 (two years after the accident), updated x-rays and MRI showed further progression of the spondylolisthesis and associated instability. As a result, Dr. Castro determined a decompression would no longer suffice, and instead recommended a fusion to address the increased instability. The progressive worsening of Claimant's degenerative lumbar spine disease over two years cannot reasonably be attributed to the work accident. The ALJ agrees with Dr. Rauzzino that Claimant probably would have required a fusion at this time irrespective of the work accident.

## ORDER

It is therefore ordered that:

1. Claimant's request for an L4-5 fusion surgery is denied and dismissed.

2. 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: January 27, 2022

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

## ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a "one-time" maintenance medical evaluation as reasonably necessary and related to his June 18, 1992 work injury.

II. Whether Claimant established, by a preponderance of the evidence, that Respondents lost the right of selection of the authorized provider, and Claimant has the right to change physicians to a physician of his choosing.

## PROCEDURAL HISTORY

This matter previously proceeded to hearing before ALJ Barbra Henk on May 24, 1995. On June 6, 1995, ALJ Henk issued Findings of Fact, Conclusions of Law, and Order. (Exhibit D) In summary, ALJ Henk entered a general order keeping medical benefits open, but "[w]ill not attempt to limit or specify the type of future care Claimant may obtain. Respondents are protected by the ordinary requirements that the care be reasonable, necessary, related to the injury and in compliance with the fee schedule." (Exhibit G, pp. 12-13)

This matter then proceeded to hearing before ALJ Patrick Spencer on April 15, 2021 by way of stipulated facts and exhibits. The issue for determination at the April 15, 2021 hearing was whether the claim was closed to maintenance medical benefits such that a reopening would be necessary before Claimant could pursue additional evaluations and treatment. The parties stipulated that if the claim was determined to be open for maintenance medical benefits, then Respondent-Insurer would authorize a one-time evaluation with Claimant's authorized treating provider (ATP) Michael Dallenbach to determine what, if any additional injury-related treatment was reasonably needed. ALJ Spencer determined that Claimant's claim for medical benefits after MMI remained open, and ordered, per the parties' stipulation, the Insurer to cover a one-time evaluation with Dr. Michael Dallenbach. (Exhibit C) Neither party appealed ALJ Spencer's April 15, 2021 order.

## FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Sollender, the ALJ enters the following findings of fact:

### *Background and Claimant's Testimony*

1. Claimant suffered an admitted industrial injury to his right wrist on June 18, 1992.

2. Claimant was placed at maximum medical improvement (MMI) by Dr. Daniel Olson on July 27, 1993 with an apportioned upper extremity impairment rating. (Exhibit G, p. 82)

3. Respondents filed a Final Admission of Liability on September 12, 1994.

4. On May 24, 1995, the parties proceeded to hearing before ALJ Henk on the sole issue of Claimant's entitlement to medical benefits after MMI. ALJ Henk awarded a general order of maintenance medical benefits for Claimant. (Exhibit D)

5. Claimant stopped working for the Employer in 1997. He then began working for the Colorado Department of Human Services (CDHS) as a maintenance supervisor later in 1997. Claimant worked full time and full duty with no restrictions.

6. In October 2011, Claimant was diagnosed with right wrist pain associated with Kienbock's disease and underwent surgery to include a right wrist denervation procedure. Respondents authorized and paid for this treatment.

7. Following his surgery, Claimant came under the care of Dr. Michael Dallenbach who diagnosed Claimant with "Advanced Kienbock's disease stage IIIB to IV. Dr. Dallenbach placed Claimant at MMI on January 23, 2012 documenting the following with respect to maintenance medical care:

> Because of his advanced Kienbock's disease, which will within a reasonable degree of medical probability continue to advance, [Claimant] will require future medical as well as surgical intervention with further treatment being dependent upon his level of pain, function, and underlying pathology.

8. Following his placement at MMI, Claimant returned to his position at the CDHS full time, full duty with no restrictions. He continued working his defined position until he retired on August 1, 2020. Claimant testified that he suffered no injuries to the right wrist/arm while working for the Department of Corrections between his January 23, 2012 MMI date and August 1, 2020, when he retired. As noted, Claimant worked in a supervisory capacity but did have the occasion to change light bulbs/ballast and work on other maintenance projects, including both electrical and plumbing jobs. According to Claimant, he would use a variety of hand tools to complete his work tasks, including screw drivers, wire strippers, cordless drills and flashlights.

9. According to Claimant, his wrist pain gradually worsened after retiring from the CDHS. Around October of 2020, his right wrist pain progressed to the point where he wanted to return to his ATP (Dr. Dallenbach) for further evaluation. Claimant requested that Respondent authorize an evaluation with Dr. Dallenbach. Respondents refused on the basis that the claim was closed. Claimant then filed an Application for Hearing seeking a determination of whether the claim was closed as to maintenance medical treatment.

10. As noted above, the parties proceeded to hearing with ALJ Spencer on April 15, 2021. By order issued May 26, 2021, ALJ Spencer determined the claim was open for maintenance care per the previous order issued by ALJ Henk on June 6, 1995. (Exhibit C, pp. 7-8) ALJ Spencer then ordered Respondents authorize a one-time evaluation with Dr. Dallenbach. (Id. at p. 9)

11. On May 27, 2021, Claimant's counsel's office, through Andy Lotrich, emailed Respondents' counsel noting that Dr. Dallenbach had retired and no longer practicing medicine. (Exhibit E, p. 16) As part of the May 27, 2021 email, Mr. Lotrich noted that Claimant had been treated previously by Dr. Karl Larsen[1]. Mr. Lotrich asked if Respondents would be "amenable" having Dr. Larsen replace Dr. Dallenbach for purposes of the evaluation. (Id.)

12. Approximately 30 minutes after Mr. Lotrich sent his email, Respondents' counsel responded as follows: "Since Dr. Dallenbach was the primary ATP in this matter and is no longer available to treat your client for non-medical reasons, my clients designate Concentra Outlook Blvd. 4112 Outlook Blvd., Suite 325, Pueblo, CO 81008, as your client's new primary ATP. (Exhibit E, p. 16)

13. Respondents' email response went on to indicate: "At this time, my clients are still considering the FFCLO and have not determined whether they will appeal or authorize a one-time evaluation with Concentra. I will let you know how they decide to proceed." claimant's new primary authorized treating provider. (Exhibit E, p. 16)

14. Claimant's counsel's office then requested Respondents consider a designation to Dr. Castrejon prompting Respondents, through counsel to answer as follows: "No. Concentra is on BBU, Inc.'s designated provider list. It not subject to negotiation, since Dallenbach is unavailable for non-medical reasons then my clients have the obligation to designate a new primary ATP for your client." (Exhibit E, p. 15)

15. Despite the indication that they would advise Claimant whether they would appeal ALJ Spencer's order or authorize the one-time evaluation with Concentra, the evidence presented persuades the ALJ that Respondents neither appealed ALJ Spencer's May 26, 2021 order nor did they authorize the evaluation with Concentra. Rather, the evidence presented establishes that Respondents requested that Claimant attend an Independent Medical Examination ("IME") with Dr. Jonathan Sollender. Consistent with the request, Dr. Sollender completed the IME on July 26, 2021.

16. As part of his IME, Dr. Sollender obtained a history from Claimant. He also reviewed medical records and completed a physical examination. He then authored the report contained at Respondents' Exhibit F. During the IME, Claimant reported "symptom aggravation" (Exhibit F, p. 20) occurring "about 8 months" prior to the IME, i.e. around October/November 2020 – shortly after he retired. Claimant

[1] Dr. Dallenbach referred Claimant to Dr. Larsen for evaluation and treatment during the course of the claim. (Exhibit F, p. 17-18) Accordingly, the ALJ finds that by virtue of the referral, Dr. Larsen is an authorized treating physician in this case.

reported that his wrist pain never ended after his 2011 surgery but was so "negligible" at that time that he was "only aware of soreness after heavy or repetitive use, suggesting that by October/November 2020 his pain was worsening with time. Indeed, Claimant reported that at the time of the July 26, 2021 IME he had wrist pain at night which, in contrast to his daytime pain, could not be ignored. (Exhibit F, p. 18)

17. Claimant also reported to Dr. Sollender that he tried to "see a workers' compensation doctor but [had] not been able to obtain a referral." (Exhibit F, p. 18)

18. Claimant testified that since retiring on August 1, 2020, he did small projects, including things that he had put off while he was working, around his home. Claimant testified that he remodeled a bathroom, converted his carport into a garage and took out a sliding glass door and replaced it with a walk-in door.

19. As part of his IME report, Dr. Sollender documented that Claimant engaged in 'hand intensive hobbies." He documented that Claimant reported that he built a garage at his home, and replaced a sliding glass door. Dr. Sollender observed that Claimant had several bruises on his left hand and forearm, which Claimant reported had occurred while replacing the sliding glass door. (Exhibit F, p. 18) According to Dr. Sollender, Claimant reported that he was doing more physically than he did when he was working. (Id.)

20. Dr. Sollender concluded that Claimant had "significantly" increased the use of his hands in a manner that was "inconsistent" with his prior level of employment. He characterized Claimant as a "full laborer with home projects of building a garage, replacing doors, etc." (Exhibit F, p. 21). He concluded that the "forceful" tasks associated with being a laborer caused Claimant to "experience an aggravation, exacerbation and acceleration" of his underlying Kienbock's disease due to non-work-related causes. Simply put, Dr. Sollender concluded that "if [Claimant] had not engaged in this (sic) heavy labor tasks, which [were] inconsistent with his prior employment, he would not be symptomatic." Accordingly, Dr. Sollender deemed the "chain of causation" to be broken prompting his opinion that Claimant's need for further evaluation and treatment (if necessary) was unrelated to his original injury or the treatment thereof. (Exhibit F, p. 21)

21. Dr. Sollender stated in his report that he could not determine whether Claimant's Kienbock's disease in the right wrist was any more advanced than it was in 2011-2012, when he was last treated. (Exhibit F, p. 21) Nevertheless, he found from Claimant's historical statement that his condition was stable until he retired.

22. As noted, Dr. Sollender testified by deposition on October 12, 2021. Dr. Sollender reiterated his opinion that Claimant's current pain/symptoms were unrelated to his 1992 industrial injury. In support of his opinion, Dr. Sollender testified:

> In essence, [Claimant] was doing fine from the surgery done by Dr. Larson (sic) in 2011. He did so well that he was able to continue his regular job without restrictions and adapted to his new wrist, if you will.
>
> He retired in July 2020. At that time of retirement, his wrist was doing fine. He said he had no problems with the wrist.
>
> In my estimation, any further challenges to his wrist condition after the date of retirement would not be due to a work condition but due to any exacerbating factors. Specifically, he said that he was doing far more work with his hands in retirement than he ever did in his eight years since he was placed at MMI in 2012. That included building a garage at his home, doing woodwork, putting in sliding glass doors.
>
> Basically, doing the intensity and acuity of work that he was not expected to be doing in his job.
>
> So to me, without any occupational factors in play, the exacerbation of his complaints were due to nonwork events.

(Sollender Depo. Tr. p. 14, ll. 15-17)

23. Dr. Sollender also testified that but for Claimant's retirement he would not have built a garage and would not be in pain because "he clearly was not in pain the day before he retired." (Sollender Depo. Tr. p. 16, ll. 11-20) While Dr. Sollender attributed Claimant's symptoms to non-work-related activities, he testified that he did not ask Claimant about what tools he was using, nor did he ask Claimant about his time commitment to these activities. (Sollender Depo Tr. p. 15, ll. 20-25, p. 33, ll. 22-25, p. 34, ll. 1-17)

24. During cross-examination, Dr. Sollender conceded that trauma can cause Kienbock's disease, that Kienbock's disease can progress and worsen over time and that it can be a life-long problem. (Sollender Depo. Tr. p. 21, ll. 8-21) He also admitted that Claimant never told him that his wrist was pain-free following his October 27, 2011 surgery. (Id. at p. 23, ll. 18-21) He also agreed that the type of post retirement activities Claimant was doing would not cause Kienbock's disease but "[could] certainly aggravate [it] if it was already present but stable." (Sollender Depo Tr. p. 25, ll. 3-5) Based upon his testimony, the ALJ finds that Dr. Sollender believes that Claimant's Kienbock's disease was stable until he retired and began working more aggressively with his hands/wrists building a garage and setting doors which caused his underlying condition to become increasingly symptomatic.

25. While Dr. Sollender conceded that an MRI is the best way to determine if there has been a progression of Claimant's Kienbock's disease, he testified that his

opinions concerning Claimant's present need for maintenance treatment were not dependent on completing an MRI, because he did not believe that Claimant's current pain is related to his industrial injury. Based upon his testimony, Dr. Sollender believes the question presented is one of causation, specifically whether Claimant's pain complaints are related to his original industrial injury or conversely to non-occupational factors which aggravated his underlying Kienbock's disease giving rise to his increased symptoms. Because he determined that Claimant's pain complaints were caused by non-work-related activities, which broke the "chain of causation" between Claimant's original injury and his current symptoms, Dr. Sollender opined that an MRI was unnecessary and the lack of one posed no impediment in his ability to opine that Claimant's pain is not causally related to his industrial injury. (Sollender Depo Tr. p. 32, ll. 4-20)

## CONCLUSIONS OF LAW

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

### *Generally*

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

### *Claimant's Entitlement to Maintenance Medical Care*

C. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present

condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity). When the respondents challenge a claimant's request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits by a preponderance of the evidence. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonableness, necessity or relatedness of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her 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 is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 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 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*.

E. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). The evidence presented persuades the ALJ that, consistent with the May 26, 2021 order of ALJ Spencer, the claim remains open for post MMI maintenance treatment. Moreover, the content of ALJ Spencer's May 26, 2021 order convinces the undersigned that ALJ Spencer directed Respondents to "cover a one-time evaluation" as part of the maintenance treatment with Dr. Dallenbach. Neither party appealed the order of ALJ Spencer. Consequently, ALJ Spencer's order is final. Despite the final nature of ALJ Spencer's order, Respondents have yet to comply with ALJ Spencer's mandate by authorizing a one time appointment with an ATP in this case. While the evaluation could not be scheduled with Dr. Dallenbach, the evidence presented persuades the ALJ that Respondents designated a new ATP (Concentra) forthwith but failed to set an appointment with the new ATP so as to comply with ALJ Spencer's May 26, 2021 order.

F. The evidence presented also convinces the ALJ that Claimant suggested alternatives to Dr. Dallenbach in order to satisfy the directive for completion of a one-time evaluation. Claimant's suggestions were answered with a hard "No" and that the issue was not open for discussion/negotiation. Despite standing firm on the designation of Concentra as the newly designated ATP in this case, the evidence presented strongly supports a conclusion that Respondents did not schedule Claimant for an appointment to complete the evaluation ordered by ALJ Spencer. Instead, Respondents requested that Claimant attend an independent medical examination with Dr. Sollender. Armed with Dr. Sollender's opinions Respondents now contend (in contrast to their prior agreement to authorize an evaluation if the claim were determined to be open for maintenance care) that Claimant's need for a one-time evaluation is unrelated to his 1992 industrial injury. The ALJ is not convinced.

G. The ALJ credits Claimant's testimony to find/conclude that substantial evidence supports a conclusion that the passage of time and the lack of maintenance treatment in any form has resulted in a deterioration of Claimant's condition. Dr. Sollender's opinion that Claimant's symptoms can be explained as an aggravation of a pre-existing condition due to his engagement in activities involving the use of his hands and wrists post retirement is unconvincing. During his deposition, Dr. Sollender acknowledged his limited understanding of the activities Claimant actually performed and the tools he used to complete those activities. Indeed, on cross-examination Dr. Sollender admitted that he did not know how many days the Claimant worked on home improvement activities. Similarly he acknowledged he did not ask Claimant how many hours per day he engaged in such activity or how many breaks he took or what kind of tools he used. Based upon the evidence presented, the ALJ is not persuaded that Dr. Sollender sufficiently advised himself on the activities Claimant was actually performing when forming his causation opinions. While the ALJ acknowledges that Dr. Sollender is a respected surgeon, the incomplete nature of the information he gathered from Claimant highlights the fact that his causation opinion appears speculative and based simply on his unsupported conclusion that Claimant's use of his hands/wrists in activities post retirement activities was sufficient to aggravate Claimant's Kienbock's disease and sever the causal connection to the 1992 work injury. Based upon the evidence presented, the ALJ finds it equally probable that Claimant's current symptoms are causally related to the natural and probable progression of his Kienbock's disease, which became symptomatic because of his 1992 work injury. Nonetheless, Claimant's condition continues to deteriorate. Given the content of ALJ Spencer's May 26, 2021 order and the testimony regarding the progressive nature of Kienbock's disease, the ALJ is convinced that the parties probably recognized the dilemma in determining whether Claimant required additional maintenance treatment. Indeed, the record contains ample evidence that Respondents agreed to authorize a "one-time" evaluation to determine Claimant's maintenance treatment needs.

H. Without completion of the previously agreed upon one-time evaluation, the ALJ is convinced that Claimant's condition will likely deteriorate further resulting in worsening pain and greater functional decline. Accordingly, the ALJ concludes that

Claimant has proven, by a preponderance of the evidence, that the requested one-time evaluation constitutes reasonable and necessary maintenance treatment related to his 1992 industrial injury. As noted, respondents retain the right to dispute whether any treatment recommendation following the one-time evaluation is reasonable, necessary and related to Claimant's 1992 industrial injury. *Hanna v. Print Expediters Inc., supra.*

*Authorized Provider and Right of Selection*

I. Authorization to provide medical treatment refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

J. C.R.S. § 8-43-404(5)(a) contemplates that respondents will designate a physician who is willing to provide treatment without regard to non-medical issues, including such concerns as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Scoggins v. Air Serv,* W. C. No. 4-642757- (ICAO, Mar 31, 2006). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). If the physician selected by the respondent refuses to treat the claimant for non-medical reasons and the respondent fails to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *See Ruybal v. University Health Sciences Center, supra; Teledyne Water Pic v. Industrial Claim Appeals Office, supra; Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (Nov. 4, 1996); *Ragan v Dominion Services, Inc.,* W.C. No. 4-127-475 (Sept. 3, 1993).

K. The fact that an authorized treating provider stops providing treatment for non-medical reasons does not automatically authorize a claimant to change physicians. Rather, the Act affords employers the right to select a new physician in the event that an authorized provider refuses to provide treatment or discharges an injured worker from care for non-medical reasons. *C.R.S. § 8-43-404(10) (b).* Failure to do so entitles a claimant to select the physician who attends to his/her injuries. In this case, the evidence presented persuades the ALJ that Claimant initially sought authorization to return to Dr. Dallenbach around October 2020. Respondents denied authorization for the medical evaluation. The parties then proceeded to hearing with ALJ Spencer in April 2021. In ALJ Spencer's Order of May 26, 2021, he ordered that Claimant should be permitted an evaluation with Dr. Dallenbach. Assuming *arguendo* that Respondents

effectively lost the right of selection when they initially declined authorization of an evaluation with Dr. Dallenbach in October 2020, Dr. Dallenbach was re-established as the authorized treating provider based upon ALJ Spencer's Order of May 26, 2021.

L. The parties were unaware that Dr. Dallenbach had retired and was no longer practicing medicine until Claimant's counsel's office attempted to schedule Claimant for an evaluation on May 27, 2021. Upon learning that Dr. Dallenbach was unable/unwilling to provide treatment to Claimant, Respondents, through counsel of record, immediately designated Concentra Outlook Boulevard as Claimant's new authorized treating physician. Based upon the evidence presented, the ALJ is not convinced that Respondents actions in designating Concentra lay outside the aforementioned statute or that they lost the right of selection in this case. The ALJ finds/concludes that Claimant's authorized treating provider is Concentra Outlook Boulevard.

## ORDER

It is therefore ordered that:

1. Insurer shall cover a one-time evaluation, as maintenance care, with an authorized treating provider, to include Concentra, to determine what, if any, additional medical treatment Claimant may require to cure and relieve him of the effects of his industrial injury. Respondents retain the right to challenge any treatment recommendation of the grounds that it is not reasonable, necessary or related to Claimant's 1992 wrist injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

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

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

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

DATED: January 27, 2022

/s/ Richard M. Lamphere

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

## ISSUES

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

- Claimant requests PPD based 9% whole person rating assigned by Dr. McLaughlin.

- The parties agreed to reserve issues relating to unpaid or unreimbursed medical expenses.

## FINDINGS OF FACT

1. Claimant worked for Employer as a journeyman lineman, maintaining electrical lines throughout the Western Slope. He injured his left shoulder on July 29, 2020 while using an 8-foot "hot stick" to move a heavy power line.

2. Claimant initially saw Dr. Robert McLaughlin at SCL Health in Grand Junction on July 30, 2020. Dr. McLaughlin diagnosed a left AC joint injury.

3. In August 2020, Claimant moved back to Arkansas, where his family lives.

4. Claimant underwent a left shoulder MRI on August 24, 2020. It showed mild AC joint arthropathy and mild reactive edema involving the distal clavicle. There were no rotator cuff or labral tears.

5. Respondents filed a Notice of Contest on August 31, 2020.

6. Claimant was referred to an orthopedic surgeon, Dr. John Harp. On October 1, 2020, Dr. Harp performed a left shoulder arthroscopic subacromial decompression, distal clavicle excision, and extensive debridement.

7. Claimant saw Dr. Gary Zuehlsdorff on January 4, 2021 for an IME at his counsel's request. Dr. Zuehlsdorff noted Claimant's left shoulder pain extended into his left trapezius muscle, but not his neck. Claimant explained he was back to work at full duty, but the work increased the symptoms in his left shoulder.

8. Dr. Allison Fall performed an IME for Respondents on April 7, 2021. Dr. Fall agreed Claimant suffered a compensable injury to his left shoulder. She noted the injury caused sleep disturbance and made driving with the left arm difficult. She further noted his left shoulder symptoms increased with physical work. Examination showed reduced shoulder range of motion and AC joint crepitus. He was tender to palpation over the lateral supraspinatus and described referred paresthesias to the left arm with palpation of the upper trapezius. Cervical range of motion was unrestricted but left lateral bending elicited

shoulder paresthesias. Dr. Fall also observed decreased scapulothoracic stability with poor movement patterns and myofascial symptoms. She opined Claimant was approaching MMI, pending additional PT and follow up with his surgeon for a possible injection.

9. Respondents filed a General Admission of Liability on June 25, 2021.

10. Because his providers in Arkansas were not Level II accredited, Claimant returned to Dr. McLaughlin in on July 30, 2021 for an evaluation of MMI and impairment. Dr. McLaughlin noted Claimant had "returned to full duty and is doing well, although still with symptoms." He was working as a lineman in Texas. His left shoulder was still "sore" and felt "a little weak" in certain positions. Examination showed some residual crepitus and reduced range of motion. Strength was good and impingement testing was negative. Claimant's cervical spine was nontender. Dr. McLaughlin opined Claimant was at MMI as of July 31, 2021. He assigned a 15% upper extremity rating based on the distal clavicle resection and ROM loss. The 15% scheduled rating converts to 9% whole person. Dr. McLaughlin recommended post-MMI maintenance care including TheraBand exercises to target the ongoing scapulothoracic dyskinesis, up to 6 PT sessions, and follow up with his orthopedic surgeon for possible injections or other interventions if he did not continue to improve.

11. Respondents filed a Final Admission of Liability on August 16, 2021, admitting for Dr. McLaughlin's 15% scheduled rating and for medical benefits after MMI.

12. Dr. John Raschbacher performed a records-review for Respondents on December 9, 2021. He opined there was "no medical basis" to convert the admitted scheduled rating to its whole person equivalent. He saw no evidence that the injury affected any structures "proximal" or "medial" to the left shoulder. He opined, "there is simply no basis, other than secondary gain, for conversion to a whole person impairment." He noted Claimant was released with no restrictions but opined that if whole person conversion were deemed appropriate, his restrictions should be revisited with an eye toward possible disqualification from his career as a lineman.

13. Dr. Raschbacher testified at hearing consistent with his report. He opined the "shoulder" is not confined to the glenohumeral joint, but also includes the sternoclavicular joint, acromioclavicular joint, and scapulothoracic articulation. Dr. Raschbacher considers the shoulder to be "part of the arm," so in his view, any symptoms or functional impairment affecting the broadly-defined "shoulder" represent purely scheduled impairments.

14. Claimant credibly and persuasively testified his left shoulder remains symptomatic. He experiences pain into his left trapezius and scapulothoracic region with activity and movements, including but not limited to reaching away from his body and working overhead. Claimant further testified he has pain and functional loss and to his left trapezius, and scapulothoracic region while working out. He described intermittent sleep disturbance and difficulty driving long distances with his left arm.

15. Dr. Raschbacher's opinions regarding whole person impairment are neither credible nor persuasive.

16. Claimant proved by a preponderance of the evidence he suffered functional impairment to his left shoulder not listed on the schedule of disabilities.

## CONCLUSIONS OF LAW

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 trapezius or 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"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g*., *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). 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).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgery performed by Dr. Harp was directed to anatomical structures

proximal to the "arm," including a subacromial decompression, distal clavicle resection, and rotator cuff debridement. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008) ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"); *see also Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). More important, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the scapula and trapezius. This pain affects his ability to engage in various activities, including overhead reaching. Multiple providers noted AC joint crepitus. Dr. Zuehlsdorff documented left trapezius pain with activity, and Dr. Fall objectively observed scapulothoracic dysfunction. Dr. Raschbacher's arguments regarding whole person conversion mirror those he made in *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). In that case, he advocated a similarly expansive view of what constitutes the "shoulder," and by extension what impairments remain on the schedule. The ALJ in *Newton* rejected those arguments and was upheld by the ICAO. The Panel's analysis in *Newton* is persuasive. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. McLaughlin provided a 15% scheduled rating, which converts to 9% whole person. Neither party requested a DIME, so Dr. McLaughlin's rating is binding under § 8-42-107.2(b). Claimant is entitled to PPD benefits based on Dr. McLaughlin's 9% whole person rating.

## ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on Dr. McLaughlin's 9% whole person rating. Insurer may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

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

3. 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: January 31, 2022

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

## ISSUES

1. Whether Claimant overcame the Division Independent Medical Examination (DIME) opinion of John Hughes, M.D. regarding Maximum Medical Improvement (MMI) by clear and convincing evidence.

2. If Claimant has overcome the DIME as to MMI, whether Claimant has established by a preponderance of the evidence entitlement to reasonable, necessary and related medical treatment.

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to a higher Average Weekly Wage (AWW) than $754.59 as admitted in the Final Admission of Liability (FAL).

## FINDINGS OF FACT

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

1. Claimant is a 55 year-old male who worked for employer. Employer hired Claimant to work as a "Milker."

2. Claimant speaks Spanish and testified that he cannot read, understand, or speak English. (Tr: 40:22-41:2)

3. On October 7, 2018, Claimant suffered an admitted industrial injury. (Tr. 41:3-4). Claimant and three fellow employees were using a large iron metal bar to try to unjam a gate. Claimant testified that the bar was approximately five and a half feet long, and weighed about 80 pounds. (Tr. 43:13-25) The bar released from the gate and hit Claimant on the right side of his forehead causing him to fall backwards to the ground. Claimant testified that he hit the back of his head when he fell, and he lost consciousness. (Tr. 47:7-19).

4. Claimant's co-workers took him to the Emergency Room (ER) at Platte Valley Medical Center approximately an hour later. Claimant testified that there was no translator with him in the ER, and the physician did not speak Spanish. (Tr. 76:12-17). The medical records make no reference to a translator, but contain documents in Spanish, including instructions regarding Claimant's head injury. (Ex. D). Claimant testified that he could sort of follow what the doctor was saying. (Tr. 76:15-17).

5. According to the medical records, Claimant told the ER physician that he sustained a blow to the front of his head from a metal bar and he had a headache and neck pain. Claimant denied loss of consciousness, vision change, nausea and vomiting. (Ex. D).

6. Claimant testified, on direct examination, that he does not remember if he told anyone in the ER that he lost consciousness. He just remembered "telling the doctor how the incident happened." (Tr. 49:18-50:1). On cross examination, however, Claimant testified that he reported loss of consciousness while in the ER. (Tr. 78:19-22).

7. In light of the inconsistencies in Claimant's testimony, and the ER records, the ALJ finds that Claimant did not tell anyone in the ER that he lost consciousness.

8. Claimant had a CT of his head and his back while in the ER. The impression of the head CT was "[n]o intracranial hemorrhage. Right frontal scalp swelling." Claimant received a normal Glasgow Coma Scale rating, indicating normal neurological function. Claimant's final diagnosis at discharge was a scalp hematoma. (Ex. D).

9. Authorized Treating Provider (ATP) Julie Parsons, M.D. saw Claimant on October 15, 2018, about a week after the accident. According to the medical records, Claimant told Dr. Parsons a metal bar hit him in the right eye, he subsequently fell on his back, hit the back of his head, and lost consciousness for a minute or so. Claimant reported no loss of hearing, no vision change, no nausea, and no dizziness. He reported muscle aches, but no swelling. Dr. Parsons reviewed Claimant's CT reports from the ER. In addition to a contusion to the face, Dr. Parsons diagnosed Claimant with a neck sprain and a low back strain. Claimant had no restrictions and returned to full duty work. (Ex. E)

10. Claimant saw Dr. Parsons again on October 24, 2018. His chief complaints were back and neck pain. He again reported no loss of hearing, no vision change, no nausea, and no dizziness. Dr. Parsons referred Claimant to physical therapy for his lower back strain. The physical therapy did not improve Claimant's lower back pain, so Dr. Parson's ordered an MRI of the lumbar spine. (Ex. E). The MRI revealed a left far lateral disc herniation at the L3-L4, a shallow posterior central disc herniation at L5-S1, and a disc bulge at L4 to L5 with a right central annular perforation. (Ex. I)

11. On January 3, 2019, Dr. Parsons referred Claimant to Roberta Anderson-Oeser, M.D. for a physical medicine and rehabilitation consultation. Dr. Anderson-Oeser examined Claimant on February 13, 2019, and his chief complaint was low back pain and right lower extremity pain and paresthesia. He did report having headaches. Dr. Anderson-Oeser diagnosed Claimant with a low back strain, low back pain, lumbar radiculopathy, and muscle spasms. She recommended epidural steroid injections, and an EMG/Nerve Conduction Study. (Ex. F).

12. In addition to Drs. Parsons and Anderson-Oeser, Claimant sought medical treatment from psychologist Jesus Sanchez, Ph.D. (Ex. 11), psychiatrist Gary Gutterman, M.D. (Ex. 7), surgeon Brian Castro, M.D. (Ex. G,) and otolaryngologist Alan Lipkin, M.D. (Ex. 9,13,16).

13. On August 6, 2019, Claimant told Dr. Parsons he was experiencing headaches accompanied with nausea and vomiting. Claimant was vague regarding the onset of the intermittent vomiting, but thought it began in May. Dr. Parsons instructed him to follow up with his primary care physician for the headaches and nausea/vomiting. Dr. Parsons explained that these symptoms were not consistent with a concussion this late after the injury, especially with a normal CT of the brain. Dr. Parsons transferred Claimant's care to Dr. Anderson-Oeser. (Ex. E.)

14. Claimant testified he reported his symptoms of dizziness and headaches at his first visit with Dr. Parsons. (Tr. 80:19-24). The ALJ does not find this testimony credible as it is not supported by the medical record. The ALJ finds that Claimant did not report his symptoms of headaches and dizziness to Dr. Parsons until August 2019, 10 months after he first began treating with her.

15. On August 22, 2019, Claimant told Dr. Anderson-Oeser that he was experiencing nausea, vomiting, headaches and neck pain. Claimant felt his medication was causing the dizziness and headaches. (Ex. F). The ALJ finds that Claimant did not report his symptoms of vomiting and nausea to Dr. Anderson-Oeser until August 2019, seven months after he first began treating with her.

16. On October 17, 2019, approximately a year after the incident, Claimant was referred to Dr. Castro for a surgical consultation regarding his lumbar spine. Dr. Castro opined that there was no indication for surgical intervention as there was no neural impingement, no disc herniation, and his straight leg raise was negative. Dr. Castro recommended that Claimant stop walking with a cane, and walk and stretch on a daily basis. (Ex. G).

17. Claimant continued to treat with Dr. Anderson-Oeser. On November 18, 2019, Claimant reported no improvement in his symptoms despite injection therapy and conservative care. (Ex. F).

18. On May 12, 2020, Claimant saw Dr. Anderson-Oeser and reported that in addition to his ongoing headaches and dizziness, he was having tinnitus and increased hearing loss. Dr. Anderson-Oeser referred Claimant to Alan Lipkin, M.D., an otolaryngologist, for an evaluation. (Ex. F)

19. On June 11, 2020, Claimant met with Dr. Lipkin. In his notes, Dr. Lipkin says Claimant "is referred by Dr. Anderson-Oeser WC for evaluation of tinnitus, hearing loss, dizziness that occurred as a result of a work-related injury that occurred 10/07/2019." (Ex. H.) Dr. Lipkin did not make an independent determination that Claimant's symptoms were causally related to his industrial injury. Further, Dr. Lipkin routinely noted the date of injury as 2019, not 2018. Claimant was still using a walking cane, despite Dr. Castro's recommendation to the contrary. Claimant reported no issues with driving or basic self-care. Claimant's audiogram showed "bilateral high frequency sensorineural loss, possibly pre-existing." (Ex. H).

20. On October 29, 2020, Dr. Lipkin diagnosed Claimant with the following: sensorineural hearing loss in both ears, tinnitus of the right ear, Benign Paroxysmal Positional Vertigo (BPPV) left ear. (Ex. H).

21. Dr. Lipkin was deposed on August 11, 2021. Dr. Lipkin testified he is not an expert regarding traumatic brain injuries (TBIs). (Ex. M at 11:25-12:5). He did not have Claimant's prior medical records before initiating care on June 11, 2020. (*Id.* at 30:9-17). Dr. Lipkin testified that symptoms of BPPV typically occur within weeks of a head injury or acute injury, but can also occur spontaneously with an unknown cause. (*Id*. at 31:2-32:3 and 33:14-19). Dr. Lipkin testified that at his March 22, 2021 visit with Claimant, he did not think that Claimant was suffering from ongoing BPPV and Claimant was experiencing less-specific unsteadiness. (*Id.* at 36:2-11).

22. In preparation for a 24-Month DIME, pursuant to §8-42-107(8)(b), C.R.S., Respondents retained Mark Paz, M.D., to conduct an Independent Medical Examination (IME).

23. On December 8, 2020, Claimant saw Dr. Paz for his IME. An independent Spanish-English interpreter was present at the exam. Claimant told Dr. Paz he is able to drive and perform activities of daily living. Claimant indicated he used the cane for relief of right-sided low back pain. (Ex. I).

24. Dr. Paz opined that Claimant sustained a right forehead contusion as a result of the October 7, 2018, incident. He concluded that it was not medically probable that Claimant has lumbar radiculopathy as a claim-related diagnosis. Dr. Paz further opined that Claimant has nonorganic low back pain. Dr. Paz opined that the Claimant's lumbar degenerative disc disease was not aggravated or accelerated by the October 7, 2018, incident. Claimant exhibited non-physiologic responses during physical examination and Claimant's medical records document a non-diagnostic and non-therapeutic response to injections to the low back. Based on these physical findings and reports, Dr. Paz opined that Claimant's bilateral lower extremity symptoms lack organic etiology and physiologic correlation, the onset of these symptoms occurred eight months prior to the IME and lack a temporal relationship to the October 7, 2018, incident. Furthermore, Dr. Paz opined that Claimant's symptoms of dizziness and vertigo are not causally related to the October 7, 2018, incident. Dr. Paz pointed out that there was no recurring documentation of symptoms of dizziness or a diagnosis of vertigo through May 8, 2019. No temporal relationship was established between the symptoms of dizziness and the date of injury. Dr. Paz opined that the Claimant reached MMI on November 9, 2020. (Ex. I).

25. Respondents requested a 24-Month DIME. John Hughes, M.D. was confirmed as the DIME physician. Dr. Hughes was asked to evaluate Claimant for a TBI that he may have sustained on October 7, 2018. (Ex. J.) Claimant did not object to the limited scope of the DIME nor did he seek a prehearing conference to amend the DIME application pursuant to WCRP Rule 11.

26. Dr. Hughes performed the DIME on April 27, 2021. He agreed with Dr. Paz and placed Claimant at MMI as of November 9, 2020. Dr. Hughes opined that Claimant did

not sustain a TBI, and he did not believe the assignment of a permanent impairment rating was appropriate. (Ex. J).

27. Dr. Hughes made the following diagnoses of Claimant: 1) Work related closed head injuries sustained October 7, 2018, with multiple injury components; 2) Scalp contusion, resolved; 3) Cervical spine/sprain, resolved; 4) Lumbar spine pain, refractory to nonsurgical care with non-identification of the lumbar spine regional pain generator to date; 5) BPPV, probably secondary to the closed head injury with current vague symptoms and incomplete documentation, not supporting assignment of a permanent impairment rating; 6) Adjustment disorder with depressed mood, quiescent on medications monitored by Dr. Gutterman. (Ex. J).

28. Dr. Hughes noted in his DIME report that he did not have all of Dr. Lipkin's medical records. There is no evidence that Claimant made any attempt to provide Dr. Hughes with any missing records per WCRP Rule11-4(B).

29. At the hearing, Dr. Paz credibly testified that based on medical literature and Claimant's presentation in the ER, Claimant did not sustain a TBI. (Tr. 105 ¶ 9-23. Specifically, no neurological deficits were observed on physical examination. *Id*. Dr. Paz credibly testified that in the ER Claimant was observed to have a normal Glasgow Coma Scale, which is a test that assesses neurological function or dysfunction. (Tr. at 107 ¶ 15-25). Claimant had a score of 15, which is the highest score possible, and indicates the highest neurological function.

30. Dr. Paz credibly testified that after a head injury or a TBI, and based on medical literature, the interval between head trauma with loss of consciousness and development of symptoms is equal to or less than four weeks. Dr. Paz testified that the Medical Treatment Guidelines do not address the onset of post TBI symptoms, so he relied on the most applicable medical literature in forming his opinion. (Tr. 108:10-25). Claimant reported symptoms of dizziness ten months after the October 7, 2018, incident.

31. Dr. Paz credibly testified that Claimant's hearing loss and tinnitus were unrelated to the October 7, 2018, incident based on their latent development in relation to the injury and documentation in medical records. (Tr. 110: 8-25). Dr. Paz further testified that only 15 percent of cases of BPPV are associated with a closed head injury. (Tr. 112:1-25). As such, Dr. Paz opines that Claimant's BPPV is unrelated to the October 7, 2018, incident, no further treatment is indicated, and a permanent impairment rating is not appropriate. (Tr. at 113:1-25).

32. Dr. Anderson-Oeser was deposed on October 15, 2021. Dr. Anderson-Oeser testified that Claimant had all of the symptoms of a TBI (nausea, dizziness and headaches). (Ex. N at 14:21-15:5). She testified that Claimant is not at MMI for TBI because he has not had vestibular rehabilitation and neuropsychological testing. (*Id.* at 19:3-17). Dr. Anderson-Oeser testified that neuropsychological testing should occur within three to six months of the injury. (*Id.* at 19:23-20:10). Claimant's injury occurred over three years ago.

33. Dr. Anderson-Oeser testified that Dr. Hughes' DIME opinion was in error because he did not have all of the medical records, but she did not know what medical records Dr. Hughes' was missing. (*Id.* at 26:8-27:14 and 32:1-33:8). She testified that Dr. Hughes erred by not having Claimant obtain vestibular therapy before reaching his conclusion that Claimant did not suffer a TBI. (*Id.* at 28:8-21). Dr. Anderson-Oeser also testified that it was "difficult'" to determine if Claimant had a TBI without neuropsychological testing because Claimant's injury was "mild". (*Id*. at 28:1-7).

34. Dr. Anderson-Oeser testified that symptoms such as nausea, dizziness, vomiting, headaches and confusion are indications of a TBI, and are present right after the injury. (Tr. 33:22-34:11).

35. Claimant did not report symptoms of nausea, dizziness, vomiting, or confusion right after the injury. Claimant did not report these symptoms until approximately ten months after his injury. The ALJ infers that Claimant did not begin experiencing these symptoms before August 2019.

36. The ALJ finds that Dr. Anderson-Oeser's testimony is credible, but it is not persuasive. Dr. Anderson-Oeser has a difference of medical opinion from Dr. Hughes and Dr. Paz.

37. The ALJ finds that Claimant did not suffer a TBI, Claimant's date of MMI is November 9, 2020, Claimant has no permanent impairment and medical maintenance is not necessary.

38. Claimant credibly testified that he "made about $1,440 per two week period" and he earned productivity bonuses of approximately $300, seven times a year. (Tr. 42:14-21). According to Claimant's wage records, he earned $37,729.77 from October 17, 2017 through October 2, 2018. (Ex. L). The records include multiple entries of $323.23, which the ALJ infers represents bonuses earned by Claimant. The ALJ finds that Claimant's AWW is $754.59 ($37,729.77 divided by 50 weeks).

## 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).

**DIME Physician's Findings**

The party seeking to overcome the DIME physician's opinion bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Hughes, determined that Claimant suffered a head injury, but not a TBI. (Findings of Fact ¶¶ 26-27). He also determined that Claimant reached MMI on November 9, 2020. (Id. at ¶ 26). These findings were consistent with those of Dr. Paz, who completed an IME on December 8, 2020. (*Id.* at ¶¶ 23-24). Dr. Hughes indicated that that Claimant's BPPV may be secondary to the October 7, 2018 injury, but he opined that Claimant's symptoms were vague and the documentation he had did not support assignment of a permanent impairment rating. (Id. at ¶ 27). Dr. Hughes opined that maintenance medical care was not indicated despite the clinical diagnosis of BPPV. *Id.* Dr. Hughes' opinion must be overcome by clear and convincing evidence.

Dr. Oeser-Anderson opined that Dr. Hughes was incorrect and that Claimant suffered a mild TBI, and was not at MMI because he needs vestibular therapy and neuropsychological testing. (*Id.* at ¶ 32). MMI is defined as the point in time when any medically determinable physical or mental impairment as a result of an injury has become stable, and when no further treatment is reasonably expected to improve the situation. § 8-40-201(11.5), C.R.S. Dr. Oeser-Anderson offered an opinion with respect to what treatment she believes Claimant needs, which differs from the opinions of Dr. Hughes and Dr. Paz. There is no clear and convincing evidence, however, that Dr. Hughes' opinions are incorrect.

Dr. Anderson-Oeser also opined that Dr. Hughes' opinions were incorrect because he did not have all of the medical records, even though she did not know what records he was missing. (*Id.* at ¶ 33). Nevertheless, Claimant did not introduce any evidence to indicate that Dr. Hughes would have reached a different opinion had he had additional records. Claimant did not introduce sufficient evidence to meet his burden of proof to overcome Dr. Hughes' findings regarding MMI and the assignment of no permanent impairment rating.

## AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although average weekly wage generally is determined from the employee's wage at the time of injury, § 8-42-102(2), C.R.S. (1992 Cum.Supp.), 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. Section 8-42-102(3), C.R.S. (1992 Cum.Supp.); see *Williams Brothers, Inc. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The ALJ finds that Claimant's AWW is $754.59. (Findings of Fact ¶ 38). This figures includes Claimant's wages and bonus.

## ORDER

It is therefore ordered that:

1. Claimant failed overcome the opinion of DIME physician regarding MMI by clear and convincing evidence. Claimant's date of MMI is November 9, 2020, with no permanent impairment ratings and no recommendation of maintenance medical care.

2. Claimant is not entitled to additional medical benefits.

3. Claimant's AWW is $754.59 as admitted in the July 2021 FAL.

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: January 31, 2022

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