OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-020-610-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her condition has worsened and that her case should be reopened.

II. Whether Claimant is entitled to change physicians to surgeon Dr. Joshua Ariel Metzl if her claim is reopened.

FINDINGS OF FACT

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

1. Claimant worked for Employer as a firefighter.
2. On July 9, 2016, Claimant suffered a compensable injury involving her left leg. The injury occurred while Claimant was driving a golf cart to get some medical supplies. While driving the cart, Claimant had her left leg hanging off the side of the cart. While driving the cart with her left leg off the cart, Claimant ran into a gate and crushed the lower portion of her left leg and ankle. Claimant was immediately taken to the emergency room where she was diagnosed with a compartment syndrome fracture. Claimant underwent surgery, with Dr. Fuller, on the day of the accident. Dr. Fuller performed a double fasciotomy. (Ex. B, p. 20.)
3. By December 14, 2016, Claimant was doing well. She had no limitations at work and was working full duty. She would, however, develop pain after running for about 5 minutes in the posterior portion of her left lower leg. It was Dr. Fuller's opinion that she might have pain while running for quite some time. (Ex. B, p. 25.)
4. On January 11, 2017, Claimant was evaluated by Dr. Sharon O'Connor. At this visit, Claimant had continued to improve and had no significant symptoms. Her exercise tolerance was getting better, and she was working full duty without any problems. Her only symptoms at that time included some continued discomfort in the medial aspect of her lower leg as well as some numbness and tingling she had in the immediate area of her scars and a small area where the crush injury occurred. Dr. O'Connor placed Claimant at MMI, released Claimant to fully duty, and concluded that Claimant did not suffer any permanent impairment. (Ex. A, p. 8.)
5. On May 11, 2018, Claimant underwent a Division of Workers' Compensation Independent Medical Examination (DIME) that was performed by Dr. Brian Beatty. At this visit, Claimant stated that overall, her symptoms have not changed. She stated that she has radiation of pain from her ankle into her leg. She also stated that her pain is intermittent and that she has some numbness and tingling around the surgical site. On a scale of 0-10, Claimant rated her daily pain as a 3. Claimant also stated that her symptoms were aggravated by standing for more than one-half hour, walking for more than one-half hour,

lifting 50-75 pounds, and during any type of sports or exercise. Lastly, she noted moderate morning stiffness. (Ex. B, p. 26.) Regarding her activities, she noted that running and lifting are restricted when performed for extended periods of time. (Ex. B, p. 26.) She did not state that her heel hurt at that time. Dr. Beatty agreed that Claimant reached MMI on January 11, 2017, and provided Claimant a 6% scheduled impairment rating. Ex. B, p. 27.)

6. Claimant kept working for Employer, [Redacted], through December 31, 2018. Beginning January 1, 2019, Claimant began working for SM[Redacted[.

7. Around September 2020, Claimant started developing symptoms from her heel up to the medial aspect of her ankle. These symptoms did not, however, cause Claimant to seek medical treatment at this time. (Ex C, p. 31.)

8. On May 19, 2021, Claimant presented to the SM[Redacted]. At this visit, Claimant stated that her left heel had been bothering her for the past six months with increasing pain over the last two months-which Claimant associated with increased activity. Claimant described her increased activity to include running and wearing her "bunker boots," i.e., work boots. At this visit, she was told to purchase a heel cup/pad and to only bike for exercise.

9. On September 16, 2021, more than three years after being placed at MMI, and while working for SM[Redacted], Claimant presented to Erik Thelander, D.P.M. (Exhibit C, p. 39.) Claimant stated that she had been mostly asymptomatic until about one year ago. She also stated that during the last month, the pain became worse. At the time of her appointment, her pain level was 8/10. (Ex. C, p. 35.) That said, Claimant's pain was in a different location than her prior injury. Her pain at this time radiated from her heel up to the medial portion of her ankle. Claimant stated that she was usually asymptomatic while wearing tennis shoes and not working–and symptomatic while working and wearing her work boots. For example, Claimant was on vacation for five weeks and did not wear her work boots but wore tennis shoes. During this time, Claimant was largely asymptomatic. (Ex. C, p. 31.) Dr. Thelander noted that it was odd that Claimant was largely asymptomatic after her surgery for years and is only now having symptoms. He thought that perhaps Claimant's work boots and job had caused compression, overuse and inflammation around her prior scar tissue which caused Claimant's nerve pain and symptoms. (Ex. C, p. 33.) Based on Claimant's pain complaints, and Dr. Thelander's assessment, he ordered an EMG of Claimant's left lower extremity to assess Claimant for possible tibial nerve neuropraxia. (Ex. C, p. 30.)

10. On September 21, 2021, Claimant returned to the SM[Redacted] Clinic. At this appointment, Claimant stated that she took six weeks off for vacation and that her heel was doing well until she returned to work. Claimant stated that her heel was doing well until she ran her METS test and then had a call where she was in her work boots for about three hours. At this point, Claimant was walking with an antalgic gait. (Ex. E, p. 73.)

11. On October 4, 2021, Claimant sought medical treatment at the CU Steadman Hawkins Clinic Denver with Dr. Metzl, when she again repeated that she "was fine" for a "couple years but over the last year she has developed more more [sic] pain." (Exhibit D, p. 60.)

12. On October 28, 2021, Dr. Metzl concluded that Claimant's "discomfort dates back to her prior injury and she would benefit from partial plantar fascial release with tarsal tunnel release. fasciitis is a result of her prior work injury." Dr. Metzl's opinion on causation, however, is mostly conclusory. He did not discuss in detail how he concluded Claimant's current condition was causally related to her 2016 work injury.

13. Claimant's testimony that her complaints that emerged at the end of 2020 while working for SM[Redacted] were persistent and related to the injury she suffered on July 9, 2016, while working for Respondent Littleton are contradicted by the consistent and repeated history of being predominately "asymptomatic" (Ex. C, p. 31), "doing well" (Ex. E, p. 73), and "was fine" (Ex. D, p. 60) for years after leaving employment with Employer Littleton.

14. Claimant repeatedly attributed her left lower extremity problems to her work duties for SM[Redacted], associating her pain "post running, in bunker boots, and duty boots" (Ex. E, p. 73), the requirement "to wear work boots" (Ex. C, p. 31), and running a "METS test and then had call where she was in boots for ≈ 3 hours" (Ex. E, p. 73.)

15. Although Claimant did not assert a Workers' Compensation Claim against SM[Redacted], the medical reports establish that the July 9, 2016, injury suffered while working for Respondent [Employer Redacted] had resolved years before Claimant suffered a new injury to her left lower extremity.

16. On February 10, 2022, Paul Stone, D.P.M, performed an IME. Dr. Stone credibly and persuasively concluded that Claimant "developed injury to the left plantar fascia with swelling and overlying compression of the branches of the posterior tibial nerve in the porta pedis which is unrelated to the 2016 injury and resultant compartment decompression." (Ex. F, p. 80.)

17. Dr. Stone, through his report and testimony, credibly and persuasively concluded that Claimant's history of symptoms related to running and wearing work or bunker boots is consistent with plantar fascia and tarsal tunnel release surgery on December 6, 2021, completed by Dr. Metzl, and that this surgery treated a separate, distinct, and different anatomical problem and area from the 2016 injury that required a four-compartment release surgery. (*See also* Ex. F, p. 80.)

18. Dr. Stone concluded that Claimant's plantar fasciitis and tarsal tunnel symptoms were not caused by her July 9, 2016, work injury. Dr. Stone credibly and persuasively concluded Claimant suffered from a new injury.

19. The ALJ finds Dr. Stone's opinions and conclusions to be credible and persuasive because his testimony is consistent with Claimant's underlying medical records related to the timing of the onset of her pain after being placed at MMI, the location of her new pain, and the conditions for which she was treated via surgery. And such opinions were explained and supported through the demonstrative exhibits presented at hearing and discussed during Dr. Stone's testimony.

20. Claimant's condition and need for additional medical treatment after being placed at MMI did not flow proximately and naturally from the July 9, 2016, work injury.

21. Claimant's July 9, 2016, industrial injury did not leave Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for

additional medical treatment. As a result, Claimant's disability and need for medical treatment do not represent compensable consequences of the industrial injury.

22. The ALJ finds that Claimant's July 9, 2016, condition has not worsened since being placed at MMI. The ALJ further finds that Claimant's need for medical treatment is unrelated to her July 9, 2016, work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that her condition has worsened and that her case should be reopened.

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

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

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

The ALJ found Dr. Stone's opinions and conclusions to be credible and persuasive because they are consistent with Claimant's underlying medical records related to the timing of the onset of her pain after being placed at MMI, the location of her new pain, and the conditions for which she was treated via surgery. And such opinions were credibly and persuasively explained and supported through the demonstrative exhibits presented at hearing and discussed during Dr. Stone's testimony.

As found, Claimant's condition and need for additional medical treatment after being placed at MMI did not flow proximately and naturally from the July 9, 2016, work injury.

As also found, Claimant's July 9, 2016, industrial injury did not leave Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for additional medical treatment. As a result, Claimant's disability

and need for medical treatment do not represent compensable consequences of the industrial injury.

As a result, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that her condition caused by the July 9, 2016, industrial accident has worsened since being placed at MMI and that her claim should be reopened. Thus, the ALJ further finds and concludes that Claimant has failed to establish by a preponderance of the evidence that the need for medical treatment is causally related to her July 9, 2016, work injury.

ORDER

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

1. Claimant's petition to reopen is denied. Thus, Claimant's request for additional benefits is denied.

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

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

DATED: July 1, 2022.

/s/ Glen Goldman

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

ISSUES

Have the respondents overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician regarding causation, maximum medical improvement (MMI), and/or permanent impairment?

FINDINGS OF FACT

1. The claimant worked for the employer as a real estate agent and property manager. On January 23, 2020, the claimant sustained a work related injury when she slipped on ice while responding to an HOA complaint. The claimant reported this incident to her supervisor and friend, Deborah Sanderson.

2. On January 24, 2020, Ms. Sanderson completed a First Report of Injury or Illness. In that document, the incident was described as "[the claimant] fell on ice and hit head". The body part identified as injured was the claimant's skull, and the injury was identified as a "contusion".

Medical Treatment Prior to January 23, 2020

3. Prior to January 23, 2020, the claimant has a lengthy medical history for insomnia, anxiety, depression, multiple closed head injuries, and spinal issues. In addition, the claimant has a history of alcohol abuse, domestic violence, and interactions with law enforcement.

4. On January 25, 2016 the claimant sought treatment for head and neck issues with Dr. Bruce Lipmann. The claimant reported that her symptoms began after she was walking up some stairs when she tripped and fell backwards hitting her head. However, the claimant testified that she was not honest with Dr. Lipmann or law enforcement regarding her injuries. The incident occurred when her boyfriend threw her down a flight of stairs.

5. On February 13, 2016, claimant was seen by Dr. Karen Locke regarding a concussion that the claimant sustained when she struck her head against a wall. The claimant was experiencing headaches, mental fogginess, irritable mood, insomnia, and low back pain.

6. On July 21, 2016, claimant sought chiropractic treatment with Dr. Steven Peltzman. At that time, the claimant reported pain in her neck, mid-back, and low back. The claimant also reported occasional headaches. Dr. Peltzman recorded that the claimant symptoms began when she fell down stairs while carrying a table.

7. During 2017, 2018, and 2019, the claimant continued her treatment with Drs. Locke and Peltzman. These medical records identify the claimant's symptoms and conditions included headaches, severe anxiety, moderately severe depression, insomnia, nausea, vomiting, back pain, and neck pain.

8. On April 15, 2019, the claimant was seen by Dr. Locke. At that time, the claimant reported suffering a concussion while in Michigan one month prior. The claimant also reported increased anxiety, vomiting, headaches, nosebleeds, low appetite, mental fogginess, rhinitis and dizziness. Dr. Locke opined that the claimant's symptoms were most likely due to the concussion.

9. On June 12, 2019, the claimant returned to Dr. Peltzman and reported increased neck pain and headaches. The claimant also reported that she had experienced a fall approximately eight weeks prior. On June 19, 2019, the claimant reported neck pain of six out of ten. On June 26, 2019, she reported her neck pain ranged from six to nine out of ten.

10. On February 12, 2018, February 13, 2018, February 17, 2019, May 27, 2019, and June 1, 2019, officers with the New Castle Police responded to incidents involving the claimant. In each instance alcohol was identified as being involved.

Medical Treatment After January 23, 2020

11. The first medical treatment the claimant sought following her fall on January 23, 2020, was on January 24, 2020. On that date, the claimant was seen in the emergency department (ED) at Valley View Hospital. At that time, the claimant described her work injury as falling on ice, hitting the back of her head, and falling onto her back. On exam, Dr. David Hile noted that the claimant's head was "normocephalic atraumatic" and the claimant was neurologically intact. There is no reference to any lacerations, swelling, bruising, or broken teeth. A cervical spine computed tomography (CT) scan was read as negative. Dr. Hile diagnosed post-concussive syndrome, and a thoracic spine muscle spasm. The claimant did not report her prior history for falls, head injuries, or neck symptoms.

12. On January 29, 2020, claimant began treatment at Grand River Clinic[1] and was seen by Mark Quinn, PA-C. On that date, the claimant's description of the January 23, 2020 was different from that on the First Report of Injury and the report at the ED on January 24, 2020. The claimant told PA Quinn that she was struck on the top of her head by a very large icicle (two feet wide, and three to four feet long), causing her to fall and strike her forehead on pavement, but she did not lose consciousness. The claimant also reported returning to work following her fall. At the time of the January 29, 2020 exam, the claimant reported headaches, light sensitivities, and feeling of being off balance. The claimant denied prior head injuries, neck pain, or back pain.

[1] The providers at Grand River Clinic, including PA Quinn have been the claimant's authorized treating providers (ATPs) for this claim.

13. On his examination, PA Quinn noted that the claimant was alert and oriented, her head was completely normal to inspection, her hearing was normal, she had a normal facial exam, her teeth and dentition were normal, her vision was normal, her neck was normal with full range of motion, and her skin examination revealed no wounds, lesions, or rashes. PA Quinn diagnosed a concussion without loss of consciousness.

14. On January 31, 2020, the claimant was seen by Chrisitina Maenle, NP at Valley View Hospital related to a pre-existing diagnosis of vertebral artery calcifications. The claimant mentioned sustaining a migraine on January 24, 2020. NP Maenle noted that the claimant's "history is a little vague". The claimant denied having back pain and NP Maenle noted the claimant's neck examination was normal.

15. On February 4, 2020, the claimant returned to PA Quinn and reported vomiting, feeling off balance, sleeping a long time, blurry vision, and that bright lights were causing headaches. The claimant also reported that she had suffered a concussion three years prior, when she was pushed down some stairs. The claimant denied any other head injuries. The claimant continued to deny neck and back pain. On exam, PA Quinn noted that the claimant's head, face, teeth, and neck were all normal, and she had full range of motion of her neck.

16. On February 12, 2020, the claimant was seen by PA Quinn and reported improvement. PA Quinn noted that the claimant's head, teeth, and neck were normal, and she had no skin wounds. The claimant had full range of motion to her neck and she continued to deny back pain. PA Quinn released the claimant to modified duty.

17. On February 24, 2020, the claimant was seen in the ED at Grand River Medical Clinic after she fell and hit her head. Chelsea Lawrenz, PA-C recorded that the claimant was improving after a prior fall until the current fall three days prior. The claimant reported that after falling she experienced exacerbation of her dizziness, headache, photophobia, nausea, back and neck pain. PA Lawrenz noted a healing laceration on the claimant's lower lip, and tenderness over the midline and bilateral lateral cervical areas.

18. On February 27, 2020, the claimant was seen by PA Quinn. In the medical record of that date, PA Quinn identified a fall on February 21, 2020 when the claimant slipped on ice and struck her head. PA Quinn noted the claimant has experienced a "significant decrease in her functionality following the second fall" and he made a referral for a neurological consultation.

19. On March 13, 2020, the claimant was seen by neurologist Dr. Mitchell Burnbaum. The claimant reported that her second fall involved slipping as she exited her bedroom, and hitting the right side of her head on tile. In his report, Dr. Burnbaum noted that although the claimant had not yet reached her baseline, she had improved following her fall in January 2020, and was "much worse" after the second fall.

20. On March 28, 2020, the respondents filed a General Admission of Liability (GAL) admitting for the January 23, 2020 injury, medical treatment, and temporary total disability (TTD) benefits.

21. On May 7, 2020, the claimant was seen by Louis Passariello, LCSW, for a mental health examination. On that date, the claimant reported that when she was injured on January 23, 2020, she suffered extensive bruising on her head and face. The claimant did not reference her fall on February 21, 2020.

22. On June 10, 2020, the claimant was seen by Dr. Dale Bowen for a neuropsychological evaluation[2]. With regard to the work injury, the claimant told Dr. Bowen that she slipped on ice, but did not mention being struck by an icicle. In addition, the claimant did not mention her second fall in February.

23. On June 10, 2020, PA Quinn released the claimant to work three days per week, working six to eight hours each day.

24. On August 10, 2020, PA Quinn released the claimant to full duty, with no work restrictions. In that same medical record, PA Quinn opined that the claimant would likely reach maximum medical improvement in the next month.

25. On September 8, 2020, the claimant reported to PA Quinn that she was working full time and doing well. On examination, PA Quinn noted that the claimant had bruising in various stages of healing, as well as a hematoma on her head. The claimant first reported that she fell at home and lost consciousness. She then described becoming injured when her dog jumped on her as she exited her car. However, PA Quinn continued to question the claimant about her injuries and he noted:

> Upon further questioning she states that her hematoma on her scalp and bruising was not from a fall as initially stated and that this was from a domestic violence incident. States she was grabbed and thrust up against a wall in her home, states she had a [loss of consciousness]. States that she reported this incident to the police and has since changed all the locks in her house. States that she is working on a restraining order against the offender and that she now feels safe in her home.

Mr. Quinn noted that he would address maximum medical improvement (MMI) in two weeks. The claimant remained working at full duty without restrictions.

26. On September 12, 2020 and September 13, 2020, the New Castle Police documented additional incidents involving the claimant. On September 19, 2020, the claimant contacted that department about obtaining a restraining order. These ALJ finds

[2] Although Dr. Bowen's report was not submitted as evidence, the report is described in the reports of Drs. Orent, Moe, and D'Angelo.

that these records substantiate the domestic violence history PA Quinn identified on September 8, 2020.

27. On September 23, 2020, the claimant returned to PA Quinn. At that time, the claimant reported that most of her symptoms had resolved. PA Quinn recommended additional care through November 23, 2020, at which time he anticipated placing the claimant at MMI.

28. On September 25, 2020, the respondents filed a GAL terminating TTD benefits as of August 10, 2020 because the claimant was released to full duty.

29. On October 2, 2020, claimant was seen in the ED at Grand River Medical Clinic regarding a foot injury. On examination, the claimants' cervical spine was identified as normal.

30. On February 12, 2021, the Rifle police transported the claimant to the ED at Grand River Medical Center because she was hallucinating. The claimant was seen by Dr. Ruth Pitts at that time. Dr. Pitts noted that the claimant was experiencing confusion, tremulousness, and tachycardia. When the claimant was unable to provide a history, Dr. Pitts obtained information from the claimant's father. The claimant's father reported that the claimant had a history of excessive alcohol consumption. Dr. Pitts opined that the claimant was experiencing alcohol withdrawal symptoms.

31. The claimant was hospitalized from February 12, 2021 through February 18, 2021. The medical records indicate that during this time the claimant was combative, agitated, confused, disheveled, lacking insight, and exhibiting poor judgment with delayed cognition. The claimant was also noted to be experiencing delirium tremens as a result of severe acute alcohol withdrawal. The claimant was instructed to pursue alcohol rehabilitation.

32. On February 22, 2021, the claimant returned to PA Quinn. At that time, PA Quinn noted that the claimant had been hospitalized because of acute psychosis. The claimant reported that she had been laid off and traveled to Michigan for approximately one month. During that time, she drank heavily and stopped taking her mental health medications. The claimant reported that upon her return to Colorado she was hospitalized with hallucinations, alcohol dependence, with withdrawal deliriums.

33. On February 25, 2021, PA Quinn ordered magnetic resonance imaging (MRI) of the claimant's brain and made a referral for neuropsychological testing.

34. On March 11, 2021, law enforcement was contacted regarding a domestic violence incident in the claimant's home. The claimant reported to officers that she was thrown down stairs by her boyfriend, which resulted in injuries to her head and hand. The claimant was transported to Valley View Hospital ED. Dr. Charlie Abramson noted that the claimant had a head abrasion and bruising on her palms.

35. On March 15, 2021, the claimant sustained a gunshot wound to her left hand. While undergoing medical treatment at Valley View Hospital, the claimant reported that her boyfriend shot her in the hand during an argument. It was noted that the claimant was heavily intoxicated upon arrival, was shaking, and difficult to control.

36. On March 22, 2021, the claimant was transported to Grand River Medical Center for admission into an alcohol recovery program. The claimant reported that she had been drinking an average of one drink per hour for four days, and she had to wake up three to four times each night to drink alcohol to prevent withdrawal symptoms. The claimant's friend was instructed to transport the claimant straight to a detox in Grand Junction.

37. On April 1, 2022, the claimant was seen by PA Quinn. On that date, PA Quinn noted that the claimant had been working until her gunshot wound and related surgery. The claimant reported occasional headaches, but the majority of her concussion symptoms were quite good.

38. On May 3, 2021, the claimant returned to PA Quinn. At that time, the claimant had full range of motion of her neck.

39. At the request of the respondents, the claimant was scheduled to attend an independent medical examination (IME) with Dr. Douglas Scott on May 16, 2021. The claimant did not appear for the IME and Dr. Scott issued a report of his review of the claimant's medical records. In his May 16, 2021 report, Dr. Scott opined that the claimant suffered a work injury involving a slip and fall, followed by a non-work related fall at her home. Dr. Scott further opined that the claimant's second fall exacerbated her post-concussion symptoms and caused new post-concussion symptoms. With regard to MMI, it was Dr. Scott's opinion that the claimant reached MMI sometime between February 12, 2020 and February 21, 2020 when she fell at home and her current symptoms were not related to her work injury. He also opined that the claimant did not need maintenance medical treatment, or a permanent impairment rating.

40. On June 3, 2021, the claimant was seen by PA Quinn. At that time, PA Quinn referenced Dr. Scott's IME report and stated that he agreed that the claimant's symptoms that were related to her work injury had resolved. PA Quinn also agreed with Dr. Scott that the claimant's fall at home in February 2020 was the cause of her current symptoms.

41. On June 23, 2021, PA Quinn and his supervising physician at Grand River Health, Dr. Bonnie Walsh, authored a letter in which they stated their agreement with Dr. Scott. Specifically, they agreed that the claimant reached MMI somewhere around February 12, 2021 and February 21, 2021.[3] The letter further stated that the claimant was placed at MMI as of June 3, 2021, with no permanent impairment, and no

[3] The ALJ infers that this is a typographical error, as Dr. Scott identified the dates of MMI as occurring between February 12, 2020 and February 21, 2020.

maintenance care. On August 23, 2021, PA Quinn identified the date of MMI as February 12, 2021.

42. On August 5, 2021, the respondents filed a Final Admission of Liability (FAL) consistent with Dr. Walsh and PA Quinn's report of MMI with no impairment.

43. On August 17, 2021, the claimant applied for a Division sponsored independent medical examination (DIME). Dr. Sander Orent was selected to perform the DIME.

44. On November 2, 2021, the claimant attended the DIME with Dr. Orent. In connection with the DIME, Dr. Orent obtained a history from the claimant and performed a physical examination. In addition, he reviewed medical records beginning on January 24, 2020, (the day after the claimant's injury). At the DIME, the claimant denied prior neck issues, and denied using alcohol since college. With regard to her mechanism of injury on January 23, 2020, the claimant reported to Dr. Orent that she was struck in the head by an icicle. The claimant denied that she struck her head on February 21, 2020. She also denied suffering an injury to her head in September 2020. Dr. Orent accepted the history provided by the claimant as true, specifically noting that he was giving her "the benefit of the doubt".

45. Dr. Orent noted that the claimant's case involved a variety of issues including psychological symptoms, possible alcohol withdrawal syndrome, and at least three closed head injuries. Dr. Orent noted that prior to the second fall February 2020 fall the claimant was improving, and experienced worsened conditions thereafter. However, Dr. Orent ultimately opined that the claimant was not at MMI and recommended repeat neuropsychological testing, and a psychiatric IME. With regard to the claimant's cervical spine condition, Dr. Orent diagnosed a cervical strain, and provided a provisional impairment rating of 22 percent, whole person. Dr. Orent explained that he assessed this rating because of deficiencies in range of motion, (even though he noted the claimant's range of motion was substantially better upon his direct observation).

46. On December 7, 2021, the respondents filed an Application for Hearing (AFH) on the issues of overcoming the DIME opinions of Dr. Orent, pre-existing and unrelated conditions, intervening accidents/injuries/conditions. The current hearing resulted.

47. At the request of the respondents, the claimant attended a psychiatric IME with psychiatrist, Dr. Stephen Moe. In connection with this IME, Dr. Moe reviewed the claimant's medical records, and conducted an interview with the claimant. In his January 10, 2022 IME report, Dr. Moe opined that the claimant recovered from her January 23, 2020 work related concussion prior to her February 21, 2020 at-home non-work related concussion. He further opined that no further treatment was necessary for the work injury (including a repeat neuropsychological assessment). In reaching his opinions, Dr. Moe noted that the claimant's report that her conditions worsened after the work injury did not meet the medically expected outcome following a mild concussion.

Dr. Moe also noted a number of inconsistencies in the claimant's reports to various providers and to her recitation of events at the psychiatric IME. Dr. Moe also opined that alcohol use disorder is the likely cause of the claimant's symptoms.

48. On January 24, 2022, Dr. Moe issued an addendum to his IME report after reviewing additional records. In that addendum, Dr. Moe stated that the additional records did not change his opinion that claimant reached MMI, with no permanent psychiatric impairment, no need for additional evaluations or treatment, and no need for restrictions.

49. Upon his review of Dr. Moe's reports, PA Quinn authored a letter dated January 26, 2022. In his letter, PA Quinn agreed with all of Dr. Moe's conclusions. In addition, PA Quinn opined that on January 23, 2020, the claimant injured her head, and that she recovered from that injury prior to the February 21, 2020 fall at home.

50. Thereafter, the claimant attended an IME with Dr. Kathleen D'Angelo. In connection with the IME, Dr. D'Angelo reviewed medical records from before and after the claimant's work injury, interviewed the claimant, and performed a physical examination. In an IME report dated February 26, 2022, Dr. D'Angelo opined that the claimant was at MMI as of February 12, 2020, and the claimant was appropriately released by PA Quinn without maintenance treatment, impairment ratings, or permanent work restrictions. Dr. D'Angelo further opined that Dr. Orent erred in performing his causation analysis, which in turn resulted in errors with regard to his opinions on MMI, impairment, work restrictions, and the need for maintenance care. Dr. D'Angelo noted that Dr. Orent did not appear to have reviewed the claimant's pre-injury medical records.

51. Dr. D'Angelo's testimony was consistent with her written report. Dr. D'Angelo testified that the history portion of her interview of claimant was difficult, because claimant has selective memory and confabulation. Dr. D'Angelo testified that it is her opinion that the claimant confabulates her medical history because of Korsakoff Syndrome[4] (which is secondary to the claimant's chronic alcohol abuse).

52. During her testimony, Dr. D'Angelo reiterated her opinion that Dr. Orent erred with respect to his causation, MMI, and impairment rating opinions. She further testified that this error was not just a mere difference of medical opinions, but a clear contradiction to what is supported by claimant's records. Dr. D'Angelo noted that Dr. Orent essentially deferred his own opinion on the neuropsychological/mental issues to a psychiatric IME, and Dr. Moe's subsequent psychiatric IME clarified that the claimant is at MMI for those issues, with no impairment, and without need for further evaluation or treatment. With regard to the claimant's cervical spine, Dr. D'Angelo testified that between the date of the claimant's work injury and the date of her February 2020 at-home accident, the claimant had multiple evaluations, and during each evaluation she denied cervical pain, she had no positive findings on cervical exam, and she had full cervical range of motion. Additionally, after claimant's fall at home in February 2020, she reported to PA Quinn that she had dramatically worsened after the fall at home, with

[4] Also referred to as chronic Wernicke's encephalopathy.

a significant increase in dysfunction. D'Angelo testified that an accurate prior medical history is essential to a competent forensic causation evaluation. In the current matter, Dr. D'Angelo noted that Dr. Orent had an inaccurate understanding of the claimant's prior cervical history, which caused his cervical causation evaluation to be erroneous.

53. The claimant testified at the hearing. The claimant's testimony was inconsistent, confusing, disjointed, and at times argumentative. The claimant testified that on January 23, 2020, she was struck in the head by a falling icicle, resulting in a fall and a loss of consciousness. The claimant further testified that as a result of her fall she broke her glasses, chipped her teeth, bruised the side of her head, and cut off the tip of her thumb. In addition, at the location where she was struck on her head, she developed a bald spot. The claimant could not explain why the January 24, 2020 ED report did not identify damage to her teeth, lacerations to her head, or thumb. The claimant testified that she had suffered a traumatic brain injury approximately five years ago, and she had fully recovered from that prior injury. The claimant repeatedly denied striking her head on February 21, 2020. During her testimony, the claimant admitted that she lied to a number of her medical providers including Dr. Lipmann, Dr. Locke, and Dr. Peltzman.

54. The ALJ does not find the claimant's testimony to be credible or persuasive.

55. The ALJ credits the medical records, the testimony and opinions of Dr. D'Angelo, and the opinions of PA Quinn, Dr. Scott, and Dr. Moe over the contrary opinions of Dr. Orent. The ALJ finds that Dr. Orent received incomplete records, and an incomplete and inaccurate history from that claimant, and he relied on that history in providing his ultimate opinions regarding diagnosis, MMI, and impairment. For those reasons, the ALJ finds that the respondents have demonstrated by clear and convincing evidence that Dr. Orent's opinions are erroneous. The ALJ concludes that the claimant reached MMI on February 12, 2020 with no permanent impairment.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. 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). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000); *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. As found, the respondents have overcome, by clear and convincing evidence, the opinions of Dr. Orent. The ALJ concludes that there is more than a mere difference of opinions in this matter. Specifically, the ALJ concludes that Dr. Orent erred in finding that the claimant is not at MMI. As found, the opinions of Dr. D'Angelo and PA Quinn are credible and persuasive on this issue. The ALJ concludes that the claimant reached MMI on February 12, 2020.

7. The ALJ further concludes that Dr. Orent erred in assigning a permanent impairment rating to the claimant's cervical spine. As found, the opinions of Dr.

D'Angelo and PA Quinn are credible and persuasive on this issue. The ALJ concludes that the claimant reached MMI with no permanent impairment.

ORDER

It is therefore ordered:

1. The claimant reached MMI for all aspects of her work injury on February 12, 2020.

2. The claimant is not entitled to permanent partial disability (PPD) benefits under this claim.

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

Dated July 5, 2022.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-186-645-001

ISSUES

I. The parties seek an order allocating death benefits/dependency benefits between Dependent-Claimants, Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter.

II. Respondents seek an order finding that Respondents are entitled to take an offset for social security survivor benefits against death benefits/dependency benefits owed to Dependent-Claimants.

STIPULATIONS

Prior to hearing, the parties entered into stipulated facts that are referenced below and memorialized within a document identified as "Dependent-Claimant and Respondents' Stipulated Facts for Hearing." (Resp. Ex. H) Dependent-Claimant surviving spouse indicated at hearing that she in fact signed the Stipulated Facts for Hearing document on May 24, 2022, and that remained in agreement with those stipulated facts.

FINDINGS OF FACT

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

1. Decedent passed away on October 21, 2021, in the course and scope of his duties as a fire fighter for Employer. (Resp. Ex. H, Stipulated Fact #1, bn 023; Resp. Exs. A-B)
2. Dependent-Claimant surviving spouse married Decedent on December 22, 2012, and Decedent and Dependent-Claimant remained married as of October 21, 2021. (Resp. Ex. H, Stipulated Fact #2, bn 023; Resp. Ex. G, bn 020)
3. In addition to Dependent-Claimant surviving spouse, when he died Decedent also left behind two biological children he had with Dependent-Claimant surviving spouse: Dependent-Claimant surviving son OS[Redacted] (D.O.B. 05/27/16), and Dependent-Claimant surviving daughter KS[Redacted] (D.O.B. 05/20/20). (Resp. Ex. H, Stipulated Facts #3-4; Resp. Ex. G, bn 021-022)
4. Dependent-Claimant surviving spouse is the mother and legal guardian of Dependent-Claimant surviving son and Dependent-Claimant surviving daughter. (Resp. Ex. H, Stipulated Fact #5, bn 023)
5. A Dependents' Notice and Claim for Compensation was filed by Dependent-Claimant surviving spouse on behalf of herself, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter. (Resp. Ex. C)

6. Dependent-Claimant surviving spouse, and Respondents, have no knowledge of any other possible dependents of Decedent as of the date of Decedent's death. (Resp. Ex. H, Stipulated Fact 12, bn 024)

7. On December 21, 2021, Insurer filed a General Admission-Fatal, admitting to death benefits/dependency benefits, and allocating those benefits equally (1/3 each) between Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter. (Resp. Ex. D) Dependent-Claimant surviving spouse testified that she believes this to be a fair and equitable distribution of death benefits/dependency benefits, and she testified that she is in agreement to this allocation.

8. Dependent-Claimant surviving spouse received a one-time $255 award for Social Security Survivor Benefits (herein "SSS Benefits"). She has not received any additional SSS Benefits, and she is not currently receiving SSS Benefits. (Resp. Ex. H, Stipulated Fact #7, bn 024)

9. Dependent-Claimant surviving son received $3,680 in SSS Benefits on January 18, 2022, for money due between October 2021 and December 2021, and he began receiving $1,274 in monthly SSS Benefits beginning in February 2022. (Resp. Ex. H, Stipulated Fact #9, bn 024)

10. Dependent-Claimant surviving daughter received $3,680 in SSS Benefits on January 18, 2022, for money due between October 2021 and December 2021, and she began receiving $1,274 in monthly SSS Benefits beginning in February 2022. (Resp. Ex. H, Stipulated Fact #11, bn 024)

11. On February 16, 2022, Respondents applied for hearing on issues that included obtaining an order regarding proper distribution of death benefits between dependents, SSS Benefit offsets, and/or any other applicable offsets.

12. The parties entered into a written set of stipulated facts on May 24, 2022. (Resp. Ex. H)

13. Dependent-Claimant surviving spouse testified that she works as a 4th grade schoolteacher, and she earns $3,500/month before taxes. She has health insurance for herself through her job and that Dependent-Claimant surviving son and Dependent-Claimant surviving daughter are covered for health insurance by Colorado Health Plan for Children Medicare/Medicaid. She owns her own home, and her mortgage payments were forgiven under a Tunnels to Towers Foundation Benefit award. She has a car payment of $460/month.

14. In addition to the one-time $255 award in SSS Benefits, Dependent-Claimant surviving spouse received $135,000 in widow's/survivor benefits from Provident Insurance, $75,000 from a life insurance policy through her work on Decedent's death, and $250,000 from American Income Life Insurance through Decedent's work.

15. Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter did not testify at the hearing.

CONCLUSIONS OF LAW

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

General Provisions

1. 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).
2. Section 8-42-121, C.R.S,. 2021, provides in pertinent part that death benefits "shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable."
3. Respondents seek an order affirming the current allocation of death benefits being paid to Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter, at equal amounts of 1/3 each, to try to help protect the dependent children's workers' compensation benefits for their future needs.
4. As found, based on a review of the evidence and the statements and testimony of Dependent-Claimant surviving spouse at hearing, the ALJ finds that an apportionment of the death benefits between Dependent-Claimant surviving spouse, Dependent-Claimant surviving son, and Dependent-Claimant surviving daughter, in a 1/3 split before offsets are applied, is equitable and fair. Respondents seek an order affirming this allocation to ensure that the benefits owed to Dependent-Claimant children, who are currently 6 years old (Owen), and 2 years old (Keiley), are clearly identified, with a stated desire to have that those benefits placed in separate bank accounts, and protected, for each child's future needs. It is noted that Dependent-Claimant surviving spouse has a regular salary, she recently received $460,000 in widow's survivor benefits from three non-social security based sources, she had her mortgage assumed by a beneficent source, and she does not identify any other large current expenses beyond her monthly car payment.
5. An argument can be made to provide a greater allocation of the death benefits to the dependent children, to provide more money for them in the future for education and/or other personal expenses. Such an allocation would lessen the impact of the dependent children's SSS Benefit award offset against their death benefits. Supporting this argument is that the dependent children's entitlement to workers' compensation death benefits will end by no later than each child's 21st birthday, meaning each has a known limited window within which to receive such benefits, and as each child's entitlement to such benefits ends, the allocation of benefits will be modified (each time increasing Dependent-Claimant surviving spouse's allocation), ultimately with all workers' compensation death benefits allocated to Dependent-Claimant surviving spouse (so long as she is living, and does not remarry). Moreover,

as found, Dependent-Claimant surviving spouse has received $460,000 in other widow benefits, which when coupled with her salary, and when considering her limited expenses, theoretically supports a distribution more heavily in favor of the dependent children.

6. While the above argument could be made, the ALJ has no reason to believe Dependent-Claimant surviving spouse does not have her children's best interests in mind, or reason to believe she will not protect her children's workers' compensation benefits to the greatest extent possible for their future. As such, it is the ALJ's determination that the fairest and most equitable distribution of workers' compensation death benefits continues to be an equal division of those benefits of 1/3 to each Dependent-Claimant before application of offsets. This is the allocation currently in place, and this is the allocation the Dependent-Claimant surviving spouse indicated she would like to have continued. Given the above, the ALJ finds and concludes that an equal allocation of death benefits among the three identified Dependent-Claimants if fair and equitable.

7. Section 8-42-114, C.R.S., (2021), states that "In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits." (Emphasis added)

8. By virtue of 8-42-114, C.R.S. (2021), Respondents are entitled to take a SSS Benefit offset against death benefits paid to each Dependent-Claimant. Dependent-Claimant surviving spouse does not contest Respondents' entitlement to SSS Benefit offsets, and there is no known factual or legal basis to deny Respondents' request to take SSS Benefit offsets.

ORDER

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

1. Respondents shall continue to apportion workers' compensation death benefits with 1/3 of the benefits being paid to be allocated to Dependent-Claimant surviving spouse, 1/3 being paid to be allocated to Dependent-Claimant surviving son, and 1/3 being paid to be allocated to Dependent-Claimant surviving daughter.

2. Respondents are entitled to take SSS Benefit offsets against death benefits paid to Dependent-Claimants, to be calculated consistent with statute and caselaw.

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: July 5, 2022.

/s/ Glen Goldman

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

ISSUES

The issues set for determination included:

- Did Claimant overcome the opinions of the physician who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") [Eric Shoemaker, D.O.] regarding permanent medical impairment by clear and convincing evidence?

- Did Respondents prove by a preponderance of the evidence that they are entitled to recover the overpayment?

FINDINGS OF FACT

1. On January 6, 2020, Claimant suffered an admitted industrial injury while working for Employer. Claimant testified she was sweeping the floor when she fell on her left side. She suffered injuries to her arm and low back.

2. Claimant testified she received treatment through the providers at Concentra, who were ATP-s for Claimant's treatment. Claimant was initially evaluated by Richard Shouse, PA-C at Concentra on January 7, 2020, who noted pain in Claimant's lower back, right knee and right arm, as well as the sacrum. Claimant was given work restrictions and x-rays were taken, which were negative for fracture and dislocation. In the follow-up evaluation on January 9, 2020, Lacey Esser, PA-C, who noted Claimant fell on her back and who documented physical findings that correlated with her symptoms.[1]

3. From January 2020 through September 2020, the Concentra records reflected consistent pain in Claimant's lower back, including loss of range of motion ("ROM"). Claimant received physical therapy ("PT"), as well as chiropractic treatment.[2] The ALJ found these records were evidence of Claimant's continued pain complaints, as well as objective findings on examination that were documented by her ATP-s .

4. Claimant was referred to John Sacha, M.D. on or about September 15, 2020. Claimant reported persistent pain in her low back. Dr. Sacha' report noted the MRI of the lumbar spine showed mild disc bulging and facet spondylolysis, with borderline foraminal narrowing from L3 to S1. Dr. Sacha recommended injections and the ALJ inferred that Claimant's low back symptoms were the basis for this treatment recommendation.

[1] These records were summarized in Dr. Shoemaker's DIME report. [Exhibits 4 and D].

[2] *Id.*

5. On October 30, 2020, Dr. Sacha administered a staged L5-S1 intra-laminar epidural injection, staged left L3-4 intra-articular facet injection, staged left L4-5 intra-articular facet injection and staged left L5-S1 intra-articular facet injection; all of which were done with fluoroscopic guidance and conscious sedation. Claimant's diagnoses by Dr. Sacha were: lumbosacral facet syndrome and lumbosacral radiculopathy.

6. Claimant returned to Dr. Sacha on November 20, 2020. He noted she did not have short term relief with either the lumbar epidural or lumbar facet injections. On examination, Dr. Sacha noted Claimant had lumbar paraspinal spasm, pain with forward flexion, extension and extension rotation. She had a negative straight leg raise and equivocal neural tension test bilaterally. Dr. Sacha's impression was: lumbosacral radiculopathy. Dr. Sacha concluded Claimant was at MMI.

7. Dr. Sacha noted that, although he did not know what Claimant's pain generator was or where the symptoms were from, she had been consistent with complaints and he recommended impairment rating. Dr. Sacha concluded Claimant sustained a 5% whole person impairment, using the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition revised. Claimant had 0% permanent impairment based upon loss of range of motion ("ROM"). Dr. Sacha completed the ROM testing and the sheets were attached to his report. Dr. Sacha's rationale for assigning an impairment rating was persuasive to the ALJ.

8. The medical records admitted at hearing documented more than six months of pain in the lumbar spine for which Claimant received treatment. At the time Dr. Sacha concluded Claimant was an MMI, Claimant had received treatment for her low back pain for more than ten (10) months.

9. The ALJ took judicial notice of portions of the *AMA Guides* governing the evaluation of permanent impairment-lumbar spine, pp.78-81.[3]

10. On November 23, 2020, Claimant returned to Concentra and was evaluated by Jonathan Claassen, D.O. At the time, Claimant reported he was having difficulty sleeping due to discomfort and pain, as well as a tingling sensation in the left leg. Dr. Classen's report documented Claimant had received physical therapy, chiropractic, dry needling and medication management for her injuries. Dr. Classsen did not make specific findings with regard to Claimant's lumbar spine, but concurred she was at MMI. His assessment was: sacral contusion and lumbar contusion. Dr. Classen completed a WCM 164 at this time.

11. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on December 21, 2020. The FAL admitted for the 5% medical impairment rating issued by Dr. Sacha. The total PPD award to which Claimant was entitled was $12,329.58.

[3] C.R.E. 201.

12. MR[Redacted] testified on behalf of Respondents. She is employed by Respondent-Insurer. Ms. MR[Redacted] testified that the previous claims handler before was the one who filed the December 21, 2020 FAL.

13. Ms. MR[Redacted] testified she was familiar with the case, including the pleadings that were filed. She confirmed that the PPD benefits admitted to in the December 21, 2020 FAL were paid out completely. The PPD paid out totaled $12,236.10. Ms. MR[Redacted] testified there were three checks issued. Two were sent to Claimant's attorney in the respective amounts of $663.42 and $9,906.52 and then one check was mailed directly to Claimant in the amount of $1,666.16.

14. An attorney disbursement sheet, dated January 24, 2021, was admitted into evidence. That sheet documented a gross recovery of $10,569.94, less attorney's fees in the amount of $2,465.91; with a net to Claimant of $8,104.03. $1,175.00 in costs were expended, leaving a net paid to Claimant of $6,929.03. Copies of checks in those amounts were also admitted into evidence.[4]

15. Claimant testified that she received and cashed the check mailed to her by her attorneys.

16. On May 4, 2021, Dr. Shoemaker performed the DOWC IME. At that time, Claimant reported pain in her low back on the left side. She stated her pain got worse with sitting and decreased with changes in position. She described her pain as 7/10. Dr. Shoemaker stated Claimant had no pain behaviors during their discussion, but had dramatic displays of pain during very superficial palpation on the left lumbar paraspinals from L2 to the sacrum.

17. Dr. Shoemaker described Claimant's lumbar ROM as full and she was able to touch her toes, though she described pain. There was no evidence that Dr. Shoemaker tested Claimant's lumbar ROM with dual inclinometers. No ROM worksheets were attached to the report. Dr. Shoemaker said Claimant had significant reproduction of pain with simulated maneuvers including axial roll and axial load.

18. Dr. Shoemaker concluded Claimant did not qualify for an impairment rating. Dr. Shoemaker said she did not meet Desk Aid 11 criteria for the use of Table 53, as there was no objective pathology. He respectfully disagreed with Dr. Sacha that disc bulging was present and with Dr. Cox that facet arthropathy or effusion was present.

19. Dr. Shoemaker opined that Claimant's pain was far too superior to be considered emanating from the sacroiliac joint. Dr. Shoemaker stated Claimant's physical examination demonstrated four out of five signs of symptom magnification which suggested a non-physiologic/non-organic component to her symptoms. He concluded Claimant's subjective complaints did not correlate with objective findings. Dr. Shoemaker said Claimant had no permanent impairment.

[4] Exhibit F.

20. Claimant testified she was not sure whether an interpreter was present during the evaluation with Dr. Shoemaker.

21. The ALJ determined a Spanish interpreter was present for the DIME appointment.[5]

22. Dr. Shoemaker testified as an expert medical doctor with board certifications in Physical Medicine and Rehabilitation, Sports Medicine and Pain Medicine. He is Level II accredited pursuant to the W.C.R.P. Dr. Shoemaker testified he received extensive training in reviewing MRI-s of the lumbar spine. During fellowship, he trained at Washington University in the Mallinckrodt School-Institute of Radiology in the Department of Radiology reviewing spine MRI-s. He reviewed the MRI and determined that the disc heights were well-preserved. He opined the canal lateral recesses and foramen widely patent and the facet joints were unremarkable with no degenerative changes. No effusion was present and Dr. Shoemaker described the lumbar MRI to be unremarkable.[6]

23. Dr. Shoemaker testified he relied on the Desk Aid 11 when deciding whether Claimant qualified for an impairment under Table 53. He said that in order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualified for a numerical impairment rating of greater than zero under Table 53. Dr. Shoemaker opined Table 53, II B did not apply in because it referred to the presence of an intervertebral disc or other soft tissue lesions. He said Claimant had no identified objective findings to support the presence of intervertebral disc or other soft tissue lesion. Dr. Shoemaker said in this circumstance, Claimant didn't consider 6 months of medically documented pain and rigidity unless you qualify for an impairment under II. He described Section B as "a subset" to II. [7]

24. Dr. Shoemaker testified Claimant demonstrated four out of five signs of symptom magnification during the DIME which suggested a nonphysiologic, nonorganic component to her symptoms. He noted she also demonstrated 2 out of the 5 Waddell's signs during Dr. Sacha's evaluation. Dr. Shoemaker stated Claimant's subjective complaints of significant pain through a large area of her spine and the reproduction of pain with certain maneuvers did not correlate with what was seen structurally in her spine on advanced imaging and response to injections. Dr. Shoemaker did not believe there were objective findings to support her subjective complaints. The ALJ concluded this opinion concerning Waddell's signs was too limiting when evaluating impairment.

25. Dr. Sacha authored a letter, dated November 11, 2021, in which he reviewed the report issued by the DIME physician. Dr. Sacha opined that Dr. Shoemaker

[5] Exhibit G.

[6] Exhibit E, p. 23: 3-25.

[7] Exhibit E, pp. 37:18-38:18.

did not follow the Division of Workers‘ Compensation Level II accreditation course in making his determination of no permanent impairment. Dr. Sacha stated Claimant clearly qualified for an impairment, as “she had a specific mechanism of injury that fit ongoing symptoms, had consistency of complaints in the low back for greater than six months and although she was very somatic in nature, she qualified for the 5% whole person impairment for the lumbar spine”.[8] Dr. Sacha concluded Dr. Shoemaker did not follow the Level II accreditation course or the *AMA Guides* when finding Claimant sustained a 0% impairment. The ALJ inferred that Dr. Sacha concluded Claimant was entitled to a medical impairment rating, as she met the criteria for such a rating, despite the fact she was somatic.

26. Dr. Sacha noted Claimant had specific complaints, consistency of complaints, mechanism of injury and objective findings on exam. The ALJ concluded the presence of exaggerated physical complaints did not obviate Claimant’s entitlement to a medical impairment rating in this case. Dr. Sacha’s opinion supported this conclusion and was persuasive to the ALJ.

27. The ALJ found Dr. Shoemaker’s report failed to address the question of whether Claimant would be entitled to Table 53 impairment even with a normal MRI. Dr. Shoemaker’s testimony indicated his opinion that Claimant would not qualify for an impairment with an unremarkable MRI, despite the presence of six months of pain/rigidity and the treatment related to same. Dr. Shoemaker failed to confirm Claimant’s lumbar ROM by testing with a dual inclinometer. These were errors.

28. Claimant overcame Dr. Shoemaker’s opinions by clear and convincing evidence.

29. The ALJ found Dr. Sacha’s calculation of Claimant’s impairment was correct.

30. Since Respondents paid PPD benefits based upon Dr. Sacha’s rating, no overpayment exists.

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

CONCLUSIONS OF LAW

General

The purpose of the Workers’ Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted

[8] Exhibit 1, p. 5.

neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

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

Overcoming the DIME

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

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician*. Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). In the case at bar, the ALJ determined Claimant met the elevated burden of proof to overcome the DIME physician's' opinion on impairment.

As determined in Findings of Fact 1-2, Claimant suffered an injury at work on January 6, 2020 and received medical treatment provided by authorized providers at Concentra. The medical records from these providers documented the presence of objective findings, including spasm. (Finding of Fact 3). Claimant received conservative treatment and was referred to Dr. Sacha, as she had continued symptoms in the low back. *Id.* Dr. Sacha administered injections, which did not ameliorate Claimant's low back pain. then concluded Claimant was at MMI. Dr. Sacha assigned a medical impairment rating, pursuant to Table 53 II B. (Findings of Fact 7, 25-26).

The *AMA Guides* provide the basis for calculation impairment in the lumbar spine. More particularly, the *AMA Guides* provide in pertinent part:

"Evaluation of impairment of the spine involves both diagnosis-related factors, such as structural abnormalities, and musculoskeletal or neurologic factors that require physiologic measurements.[9]

[9] *AMA Guides*, page 78.

Table 53 II applied to Claimant's injury in the case at bench and provides:

"Intervertebral discs or other soft tissue lesions:

…

B. Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests".

The ALJ reasoned that a plain reading of the aforementioned section of the *AMA Guides* provided for the assignment of a medical impairment rating in this case, even when Waddell's signs were present and there was a question as to the presence of degenerative changes in Claimant's lumbar spine. The medical evidence reflected the fact that Claimant had medically documented injury, along with at least ten months of medically documented pain and rigidity. (Finding of Fact 8). As found, Dr. Sacha cited this specific provision of the *AMA Guides* when concluding Claimant was entitled to a 5% medical impairment. (Finding of Fact 25). In this regard, the ALJ concluded that Dr. Sacha considered the question of Claimant's symptom exaggeration when he performed ROM testing and applied the validity criteria. *Id.* Dr. Sacha's reasoning that Claimant was entitled to a Table 53 medical impairment rating was credible to the ALJ. (Finding of Fact 26).

The ALJ determined Dr. Shoemaker made factual errors in assessing impairment, starting with the failure to address the objective findings in Claimant's lumbar spine which were documented in the medical records. (Finding of Fact 27). Dr. Shoemaker also did not perform ROM testing with dual inclinometers. *Id.* The ALJ also viewed Dr. Shoemaker's construction of the pain and rigidity requirement of Table 53 to be too circumscribed, in that he concluded Claimant's had no permanent impairment because of the presence of Waddell's signs and what he described as nonorganic pain complaints. (Finding of Fact 24). Dr. Shoemaker, while disagreeing with Dr. Sacha and Dr. Cox regarding the MRI, did not believe Claimant would qualify for a Table 53 impairment, despite meeting the plain language of Table 53 II B. The AJ determined Dr. Shoemaker's opinions were erroneous and that Claimant qualified for a permanent medical impairment (and PPD benefits) in these circumstances.

The ALJ considered Respondents' argument that Dr. Sacha and Dr. Shoemaker were simply expressing different opinions and the mere difference of opinion did not constitute unmistakable evidence that the DIME was wrong. [citing *Vega-Arreola v. Buxman Dairy & Farms*, W.C. 4-889-919, February 25, 2014]. The ALJ found Dr. Shoemaker made errors with regard to his conclusions about impairment and accordingly his opinions were overcome by clear and convincing evidence.

Overpayment

In light of the ALJ's findings with regard to permanency, no overpayment exists. The remaining issue with regard to overpayment, specifically Respondents' request that Claimant repay the overpayment is moot.

ORDER

It is therefore ordered:

1. Claimant met her burden to overcome the DIME physician's findings with regard to her medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 5% whole person impairment of her lumbar spine as a result of her industrial injury.

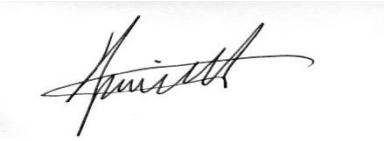
3. Respondents shall pay PPD benefits based upon 5% medical impairment rating. Respondents are entitled to a credit for PPD benefits previously paid.

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: July 5, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-136-634-002

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that his upper extremity scheduled rating for his arm at the shoulder should be converted to a whole person rating?

- Are Respondents entitled to reimbursement of the cancellation fee incurred as a result of Claimant's last-minute cancellation of his Independent Medical Examination ("IME")?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on June 8, 2022. Respondents requested a full Order on June 15, 202, which was received on June 16, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant, who was 20 years old on the date of injury (D.O.B. April 15, 1999) worked as an HVAC technician for Respondent-Employer.

2. On April 13, 2020, Claimant suffered an admitted industrial injury when he fell while he was working 15 to 20 feet in the air at a job site. Claimant testified the work space was dark and he fell through the ceiling tile. Claimant fell on his left side, hurting his left knee and shoulder. He said he felt his left shoulder dislocate, but it went back into place.

3. Claimant was a minor when he was injured at work on April 13, 2020.

4. Claimant was taken by ambulance by the Castle Rock Fire and Rescue Department to Castle Rock Adventist Hospital. The records reflected Claimant complained of left knee and left shoulder pain to the EMS personnel.

5. At the Castle Rock Adventist Hospital Emergency Department, Claimant underwent a head and cervical CT scan. X-rays were also taken of the left knee, tibia/fibula and left shoulder. The CT scans were negative for an intracranial hemorrhage or major abdominal pelvic visceral injury, hemoperitoneum, or acute fracture. Claimant was evaluated by Derrick Morford, D.O., whose clinical impression was fall, initial encounter; acute pain of left knee.

6. On April 14, 2020, Claimant was evaluated by Troy Manchester, M.D. at Concentra and was complaining of left knee, as well as left shoulder pain. On examination, Claimant's left knee and tenderness diffusely over the anterior knee and mild flexion caused medial pain. Claimant's cervical and thoracic spine had no tenderness and full range of motion ("ROM").

7. Dr. Manchester's assessment was: fall from height of greater than 3 feet; contusion of left shoulder and left knee; abrasion lower left leg, initial encounter; other internal derangement of left knee; shoulder dislocation, left, initial encounter. Claimant was prescribed hydrocodone, ibuprofen and an MRI was ordered for the left knee.

8. On April 15, 2020, Claimant underwent an MRI of the right knee and the films were read by Clinton Anderson, M.D. Dr. Anderson's impression was: grade 1 MCL injury; small joint effusion; small popliteal cyst.

9. Claimant had telemed appointments with Dr. Manchester on April 16 and 30, 2020, at which time he reported continued pain in both the left knee and left shoulder. A course of physical therapy ("PT") was ordered, which Claimant received at Concentra.

10. On April 29, 2020, Claimant underwent an MRI of the left shoulder and the films were read by Robert Leibold, M.D. Dr. Leibold's impression was: non-displaced tear of the inferior glenoid labrum extending from approximately the 5:00 to 9:00 position, with posterior decentering of the humeral head; recommend clinical correlation with posterior instability; intact rotator cuff.

11. Mark Fallinger, M.D. evaluated Claimant for an orthopedic consult on April 30, 2020. Dr. Failinger's impression was: left shoulder status post apparent dislocation event with persistent voluntary instability and increased posterior translation on exam. Dr. Failinger referred Claimant to Carry Motz, M.D for shoulder surgery.

12. On May 19, 2020, Claimant was evaluated at Concentra by Dr. Motz, M.D., who discussed the possibility of performing a left shoulder arthroscopy with posterior labral repair and capsulorrhaphy. Claimant requested the surgery.

13. On July 6, 2020, Claimant underwent surgery on his left shoulder, which was performed by Dr. Motz. Dr. Motz performed a left shoulder arthroscopy, with posterior labral repair and capsulorrhaphy, using ConMed Y-Knot flex 1.8 mm. double–loaded anchors times two. The preoperative diagnosis was: left shoulder posterior instability, with the post-operative diagnosis: left shoulder grade II posterior instability. The operative report noted the posterior labrum had a tear, which was non-displaced; also was frayed and worn.

14. Dr. Motz evaluated Claimant on July 14, 2020, at which time Claimant reported continued symptoms. Claimant returned to Dr. Manchester for an evaluation on August 6, 2020 and August 20, 2020. At the August 6th appointment, Dr. Manchester noted pain in Claimant's axilla (i.e., armpit) upon physical exam. At the August 20

appointment, Dr. Manchester noted that Claimant reported persistent neck and mid-back pain.[1] It is also noted in the Review of Systems that Claimant was experiencing neck pain and pain in his axilla upon physical exam.

15. Claimant received underwent PT after the surgery with Courtney Spivey, PT beginning on July 24, 2020. Overall, he attended 12 post-operative PT visits. At all 12 sessions, Claimant complained of pain in his left scapula and underwent scapula therapy. At nine of the sessions, beginning on August 5, 2020, Claimant complained of left upper trapezius pain and underwent therapy to his trapezius. The ALJ found these records reflected evidence of post-surgery pain in anatomic structures beyond the shoulder joint.

16. Claimant was evaluated on April 13, 2021 by Brian Beatty, D.O. Dr. Beatty noted Claimant underwent surgery on July 4, 2020 and received PT on both his knee and shoulder thereafter. He also experienced some neck and upper back pain. Claimant had worked modified duty with limitations of 10 pounds lifting and no climbing ladders and gradually transitioned to full duty.

17. Dr. Beatty, concluded Claimant was at MMI on April 13, 2021 and assigned a 7% scheduled impairment, which converted to a 4% whole person impairment. The impairment rating was based upon loss of ROM at the shoulder.

18. On June 3, 2021, a Final Admission of Liability ("FAL") was filed on behalf of Respondents, admitting for Dr. Beatty's 7% scheduled impairment for the right shoulder. The FAL reflected an overpayment of TTD in the amount of $1,530.95.

19. Respondents requested an IME with Robert Messenbaugh, M.D., which was scheduled for September 29, 2020. Claimant did not attend the IME.[2]

20. Claimant testified that he missed the IME because due to the death of his best friend.

21. There was no evidence in the record that Claimant refused to attend the IME or that his failure to attend the IME was willful.

22. There was no Court Order compelling Claimant's attendance at the IME with Dr. Messenbaugh.

23. Claimant's IME with Dr. Messenbaugh was rescheduled and took place on November 16, 2021.

[1] Exhibit 5, pp. 61-63.

[2] The written request for the IME was not admitted into evidence.

24. Dr. Messenbaugh concluded that he agreed with Dr. Beatty's opinion that Claimant had a 7% upper extremity impairment rating. Dr. Messenbaugh also stated there was "no justification to convert [Claimant's] 7% upper extremity impairment rating into a whole person impairment rating based on Mr. Oline's cervical spine complaints". [3] He said Dr. Beatty did not mention any cause of Claimant's neck and back discomfort and did not indicate that these complaints were related to Claimant's left shoulder injury. Dr. Messenbaugh opined that if Dr. Beatty found that Claimant had impairment issues related to his cervical spine, Dr. Beatty would have provided Claimant with a cervical impairment rating in addition to the upper extremity impairment rating. Dr. Messenbaugh testified as an expert at hearing and his testimony was consistent with his report

25. Dr. Messenbaugh testified as an expert at hearing. He stated that he did not see any evidence of muscular instability when he evaluated Claimant.[4] Dr. Messenbaugh emphasized the critical importance of the lack of any reports of the type of pain that Claimant suddenly complained of in his hearing testimony and to Dr. Beatty on April 13, 2021. Dr. Messenbaugh said that he thought "if someone who has a workers' compensation injury such as this, were to have lingering issues that were of a significant concern, they would have contacted their primary treating physician and would have sought evaluation and treatment, which . . . he did not do". Dr. Messenbaugh opined that there was no evidence or objective findings that Claimant's site of functional impairment extends beyond the shoulder.[5]

26. Claimant testified that he still has pain in his left shoulder, trapezius, scapula and neck. In his job, Claimant has to frequently reach overhead, which causes discomfort. He testified that when he is doing overhead work, he experienced pain in his left shoulder that involves "burning and fatigue" in his "back muscle by the shoulder blade" Claimant stated he has changed his body mechanics in order to protect his left shoulder. The ALJ credited Claimant's testimony regarding his residual complaints and this was evidence of impairment beyond the shoulder joint.

27. The ALJ finds Claimant's injury affected structures beyond the glenohumeral joint and had a functional impairment beyond the shoulder.

28. The ALJ concluded Claimant sustained a permanent impairment beyond the shoulder joint and is entitled to a whole person impairment.

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

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[3] Exhibit H.

[4] Hearing Transcript ("Hrg. Tr.") p. 42:16-19.

[5] Hrg. Tr. p. 42:20-24.

CONCLUSIONS OF LAW

General

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

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

Conversion of Impairment Rating

As determined in Findings of Fact 1-8, Claimant was injured at work when he fell through a ceiling. Claimant suffered an injury to his left shoulder and knee, requiring emergency treatment, as well as treatment through his ATP-s at Concentra. *Id*. As found, Claimant's ATP's concluded he required a left shoulder arthroscopy, with posterior labral repair and surgery was performed on July 6, 2020. (Findings of Fact 11–12).

After surgery, Claimant underwent PT and the ALJ found he reported left trapezius and scapular pain. (Finding of Fact 15). As found, Dr. Beatty, noted neck and upper back pain in the evaluation conducted on April 13, 2021. (Finding of Fact 16). Dr. Beatty placed Claimant at MMI that day, assigning a 7% scheduled impairment, which converted to a 4% whole person impairment. (Finding of Fact 17). Respondents admitted for Dr. Beatty's medical impairment rating, filing an FAL on June 3, 2021. (Finding of Fact 18).

On the question of whether Claimant was entitled to a whole person impairment rating, the ALJ noted the inquiry starts with § 8-42-107(1)(a), C.R.S. The statute provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)". When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

The issue was whether Claimant sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). To make this determination, the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id.* Pain and

discomfort that limit Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

The ALJ concluded Claimant met his burden of proof for conversion of the impairment rating and his rationale was two-fold. First, in the medical records admitted at hearing, Claimant described pain in his right upper extremity following his surgery, which extended beyond the shoulder joint, including the scapula and trapezius. As found, Claimant also reported pain in the mid back, neck and axilla following the surgery. (Finding of Fact 14). The involvement of these structures beyond the glenohumeral joint was borne out in the medical records, including the post-surgery PT records. (Finding of Fact 15). Second, the ALJ found Claimant also had a loss of function in that he had to self-limit his activities at work. (Finding of Fact 26). Claimant's testimony persuaded the ALJ that Claimant experienced pain and discomfort which constituted functional impairment beyond the shoulder joint itself. (Finding of Fact 27). Therefore, Claimant's testimony regarding the injury to his shoulder and its sequelae, provided additional factual support for the ALJ's determination that he was entitled to a whole person rating.

The ALJ considered Respondents' argument that Claimant's impairment was limited to the scheduled impairment rating. Respondents argued Claimant's impairment involve the only the glenohumeral joint and did not extend beyond that. Respondents pointed to the fact Claimant did not have complaints of neck pain immediately after his fall and relied upon Dr. Messenbaugh's expert testimony in support of this argument, as well. Respondents also cited *Newton v. Broadcom Inc.*, W.C. No. 5-095-589-002 (July 8, 2021); *Lovett v. Big Lots*, WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (Dec. 28, 2006).

The ALJ credited Claimant's testimony, as well as the references in the medical records which established Claimant's impairment was beyond the glenohumeral joint. The ALJ also noted that the result in *Newton v. Broadcom Inc., supra,* where the Claimant also had pain in the scapula and trapezius supports the conclusion here.

Based upon the evidence admitted at hearing, the ALJ concluded Claimant met his burden of proof to show an entitlement to PPD benefits for the whole person medical impairment rating issued by Dr. Beatty. (Finding of Fact 28). Respondents are therefore liable to pay said benefits.

Payout Rate

"Where an employee is a minor and the disability of such minor is permanent compensation to said minor shall be paid at the maximum rate of compensation payable under said articles at the time of the determination of such permanency". § 8-42-102(4), C.R.S.; See also *Casa Bonita v. ICAO,* 677 P.2d 344 (Colo. App. 1983). "At the time of injury" refers to the date of the employee's accident. § 8-42-102(5). A minor is an individual who has not attained the age of twenty-one. The maximum wage rate on April 13, 2021, the date of Claimant reached MMI, is $1,074.22. § 8-42-105, C.R.S.

As found, Claimant was a minor on the date of injury. (Finding of Fact 3). Accordingly, Claimant has proven by the preponderance of the evidence that the maximum pay rate at the time of MMI ($1,074.22) must be used when calculating the value of Claimant's whole person impairment. The Order will require Respondents to pay PPD benefits at pursuant to § 8-42-102(4), C.R.S.

Sanctions

Respondents argued that because W.C.R.P. Rule 8-8, required Claimant to submit for an independent medical examination, pursuant to § 8-43-404, C.R.S., they were entitled to sanctions for Claimant's failure to appear on September 29, 2020. Respondents averred that because Claimant failed to attend the examination, Employer can recover the costs incurred for that cancellation. Respondents also argued that while the statute was silent on the issue of what costs shall be reimbursed, C.R.C.P. 37 established that the Court can impose sanctions upon a party who fails to cooperate in discovery, including reasonable expenses caused by the failure of an individual to attend an Independent Medical Examination. C.R.C.P. 37(b)(2)(E).

§ 8-43-404(3), C.R.S. provides in pertinent part:

> "So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division appointed pursuant to section 8-43-208(1) or in any way obstructs the same, all right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred".

This section provides a remedy for Claimant's refusal to attend an evaluation. In the case at bar, there was no evidence presented that Claimant refused to attend the IME or that the failure to attend the appointment with Dr. Messenbaugh was willful. (Finding of Fact 21).

The ALJ concluded that Respondents did not establish a factual basis for the request that Claimant reimburse them for the cancellation fee for the appointment with Dr. Messenbaugh. As found, there was no Court order compelling Claimant's attendance

at this appointment. (Finding of Fact 22). The ALJ determined there was insufficient evidence to show Claimant's failure to attend the appointment was willful, warranting sanctions under CRCP 37. Specifically, CRCP 37(b)(2)(E) does not provide for the imposition of sanctions under these circumstances where there was no Court Order.

ORDER

It is therefore ordered:

1. Respondents shall pay PPD benefits based upon the 4% whole person rating. The benefits shall be paid pursuant to § 8-42-102(4), C.R.S.

2. Respondents shall pay 8% interest on all benefits not paid when due and owing.

3. Respondents' request that Claimant reimburse them for the cost of the IME appointment cancellation on September 29, 2020 is denied and dismissed.

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

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

DATED: July 7, 2022

STATE OF COLORADO

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

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

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $505.03.

FINDINGS OF FACT

1. Employer is a national moving and storage company based in Carrolton, Texas with an office located in Colorado Springs, Colorado. At the outset of employment, all new employees receive Employer's *Employee Safety Commitment*. New employees also review Employer's *Policies and Safety Manual*. The *Policies and Safety Manual* details Employer's safety philosophy, rules and procedures.

2. Employer's *Policies and Safety Manual* specifically addresses drivers. The *Manual* outlines "Driving and Stopping Rules," including avoiding driving too fast for highway conditions, only driving at speeds that allow the driver to maintain control of the vehicle at all times and under all conditions, and always avoiding excessive and unnecessary lane changes. The section further mandates that "responsible, safe and efficient and courteous drivers not only follow [Employer's] rules in conjunction with federal, state, and city driving and stopping rules, they also demonstrate their professionalism as drivers," including utilizing defensive driving behaviors, such as "seeing and being seen," having "heightened awareness," and "managing speed and space."

3. Claimant applied for employment with Employer on or about April 2, 2021. On April 2, 2021 Claimant received, reviewed and acknowledged his understanding of Employer's *Employee Safety Commitment* and *Policies and Safety Manual*. On April 19, 2021 Claimant began working as a moving "helper." In his capacity as a moving helper Claimant rode as a passenger to various job locations where he loaded and/or unloaded trucks. In late June of 2021 Claimant applied for a driver position with Employer. He had 8-10 years of prior driving experience and training in driving military vehicles of 31 feet or less in length.

4. Employer has additional safety protocols that focus specifically on drivers. All prospective new drivers must separately apply for a driver position. Employer considers each applicant's prior driving experience and training. Each driver applicant

reviews and acknowledges Employer's *Company Vehicle Policy*. Furthermore, all applicants receive and review *Entry Level Training Guide for Drivers*, which provides that it is "Drivers responsibility to comply with safety regulations." The *Guide* provides that each driver is responsible for the safe operation of Employer's vehicles and must operate them in accordance with the laws, ordinances, and regulations in the appropriate jurisdiction and with the Federal Motor Carrier Safety Administration. Finally, each driver applicant must pass a written test and an "on road" driving examination focused on Employer's driver-based safety rules. Notably, during the road portion, each driver is tested on safe passing procedures, including allowing sufficient space for passing and only passing in safe locations.

5. Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

6. Employer's National Safety Director RB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules after a violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation, from coaching, to escalating suspensions, to removal from a driver position.

7. In late July 2021, Employer assigned Claimant a moving job that required transport of a quarter-full size load of small household items and boxes from Crestone, Colorado to El Prado, New Mexico. The load was small compared to most jobs and the largest item was a computer desk.

8. Operations Manager of Employer's Colorado Springs office MC[Redacted] explained that Employer assigned Claimant its smallest truck for the job. The vehicle was a 2020 Isuzu Box Truck with limited horsepower and a governor that regulated its top speed to 65 mph. Mr. MC[Redacted] noted that Claimant drove the truck on 60% of his jobs since becoming a driver, it was his primary truck and he was very familiar with the truck's capabilities and limitations.

9. On July 21, 2021 Claimant and his helper for the job, MB[Redacted], loaded the box truck in Crestone, Colorado. They then drove to Alamosa, Colorado and spent the night. The next morning, Mr. MC[Redacted], who was monitoring their progress on a tele-track system, noticed they were late getting started. Mr. MC[Redacted] called and asked them to get on the road. Claimant and Mr. MB[Redacted] left Alamosa at 8:34 a.m. mountain standard time and arrived in El Prado around 11:58 a.m. They began downloading the truck at 12:16 p.m. Claimant and Mr. MB[Redacted] started driving back towards Colorado Springs at 1:59 p.m.

10. On the drive to Colorado Springs, Claimant made a scheduled stop for gas, and two unscheduled stops for snacks. During the second stop, Mr. MC[Redacted] called Claimant, inquired why he stopped again, and told him to get back on the road. Mr.

MC[Redacted] did not tell Claimant to speed or otherwise engage in unsafe driving. He simply directed Claimant to cease taking unscheduled stops.

11. Mr. MC[Redacted] continued to monitor Claimant's progress. After again noticing the box truck had stopped, he called Claimant. A state patrol officer picked up Claimant's phone and told Mr. MC[Redacted] there had been a motor vehicle accident. Mr. MC[Redacted] then drove to the crash site where he personally observed the area of the accident.

12. Claimant's route back to Colorado Springs proceeded north to Alamosa, where he turned east on US 160 towards I-25. The route traverses La Veta Pass and is one lane in both directions in certain areas. As claimant approached Fort Garland, he found himself directly behind a semi-truck that was behind a pick-up truck pulling a long livestock trailer. Claimant entered the westbound lane, while heading east, with the intent to pass both of the slower vehicles. His truck had not even cleared the semi-truck when he realized a car was coming directly at him from the opposite direction. He swerved to avoid a collision, drove his truck off the highway, and ultimately crashed into a ditch. Claimant suffered catastrophic injuries to his spine and is paralyzed from the waist down as a result of the accident.

13. The parties stipulated at the hearing that Claimant was in a legal passing zone at the time of the accident. Moreover, he was not exceeding the speed limit when the accident occurred on July 22, 2021.

14. A State of Colorado Traffic Crash Report completed by Corporal Roybal on August 1, 2021 described the crash as follows: "[v]ehicle #1 was eastbound Colorado 160 237' west of MP 271. Vehicle #1 attempted to pass, proceeded into the westbound lane which was occupied by a westbound vehicle. Vehicle #1 went off the left side of the roadway, collided with a ditch and continued eastbound." Corporal Roybal's accident diagram illustrated that Claimant was coming around a bend while attempting to pass. However, Corporal Roybal mistakenly believed Claimant was trying to pass a single smaller vehicle before the accident. The accident occurred at 4:10 p.m. during daylight hours. Claimant was ticketed for careless driving causing bodily injury.

15. On July 23, 2021 Employer completed a First Report of Injury. On August 5, 2021 Insurer filed a General Admission of Liability (GAL). Respondents took a 50% safety rule offset under §8-42-112, C.R.S.

16. The box truck Claimant drove on the date of his accident was equipped with a Netradyne camera system consisting of a total of four cameras. The system included a forward facing camera. After the accident, the Netradyne system was sent to the manufacturer to obtain videos of the accident. In January 2022, MP4 video files provided clips from several minutes before and during the accident. The videos begin with Claimant following four or five vehicles. Each of the vehicles is following a long semi-truck that is directly behind a pick-up truck pulling a long livestock trailer. The section of highway includes numerous curves and bends. The terrain on the sides of the highway is elevated,

with areas of foliage limiting visibility. Vehicles can be seen traveling in the opposite direction in the westbound lane prior to the accident.

17. As the video progresses, the four or five vehicles in front of Claimant's truck each find an opportunity to pass the semi and the pick-up truck pulling the livestock trailer. Claimant's box truck is then directly behind the two vehicles. The highway then curves to the left, and, because of the slightly elevated terrain and foliage on the west side of the road, visibility of westbound traffic is limited. At that moment, Claimant entered the westbound lane to attempt to pass both the semi-truck and the pick-up truck pulling the livestock trailer. However, while the box truck was still in the process of passing the semi, a westbound vehicle can be seen coming into view. Both Claimant's box truck and the oncoming vehicle swerve off the road to avoid a head on collision. Claimant's truck continues into a field and ultimately crashes into a ditch.

18. Respondents hired Adam Michener, M.S., P.E., ACTAR, to perform a forensic accident reconstruction evaluation and provide an expert opinion regarding the cause of the accident. Mr. Michener examined the truck, available records, and the video. In his report Mr. Michener noted the limitations of Claimant's vehicle. Specifically, the box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis Mr. Michener explained that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. Mr. Michener concluded that the July 21, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver. He maintained his opinions when he testified at the hearing in this matter.

19. Mr. TB[Redacted] testified that Claimant's attempt to pass under the circumstances violated several company safety policies, including avoiding unnecessary lane changes, failing to see and be seen, not engaging in defensive driving, not allowing sufficient space and time for passing, and failing to pass in a safe location. Furthermore, Mr. TB[Redacted] remarked that Claimant's decision to pass under the circumstances did not reflect the common sense required of all Employer drivers.

20. Employer's Colorado Spring's office assistant operations manager LO[Redacted] reviewed the video from the events preceding Claimant's accident. She explained that Claimant violated numerous safety rules in attempting to pass the vehicles. Ms. LO[Redacted] noted that Claimant was trying to pass on a curve but lacked the visual range to pass safely. She also remarked that Claimant violated Employer's safety rules because he did not have sufficient time and space for passing and was attempting to pass in an unsafe location.

21. Mr. MC[Redacted] testified that he drove to the accident location on July 22, 2022. He observed that the section of US 160 in which the accident occurred is winding, mountainous, contains foliage, and includes blind spots. Visibility is thus difficult. Mr. MC[Redacted] subsequently visited Claimant at the hospital in Denver and they

discussed the incident. During the conversation Claimant acknowledged his responsibility for the accident and did not blame other factors.

22. After the data from the box truck was converted to video in January 2022, Mr. MC[Redacted] reviewed the footage. Based upon his observations and considering the circumstances of the accident, he concluded that Claimant violated numerous Employer safety rules. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

23. MB[Redacted] testified that he worked for Employer as a helper for 3-4 months in 2021. He was Claimant's co-worker and passenger in the truck on the date of the accident. Mr. MB[Redacted] remarked that as they drove up La Veta Pass there was "a semi" in front of them. Clamant attempted to pass the vehicle, but neither he nor Claimant saw the car coming from the opposite direction. Claimant then swerved off the road and crashed. Mr. MB[Redacted] summarized that the accident occurred because "neither of us saw the car coming." He acknowledged that the section of US 160 where the incident occurred had curves with foliage on the sides of the road. Mr. MB[Redacted] also remarked that, before Claimant attempted the pass, he inquired whether he should attempt the maneuver. From Mr. MB[Redacted]'s vantage point in the passenger seat, he could not see the truck pulling the long livestock trailer or the vehicle traveling in the opposite direction around the curve.

24. Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. He testified he did not believe he was driving recklessly or that his pass attempt was unsafe. Nevertheless, Claimant admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. In fact, he could not see the car coming in the opposite direction because of the bend and foliage. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant attempted the pass because the vehicles were going slower than normal. He commented the cause of the accident was human error, "which is on me." Finally, although Mr. MC[Redacted] told him to get going while he was stopped for a break, he was not directed to forgo safety or drive recklessly.

25. Respondents have proven that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty

percent. Initially, Claimant asserts his accident was not willful because he did not intend to make an unsafe pass and break a safety rule. He contends the accident occurred due to human error because he simply could not see the vehicle coming in the opposite direction. However, he attempted to pass both a semi-trailer truck and a pickup truck pulling a long stock trailer around a curve. Importantly, Claimant was driving a box truck with limited horsepower and a speed governor. Based on the obvious danger presented by the attempted pass, as well as the persuasive testimony of Employer's witnesses and Mr. Michener, Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving.

26. The record reflects that Employer has adopted reasonable safety rules regarding safe driving and passing while operating a company vehicle. Safety protocols include several general rules, such as defensive driving, driving at speeds that allow the driver to maintain control of the vehicle at all times and under all circumstances, driving with heightened awareness, managing space and speed, and assuring the driver is able to "see and be seen." Employer also has specific safety rules, including avoiding unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations. Employer's safety rules are unambiguous, definite, and non-conflicting.

27. Claimant was aware of Employer's reasonable safety rules for drivers. Employer expressed the rules to Claimant through its safety manual, safety training, and safety testing. Notably, Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

28. The record reflects that Employer enforces its safety rules. Notably, Mr. TB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules any time there is a noted violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation that proceeds from coaching, to escalating suspensions, to removal from a driver position.

29. The record reveals that Claimant willfully violated Employer's safety rules. Claimant decided to pass under unsafe conditions. He lacked clear vision of vehicles coming in the opposite direction due to terrain and the curve in the road. Although passing was not prohibited in the area, Claimant was attempting to pass both a semi-truck and a pick-up truck pulling the livestock trailer while driving a box truck limited by a speed governor. Mr. Michener persuasively explained that Claimant's box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis, Mr. Michener concluded that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. He determined that the July 22, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver.

30. Mr. MC[Redacted] persuasively concluded that Claimant violated numerous Employer safety rules by attempting to pass both the semi-truck and the pick-up truck pulling the livestock trailer on July 22, 2021. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

31. In contrast, Claimant testified that the reason he attempted to pass the other vehicles on July 22, 2021 was because they were moving slower and other vehicles in front of him were passing. He explained that, when he attempted to pass the vehicles, he believed that he had enough room to safely make the pass. Claimant remarked that at the time of the accident he was neither driving recklessly nor taking a risk he would not normally have taken. He remarked that he would never intentionally violate any of Employer's safety rules. Nevertheless, Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. Moreover, he admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. He thus could not see the car coming in the opposite direction. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant summarized the cause of the accident was human error, "which is on me."

32. Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving. Under the circumstances, Claimant's pass attempt specifically violated Employer's safety rules including "seeing and being seen," avoiding excessive and unnecessary lane changes, allowing sufficient space to pass and only passing in safe locations. The record reflects that Claimant was aware of Employer's safe driving rules but deliberately attempted to pass two long vehicles while driving a box truck in an area of limited visibility. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

8. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant asserts his accident was not willful because he did not intend to make an unsafe pass and break a safety rule. He contends the accident occurred due to human error because he simply could not see the vehicle coming in the opposite direction. However, he attempted to pass both a semi-trailer truck and a pickup truck pulling a long stock trailer around a curve. Importantly, Claimant was driving a box truck with limited horsepower and a speed governor. Based on the obvious danger presented by the attempted pass, as well as the persuasive testimony of Employer's witnesses and Mr. Michener, Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving.

9. As found, the record reflects that Employer has adopted reasonable safety rules regarding safe driving and passing while operating a company vehicle. Safety protocols include several general rules, such as defensive driving, driving at speeds that allow the driver to maintain control of the vehicle at all times and under all circumstances, driving with heightened awareness, managing space and speed, and assuring the driver is able to "see and be seen." Employer also has specific safety rules, including avoiding unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations. Employer's safety rules are unambiguous, definite, and non-conflicting.

10. As found, Claimant was aware of Employer's reasonable safety rules for drivers. Employer expressed the rules to Claimant through its safety manual, safety training, and safety testing. Notably, Claimant reviewed and acknowledged understanding Employer's *Company Vehicle Policy* on June 29, 2022. On the same day he received Employer's *Entry Level Guide for Drivers* and passed a written driver safety quiz. On July 2, 2021 Claimant passed Employer's on-road test.

11. As found, the record reflects that Employer enforces its safety rules. Notably, Mr. TB[Redacted] testified that when an applicant is hired as a driver, he must regularly attend driver safety meetings and review safety training materials. He remarked that Employer enforces its safety rules any time there is a noted violation. Mr. TB[Redacted] commented that Employer has a detailed enforcement process that involves a range of consequences for each violation that proceeds from coaching, to escalating suspensions, to removal from a driver position.

12. As found, the record reveals that Claimant willfully violated Employer's safety rules. Claimant decided to pass under unsafe conditions. He lacked clear vision of vehicles coming in the opposite direction due to terrain and the curve in the road. Although passing was not prohibited in the area, Claimant was attempting to pass both a

semi-truck and a pick-up truck pulling the livestock trailer while driving a box truck limited by a speed governor. Mr. Michener persuasively explained that Claimant's box truck was a class 5 truck with only 210 horsepower, limited acceleration ability and a speed governor. He also mentioned the long length of the two vehicles Claimant was trying to pass, the curves in the road, and the limited visibility. Based on his forensic analysis, Mr. Michener concluded that Claimant needed approximately double the amount of time, or more, to achieve the attempted pass of the semi and the pick-up truck pulling the livestock trailer. He determined that the July 22, 2021 accident was a direct result of Claimant's attempted unsafe pass with insufficient time and space to complete the maneuver.

13. As found, Mr. MC[Redacted] persuasively concluded that Claimant violated numerous Employer safety rules by attempting to pass both the semi-truck and the pick-up truck pulling the livestock trailer on July 22, 2021. Among the rules Claimant violated were "seeing and being seen" in which a driver must be able to see clearly around the vehicle he is passing, where he is going to be passing and ensuring he is visible to other drivers. Claimant also violated the safety rule regarding managing time and space. Mr. MC[Redacted] remarked that Claimant further violated the safety rule regarding having heightened awareness of surroundings. Specifically, Claimant did not have sufficient time to make the attempted pass and compromised safety. Mr. MC[Redacted] noted that the box truck had limited capabilities, Claimant attempted this pass around a corner with limited visibility, and he was trying to pass two long vehicles. He summarized that Claimant's pass attempt violated Employer's safety protocols and rules with respect to defensive driving, avoiding excessive and unnecessary lane changes, allowing sufficient space to pass, and only passing in safe locations.

14. As found, in contrast, Claimant testified that the reason he attempted to pass the other vehicles on July 22, 2021 was because they were moving slower and other vehicles in front of him were passing. He explained that, when he attempted to pass the vehicles, he believed that he had enough room to safely make the pass. Claimant remarked that at the time of the accident he was neither driving recklessly nor taking a risk he would not normally have taken. He remarked that he would never intentionally violate any of Employer's safety rules. Nevertheless, Claimant acknowledged he was trying to pass both the semi-truck and the pick-up truck pulling the long livestock trailer. Moreover, he admitted he was approaching a bend and there was foliage on the sides of the roads in the area of the accident. He thus could not see the car coming in the opposite direction. Claimant also recognized that on July 22, 2021 he was driving a box truck with a governor limiting the truck's maximum speed that had poor acceleration. Claimant summarized the cause of the accident was human error, "which is on me."

15. As found, Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding safe driving. Under the circumstances, Claimant's pass attempt specifically violated Employer's safety rules including "seeing and being seen," avoiding excessive and unnecessary lane changes, allowing sufficient space to pass and only passing in safe locations. The record reflects that Claimant was aware of Employer's safe driving rules but deliberately attempted to pass two long vehicles while driving a box truck in an area of limited visibility. Accordingly, Claimant willfully failed to obey a reasonable safety rule

in violation of §8-42-112(1)(b) C.R.S. on July 22, 2021 and his non-medical benefits should thus be reduced by fifty percent.

ORDER

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

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

2. Claimant earned an AWW of $505.03.

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

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

DATED: July 8, 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

1. Whether Claimant established by a preponderance of the evidence that a left total hip arthroplasty, as requested by Authorized Treating Physician (ATP) Jeremy Kinder, M.D., is causally related to Claimant's admitted March 5, 2020 work injury.

FINDINGS OF FACT

1. On March 5, 2020, Claimant sustained an admitted injury to his right hip arising out of the course of his employment with Employer. On that date, Claimant tripped and fell directly onto his right lateral hip while performing his job duties for Employer.

2. Following his March 5, 2020 injury, Claimant was initially seen by physician assistant Andrew Hildner, PA-C, at SCL Health Medical Group on March 18, 2020. Claimant saw Mr. Hildner four additional times from March 25, 2020 to June 16, 2020. Claimant did not complain of issue with his left hip during these visits. At his initial visit, Mr. Hildner noted that Claimant had a significant limp. At later visits, on May 4, 2020 and May 26, 2020, he characterized Claimant's gait as a "very slight antalgic gait." At his June 16, 2020 visit, Mr. Hildner noted in his examination note "minimally right antalgic" which the ALJ infers is a description of Claimant's gait. (Ex. 4).

3. Claimant also had consults with Joseph Hsin, M.D., at Cornerstone Orthopedics and Sports Medicine on March 10, 2020, and Michael Ellman, M.D., at Panorama Orthopedics for evaluation of his right hip. During those visits, Claimant did not complain of issues with his left hip. At his visit, Dr. Ellman a normal examination of Claimant's left hip, including negative Patrick's (FABER) and impingement (FADIR) tests. (Ex. B and 5)

4. On July 7, 2020, Claimant reported to Mr. Hildner experiencing left hip and low back pain. Mr. Hildner attributed to the new symptoms to his right hip pain which he indicated was affecting his gait. On examination, he noted a mildly positive FADIR test for hip impingement, but no other objective findings. (Ex. 4). Claimant also reported left hip and low back pain at his July 27, 2020 visit with Mr. Hildner. (Ex. 4).

5. On July 30, 2020, Claimant was evaluated by Barbara Wright, P.A., at Panorama Orthopedics. Ms. Wright noted that Claimant reported "over the last month or two, his left hip and lumbar spine have also been causing significant pain for him due to compensation." Ms. Wright did not document an examination of Claimant's left hip or otherwise comment on Claimant's left hip in the medical record. (Ex. 5).

6. On August 4, 2020, Respondents filed a General Admission of Liability, admitting for medical benefits related to the Claimant's right hip. (Ex. 3)

7. On August 6, 2020, Claimant saw Jeremy Kinder, M.D., at Panorama for evaluation of his right hip. Dr. Kinder recommended a total hip arthroplasty to replace Claimant's right hip. Claimant's left hip was not evaluated at this visit. (Ex. 5).

8. On September 2, 2020, Claimant saw Jon Erickson, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Erickson documented that Claimant reported chronic, severe pain in the right hip and "gait related low back and left hip pain." Dr. Erickson did not address Claimant's left hip in his IME report. Dr. Erickson raised concerns that Claimant's right hip pain was not related to his hip joint but may have related to a sports hernia or insufficiency fracture in his pubic ramus region. (Ex. 7).

9. Over the next two months, Dr. Ellman evaluated Claimant to determine if Dr. Erickson's hypothesis related to the source of Claimant's right hip pain was correct. During these visits, Claimant did not report left hip symptoms. (Ex. 4, 5). Based on Dr. Erickson's IME, Dr. Ellman referred Claimant to Dr. Robert MacDonald for evaluation of a potential sports hernia. Ultimately, Dr. MacDonald ruled out a sports hernia and noted that he suspected Claimant's right hip issues were "all hip pathology." (Ex. C).

10. Claimant's next reported left hip pain when he returned to Mr. Hildner on November 18, 2021. Mr. Hildner noted that Claimant's left hip pain was "likely compensatory from [right] hip pain with likely underlying chronic [osteoarthritis]," and noted that Claimant had a significant right antalgic gait. Claimant also reported bilateral knee pain which Mr. Hildner also characterized as "probably also compensatory with underlying [osteoarthritis]." Mr. Hildner indicated that Claimant's knees are "not worker's comp related. (Ex. 4).

11. On December 3, 2020, Dr. Kinder evaluated Claimant. Claimant reported left hip pain at the same severity as his right hip pain. Claimant also reported right knee pain, difficulty walking, and symptom aggravation with activity. Left hip x-rays taken on December 3, 2020 demonstrated a progression of arthritis and moderate joint space narrowing in the right hip. Claimant's left hip arthritis was characterized as "moderate." Dr. Kinder opined that hip replacements were the only treatment likely to help Claimant significantly. Claimant elected to proceed with a right hip arthroplasty, and Dr. Kinder requested authorization for the procedure. Dr. Kinder's request for authorization for right hip was approved on March 2, 2021. (Ex. 5).

12. Between December 16, 2020 and April 14, 2021, Claimant saw Mr. Hildner five times and continued to report left hip symptoms. On March 3, 2021, Mr. Hildner indicated Claimant was "developing additional symptoms – particularly lumbar paraspinal spasm – and worsening of other joint pain due to antalgic gait and compensatory movements/positioning." Mr. Hildner documented Claimant's left hip pain at these visits, and described Claimant's gait as slow and antalgic on the right. (Ex. 4).

13. Dr. Kinder performed a right hip arthroplasty surgery on April 22, 2021. (Ex. 5).

14. On May 6, 2021, Claimant saw Dr. Kinder and reported he was experiencing pain in his left hip and was placing all his weight on the left side. On examination, Dr. Kinder

noted pain with internal rotation in both flexion and extension. Dr. Kinder found a positive impingement sign and recommended an MRI of Claimant's left hip to evaluate for a potential labral tear and to evaluate the severity of his arthritis. (Ex. 5).

15. On May 19, 2021, Claimant saw Mr. Hildner, who noted Claimant's right hip pain had improved following surgery. Mr. Hildner stated "the improving right hip pain has made his left hip and bilateral knee pain feel much worse." (Ex. 4).

16. On June 3, 2021, Claimant saw Dr. Kinder for a post-surgical evaluation of his right hip. Claimant's left hip was not evaluated at this visit. (Ex. 5).

17. On October 4, 2021, an MRI of Claimant's left hip was performed. The MRI showed a nondisplaced tear of the left acetabular labrum, and slight narrowing of the ischiofemoral distance, which the radiologist indicated can "predispose to ischiofemoral impingement." (Ex. 5).

18. Claimant saw Dr. Kinder on October 7, 2021, reporting improving left hip pain, although with stabbing pain and symptoms exacerbated by weight bearing. On examination, Dr. Kinder noted there was no crepitus or tenderness to palpation over the greater trochanteric region. He further noted mild pain with range of motion. Claimant's MRI showed a labral tear in the left hip, and recommended a cortisone injection. Dr. Kinder also recommended a second opinion from Daniel Haber, M.D., to determine if Claimant would benefit from a hip arthroscopy vs. a total hip replacement. Claimant had the left hip injection on October 15, 2021. The hip injection provided complete short-term relief of Claimant's left hip pain, but the pain returned within two weeks. (Ex. 5).

19. On October 28, 2021, Claimant saw Daniel Haber, M.D., for a second opinion. Dr. Haber reviewed Claimant's MRI images and interpreted the images as showing a non-displaced degenerative appearing labral tear with moderate chondrosis in the weight bearing aspect of the acetabulum. He also noted that Claimant had a moderate cam deformity. Dr. Haber diagnosed Claimant with primary osteoarthritis of the left hip and "other articular cartilage disorders." Dr. Haber indicated that he did not believe Claimant would benefit from an arthroscopy. He opined "I believe that this labrum is degenerative in nature as a consequence of having mild to moderate osteoarthritis. (Ex. C).

20. On November 11, 2021, Claimant returned to Dr. Kinder. Dr. Kinder noted that Claimant had moderate osteoarthritis of the left hip with a cam lesion and labral tear. He indicated Claimant's arthritis disqualified him from arthroscopic surgery and that Claimant requires a hip replacement. (Ex. 5). Dr. Kinder requested authorization for Claimant's left hip arthroplasty through Insurer. Insurer denied authorization on November 22, 2021. (Ex. 1).

21. From November 16, 2021 through March 14 2022, Claimant saw Mr. Hildner four additional times. During this time, Claimant continued to report various levels of left hip pain. On November 16, 2021, Mr. Hildner noted that Claimant's gait "appears to be a mix of right hip weakness and left hip antalgia, but overall fairly normal and much improved

from previous exams." At the December 28, 2021 visit, Claimant reported tearing pain in his left groin" when performing right hip flexion stretches. (Ex. 4).

22. On June 13, 2021, Robert Messenbaugh, M.D., performed an independent medical examination of Claimant at Respondent's request. Dr. Messenbaugh testified at hearing and was admitted as an expert in orthopedic surgery. In his report, Dr. Messenbaugh opined that Claimant had no actual left hip complaints, and that the areas Claimant identified on examination with pain were indicative of a strain of his left hamstring. He further opined that Claimant did not require surgery on his left hip. The ALJ finds neither of these opinions credible or persuasive. At hearing, Dr. Messenbaugh testified that he reviewed Claimant's MRI from October 4, 2021, and that the MRI showed arthritis and an abnormal hip anatomy identified as a congenital "cam" deformity. Dr. Messenbaugh testified that a cam deformity can lead to labral tearing, fraying and degeneration, and can create degenerative arthritis. Dr. Messenbaugh further opined that Claimant's work injury did not accelerate or permanently alter Claimant's left hip. Dr. Messenbaugh opined that Claimant's left hip symptoms were most likely caused by degenerative changes, and that the labral tear was likely caused by Claimant's congenital cam deformity. While the ALJ finds credible Dr. Messenbaugh's opinion that the pathology in Claimant's left hip was not caused by his work injury, he offered no credible explanation why Claimant's left hip symptoms emerged only after Claimant spent four months walking with an altered gait caused by his right hip injury. He testified that Claimant's weight increased the risk for development of hip pain, but no credible evidence was admitted to indicate that Claimant experienced a significant weight gain following his injury which would have caused his hip pain. Dr. Messenbaugh's opinion that Claimant's left hip symptoms are unrelated to his work-related injury is unpersuasive.

23. At hearing, Claimant testified that he had no issues with his left hip prior to his March 5, 2020 work injury. Claimant has worked performing body work on automobiles for most of his adult life and was able to perform his job duties without restrictions. Claimant credibly testified that after his work injury, he walked different and felt as if he was putting more weight on his left side to keep weight off of his right hip. He further testified that after his left hip pain began, it did not resolve, and presently exists.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. 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 left hip total arthroplasty recommended by Dr. Kinder is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's initial injury was directly to his right hip. As a result of this injury, Claimant developed an altered, antalgic gait. The ALJ finds credible PA Hildner's opinion that the altered gait resulted in pain to Claimant's hip

approximately four months after the initial injury. Beginning in July 2020, Claimant began reporting hip pain which was documented in the records of multiple providers. The ALJ further finds credible Claimant's testimony that his left hip pain did not resolve.

Following the emergence of his left hip pain, Claimant's primary treatment was focused on his right hip, despite reports of continued left hip symptoms. In December 2020, Dr. Kinder evaluated Claimant's left hip, reviewed left hip x-rays and opined that hip replacements were the only procedure likely to help Claimant significantly. The ALJ infers from this statement that Dr. Kinder's opinion was that hip replacement would be the only treatment likely to relieve Claimant's reported hip pain. After the December 3, 2020 visit with Dr. Kinder, Claimant continued to report left hip pain and exhibit an altered gait. Ultimately, in November 2021, Dr. Kinder sought authorization from Insurer for a left hip total arthroplasty, which was denied.

No credible evidence was admitted to suggest a plausible alternative cause for the emergence of his left hip symptoms in July 2020. Prior to May 2020, Claimant had no left hip symptoms, and the symptoms only developed after four months of walking with an altered gait and compensating for his right hip pain. The ALJ does not find credible Dr. Messenbaugh's opinion that Claimant's hip pathology was not aggravated or exacerbated by his altered gait. Similarly, Respondents' contention that Claimant's non-work-related knee pain could be an equally likely cause of his left hip pain is not persuasive because Claimant did not report knee pain until approximately four months after he developed left hip pain.

Based on the totality of the evidence, the ALJ concludes that it is more likely than not that Claimant's right hip injury resulted in an altered gait which caused the emergence of symptoms in his left hip. The Claimant has pre-existing arthritis and a degenerative labral tear which were asymptomatic until he spent approximately four months walking with an altered gait and compensating for his right hip pain. Although Dr. Kinder's recommended surgery is to address the pre-existing pathology of Claimant's left hip, but for the pain caused by Claimant's altered gait and compensation for his right hip injury, treatment of Claimant's left hip would not have been necessary. Consequently, the need for a left hip arthroplasty is causally related to Claimant's May 5, 2020 work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the left hip total arthroplasty is GRANTED.

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

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

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

DATED: 7-8-2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-588-918-010

ISSUES

The issues set for determination included:

- Did Respondents overcome the conclusions of Kathie McAlpine, M.D., who performed the twenty-four month Division-sponsored Independent Medical Examination ("DIME"), by clear and convincing evidence?

- Did Claimant proved by a preponderance of the evidence that the proposed surgery for the right knee was reasonable necessary and related?

- Does the doctrine of issue preclusion preclude Claimant from litigating the issue of whether Respondents should be responsible for his right shoulder surgery?

- Did Claimant prove by a preponderance of the evidence that the proposed surgical evaluation for the right shoulder was reasonable necessary and related?[1]

PROCEDURAL STATUS

At the close of Respondents' case in chief, Claimant made an oral Motion for Directed Verdict, asserting that Respondents had not adduced sufficient evidence to meet the clear and convincing evidentiary standard to overcome the DIME physician's opinions.

The matter was taken under advisement and the ALJ concluded that the Motion should be denied. Respondents introduce sufficient evidence to controvert the opinions of Dr. McAlpine to defeat the Motion for Directed Verdict. However, as noted *infra*, Respondents did not overcome Dr. McAlpine's opinions by clear and convincing evidence.

A Summary Order was issued on June 9, 2022. On June 14, 2022, Respondents submitted a "Request for Specific Findings of Fact, Conclusions of Law and Order". The Claimant and Respondents filed Proposed Orders on June 22, 2022. A Full Order was served on July 13, but had a typographical error in the case number. This Order corrects that.

[1] At the outset of the hearing, counsel for Claimant requested that the issues of permanent total ("PTD") and permanent partial disability ("PPD") benefits be deferred and counsel for Respondents agreed PTD benefits issue would be deferred. Respondents' counsel stated that because Claimant had received an excess of the statutory cap in TTD benefits, he would not be entitled to PPD benefits.

FINDINGS OF FACT

1. On July 22, 2003, Claimant was injured while working for Employer. The injury occurred when his truck rolled back after he parked it and he rolled his left ankle as he was trying to chase after it.

2. Claimant suffered a peroneal tear and underwent multiple surgeries on the left ankle, including multiple attempts at an ankle fusion. Claimant required extensive treatment following the surgeries, as he developed complications with infections.

3. Claimant underwent a below knee amputation on May 12, 2012. Claimant was treated by multiple physicians after the amputation surgery.

4. On June 4, 2012, a General Admission of Liability was filed on behalf of Respondents. The GAL admitted for medical and wage benefits (TTD). The GAL reflected that fact that Claimant was paid TTD benefits from January 28, 2005 to the present, with reduction for the receipt of SSDI benefits beginning on June 1, 2012.

5. Following the amputation surgery in 2012, Claimant testified that his balance was affected and he has fallen down a number of times.[2]

7. The medical records admitted at hearing reflected treatment following the surgery, as well as the fact that Claimant sustained injuries as the result of falls. Claimant sustained a tear of the quadriceps tendon in right knee after a fall in 2012. That required a surgical repair and rehabilitation treatment. The ALJ concluded this fall affected the condition of Claimant's right knee. There was evidence in the record that Claimant required treatment for injuries Claimant sustained when he fell.

8. At a hearing conducted on September 26, 2019, ALJ Cannici considered the issue of medical benefits, specially the request for authorization of a right shoulder arthroplasty. In the Findings of Fact, Conclusions of Law and Order issued by ALJ Cannici on or about October 29, 2019, the request for a right shoulder arthroplasty was denied and dismissed. ALJ Cannici credited Nicholas Olsen, M.D.'s testimony that Claimant's right shoulder condition (end-stage osteoarthritis) was familial and the result of the natural progression of age-related arthritis.[3]

9. On October 31, 2019, Claimant was evaluated by Jeremy Kinder, M.D, at which time Claimant was reporting right knee pain. Dr. Kinder referred Claimant for an MRI.

10. Claimant underwent an MRI of the right knee on December 9, 2019. The MRI showed postsurgical changes of the distal quadriceps tendon without acute tear;

[2] Hearing Transcript ("Hrg. Tr.") p. 65:2-8.

[3] Exhibit SS, pp. 2112-2120; Exhibit 12, pp.141-148.

postsurgical changes affecting the patellar tendon without acute injury; extensive chronic degenerative changes at the patellofemoral articulation which could indicate chronic patellofemoral tracking; moderate sized horizontal tear of the medial meniscus mid body and posterior horn with associated 2 mm. medial extrusion; mild degenerative changes in the medial lateral compounder of articular surfaces; collateral ligaments and cruciate ligaments remained intact.[4]

11. On January 2, 2020, Claimant was evaluated by Dr. Kinder. At that time, pain was present in the medial and lateral aspect of his right knee. On examination, tenderness was noted on the medial and lateral joint line, but no varus valgus instability was present. Dr. Kinder noted Claimant had "continued downfall' since the quadriceps tear. Dr. Kinder noted the MRI (December 9, 2019) showed a horizontal tear with some extrusion, with some chronic changes, as well as some arthritic changes underneath the patellofemoral joint. Dr. Kinder administered a cortisone injection to Claimant's right knee.

12. Claimant returned to Dr. Kinder on January 22, 2020 and it was noted Claimant fell on his right knee the day before and had significant pain. Claimant reported he did not have relief with the cortisone injection. Dr. Kinder's diagnosis was: tear of medial meniscus of right knee, unspecified tear type and he was of the opinion that viscosupplementation would not help. Dr. Kinder recommended an arthroscopy for the medial meniscal tear, including possible meniscectomy and Claimant wanted to proceed with the surgery. The ALJ credited Dr. Kinder's opinion that Claimant needed surgery for the right knee.

13. Claimant was evaluated by Dr. Olsen, on February 5, 2020, at the request of Respondents. Claimant reported right knee pain which had gotten worse. Claimant advised Dr. Olsen that he had had several falls, the last of which was approximately January 21, 2020. Claimant said he did not know the dates of each of these falls and did not go to the doctor each time he fell.

14. On examination, Claimant's right knee demonstrated mild atrophy in the quadriceps mechanism, with full extension and 150° of flexion. Moderate tenderness along the medial joint line was present with palpation. The McMurray's maneuver was positive for medial joint line pain, with Apley's compression positive for medial joint line pain. The anterior drawer sign and Lachman's maneuver were negative no evidence of instability in the collateral ligaments with testing was found.

15. Dr. Olsen reviewed the right knee MRI and noted that Claimant had an equal chance of improving with rehab and viscosupplementation as he did from a partial meniscectomy of the right knee. Dr. Olsen stated he was unable to relate Claimant's knee condition to the work injury that occurred on July 22, 2012 (sic) and unable to relate it to the fall that occurred on October 10 or 12, 2012 when he ruptured the quadriceps tendon. The MRI did not show fraying or chronic degeneration that would have been

[4] Exhibit A, pp. 9–10.

seen with a long-standing tear and Dr. Olsen, believe the MRI findings were new. Dr. Olsen, agreed that viscosupplementation would be appropriate for the right knee, but it was not related to Claimant's work injury.

16. The ALJ concluded that to the extent that Claimant fell in January 2020 and it was related to his loss of balance, the tear would be related to the original work injury.

17. On August 14, 2020, Claimant underwent a Division Independent Medical Examination, which was performed by Dr. McAlpine. Claimant testified that he met with Dr. McAlpine over three days. Claimant's current symptoms included: left knee weakness, as well as right knee weakness and constant pain (6/10). Claimant also had what he estimated to be 50% of the strength and mobility in his left shoulder since reverse replacement surgery was performed on July 13, 2018. He said his shoulder pain was 5/10 nightly. Claimant described constant pain (5/10) in his right shoulder, which spiked when lifting or moving his right arm. Claimant advised Dr. McAlpine that his right shoulder deteriorated after using crutches.

18. On examination, Claimant's left shoulder had restricted range of motion ("ROM") and mild atrophy was present in the right knee quadriceps. The McMurray's maneuver was positive for medial joint line pain, with the drawer sign and Lachman's maneuver both negative. No evidence of instability was present in the collateral ligaments.

19. Dr. McAlpine's diagnoses were: Below the knee amputation, left; left ankle-diagnoses prior to left BKA: peroneal tendon dislocation; 715.17: osteoarthrosis and allied disorders: osteoarthrosis, localized, primary ankle and foot; 733.82: non-union of fracture; bilateral osteoarthritis of the knees; S/P right quadriceps tendon repair; right quadriceps tendon tear; S/P left knee patellofemoral arthroplasty; S/P left shoulder reverse total replacement; left shoulder rotator cuff tear; right shoulder osteoarthritis; medial meniscus tear, right knee. The DIME report indicated Claimant was at MMI as of the date of the evaluation. However, Dr. McAlpine opined that if surgery were recommended on either the knee or shoulder that Claimant was not at MMI.[5]

20. Dr. McAlpine further amplified her opinions when she provided expert testimony on October 6, 2020. Dr. McAlpine testified as an expert and stated opined that the condition of the right knee was caused or to the sequelae of the work injury that the condition of Claimant's right knee was related to the work injury and its sequalae. Dr. McAlpine noted:

> "So part of it, it has to be qualified. I agree that there was a significant incident that caused trauma to the right leg, including the knee and where he tore his quadriceps at that time. I also – the statement I made before, probably in a

[5] Exhibit 7, p. 44.

logical way there has been increased pressure on that leg after injuring the left, you know, leg on 7/22/2003.

The physics and the biomechanics of it, it probably had increased strain for that whole time. But there was a significant incident that occurred on the date that you – you know, I don't have the date right in front of me. I'd have to look at that." [6]

21. Dr. McAlpine acknowledged there was question whether the tear noted in the December 2019 MRI was "acute" because the radiologist did not describe it as such. However, Dr. McAlpine noted Claimant had multiple falls any one of which could have caused the tear.[7] Dr. McAlpine agreed that a torn medial meniscus would cause pain, but here where Claimant had multiple falls, the degree to which it was torn would impact the degree of pain he felt, as well as his pain tolerance. Claimant advised her that he was having pain and swelling in October 2019 at the time he was using a recumbent bike. Dr. McAlpine also testified that when Claimant subsequently fell (after December 2019), he could have torn the medial meniscus more. This opinion was persuasive to the ALJ.

22. The rationale provided by Dr. McAlpine showed she considered the issue of relatedness and causation with regard to the condition of Claimant's right knee. Dr. McAlpine opined that additional pressure was put on the right leg after the injury to the left leg and that, coupled with trauma from various falls (including January 2020) led to the need for surgery. Dr. McAlpine's testimony led the ALJ to conlude she considered multiple causes of the condition of Claimant's right knee. Dr. McAlpine believed the condition of Claimant's knee was related to the work injury. Her reasoning was persuasive to the ALJ.

23. Dr. McAlpine testified that she reviewed the research on the biomechanics of crutches and canes (citing the Journal of Biomechanical Engineering, as well as other sources). The studies indicated that recurrent use of crutches and straight canes would probably increase the progression of underlying degenerative disease. She believed this would increase the pressure and cause more extension type problems with the shoulder. Dr. McAlpine said long term use of crutches can create changes in the loading of the elbow/shoulder joints. Dr. McAlpine also testified that her opinion was based upon general principles of biomechanics.[8] This was the basis of her recommendations that Claimant be evaluated by a surgeon. Dr. McAlpine opined the condition of Claimant's shoulder was related to the work injury.

24. Dr. Olsen performed four independent medical evaluations of Claimant, at the request of Respondents. The first evaluation took place on May 7, 2014 and the

[6] Exhibit 8 (Dr. McAlpine's testimony), pp. 68-69.

[7] Exhibit 8 (Dr. McAlpine's testimony), p. 20:2-8.

[8] Exhibit 8 (Dr. McAlpine's testimony), pp. 103:6-16, 104:1-8; 106:20-22, 108:12-16.

second evaluation was on May 1, 2017. The next evaluation took place on June 19, 2019 and the last evaluation occurred on February 5, 2020. Dr. Olsen also testified as an expert at the most recent hearing, as well as the hearings in which ALJ Cannici, ALJ Felter and ALJ Jones presided.

25. Dr. Olsen testified as to the general accepted types of tears of a meniscus. Dr. Olsen stated that there are two kinds of medial meniscus tears-acute tears and chronic tears. Dr. Olsen said that an acute tear of the meniscus on MRI will show a bright white signal indicating that there is a tear from one edge of the meniscus to the other edge of the meniscus. Dr. Olsen testified that the meniscus tear, as shown on the December 9, 2019 MRI, was an acute tear and not a chronic tear. Dr. Olsen opined that Claimant's need for knee surgery was not related to the work injury, rather it was the result of the degenerative process in the knee. The ALJ concluded Dr. Olsen was expressing a different opinion with regard to the cause of Claimant's knee condition.

26. Dr. Olsen disagreed with Dr. McAlpine that Claimant's shoulder issues were related to use of crutches. He said Claimant described his crutch use as intermittent and would switch back and forth between using crutches and the wheelchair. In the June 19, 2019, report Dr. Olsen opined that, at best, Claimant only suffered a temporary aggravation of his right shoulder while he was using his crutches. Dr. Olsen opined Claimant's crutch use did not cause a permanent aggravation of the underlying osteoarthritis in his right shoulder.[9] Dr. Olsen said this was the natural progression of the underlying osteoarthritis is that, as one ages, the osteoarthritis simply gets worse.

27. Dr. Olsen also testified at the September 26, 2019 hearing as follows:

> "Mr. Robbins is using the crutches and wheelchair alternatively and on an intermittent basis. And, he is rarely mobile. And when he is mobile, he can switch between one mode of ambulation [with] the other depending on his symptomology. There is simply not enough documented time to result in a permanent deviation of a natural progression of his familial age-related osteoarthritis. Now, the crutches could cause a temporary increase in his symptoms as it did in 2013 for a period of months, but it was not great enough to affect the underlying progression of his osteoarthritis".[10]

28. At the hearing on July 8, 2021, Dr. Olsen testified the studies upon which Dr. McAlpine relied were based on uninterrupted crutch use. Dr. Olsen disagreed that Claimant's shoulder condition was related to his work injury. The ALJ concluded Dr. Olsen was expressing a different opinion with regard to the etiology of Claimant's shoulder condition.

[9] Exhibit A, p. 26.

[10] Exhibit QQ, p. 2086.

29. Respondents did not meet their burden of proof to show Dr. McAlpine's opinions concerning Claimant's knee and shoulder were more probably wrong.

30. The ALJ found it was more probable than not that Claimant requires surgery in the right knee because his balance was altered as a result of his industrial injury and this led direct to falls, which aggravated and accelerated the condition of his right knee.

31. The doctrine of issue preclusion does not apply with regard to the treatment proposed for Claimant's shoulder. The ALJ finds that a different issue was presented at this hearing, namely overcoming the DIME opinions. The ALJ also finds the burden of proof on this issue was different.

32. Based upon the totality of the medical evidence, the ALJ found that it is reasonable and necessary for Claimant to undergo an evaluation of his right shoulder. Respondents are required to pay for an evaluation of the shoulder. The ALJ makes no findings what treatment Claimant requires for the right shoulder at this time.

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

CONCLUSIONS OF LAW

General

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

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

Overcoming the DIME

As determined in Findings of Fact 1-3, Claimant was injured on July 22, 2003 when a vehicle rolled back on his ankle. Claimant suffered a peroneal tear and underwent

multiple surgeries when his doctors attempted to fuse the ankle after his injury. On May 12, 2012, Claimant underwent a below the knee amputation. *Id.* After his amputation Claimant testified his balance was affected and he has fallen on multiple occasions since that time. (Finding of Fact 4). Claimant's testimony was credible to the ALJ. *Id.*

As a result of one of his falls, Claimant suffered a tear of the quadriceps tendon in his right knee in 2012. (Finding of Fact 7). Claimant required extensive treatment after that time. Respondents requested a 24-month DIME and Dr. McAlpine performed the evaluation on August 14, 2020. (Finding of Fact 16). Dr. McAlpine concluded Claimant was not at MMI with regard to his right knee and right shoulder. (Finding of Fact 18). Respondents then filed an AFH to contest these findings. Claimant requested treatment, including surgery for the right knee and right shoulder.

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

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Respondents had the burden of proof to overcome Dr. McAlpine's conclusion on MMI. 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,* 5 P.3d 385 (Colo. App. 2000).

As found, Respondents did not meet their burden of proof to show that Dr. McAlpine's conclusions that Claimant was not at MMI with regard to his right knee and right shoulder were more probably wrong. (Finding of Fact 29). As determined in Findings of Fact 19-22, Dr. McAlpine reviewed Claimant's treatment records and concluded that he was not an MMI and required treatment for the right knee. In this regard, while recognizing the complex issues involved in Claimant's lengthy course of treatment, Dr. McAlpine opined that the cause of the medial meniscus tear was weakness resulting from the original injury, as well as the falls Claimant experienced. Dr. McAlpine noted there was a question as to whether the meniscus tear shown in the MRI was acute and then offered an opinion as to why the right knee was related. *Id.* The ALJ credited this opinion.

Likewise, Dr. McAlpine concluded Claimant was not an MMI for the right shoulder because of extensive use over time with crutches. Dr. McAlpine opined that the cause of

Claimant‘s shoulder symptoms was the result of the use of crutches. The ALJ determined that what was offered into evidence on the both the right knee and right shoulder was a differing expert opinion (Dr. Olsen), who disagreed with the opinion offered by Dr. McAlpine. (Findings of Fact 25 and 28). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician.

In summary, Respondents did not adduce sufficient evidence to overcome Dr. McAlpine’s opinions as to whether Claimant was at MMI, specifically with reference to the right knee and right shoulder.

Medical Benefits

Turning to the question of medical benefits, the ALJ reviewed the extensive medical records adduced on behalf of the parties and determined that the proposed surgery for the right knee was reasonable and necessary, as well as related to the industrial injury in 2003. Claimant is entitled to such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Respondetns are liable to provide such treatment provided it is reasonable, necessary and related to the work injury. In the case at bench, the ALJ credited the opinion of Dr. Kinder, who was an ATP, on Claimant’s need for right knee surgery. (Finding of Fact 12).

The ALJ concluded the doctrine of issue preclusion did not apply in this case. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. App. 2001). The issue regarding Claimant‘s shoulder surgery, despite having previously gone to hearing is subject to a different burden of proof, as the issue being adjudicated concerns Respondents’ attempt to overcome the conclusions of the DIME physician. (Finding of Fact 31). *Holcombe v. FedEx. Corp.*, W.C. 4-828-259 (ICAO March 24, 2007).

With regard to the potential shoulder surgery, the record was less clear. Based upon the most recent medical records, the record did not clearly establish surgery was being recommended for Claimant‘s right shoulder at this time. However, the ALJ determined the proposed evaluation of Claimant‘s right shoulder was reasonable and therefore, Respondents will be ordered to provide this treatment. (Finding of Fact 32).

When making the determinations with regard to the shoulder and knee, the ALJ considered Respondents‘ argument that Claimant‘s symptoms were the result of a degenerative condition in his knee and the natural progression of this condition. The ALJ found that despite the time that had elapsed since the industrial injury, it was the initiating event, which constituted the cause of Claimant‘s need for treatment. The ALJ considered Respondents‘ assertion that Claimant’s shoulder condition was not related to the work injury. After considering Dr. McAlpine’s opinion, as well as those offered by the ATP-s,

the ALJ found Claimant met his burden of proof to show that the condition of his shoulder and knee were related to the July 22, 2003 injury.

ORDER

It is therefore ordered:

1. Claimant's Motion for Directed Verdict is denied.

2. Claimant is not at MMI and Respondents shall provide medical benefits to Claimant, including the proposed surgery on the right knee.

3. Respondents shall provide medical benefits to Claimant, including an orthopedic evaluation of Claimant's shoulder.

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: July 12, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

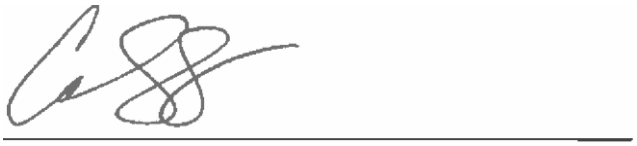
ORDER

It is therefore ordered:

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

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

Dated this 13th day of July 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.

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **DELIA CARTER,** Claimant, v. **LANDVEST CORPORATION,** Employer, and **ACCIDENT FUND INSURANCE COMPANY OF AMERICA,** Insurer, Respondents.	**COURT USE ONLY** **CASE NUMBER:** **WC 5-175-275-001** **5-179-157-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A VIDEO HEARING in the above captioned matter was held on May 3, 2022, before Administrative Law Judge (ALJ), Richard M. Lamphere.

Claimant was present and represented by Gordon J. Heuser, Esq. Respondents were represented by Eliot J. Wiener, Esq. The proceeding was digitally recorded on the Google Meets platform between 1:00 and 3:05 p.m.

Claimant testified on her behalf. In lieu of his live testimony, Respondent lodged a transcript of the April 26, 2022, deposition of Dr. William Ciccone, II. The deposition testimony of Dr. Ciccone is admitted into the evidentiary record. In addition, to the aforementioned testimony, the parties submitted hearing exhibits which were admitted into the evidentiary record as follows: Claimant's Exhibits 1-22 and Respondents Hearing Exhibits A-K.

At the conclusion of the hearing, the ALJ granted the parties' request to hold the record open through May 27, 2022, to allow counsel time to file position statements with the ALJ in lieu of closing argument. The deadline to submit the position statements was subsequently extended to June 9, 2022. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this order, Delia Carter will be referred to as "Claimant"; Landvest Corporation will be referred to as "Employer" and Accident Fund Insurance Company of America will be referred to as "Insurer". Employer and Insurer will be referred to as "Respondents". All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2015); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

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

Gordon J. Heuser, Esq.
gordon.heuserlaw.com

Eliot J. Wiener, Esq.
eliot.wiener@ritsemalaw.com

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

Date: July 13, 2022

/s/ Matthew Chavez_____
Court Clerk

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a work related injury to her right knee on May 20, 2021 (W.C. No. 5-175-275-001), July 29, 2021 (W.C. No. 5-179-157-001), December 15, 2021 (W.C. No. 5–194–727) or January 6, 2022 (W.C. No. 5–194–728)?

II. If Claimant established that she suffered a compensable right knee injury, whether she also established, by a preponderance of the evidence, that the medial meniscus repair and/or partial medial meniscectomy recommended by Dr. David Walden is reasonably necessary and causally related to the compensable claim.

III. If Claimant established that she sustained a compensable injury, did she also prove that she is entitled to an award of temporary total disability (TTD) benefits from July 30, 2021 through October 3, 2021?

STIPULATIONS

At the commencement of hearing, the parties stipulated to an Average Weekly Wage (AWW) of $1,127.98. The stipulation is approved. Claimant's counsel also noted that the December 15, 2021 and January 6, 2022 claims represented temporary exacerbations of Claimant's condition caused by either the May 20, 2021 or July 29, 2021 injuries.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ciccone, the ALJ enters the following findings of fact:

Background and Claimant's Alleged May 20, 2021 Injury

1. Claimant works as a General Manager for Employer who operates a storage unit facility. She has been worked for Employer since November 26, 2018. Claimant's job duties include performing inspections several times a day to ensure safety, security, and cleanliness of the facility and storage units. In performing such inspections, Claimant is required to walk up and down hallways where the storage units are located. Claimant's job duties also require her to perform administrative tasks such as renting storage units, monitoring the front office, and doing paperwork.

2. Claimant testified that on May 20, 2021, she was performing an inspection on the second floor of the storage facility when she developed pain in her right knee.

According to Claimant, she had walked the length of a hallway and turned her body to the left to view a storage unit. She then turned back to the right to continue with her rounds. When turning, Claimant testified that she did not move (turn) her feet. As noted, Claimant felt pain in her right knee as she pivoted back to the right to continue with her rounds.

3. Claimant finished her rounds and returned to her desk. Claimant testified that her right knee hurt the rest of the day and she could not find a position of comfort. Upon completing her shift and leaving the office, Claimant testified that she stepped awkwardly off a curb and experienced sharp pain in her right knee while walking to her car in the employee parking lot.

4. Claimant did not report the alleged injury or seek medical care on May 20, 2021. Rather, Claimant proceeded to a previously scheduled massage and after that, massage went home for the evening.

5. When Claimant got home following her massage, she testified that she was having sharp right knee pain when going upstairs and was forced to set off her car alarm to alert her children that she needed help to get into her home.

6. During cross-examination, Claimant testified that she completed a manager's incident report. She testified that she wrote that she had experienced discomfort in her knee that day and when she stepped off a curb at the end of the day the pain got worse. Claimant testified that she explained to Dr. Wu what had happened at work and that she had explained it to Dr. Bisgard as well. The incident report in question does not indicate that Claimant twisted her knee while making rounds. (See CHE 14, p. 216). Claimant testified that she did not put down the details of twisting her knee on the incident report because she was trained to keep information on the form brief.

7. Claimant testified that she presented to presented to UCHealth Emergency Department (ED) on the morning of May 21, 2021 with complaints of right knee pain. The ER note from this visit indicates that the onset of right knee pain was yesterday evening and that Claimant was walking down some stairs when she started feeling sharp right knee pain, which worsened when straightening her leg. Claimant denied injury. Physical exam revealed medial lateral joint line tenderness to palpation of the right knee with full range of motion. There was noted a positive McMurray's sign with mild joint effusion. The ED physician's clinical impression was a potential meniscus injury of the right knee. The ED report does not contain a history that Claimant's injuries were work-related. It was recommended that Claimant follow up with her primary care physician and consider using an OTC knee sleeve for support in conjunction with Ibuprofen and Tylenol for pain. (CHE 3, pp. 81-82, 87-88).

8. The Claimant was seen by Physician Assistant (PAC) Jayme Eatough at UCHealth Urgent Care on May 24, 2021. Claimant completed a patient intake form at that time, reporting a mechanism of injury (MOI) of "stepping off curb" (CHE 4, p. 107). PAC Eatough reported:

> She felt leg pain in the front when she was sitting at her desk doing computer work. The pain was mild … When she went to leave she stepped off a curb and felt shooting pain. She did not fall or have any trauma to the leg … she then went and got her massage which didn't help. She then drove home and had a hard time using the gas and brake pedal … to get in the house you have to go down and upstairs. She had sharp pain with both going up and down. She set off the car alarm to get her kids to come out and help.

Id. at p. 108-109.

9. Physical exam was positive for an inability to fully straighten the right knee, an inability to bear weight enough to perform a Thessaly test, significant decreased strength in the right quadriceps and hamstrings when compared to the left, and some swelling on the lateral inferior aspect of the right knee. X-rays of the knee did not reveal any acute abnormalities although a patellar enthesophyte at the quadriceps insertion was found. PAC Eatough diagnosed “Acute pain of right knee” and “Sprain of right knee, unspecified ligament, initial encounter”. The Claimant was provided with a knee brace, told to use crutches in conjunction with rest, ice, NSAIDs, and elevation to help with pain. She was also assigned physical restrictions of “sitting/sedentary work only”. (Id. at p. 111). As part of this encounter, Dr. Elizabeth Bisgard signed a WC-164, which indicated that the relatedness of the objective findings on examination to the described MOI was undetermined. Indeed, Dr. Bisgard noted: “Causality unsure”. (Id. at p. 120).

10. On June 4, 2021, Claimant presented to Emily Burns, M.D. with continued complaints of right knee pain, which becomes sharp with extension. The worst pain was along the bottom of the kneecap. Dr. Burn’s note indicated that she reviewed the claimant’s MOI. The mechanism reported was that the Claimant had a mild tweak from walking down the hall and turning down the hallway to the left. Dr. Burns reported the Claimant was just walking and had a clipboard in her hand. At the end of the day, the Claimant stepped off a curb and had a sharp pain. Dr. Burns reported that the Claimant did not fall and categorized the injury as minor. Dr. Burns reported, “It is unclear if this is a true work-related injury. However, given the minor mechanism we would certainly expect improvement by now and she is still requiring crutches for ambulation." Dr. Burns was most suspicious for either patella chondromalacia/cartilage injury versus lateral meniscus injury. She recommended an MRI with continued use of crutches as needed. (CHE 3, pp. 99-101).

11. A MRI performed on June 14, 2021 was read as being normal. (CHE 6, p. 128).

12. Claimant returned to Dr. Burns on June 15, 2021 with throbbing pain in her right knee, which was shooting mostly underneath and along the lower side of the right

kneecap. Dr. Burns advised the Claimant that her MRI findings were normal. Physical exam was similar to that performed at the previous appointment with Dr. Burns, except for mild atrophy of the right quadriceps was noted when compared to the contralateral side. Dr. Burns diagnosed right knee pain and recommended home exercises and sitting work only. Dr. Burns reported that because Claimant did not have a significant work injury and had a completely normal MRI, she could not say with greater than 50% certainty that the Claimant's current symptoms were caused by a work-related mechanism. (CHE 3, pp. 102-105).

13. Respondents filed a Notice of Contest denying liability for the May 20, 2021 injury on July 26, 2021 (Respondents' Hearing Exhibit (RHE) F, pp. 88-89).

14. Claimant presented to Penrose St. Francis Primary Care on July 7, 2021 with reports of persistent right knee pain. She reported that she developed "sharp right knee pain" while walking down some stairs, which was worse with straightening the right knee out. Claimant requested an orthopedic referral. (RHE D, p. 53).

Claimant's Alleged July 29, 2021 Injury

15. Claimant contends she sustained a second work-related right knee injury on July 29, 2021, while maneuvering/scooting a wheeled chair she was sitting in to get a better view of an on-site incident involving a motor vehicle and an overhead door at the storage facility. Claimant's work area is covered by a security camera and there is video tape of the alleged July 29, 2021 injury.

16. Claimant testified that on this date (July 29, 2021), she was sitting in a rolling chair at her workstation when she reinjured her right knee. According to Claimant, she noticed a customer running into the loading bay door. In order to get a better look at what was happening; Claimant testified that while sitting down, she used her right leg, with "quite a bit" of pressure to push her chair to the left side of the desk. Claimant testified that as she pushed her wheeled chair to the left with her right leg, she experienced immediate severe pain in her right knee, which she would subsequently describe as sharp and throbbing. (CHE 7, p. 133).

17. The ALJ has carefully reviewed the aforementioned video recording of the July 29, 2021 incident contained at RHE J, p. 127. The video recording is 15 minutes 37 seconds in length. Review of security video shows the Claimant at her desk, completing paperwork and generally attending to a customer. She is sitting in a wheeled rolling chair placed on a hard surface floor, which she maneuvers side to side and front to back by pushing her feet on the floor. In the video, Claimant uses both the right and left leg to move her chair short distances within her work area. She wears a knee brace on the right leg. (RHE J).

18. At approximately 3 minutes and 43 seconds into the video, Claimant's attention is drawn to the garage bay directly in front of her desk. In order to get a better

view what is transpiring in the garage bay, Claimant grabs the left side of her desk with her left hand and pulls herself past the left side of her desk. She is not observed to push the chair to the left by using her right leg with "quite a bit of pressure" as she testified. Indeed, the movement is primarily accomplished with use of the left arm. At best, there is minimal use of the right leg as Claimant moves her rolling chair to the left side of her desk. (RHE J).

19. From 3:44 to 4:04 of the video, Claimant is observed to be sitting in her chair located just beyond the left side of her desk looking into the garage bay. There are no outward signs of injury. Indeed, Claimant appears to sit comfortably in her chair at the left side of her desk until the 4 minute and 5 second mark of the video, at which time she scoots her chair back under her workstation by using both legs to propel the chair forward. She then resumes her duties without any obvious signs of pain, injury or difficulty.

20. From 4:06 to 15:37, Claimant works on completing the paperwork for the customer who is standing directly in front of her desk. She briefly interacts with co-workers and occasionally scoots her chair from side to side and backward to reach for documents on a printer tray located behind her. Again, she gives no indication that she sustained an injury or is in discomfort during the remainder of the video. (RHE J).

21. Claimant filed two additional right knee claims with dates of injury on December 15, 2021 and January 6, 2022. At hearing, the Claimant testified that these two claims represented nothing more than temporary exacerbations of the injuries she sustained on May 20, 2021 and/or July 29, 2021.

22. The Claimant did not return to UCHealth in connection with her July 29, 2021 claim, but instead went to see Dr. George Johnson at Concentra Medical Centers (Concentra) on July 29, 2021. Dr. Johnson reported that the mechanism of injury occurred when the Claimant was scooting in her wheeled office chair at work. Dr. Johnson reported the Claimant did have a prior May 2021 injury when she was walking at work, and that the Claimant's condition had not improved over the past two months. (RHE E, p. 55). Physical examination of the right knee, which revealed swelling and tenderness over the medial joint line along with limited range of motion in all planes. (Id. at p. 57). Dr. Johnson's assessment was internal derangement of the right knee. (Id. at p. 54). He opined that Claimant's objective examination findings were "consistent with history and/or work-related mechanism of injury/illness." (Id.) Dr. Johnson recommended a knee brace, medications, and X-rays. Claimant was also given restrictions to include lifting, pushing/pulling up to 2 pounds, walking for 1 hour a day, standing for 1 hour per day, continuous use of crutches and wearing a brace or splint on her right knee for at least eight hours per day. (Id.) Dr. Johnson did not review the video of the July 29, 2021 incident that gives rise to this claim.

23. X-rays of the right knee performed on July 29, 2021 were read as normal. (RHE B, p. 19).

24. An August 12, 2021 note from Dr. Johnson indicates that Claimant's right knee symptoms were unchanged and that Claimant was not working due to restrictions. (RHE E, p. 58).

25. Claimant testified that Dr. Johnson imposed restrictions on her to include not being allowed to drive. She testified that she worked up until July 30, 2021, albeit in a modified capacity. She also testified that she was not told by her employer when she could return to work. Claimant stated that she was told by her employer that she had to wait for the insurance company for further direction on return to work. Claimant testified and the evidence presented supports a finding that she returned to work on October 4, 2021.

26. On August 23, 2021 Claimant presented to orthopedic surgeon Janie Friedman, M.D. According to Dr. Friedman's note, Claimant had had several years of off/on knee pain, which "got acutely worse after two incidents of twisting her knee at work on 5/19/21 (sic) and 7/29/21." At the time of Dr. Friedman's evaluation, Claimant was having pain primarily on the medial aspect of her knee without radiation. Her symptoms were reportedly unchanged after the second incident at work. Physical exam was positive for decreased range of motion. Dr. Friedman felt that Claimant's history and exam are consistent with a knee sprain. Dr. Friedman ordered x-rays, which demonstrated "well maintained joint spaces with no osseous abnormalities." She also reviewed Claimant's June 14, 2021 MRI, which she opined was "normal with no pathology noted." Dr. Friedman advised Claimant to "stop relying" on the brace and crutches as she felt they may be "hindering" her recovery. She administered a steroid injection and told Claimant if she didn't improve in 6-8 weeks, consideration would be given for a repeat MRI. (RHE E, pp. 78-80).

27. A repeat MRI performed on September 10, 2021 revealed the following:

- Subtle horizontal cleavage tear of root of medial meniscus without detachment measuring 4.5 mm.

- The cruciate ligaments, collateral ligaments, and extensor apparatus are all within normal limits. No osseous abnormalities.

- Focal prepatellar subcutaneous edema could reflect low-grade subacute soft tissue contusion status post history of trauma.

- Tri-compartmental low-grade partial-thickness articular cartilage loss most prominently involving the patellofemoral compartment.

(RHE B, p. 21).

28. Claimant returned to Dr. Johnson on September 16, 2021, with bilateral knee and back pain. Dr. Johnson noted that the September 10, 2021 MRI revealed a medial meniscus tear. Dr. Johnson also noted that Claimant was experiencing

compensatory left knee and back pain. Dr. Johnson assigned Claimant work restrictions of no driving the company vehicle, no lifting over 10 pounds, walking, and standing up to 2 hours per day, and referred Claimant to orthopedic surgeon David Walden, M.D. for further workup. (CHE 9, pp. 156-159).

29. Claimant was evaluated by Dr. Walden on October 4, 2021. According to his note, Claimant told Dr. Walden that she had a normal right knee until May 2021 when she was checking some units and twisted her right knee. Later that day, she stepped off a curb, causing further injury. The knee pain increased to the point where Claimant needed crutches. This note further indicates that Claimant re-injured herself in a second work-related incident on July 29, 2021, when she "got up quickly to check on a client who had pulled into the overhead door." Physical exam revealed decreased range of motion, diffuse tenderness of the medial lateral facets of the patella, medial lateral tissues with confluence of the medial facets of the patella, tibia, and femur. There was medial joint line tenderness, slight lateral joint line tenderness, and posterior mild pain. McMurray maneuvers were noted as equivocal. Dr. Walden reviewed the June 14, 2021 and September 10, 2021 MRIs which he interpreted as normal and with a possible medial meniscal tear respectively. Dr. Walden recommended conservative care including physical therapy to improve Claimant's range of motion for what he assessed was a flexion contracture of the right knee due to arthrofibrosis. He also administered a second steroid injection. There is no indication that Dr. Walden reviewed the aforementioned video tape of the July 29, 2021 incident during which Claimant alleges to have reinjured her knee. (CHE 12, pp. 207-209).

30. Based upon the content of his October 4, 2021 report, the ALJ finds Dr. Walden's understanding of the mechanism of injury alleged to have caused re-injury inconsistent with the July 29, 2021 security video tape. Indeed, there is no indication that Claimant "got up quickly" at any point during the incident in question to check on a client who had "pulled into the overhead door."

31. On December 22, 2021 Claimant was seen for a follow-up evaluation of her right knee. Dr. Walden noted that she had six visits of PT without lasting relief. Claimant was not convinced that the condition of her knee was improving and "wanted to discuss possible surgical intervention." Examination of the right knee revealed, in part, reports of pain along the medial joint line, which was exacerbated by medial McMurray testing. Dr. Walden's diagnoses on this day were acute meniscus tear and arthrofibrosis of the right knee. Dr. Walden opined that Claimant's symptoms correlated with the MRI findings of a medial meniscus tear. He also, without specifying which incident, noted that the mechanism of injury also could have produced this. Dr. Walden recommended arthroscopic surgery. (CHE 9, pp. 195-196; see also RHE E, p. 77).

Dr. Ciccone's Independent Medical Examination and Subsequent Testimony

32. At Respondents' request Claimant was evaluated by orthopedic surgeon William Ciccone II, M.D. Claimant gave Dr. Ciccone a history that on May 20, 2021, she

injured her right knee turning around while checking the storage units and noticed pain. This pain increased while leaving work when she had to “step down some stairs quickly.” According to this note, Claimant also alleged that she injured her knee further on July 29, 2021, while she was leaning around a desk to see out the window to watch a truck back into a door. Claimant also relayed to Dr. Ciccone that she injured her right knee again in December 2021 while watching video footage at work when, while pulling her chair forward, she hit her knee on the handle of the desk. She had a similar incident about a week later while stepping quickly to get to her phone. Dr. Ciccone’s report indicated that Claimant has most of her pain in the anteromedial and anterolateral aspect of her right knee, which gets worse with walking and stairs. (RHE A).

33. Dr. Ciccone opined that he did not believe the Claimant sustained a work-related injury to her knee, but that she may have suffered “increased pain with work activities.” He agreed with Dr. Burns who, on June 4, 2021, questioned whether this was a true work-related injury, and who on June 15, 2021, reported that she could say with greater than 50% certainty that Claimant's current symptoms were caused by a work-related injury. Moreover, Dr. Ciccone did not believe that the July 29, 2021 mechanism would cause a work-related injury. He reported that while the September 10, 2021 MRI may have revealed a subtle meniscal tear, Claimant did not have examination findings consistent with an acute meniscal tear. Dr. Ciccone was not provided the MRI imaging for review. (RHE, A).

34. Dr. Ciccone testified by evidentiary deposition on April 26, 2022 as an expert in orthopedic surgery. Prior to his deposition, Dr. Ciccone reviewed additional materials to include Claimant’s discovery responses, the June 14, 2021 MRI and the aforementioned July 29, 2021 security camera video.

35. After reviewing the additional information, Dr. Ciccone reiterated his previous opinion that Claimant did not suffer a work-related injury to her knee because the mechanisms of injury were not ones that he associated with acute meniscal pathology. (Depo. Trans. p. 10, lines 1-7). Dr. Ciccone then testified that he did not review the September 2021 MRI, but assuming that a meniscal tear was present, it may be degenerative in nature and unrelated to any injury, including the July 29, 2021 or May 20, 2021 incidents. (Depo Trans. p. 12, lines 7-25, p. 13, lines 1-21).

36. While he agreed that Dr. Walden documented an examination that correlated with an acute meniscal tear, Dr. Ciccone noted that Dr. Walden’s examination was inconsistent with all other providers who had examined the right knee. (Depo. Trans. p. 15, lines 10-22).

37. Dr. Ciccone testified that he disagreed with Dr. Walden’s recommendation for surgery because Claimant did not have a mechanism of injury likely to cause meniscal tearing and because Claimant would not likely benefits from surgery because her “knee pain is not consistent with meniscal pathology”. (Depo. Trans. p. 17, lines 8-19).

38. During cross-examination, Dr. Ciccone explained that the presence of a subchondral cyst and "scattered, low-grade partial thickness cartilage loss on imaging represents findings consistent with degenerative change. (Depo. Trans. p.p. 21-23, see also RHE B, p. 20-21). He also explained that the phrase "mild attenuation of the medial meniscus" as used in the September 10, 2021 MRI meant that the meniscus was "a little thinner" in appearance than normal. (Depo. Trans. p. 25, lines 5-8). He testified that "attenuation" is not synonymous with a tear. (Id. at p. 25, lines 9-10). He also explained that as used in the September 10, 2021 MRI, the phrase "mild attenuation of the medial meniscus towards the root favored subtle horizontal tear" meant:

> . . . that it's not clearly a tear. It means that it could be a tear, may be a tear. In the setting of early degenerative change, it may mean nothing as far as injury. It may just be part of the degeneration that is occurring within the knee.

(Depo. Trans. p. 25, lines 11-20).

39. Dr. Ciccone clarified that the word subtle meant that there may or may not be a meniscal tear present on the September 10, 2021 MRI. (Depo. Trans. p. 37, lines 16-24). According to Dr. Ciccone, MRI is very sensitive in discerning meniscal tearing and in MRIs that are read as "normal" it is unlikely there is any meniscal tearing. (Depo. Trans. p. 38, lines 14-22). Dr. Ciccone explained that in this case, the radiologist reading the September 10, 2021 MRI noted an abnormality in the medial meniscus, which he felt "might" be a tear. (Depo. Trans. p. 38, lines 14-19). Dr. Ciccone was then asked to assume that there was a meniscal tear by the time of the September 10, 2021 MRI that was not present by MRI obtained on June 14, 2021. Assuming this to be the case, Dr. Ciccone was asked whether the July 29, 2021 incident would have caused the tear present on the September 10, 2021 MRI. In response, Dr. Ciccone testified: "By work-related mechanism, I think it's unlikely that that (July 29, 2021 incident) would have caused a tear." (Depo. Trans. p. 39, lines 5-14).

40. The ALJ has carefully considered the reports of Dr. Walden and the expressed opinions of Dr. Ciccone and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. Ciccone's opinions credible and more persuasive than those of Dr. Walden.

41. The evidence presented, persuades the ALJ that Claimant has failed to prove that she suffered an acute tear of the medial meniscus as a direct consequence of either the May 20, 2021 or July 29, 2021 alleged injurious incidents. To the contrary, the evidence presented persuades the ALJ that Claimant's meniscal tear is, more probably than not, degenerative in nature and precipitated by her underlying, osteoarthritis rather than by pivoting on her feet, ascending/descending stairs, stepping off a curb or pushing a rolling chair on a hard surface with her right foot as she claims. Consequently, Claimant has failed to prove by a preponderance of the evidence that she sustained a work related injury arising out of her employment on May 20, 2021 or July 29, 2021.

42. Even if Claimant had established a causal connection between her right medial meniscal tear and her work related functions, on May 20, 2021 or July 29, 2021, she failed to prove by a preponderance of the evidence that the surgery recommended by Dr. Walden is reasonable or necessary. To the contrary, the ALJ is persuaded by Dr. Ciccone's testimony that the recommended surgery is unlikely to result in any benefit. Accordingly, the ALJ finds the recommendation for surgery unreasonable.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found, the ALJ concludes the testimony of Dr. Ciccone to be credible and more persuasive than the contrary opinions of Dr. Walden.

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence

or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the evidence presented supports a conclusion that Claimant's alleged injuries occurred in the course of her employment. Nonetheless, Claimant must also establish that her alleged injuries arose out of her employment before the claim(s) can be found compensable.

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2014. Here, Dr. Ciccone persuasively testified that the pain and suspected medial meniscal tear in Claimant's right knee is probably emanating from and related to the natural progression of degenerative arthritis in the knee rather than any activity or condition associated with Claimant's employment, i.e. walking, pivoting, ascending/descending stairs, stepping up onto and down from a concert curb or scooting in a rolling chair. The record evidence, including the physical examinations of Dr. Burns and the evaluation of Dr. Friedman support Dr. Ciccone's opinions. Based upon the evidence presented, the ALJ is convinced that the condition of Claimant's right knee, including her suspected meniscus tear are unrelated to either the May 20, 2021 or July 29, 2021 incident occurring at work.

F. The question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and her need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, Claimant has failed to establish a causal connection between her employment related duties and the resulting condition for which medical treatment benefits are sought. Here, the origin of Claimant's pain and the cause of her suspected medial meniscus tear, more probably than not, is progressing degenerative change within the right knee rather than any activity associated with her job. Consequently, her claims must be denied and dismissed.

G. Although Claimant is not alleging that her meniscal tear was "precipitated" by a pre-existing condition and instead by a discrete injury, the ALJ finds and concludes, that Respondents are suggesting, among other things, that Claimant's meniscal tear is a likely consequence of a pre-existing condition (degenerative arthritis) brought by Claimant to the workplace. Consequently, the ALJ has also analyzed the compensable nature of this case pursuant to the decision announced by the Colorado Supreme Court in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) and the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

H. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean, "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of the pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the

employment and the injury. *See Ramsdell v. Horn, supra.* In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* Courts have previously held that hard level concrete floors, concrete stairs, and curbs are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). There is no requirement that the pre-existing condition is symptomatic prior to the injury in order for the special hazard rule to apply. *Alexander v. Emergency Courier Services, supra*. Here, Claimant did not testify that any particular flaw in the curb caused her right knee injury. As presented, the evidence supports a finding that the curb in this case is not a special hazard of employment but rather a ubiquitous condition, which Claimant could have encountered off the job. Moreover, as found, the record evidence supports a conclusion that Claimant's meniscal tear was precipitated by her pre-existing osteoarthritis. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury to Claimant's right knee under any claim that stepping off the curb caused her injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); See *also Ramsdell v. Horn*, *supra.* Here Claimant failed to establish that a special hazard of employment combined with her pre-existing condition to cause the injury in question. Accordingly, her claim for benefits based upon an injury suffered while stepping off a curb must be denied and dismissed.

I. As Claimant failed to establish that she sustained a compensable, work related injury on May 20, 2021 or July 29, 2021, her alleged exacerbations of these injuries occurring on December 15, 2021 and January 6, 2022, must also be denied and dismissed. Because Claimant has failed to carry her burden to establish that she sustained compensable work-related injuries, this order does not address her claims to medical and lost wage benefits.

ORDER

It is therefore ordered that:

1. Claimant's claims for worker's compensation benefits alleged to have occurred from injuries sustained on May 20, 2021 and July 29, 2021 are 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: July 13, 2022

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-248-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury from a motor vehicle accident, on June 17, 2021, while in the course and scope of his employment with Employer.

2. Whether Claimant is entitled to medical benefits for services rendered related to the June 17, 2021 motor vehicle accident.

3. Whether Claimant should be awarded TTD benefits from June 18, 2021 to January 9, 2022. If so, what was Claimant's AWW?

FINDINGS OF FACT

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

1. Employer is in the business of sanitizing hog farm facilities. CS[Redacted] is the owner of Employer, and he lives in Yuma, Colorado. The registered address for Employer is 313 S. Main Street, Yuma, Colorado 80759 (Ex. S). Employer's "office" is in Yuma, Colorado.

2. Mr. CS[Redacted] testified that Seaboard Farms was Employer's only client in June 2021. Seaboard Farms had several locations, each housing pigs at different stages of their preparation for slaughter. All of the locations were in Holyoke, Colorado. Holyoke is approximately an hour from Yuma, by car.

3. Claimant began working for Employer in February 2020. Claimant testified that he earned $13 an hour plus bonus, and his job was to power wash and sanitize facilities at various hog farms.

4. Claimant credibly testified that on approximately six occasions prior to June 17, 2021, he traveled to Yuma, Colorado to work for Employer. Claimant testified that he cleaned up the yard and pulled weeds at Mr. CS[Redacted] 's house, the "other" house, and also at the "office". Claimant's pay for this work was a part of what he would earn as an employee of Employer. Claimant presented no evidence to support these payments.

5. MG[Redacted] also worked for Employer. Mr. MG[Redacted] credibly testified that on approximately three occasions he worked at Mr. CS[Redacted] 's home in Yuma. Mr. MG[Redacted] testified that the first time he worked at Mr. CS[Redacted] 's house he cleaned the yard, hung sheet rock, and took tools to the "office." Mr. MG[Redacted] testified that his pay for this work was part of his regular paycheck.

6. The ALJ finds that Claimant's employment included performing work for Employer in Yuma at Mr. CS[Redacted] 's personal residence, the other house and the office. Claimant traveled to Yuma at the express or implied direction of Employer, and conferred a benefit to Employer.

7. Employer and Seaboard Farms had a fee dispute. On June 14, 2021, Claimant and other employees were told by Employer to report to the hog farm owned by Seaboard Farms, and begin removing the equipment. On June 14, 2021, Claimant helped remove Employer's equipment off the hog farm.

8. Claimant's timecard for June 14, 2021, reflects 10 hours of work that day. The 10 hours of work is hand-written on the time card. (Ex. D). According to Mr. CS[Redacted] , Claimant did not punch his time card that day, but Employer paid him for 10 hours of work.

9. Mr. MG[Redacted] testified that on June 14, 2021, he moved Employer's equipment from the farm to a garage in another location. Employer also paid Mr. MG[Redacted] for 10 hours of work that day even though he did not punch his time card.

10. Employer was not able to remove all of its equipment on June 14, 2021. There is conflicting testimony as to what other day or days the equipment was removed.

11. Claimant testified that he did not work on June 15, 2021 because he had the day off, but on June 16, 2021, he continued to remove equipment from Seaboard Farms for Employer.

12. Mr. CS[Redacted] 's brother, JSV[Redacted], testified that he is not employed by Employer. Mr. JSV[Redacted] further testified that he helped Claimant and Mr. MG[Redacted] remove equipment on June 14 and 15, 2021. Mr. JSV[Redacted] testified that he helped Claimant move personal things on June 16, 2021. Claimant testified that Mr. JSV[Redacted] used the "company truck" to help him move furniture on either June 15 or 16, 2021.

13. Mr. CS[Redacted] testified that Employer was no longer in business as of June 15, 2021 because all of the equipment had been pulled from the hog farm. Mr. CS[Redacted] , however, was not present in Holyoke when the equipment was removed.

14. The ALJ finds that on at least two days between June 14 and June 16, 2021, Claimant helped remove Employer's equipment from the hog farms with Mr. JSV[Redacted] 's assistance.

15. There is no evidence that Employer paid Claimant for any work he performed after June 14, 2021.

16. Mr. CS[Redacted] testified that he asked his brother, Mr. JSV[Redacted] , to tell Claimant and the other employees that there was no more work for them.

17. Claimant credibly testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer.

Claimant further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

18. Mr. MG[Redacted] corroborated Claimant's testimony. He testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer. He further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

19. Mr. CS[Redacted] testified that in June 2021, he had health issues and had them "for a while." Because of his health issues, Mr. CS[Redacted] , did not spend much time in Holyoke, near the hog farms. Mr. JSV[Redacted] assisted his brother with personal and employment issues.

20. The ALJ finds that even though Mr. JSV[Redacted] was not technically employed by Employer, he was an agent of Employer, and specifically acted on behalf of Mr. CS[Redacted] and Employer.

21. Mr. JSV[Redacted] lived in Holyoke and had a social relationship with Claimant and Mr. MG[Redacted] .

22. Claimants credibly testified that Mr. JSV[Redacted] regularly picked them up and drove them to and from the specific hog farms where they worked each day. Claimants did not know where they were needed for work on any given day. They relied upon Mr. JSV[Redacted] to communicate where they would be working, and to transport them to and from the location for work. Claimants further testified that when they worked for Employer in Yuma, Mr. JSV[Redacted] drove them to Yuma from Holyoke.

23. It is uncontroverted that Mr. CS[Redacted] relied upon his brother, Mr. JSV[Redacted] , to communicate with the employees, including Claimant, on his behalf.

24. Mr. JSV[Redacted] testified that he went to Yuma on June 17, 2021, to "help" his brother, Mr. CS[Redacted] . That morning, Mr. JSV[Redacted] picked up Claimants in a truck owned by Employer. A man by the name of JV[Redacted] and Mr. JSV[Redacted] 's dog were also in the truck.

25. Claimant testified that on June 17, 2021, he went to Yuma with Mr. JSV[Redacted] to clean Mr. CS[Redacted] 's yard, and other properties he owned, just as he had done in the past. Mr. MG[Redacted] corroborated this testimony. Both Claimant and Mr. MG[Redacted] credibly testified that they had each been to Yuma on previous occasions to work for Employer by cleaning the yard and doing odds and ends.

26. Mr. JSV[Redacted] testified that Claimant and Mr. MG[Redacted] were his friends and they wanted to go for a ride with him on June 17, 2021. The ALJ does not find this testimony credible. The ALJ finds that Claimants had not been informed that their employment ended on June 15, 2021. Claimants believed they were going to work for Employer in Yuma on June 17, 2021, and they expected to be paid by Employer for this

work. The ALJ infers that neither Claimant nor Mr. MG[Redacted] would voluntarily go to Yuma to clean the yard of Mr. CS[Redacted] if they knew their employment ceased on June 15, 2021, as Mr. CS[Redacted] testified.

27. Claimant and Mr. JSV[Redacted] testified that they when they got to Yuma, they went to the "other house" to pick up tools. Claimant cleared weeds and cleaned the area behind Employer's office. Claimant testified that he also picked weeds at Mr. CS[Redacted] 's house.

28. Mr. JSV[Redacted] drove Claimants back to Holyoke. When close to Holyoke, Mr. JSV[Redacted] lost control and rolled the truck. Claimant was ejected and the truck landed on top of him. (Ex. 1). Mr. MG[Redacted] wanted Mr. JSV[Redacted] to call 911, but he declined and called his brother, Mr. CS[Redacted] . Mr. MG[Redacted] and Mr. JV[Redacted] lifted the truck and pulled Claimant out from under it.

29. Claimant called his girlfriend, who came and took him to Melissa Hospital in Holyoke. Claimant was transferred by helicopter to Swedish Medical Center in Englewood. The medical reports show that Claimant suffered neck pain, a C5 fracture, and a left wrist styloid fracture. (Ex. 6). Claimant testified he remained hospitalized for approximately four days.

30. Claimant testified that one week after he was released from the hospital he called Mr. JSV[Redacted] to ask when he could return to work, and Mr. JSV[Redacted] told him that there was no more work. Claimant testified that this was the first time he learned there was no more work with Employer. The ALJ finds Claimant's testimony credible.

31. Claimant credibly testified that he has received extensive medical bills that remain unpaid to date, including the helicopter transportation from Melissa Hospital to Swedish Medical Center, diagnostic testing and additional treatment. Bills for these services were not presented at hearing.

32. Claimant filed a Workers' Claim for Compensation on August 4, 2021. (Ex. R). Respondents' filed a First Report of Injury on August 11, 2021, and a Notice of Contest on August 27, 2021, claiming that further investigation was needed. (Ex. N).

33. Employer objected to Claimant's claim on the basis that Claimant was not on the payroll on that date, and that "it [Employer] quit June 15, 2021." (Ex. D).

34. The ALJ finds that on June 17, 2021, Claimant was an employee of Employer, was performing work on behalf of Employer in Yuma, Colorado at the express or implied direction of Employer, and this work conferred a benefit on Employer.

35. Claimant's gross earnings from January 1, 2021 to June 14, 2021 (164 days or 23.42 weeks) were $15,627. (Ex. 7). Based on this information, Claimant's AWW was $667.25.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

Employment Status

In order for an injury to qualify under the Act, there must be an employer/employee relationship at the time of the injury. §§ 8-40-202(b) and 8-40-203(b) C.R.S. The ALJ credits Claimants' testimony that the alleged termination of work was not communicated to either of them prior to the accident on June 17, 2021. Both Claimant and Mr. MG[Redacted] credibly testified that neither Mr. CS[Redacted] nor Mr. JSV[Redacted] told them that Employer no longer had work for them until several days after the June 17, 2021 accident. Claimant and Mr. MG[Redacted] both credibly testified that neither of them understood that Employer did not have any more work for them on the hog farms at the time they helped remove the equipment between June 14 and June 16, 2021. As found, Claimant has proven by a preponderance of the evidence that he was working for Employer on June 17, 2021, and he conferred a benefit on Employer.

Course and Scope

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.,* W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

The Colorado Supreme Court applied the *Madden* factors in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 867 (Colo. 1999). In that case, Claimant was injured in a motor vehicle accident as he was driving to a temporary construction site operated by Employer-Armendariz Construction Company. Claimant did not meet with other workers at a service station in Grand Junction, Colorado, where Employer customarily paid for the cost of fuel and employees carpooled. The ALJ concluded that the employer expected claimant to travel as part of his job and he performed services at a substantial distance from his home. The ALJ's decision that the claim was compensable was affirmed by the ICAO, the Court of Appeals and the Colorado Supreme Court. The Court stated:

> Applying these variables to the facts of this case, we find that there is no evidence that Reynolds' injury occurred during working hours or that it occurred on his employer's premises. In addition, there is no evidence in this case that Reynolds' injury occurred within a zone of special danger warranting recovery. However, there is sufficient evidence to support the ALJ's finding that travel was contemplated by Reynolds' employment contract with his employer, Armendariz Construction Company, to warrant recovery under the Workers' Compensation Act of Colorado.

Id. As the Court in *Staff Adm'rs,* recognized, even where not all of the *Madden* factors were present, it was possible that an employee's injuries arose out of his/her employment.

The *Madden* Court cited several cases where compensability was found because travel by an employee was at the express or implied request of the employer, or the travel conferred a benefit on the employer beyond the sole fact of the employee's arrival at work. 977 P.2d at 864-65 (citations omitted). Such travel is contemplated by the employment contract even if the advantage to the employer may have been slight. *Berry's Coffee Shop,* 423 P.2d at 5.

When considering the role travel played, the ALJ determined Claimant's travel to and from Yuma was at Mr. JSV[Redacted] 's request, and as found, Mr. JSV[Redacted] was an agent of Employer. (Findings of Fact ¶ 20). Thus, Claimant's travel was at the express or implied request of Employer. Additionally, as found, Claimant's travel to Yuma conferred a benefit on Employer as he performed work for Employer on June 17, 2021. (Findings of Fact ¶ 34). In addition, the evidence in the record showed that Mr. JSV[Redacted] regularly drove Claimant to and from work assignments. (Findings of Fact ¶ 22). The ALJ credits Claimant's testimony that he had been paid for work he performed for Employer in Yuma on previous occasions, and he expected to be paid for the work on June 17, 2021. (Findings of Fact ¶ 26). The ALJ concludes there was a causal connection between Claimant's travel to various locations, including, but not limited to, Yuma and his employment. *Loffland Brothers v. Baca*, 651 P.2d 431, 432-433 (Colo. App. 1982); *Cf. Lewis Essary v. General Dynamics,* W.C. 5-117-912 (ICAO December 1, 2020) *aff'd, Colo. Ct. App, 10CA2103,* August 12, 2021, *unpublished*. The ALJ concludes that Claimant proved by a preponderance of the evidence that his injury arose out of the course and scope of employment, and Claimant's June 17, 2021 injury, is compensable under the Act.

AWW

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW was $667.25. (Findings of Fact ¶ 35).

TTD

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled as of June 17, 2021 through January 9, 2022, during which time he underwent medical care. (Ex. 5 and 6). Claimant

is entitled to TTD benefits beginning June 18, 2021 and ending January 9, 2022. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days.

Medical Benefits

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.29 777 (Colo. App. 1990). "Authorization" refers to the provider's legal status to treat the injury at the Respondent's expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ that must be upheld if supported by substantial evidence in the record. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony of contrary inferences. See *F.R. Orr Constr. v. Rinta*, 171 P.2d 965 (Colo. App. 1985).

The evidence established that at no time following the auto accident of June 17, 2021, did Employer refer Claimant for medical care. He received emergency medical care from Melissa Hospital, as well as Swedish Medical Center, including a flight for life helicopter flight from Holyoke to Denver. The precise amounts of the bills outstanding remains to be determined. Claimant's care at Melissa Hospital and continued care at Swedish Medical Center are compensable. *See Sims v. ICAO*, 797 P.2d 777 (Colo. App. 1990) (emergency care is compensable).

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 17, 2021 in the course and scope of employment.

2. Claimant's treatment at Melissa Hospital and Swedish Medical Center is reasonable and necessary.

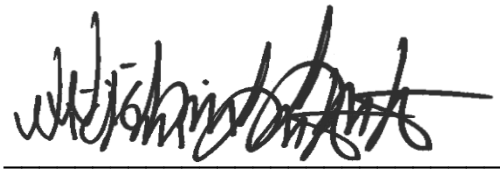
3. Claimant's AWW at the time of his injury was $667.25.

4. Claimant has shown that due to his injury he was out of work from June 18, 2021 through January 9, 2022. He is entitled to a weekly TTD rate based on an AWW of $667.25.

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

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

DATED: July 13, 2022



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-139-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury from a motor vehicle accident, on June 17, 2021, while in the course and scope of his employment with Employer.

2. Whether Claimant is entitled to medical benefits for services rendered related to the June 17, 2021 motor vehicle accident.

3. Whether Claimant should be awarded TTD benefits, and if so, what was Claimant's AWW?

FINDINGS OF FACT

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

1. Employer is in the business of sanitizing hog farm facilities. CS[Redacted] is the owner of Employer, and he lives in Yuma, Colorado. The registered address for Employer is [Redacted], Yuma, Colorado 80759 (Ex. S). Employer's "office" is in Yuma, Colorado.

2. Mr. CS[Redacted] testified that Seaboard Farms was Employer's only client in June 2021. Seaboard Farms had several locations, each housing pigs at different stages of their preparation for slaughter. All of the locations were in Holyoke, Colorado. Holyoke is approximately an hour from Yuma, by car.

3. Claimant could not recall exactly when he began working for Employer, but thought it was in February or March of 2021. The earliest payroll record for Claimant is from March 8, 2021. (Ex. D.) Claimant testified that he earned $13 an hour plus bonus, and his job was to power wash and sanitize facilities at various hog farms.

4. Claimant credibly testified that on approximately three occasions prior to June 17, 2021, he traveled to Yuma, Colorado to work for Employer. Claimant testified that the first time he worked at Mr. CS[Redacted] 's house he cleaned the yard, hung sheet rock, and took tools to the office. Claimant testified that his pay for this work was part of his regular paycheck. Claimant presented no evidence to support these payments.

5. OR[Redacted] also worked for Employer. He credibly testified that on approximately six occasions prior to June 17, 2021, he traveled to Yuma to work for Employer. He cleaned up the yard and pulled weeds at Mr. CS[Redacted] 's house, the "other" house, and also at the office. Mr. OR[Redacted] 's pay for this work was a part of what he would earn as an employee of Employer.

6. The ALJ finds that Claimant's employment included performing work for Employer in Yuma at Mr. CS[Redacted] 's personal residence, the other house and the office. Claimant traveled to Yuma at the express or implied direction of Employer, and conferred a benefit to Employer.

7. Employer and Seaboard Farms had a fee dispute. On June 14, 2021, Claimant and other employees were told by Employer to report to the hog farm owned by Seaboard Farms, and begin removing the equipment. On June 14, 2021, Claimant helped remove Employer's equipment off the hog farm.

8. Claimant's timecard for June 14, 2021, reflects 10 hours of work that day. The 10 hours is handwritten on the time card. (Ex. D). According to Mr. CS[Redacted] , Claimant did not punch his time card that day, but Employer paid him for 10 hours of work.

9. Mr. OR[Redacted] testified that on June 14, 2021, he helped remove Employer's equipment from the farm. Employer paid Mr. OR[Redacted] for 10 hours of work that day even though he did not punch his time card.

10. According to Mr. CS[Redacted] 's brother, JSV[Redacted], Employer was not able to remove all of its equipment on June 14, 2021. Mr. JSV[Redacted] testified that he helped Claimant and Mr. OR[Redacted] remove equipment on June 14 and 15, 2021. Mr. JSV[Redacted] further testified that he is not employed by Employer.

11. Mr. CS[Redacted] testified that Employer was no longer in business as of June 15, 2021 because all of the equipment had been pulled from the hog farm. Mr. CS[Redacted] was not present in Holyoke when the equipment was removed.

12. The ALJ finds that Claimant helped remove Employer's equipment from the hog farms with Mr. JSV[Redacted] 's assistance on June 14 and 15, 2021.

13. There is no evidence that Employer paid Claimant for any work he performed after June 14, 2021. The ALJ finds that Employer did not pay Claimant for his work on June 15, 2021.

14. Mr. CS[Redacted] testified that he asked his brother, Mr. JSV[Redacted] , to tell Claimant and the other employees that there was no more work for them.

15. Claimant testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with Employer. Claimant further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

16. Mr. OR[Redacted] corroborated Claimant's testimony. He testified that even though Employer's equipment was removed from the hog farm, he did not realize there was no more work for him with employer. He further testified that no one from Employer told him there was no more work, and specifically, Mr. JSV[Redacted] never told him there was no more work with Employer.

17. Mr. CS[Redacted] testified that in June 2021, he had health issues and had them "for a while." Because of his health issues, Mr. CS[Redacted] , did not spend much time in Holyoke, near the hog farms. Mr. JSV[Redacted] assisted his brother with personal and employment issues.

18. The ALJ finds that even though Mr. JSV[Redacted] was not technically employed by Employer, he was an agent of Employer, and specifically acted on behalf of Mr. CS[Redacted] and Employer.

19. Mr. JSV[Redacted] lived in Holyoke and had a social relationship with Claimant and Mr. OR[Redacted] .

20. Claimants credibly testified that Mr. JSV[Redacted] regularly picked them up and drove them to and from the specific hog farms where they worked each day. Claimants did not know where they were needed for work on any given day. They relied upon Mr. JSV[Redacted] to communicate where they would be working, and to transport them to and from the location for work. Claimants further testified that when they worked for Employer in Yuma, Mr. JSV[Redacted] drove them to Yuma from Holyoke.

21. It is uncontroverted that Mr. CS[Redacted] relied upon his brother, Mr. JSV[Redacted] to communicate with the employees, including Claimant, on his behalf.

22. Mr. JSV[Redacted] testified that he went to Yuma on June 17, 2021, to "help" his brother, Mr. CS[Redacted] . That morning, Mr. JSV[Redacted] picked up Claimants in a truck owned by Employer. A man by the name of JV[Redacted] and Mr. JSV[Redacted] 's dog were also in the truck.

23. Claimant testified he went to Yuma on June 17, 2021, with Mr. JSV[Redacted] to clean Mr. CS[Redacted] 's yard, and other properties he owned, just as he had done in the past. Mr. OR[Redacted] corroborated this testimony. Both Claimant and Mr. OR[Redacted] credibly testified that they had each been to Yuma on previous occasions to work for Employer by cleaning the yard and doing odds and ends.

24. Mr. JSV[Redacted] testified that Claimant and Mr. OR[Redacted] were his friends and they wanted to go for a ride with him on June 17, 2021. The ALJ does not find this testimony credible. The ALJ finds that Claimants had not been informed that their employment ended on June 15, 2021. Claimants believed they were going to work for Employer in Yuma on June 17, 2021, and they expected to be paid by Employer for this work. The ALJ infers that neither Claimant nor Mr. OR[Redacted] would voluntarily go to Yuma to clean the yard of Mr. CS[Redacted] if they knew their employment ceased on June 15, 2021, as Mr. CS[Redacted] testified.

25. Mr. JSV[Redacted] testified that Claimant did no work at all on June 17, 2021. Mr. JSV[Redacted] testified that Claimant drank beer while they drove to Yuma, and that he smoked marijuana later in the day while there. Mr. CS[Redacted] testified that Claimant smoked marijuana that day, but later testified he never actually saw Claimant do this.

26. Claimant testified that he worked at Mr. CS[Redacted] 's house and cleaned the outside of the office. Claimant also testified that he smoked marijuana that day, but he denied drinking beer. Mr. OR[Redacted] testified that he saw Claimant working and using the wheelbarrow that day. Mr. OR[Redacted] further testified that he never saw Claimant smoke marijuana, and while he saw a beer bottle, he never saw Claimant drink any beer.

27. The ALJ credits the testimony of Claimant and Mr. OR[Redacted] . The ALJ finds that even though Claimant smoked marijuana at some point while in Yuma on June 17, 2021, Claimant performed work for the benefit of Employer, at the express or implied direction of Employer.

28. Mr. JSV[Redacted] drove Claimants back to Holyoke. When close to Holyoke, Mr. JSV[Redacted] lost control and rolled the truck. (Ex. 1). Mr. OR[Redacted] was ejected and the truck landed on top of him. Claimant wanted Mr. JSV[Redacted] to call 911, but he declined and called his brother, Mr. CS[Redacted] . Claimant and Mr. JV[Redacted] lifted the truck and pulled Mr. OR[Redacted] out from under it.

29. Mr. OR[Redacted] called his girlfriend, who came and took Mr. OR[Redacted] and Claimant to Melissa Hospital in Holyoke. Claimant was hospitalized with a contusion of his lung, a fracture to his sternum and multiple abrasions. Claimant was kept overnight for observation. (Ex. 12 and Ex. A).

30. Claimant was discharged on June 18, 2021. Dr. Harris gave Claimant a release to work that said Claimant had a fractured sternum, his expected healing was six to eight weeks, and that he would be able to gradually return to work after that time. Dr. Harris recommended Claimant see his primary physician to be cleared and his restrictions determined. (Ex. 12 and Ex. A).

31. Claimant testified that to date, he has not undergone follow-up care. Without employment, Claimant returned home to Thornton. Claimant lacked the ability and means to get follow up care. Thus, he has not had any medical care since being discharged from Melissa Hospital post-accident.

32. Claimant filed a Workers' Claim for Compensation on August 4, 2021. (Ex. P). Respondents' filed a First Report of Injury on August 10, 2021, and a Notice of Contest on August 27, 2011, claiming that further investigation was needed. (Ex. Q).

33. Claimant testified that he contacted Mr. JSV[Redacted] , about four days after his discharge, via the What's Up app, to see when he could return to work. Claimant testified that this was the first time he learned there was no more work with Employer. The ALJ finds Claimant's testimony credible.

34. Employer objected to Claimant's claim on the basis that Claimant was not on the payroll on that date, and that "it [Employer] quit June 15, 2021." (Ex. D).

35. The ALJ finds that on June 17, 2021, Claimant was an employee of Employer, was performing work on behalf of Employer in Yuma, Colorado at the express or implied direction of Employer, and this work conferred a benefit on Employer.

36. Claimant's gross earnings from March 8, 2021, to June 14, 2021 (98 days or 14 weeks) were $8,973.47. (Ex. 7). Based on this information, Claimant's AWW was $640.96.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

Employment Status

In order for an injury to qualify under the Act, there must be an employer/employee relationship at the time of the injury. §§ 8-40-202(b) and 8-40-203(b) C.R.S. The ALJ credits Claimants' testimony that the alleged termination of work was not communicated to either of them prior to the accident on June 17, 2021. Both Claimant and Mr. OR[Redacted] credibly testified that neither Mr. CS[Redacted] nor Mr. JSV[Redacted] told them that Employer no longer had work for them until several days after the June 17, 2021 accident. Claimant and Mr. OR[Redacted] both credibly testified that neither of them understood that Employer did not have any more work for them on the hog farms at the

time they helped remove the equipment between June 14 and June 16, 2021. As found, Claimant has proven by a preponderance of the evidence that he was working for Employer on June 17, 2021, and he conferred a benefit on Employer.

Course and Scope

An injury must arise out of, and in the course of, the Claimant's employment to be compensable. § 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). One exception, however, to the coming and going exclusion is when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work. *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P.3d 1267 (Colo. App. 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. 977 P.2d at 865. The question of whether Claimant presented "special circumstances" sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Elec.,* W.C. 4-939-901-03 (ICAO February 22, 2016). The *Madden* Court reasoned that "the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances. . . . the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act." 977 P.2d at 864.

The Colorado Supreme Court applied the *Madden* factors in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 867 (Colo. 1999). In that case, Claimant was injured in a motor vehicle accident as he was driving to a temporary construction site operated by Employer-Armendariz Construction Company. Claimant did not meet with other workers at a service station in Grand Junction, Colorado, where Employer customarily paid for the cost of fuel and employees carpooled. The ALJ concluded that the employer expected claimant to travel as part of his job and he performed services at a substantial distance from his home. The ALJ's decision that the claim was compensable was affirmed by the ICAO, the Court of Appeals and the Colorado Supreme Court. The Court stated:

> Applying these variables to the facts of this case, we find that there is no evidence that Reynolds' injury occurred during working hours or that it occurred on his employer's premises. In addition, there is no evidence in this case that Reynolds' injury occurred within a zone of special danger warranting recovery. However,

> there is sufficient evidence to support the ALJ's finding that travel was contemplated by Reynolds' employment contract with his employer, Armendariz Construction Company, to warrant recovery under the Workers' Compensation Act of Colorado.

Id. As the Court in *Staff Adm'rs,* recognized, even where not all of the *Madden* factors were present, it was possible that an employee's injuries arose out of his/her employment.

The *Madden* Court cited several cases where compensability was found because travel by an employee was at the express or implied request of the employer, or the travel conferred a benefit on the employer beyond the sole fact of the employee's arrival at work. 977 P.2d at 864-65 (citations omitted). Such travel is contemplated by the employment contract even if the advantage to the employer may have been slight. *Berry's Coffee Shop,* 423 P.2d at 5.

When considering the role travel played, the ALJ determined Claimant's travel to and from Yuma was at Mr. JSV[Redacted] 's request, and as found, Mr. JSV[Redacted] was an agent of Employer. Thus, Claimant's travel was at the express or implied request of Employer. Additionally, as found, Claimant's travel to Yuma conferred a benefit on Employer as he performed work for Employer on June 17, 2021. (Findings of Fact ¶¶ 27 and 35). In addition, the evidence in the record showed that Mr. JSV[Redacted] regularly drove Claimant to and from work assignments. (Findings of Fact ¶ 20). The ALJ credits Claimant's testimony that he had been paid for work he performed for Employer in Yuma on previous occasions, and he expected to be paid for the work on June 17, 2021. (Findings of Fact ¶ 24). The ALJ concludes there was a causal connection between Claimant's travel to various locations, including, but not limited to, Yuma and his employment. *Loffland Brothers v. Baca*, 651 P.2d 431, 432-433 (Colo. App. 1982); *Cf. Lewis Essary v. General Dynamics,* W.C. 5-117-912 (ICAO December 1, 2020) ***aff'd,*** *Colo. Ct. App, 10CA2103,* August 12, 2021, *unpublished*. The ALJ concludes that Claimant proved by a preponderance of the evidence that his injury arose out of the course and scope of employment, and Claimant's June 17, 2021 injury is compensable under the Act.

AWW

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW is $527.85. (Findings of Fact ¶ 37).

TTD

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of

the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled for eight weeks, during which time he was restricted from working. (Ex. 12 and Ex. A). Claimant is entitled to TTD benefits beginning June 18, 2021 and ending August 13, 2021. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days.

Medical Benefits

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.29 777 (Colo. App. 1990). "Authorization" refers to the provider's legal status to treat the injury at the Respondent's expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ that must be upheld if supported by substantial evidence in the record. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony of contrary inferences. See *F.R. Orr Constr. v. Rinta*, 171 P.2d 965 (Colo. App. 1985).

The evidence established that at no time following the auto accident of June 17, 2021, did Employer refer Claimant for medical care. He received emergency medical care from Melissa Hospital. The precise amounts of the bills outstanding remains to be determined. Claimant's care at Melissa Hospital is compensable. *See Sims v. ICAO*, 797 P.2d 777 (Colo. App. 1990) (emergency care is compensable).

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 17, 2021 in the course and scope of employment.

2. Claimant's treatment at Melissa Hospital was reasonable and necessary.

3. Claimant's AWW at the time of his injury was $527.85.

4. Claimant has shown that due to his injury he was out of work from June 18, 2021 through August 13, 2021. He is entitled to a weekly TTD rate based on an AWW of $527.85.

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

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

DATED: 7-13-22

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

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the lumbar spine surgery recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 24, 2020 work injury?

FINDINGS OF FACT

1. On February 24, 2020, the claimant was working as a teacher in the severe needs classroom. On that date, the claimant and two other employees were injured by an autistic student. This student was at least 16 years old and approximately six feet tall. The student became agitated to the point that he grabbed the claimant by her hair and roughly shook her "like a rug". During this interaction, the claimant's head struck a metal door frame, and her head was pulled down toward the floor.

2. The claimant's coworkers testified at the hearing and corroborated the events of February 24, 2020. The claimant and her two coworkers were transported by the school psychologist to the emergency department (ED) at Community Hospital.

3. Immediately following the incident, the claimant had pain in her head and neck. She had blurred vision, nausea, and dizziness. In addition, the claimant vomited twice between the time of the incident and arriving at the ED for treatment.

Low back treatment prior to February 24, 2020

4. In 2017, the claimant sought medical treatment for low back symptoms. On July 13, 2017, the claimant was seen by Jason Bell, PA-C, at Rocky Mountain Orthopaedic Associates. At that time, the claimant reported experiencing about a week of severe and acute low back pain, with leg pain (right greater than left). Lumbar spine x-rays taken on that date showed no evidence of any acute injury. The x-rays also showed some minor narrowing at the L5-S1 level. PA Bell ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

5. On July 17, 2017, a lumbar spine MRI was performed and showed a large right paracentral disc extrusion at the L5-S1 level causing severe foraminal stenosis.

6. On July 27, 2017, the claimant returned to Rocky Mountain Orthopaedic Associates and was seen by Dr. Kirk Clifford. On that date, the claimant continued to report low back pain, with right greater than left leg symptoms. Given the MRI results, Dr. Clifford recommended right sided L5-S1 and S1-S2 transforaminal epidural steroid

injections (TFESIs). These injections were administered by Dr. Clifford on August 10, 2017.

7. On September 13, 2017, the claimant was seen by PA Bell and reported "pretty good relief" from the injections. The claimant asked about repeat injections.

8. On September 14, 2017, Dr. Robert Frazho administered ESIs at the right L5-S1 and S1-S2 levels.

9. The claimant returned to Dr. Frazho on November 15, 2018, and reported "good relief" from the September 2017 injections. Dr. Frazho noted that the claimant's pain was not bilateral. In addition, Dr. Frazho recommended core strengthening, weight loss, and bilateral L5-S1 ESIs. Dr. Frazho administered the recommended injections on that same date.

10. On December 6, 2018, the claimant was seen by Dr. Frazho. At that time, the claimant reported that the most recent injection provided some relief. Dr. Frazho noted that the claimant continued to have axial pain, with possible facet pain. He recommended bilateral L5-S1 facet injections. Dr. Frazho also identified medial branch blocks and/or surgery as potential future treatment. On January 10, 2019, Dr. Frazho administered bilateral L5-S1 facet injections to address the claimant's diagnosis of lumbar spondylosis.

Medical treatment beginning February 24, 2020

11. In the ED at Community Hospital on February 24, 2020, the claimant's initial symptoms were listed as headache, nausea, tenderness at the left temple, with her greatest pain in the right side of her neck and right shoulder. Lynda Steinbach, FNP noted that the claimant's back was normal on examination, with full range of motion. FNP Steinbach listed the claimant's diagnoses as neck strain and head contusion.

12. The claimant testified that she does not recall whether her back was examined at Community Hospital. At that time, her focus was on her head related symptoms.

13. On February 28, 2020, the claimant sought treatment in the ED at St. Mary's Hospital because of ongoing headaches. At that time, the claimant was seen by Jacob Cimolin, PA-C. On examination, PA Cimolin noted midline cervical tenderness. The medical record of that date noted "no midline tenderness to palpation" of the claimant's back. PA Cimolin opined that the claimant suffered a concussion and recommended computed tomography (CT) scans of the claimant's head and neck.

14. The CT scans were performed on that same date. The head CT was negative for any intracranial abnormalities. The CT of the claimant's cervical spine showed a disc protrusion at the C6-C7 level which was causing moderate canal stenosis.

15. On March 2, 2020, the claimant was seen by her authorized treating provider (ATP), Dr. Craig Stagg. On that date, the claimant reported ongoing headaches with photophobia. The claimant also reported pain in her cervical spine and lumbar spine. On examination, Dr. Stagg noted that the claimant was tender to palpation over the right sacroiliac (SI) joint. Dr. Stagg listed the claimant's diagnoses as closed head injury with post concussive symptoms; disc protrusion at the C6-C7 level; and a lumbar strain. Dr. Stagg ordered a lumbar spine x-ray and an MRI of the claimant's cervical spine. Dr. Stagg made a referral to Dr. Clifford for a orthopedic evaluation; a referral to Dr Joel Dean for a neurological evaluation; and to Dr. Dale Bowen for a neuropsychological evaluation. In addition, the claimant was taken off of all work.

16. On March 5, 2020, the claimant returned to Dr. Stagg and reported ongoing headaches and numbness into her left leg. Dr Stagg made a referral to physical therapy.

17. On March 12, 2020, the claimant was seen by Dr. Clifford. The purpose of that appointment was to address the claimant's neck[1] related symptoms. The claimant reported to Dr. Clifford that since her injury, she had noticed pain in the posterior aspect of her left leg.

18. The claimant was also seen by Dr. Stagg on March 12, 2020. At that time, the claimant reported pain in her low back with numbness into her left leg. Dr. Stagg noted that the claimant's lumbar spine had mild diffuse tenderness, with a positive straight leg raise on the left. He recommended an MRI of the claimant's lumbar spine.

19. On April 7, 2020, a lumbar spine MRI showed a loss of disc space height at the L5-S1 level, with a mild posterior disc bulge. There was no significant spinal stenosis. It was noted that the neural foramen did appear somewhat narrowed bilaterally due to bony overgrowth. The MRI also showed that the prior large herniated disc had resolved.

20. The claimant continued treating with Dr. Stagg. The claimant reported improvement of her headaches. However, she continued to report low back pain with radicular symptoms.

21. On June 8, 2020, the claimant returned to Dr. Clifford. At that time, the claimant reported pain across her lumbar spine, into her left buttock, left posterior thigh, left calf, and left foot. Her back pain was at a six out of ten, while her leg pain was a five out of ten. On examination, Dr. Clifford noted that range of motion for the claimant's lumbar spine was restricted by fifty percent on flexion, extension, and lateral bending. Dr. Clifford recommended a left sided L5-S1 (TFESI) for therapeutic and diagnostic

[1] The ALJ recognizes that the claimant has undergone a number of treatment modalities related to her cervical spine. However, as the claimant's cervical spine (and related treatment) is not at issue at this time, the ALJ does not recite all cervical spine treatment in this order.

purposes. On July 15, 2021, Dr. Clifford administered the recommended left L5-S1 TFESI.

22. On July 28, 2020, the respondent filed a General Admission of Liability (GAL) regarding the February 24, 2020 injury.

23. On October 7, 2020, the claimant was seen by Dr. Clifford. With regard to the recent injection, the claimant reported 100 percent relief for two days, but no relief after that. The claimant continued to report pain across her lumbar spine, into her left buttock, left posterior thigh, left calf, and left foot. Her back pain was at four out of ten, and her leg pain at 5 out of ten. At that time, Dr. Clifford recommended core strengthening and stretching.

24. On January 18, 2021, the claimant returned to Rocky Mountain Orthopaedic Associates and was seen by Todd Ousley, PA-C. The claimant reported one to two months of relief from the October 2020 injection. As of the time of the appointment, the claimant's left sided symptoms had returned. PA Ousley recommended left L5-S1 and S1-S2 TFESIs. He also noted that the claimant was a candidate for an L5-S1 anterior lumbar interbody fusion (ALIF). On February 17, 2021, Dr. Clifford administered left L5-S1 and S1-S2 TFESIs.

25. On April 8, 2021, the claimant was seen by PA Ousley. In the medical record of that date, PA Ousley noted that the claimant's pre-existing L5-S1 foraminal stenosis and disc degeneration was "exacerbated by an injury at work". PA Ousley further noted that injections had provided the claimant with "some good temporary relief" of her symptoms. Surgical options were discussed, including a fusion at the L5-S1 level, or an artificial disc replacement. In the interim, facet joint injections at the L5-S1 level were recommended. Bilateral L5-S1 facet injections were performed by Dr. Clifford on May 26, 2021.

26. On August 11, 2021, the claimant was seen by PA Bell. At that time, the claimant reported "modest temporary relief" from the facet injections. PA Bell noted that the claimant's symptoms were "consistent with degenerative disc disease, with acute exacerbation during a work related injury." PA Bell further noted possible surgical intervention involving an anterior approach L5-S1 disc replacement.

27. On November 9, 2021 a request for an L5-S1 disc replacement was sent to the respondent for authorization.

28. At the request of the respondents, on December 17, 2021, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Rauzzino opined that the claimant does not have a left sided foraminal disc herniation at the L5-S1 level. Dr. Rauzzino further opined that the requested disc replacement surgery is not reasonable, necessary, or related to the claimant's work injury. In support of this opinion, Dr. Rauzzino noted that the claimant suffered minimal

direct injury to her lumbar spine on February 24, 2020. Therefore, it is his opinion that any treatment of the claimant's lumbar spine would not be work related. Dr. Rauzzino further opined that the claimant has reached maximum medical improvement (MMI).

29. Based upon Dr. Rauzzino's report, the respondent denied authorization for the lumbar surgery.

30. On March 14, 2022, the claimant was seen by PA Ousley. The denial of the surgical request was discussed at that time. PA Ousley recommended repeat L5-S1 and S1-S2 TFESIs. PA Ousely noted that these same injections had previously provided the claimant with relief.

31. On March 15, 2022, Dr. Albert Hattem reviewed the request for epidural injections to the claimant's lumbar spine. Dr. Hattem recommended denial of the injections. In support of this opinion, Dr. Hattem noted that the Colorado Medical Treatment Guidelines (MTG) provided that repeat ESIs are indicated if the initial injection resulted in an 80 percent improvement of symptoms. Dr. Hattem noted that the claimant underwent injections on February 17, 2021 and on March 17, 2021 reported that she did not receive significant relief of her symptoms.

32. Based upon Dr. Hattem's report, the respondent denied authorization for the requested injections.

33. On May 2, 2022, Dr. Hattem authored a report after performing a review of the claimant's medical records. In that report, Dr. Hattem opined that the claimant did not suffer a temporary or permanent aggravation of her pre-existing lumbar spine condition on February 24, 2020. In support of this opinion, Dr. Hattem noted that on the date of the injury, the medical records indicate that the claimant's lumbar spine had normal range of motion. In addition, on February 28, 2020, the claimant identified her symptoms as headache, neck pain, and shoulder pain. Dr. Hattem further noted that the first report of lumbar spine pain was documented on March 2, 2020. As it is his opinion that the claimant's lumbar spine was not injured on February 24, 2020, it is also Dr. Hattem's opinion that the requested surgery is not causally related to the work injury. Dr. Hattem identified the claimant's date of MMI as December 29, 2020, as this was the date she was released to full duty.

34. Dr. Rauzzino's deposition testimony was consistent with his written report. Dr. Rauzzino reiterated his opinion that the claimant did not injure her lumbar spine on February 24, 2020. If the claimant did suffer an injury to her lumbar spine on that date, Dr. Rauzzino posits that it was a soft tissue injury and/or a possible irritation of the nerve that did not cause any permanent injury. It continues to be his opinion that the claimant's symptoms are related to her pre-existing degenerative disc disease at the L5-S1 level. Dr. Rauzzino agrees that the surgery is reasonable to treat the claimant's symptoms. However, it is not causally related to her work injury.

35. Dr. Clifford testified via deposition. In his testimony, Dr. Clifford addressed his prior treatment of the claimant. Specifically, Dr. Clifford testified that in 2017 he did not recommend the claimant undergo disc replacement surgery. Dr. Clifford further testified that in 2017, the claimant was improving without surgical intervention. In comparison, Dr. Clifford noted that the claimant's 2017 symptoms were right sided, whereas her current post-injury symptoms are left sided. With regard to the April 2020 lumbar spine MRI, Dr. Clifford testified that he saw resolution of the prior disc herniation. He also noted left more than right sided neural foraminal stenosis. Dr. Cliffor testified that it is his opinion that the claimant's work injury exacerbated her pre-existing low back condition. Dr. Clifford reiterated that he has recommended the claimant undergo an L5-S1 artificial disk replacement. With regard to the request for injections, Dr. Clifford explained that since the claimant could not get the recommended surgery, the injections would be intended to provide some relief of her symptoms.

36. The claimant testified that her current symptoms include persistent nerve type pain down her left leg, with throbbing down the leg and into her knee. The claimant further testified that she has only experienced this pain since the work injury. She described the pain as being "relentless" for the past two years. The claimant has undergone various treatments since her injury, including massage, acupuncture, dry needling, and chiropractic treatment. Nothing has resolved these back and left leg symptoms.

37. The claimant testified that her prior back symptoms were short term "bouts" of pain, nothing persistent. The claimant testified that following the injections in 2017, her back symptoms resolved.

38. The ALJ credits the claimant's testimony regarding the nature and onset of her low back symptoms. The ALJ is persuaded that the claimant's low back was symptomatic immediately following the work injury. The ALJ is also persuaded that initially the injuries to the claimant's head and neck were the primary focus of the claimant and her medical providers, as those body parts caused the most pain and discomfort.

39. The ALJ also credits the medical records and the opinions of Dr. Clifford over the contrary opinions of Dr. Rauzzino.The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the February 24, 2020 work injury resulted in an aggravation/exacerbation of the claimant's pre-existing lumbar spine condition, resulting in the need for medical treatment. The ALJ also credits the testimony of Dr. Clifford and finds that the recommended lumbar spine surgery is reasonable, necessary, and related to the claimant's work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section

8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

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

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that her lumbar spine was injured during the admitted February 24, 2020 work injury. Specifically, the claimant has demonstrated, by a preponderance of the evidence, that her pre-existing low back condition was aggravated by the work injury. As found, the claimant has demonstrated, by a preponderance of the evidence, that treatment of her lumbar spine, including disc replacement surgery as recommended by Dr. Clifford, is reasonable medical treatment necessary to cure and relieve the claimant from the

effects of the work injury. The claimant's testimony, the medical records, and the opinions of Dr. Clifford are found to be credible and persuasive.

ORDER

It is therefore ordered:

1. The respondent shall pay for reasonable and necessary medical treatment of the claimant's lumbar spine, pursuant to the Colorado Medical Fee Schedule.

2. The respondent shall pay for the recommended L5-S1 disc replacement surgery, pursuant to the Colorado Medical Fee Schedule.

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

Dated July 14, 2022.

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

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

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

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

ISSUES[1]

- Whether Claimant proved by a preponderance of the evidence that she sustained a compensable occupational disease.

- If compensable, whether Claimant proved by a preponderance of the evidence she required medical care that was authorized and reasonably necessary to cure and relieve from and related to the occupational disease.

- If compensable, whether Claimant proved by a preponderance of the evidence she was entitled to temporary indemnity benefits.

- If compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 33-year-old, right hand dominant female. Claimant worked for Employer as a phlebotomist from June 2019 to December 6, 2021. Claimant's job duties included performing check-ins, assessing vital signs, and typing.

2. Claimant's work involved manually pumping a blood pressure cuff. Claimant testified that she would pump the bulb 12 to 15 times per patient, and that she often took vitals signs multiple times per patient.

3. Claimant worked three 12-hour shifts per week. Claimant's standard two-week work hours totaled 72 hours.

4. Claimant testified that she began working substantial overtime during the COVID-19 pandemic, starting around October 2020. Claimant testified that during the COVID-19 pandemic the number of patients per day almost tripled by the end of 2020 – up to 80 to 100 patients per day. Claimant's wage records indicate Claimant occasionally worked an extra 1-3 hours in addition to her standard 72-hour work week per two-week around this time period.

[1] In his position statement, Claimant also endorsed the issue of "Whether Claimant is entitled to an award of costs pursuant to § 8-43-315(1), C.R.S. (ALJ can order witness fees and costs where need to call a subpoenaed witness arose out of 'the raising of any incompetent, irrelevant, or sham issues by the other party')." This issue was not endorsed on any Application for Hearing, Case Information Sheet, nor at either hearing. Evidence was not offered at hearing and Respondents did not brief the issue. Accordingly, the ALJ does not address the issue in this Order.

5. Claimant began experiencing right forearm pain in late December 2020, with subsequent loss of grip strength. She reported this problem to her Employer and was sent to Concentra.

6. Claimant first presented to Jonathan Claassen, D.O. at Concentra on January 14, 2021 with complaints of bilateral forearm and hand pain, mostly on the right, which she felt resulted from repetitive motion. Claimant reported the onset of symptoms began approximately two weeks prior with the pain gradually increasing. Claimant further reported an inability to grip with her right hand. On physical examination, Dr. Claassen noted diffuse tenderness along the extensor muscles of the right forearm and full range of motion, tenderness in the carpal tunnel of the right wrist and decreased sensation of touch of the ulnar nerve distribution on palpation with full range of motion and generalized hypertonicity. Dr. Claassen assessed Claimant with right radial tunnel syndrome and referred Claimant to a hand specialist and for an EMG. He placed Claimant on temporary restrictions until 1/15/2021 of no repetitive lifting or carrying above two pounds; no gripping/pinching/squeezing with the right hand; no pronating/supinating; and no keyboard/mouse use. Dr. Claassen completed a WC-164 form indicating his findings were consistent with a work-related mechanism of injury/illness.

7. Dr. Claassen testified that David M. Bierbrauer, M.D., a hand surgeon, happened to be staffing the Concentra office where Claimant was seen on January 14, 2021, and Dr. Bierbrauer also examined Claimant. He testified he relied on Dr. Bierbrauer's expertise when diagnosing Clamant with radial tunnel syndrome.

8. Kathy McCranie, M.D. performed an EMG of Claimant's right upper extremity on February 1, 2021. Claimant reported that she began experiencing pain and weakness in her right upper extremity around early January 2021 that gradually worsened. Dr. McCranie noted Claimant was unsure of the cause, but "I attributed it to repetitive motion." (Cl. Ex. 2, p. 20). Dr. McCranie opined that the EMG was within normal limits. She concluded that Claimant's physical examination was more consistent with epicondylitis and forearm tendinitis and recommended that Claimant follow-up with Dr. Claassen and Dr. Bierbauer.

9. Dr. Bierbauer reexamined Claimant on February 4, 2021. Dr. Bierbauer opined that Claimant has right radial tunnel syndrome, which he noted was "notoriously difficult" to find on nerve conduction testing, noting several studies suggested that upward of 80% of people with such condition will have a negative nerve test. He stated that Claimant's clinical exam was fairly uncontroversial and pointed towards radial tunnel syndrome. Dr. Bierbauer administered a cortisone injection to Claimant and provided a shoulder sling.

10. On February 15, 2021, Claimant reported to Dr. Claassen that her symptoms had worsened since receiving the cortisone injection. Claimant reported that her elbow was now popping and that she was experiencing pain in her hand. Dr. Claassen referred Claimant for physical therapy.

11. Claimant began physical therapy with Heather Markus, D.P.T. on February 17, 2021 and underwent a total of four sessions of physical therapy prior to her follow-up appointment with Dr. Bierbauer on March 4, 2021.

12. On March 4, 2021, Dr. Bierbauer opined that Claimant continued to experience persistent right radial tunnel syndrome symptoms despite injections and therapy. He discussed surgical intervention with Claimant, who declined at that point. Dr. Bierbauer recommended Claimant resume use of her right upper extremity as tolerated and return for follow-up as needed. Dr. Bierbauer completed a WC-164 form indicating his objective findings were consistent with a work-related mechanism of injury/illness.

13. Dr. Claassen reexamined Claimant on March 9, 2021. Claimant reported her pain was the same but that her grip strength was slowly improving. Claimant was working modified duty.

14. Claimant testified at hearing that she returned to work abiding by her restrictions performing modified duty from 3/1/21 through 12/6/21, when she and the Employer essentially agreed she would separate her employment because she could not perform her phlebotomist duties.

15. Claimant continued to undergo physical therapy with Dr. Markus until her next visit with Dr. Claassen on March 17, 2021. Dr. Claassen recommended continuing physical therapy, which Claimant did until her authorization for PT visits ended. As of her last (11th) visit with Markus, DPT, Claimant was only 30-40% towards recovery.

16. On February 25, 2021, Jill Adams, C.R.C., performed a Job Demands Analysis and Risk Factor Analysis ("JDA"). Ms. Adams issued a report on March 1, 2021. Due to Claimant's restrictions, Ms. Adams observed other workers performing Claimant's job duties for the purpose of her evaluation. Ms. Adams interviewed Claimant by telephone. Ms. Adams noted Claimant's job schedule consisted of three 12-hour shifts per week, during which time Claimant rotated every three to four hours to perform medical screenings. Ms. Adams categorized Claimant's job duties in eight essential functions:

1) Machine setup comprising of 1-3% of job tasks.
2) Labeling comprising of 1-5% of job tasks.
3) Medical screening comprising of 25-30% of job tasks. (Including use of blood pressure cuff to obtain blood pressure and removal of cuff).
4) Phlebotomy comprising of 25-30% of job tasks. Ms. Adams noted it was typical to process at least 20-25 phlebotomy procedures per work shift, which took 1-3 minutes at most, with the entire process taking 10-15 minutes.
5) Donor disconnects comprising of 10-15% of job tasks.
6) Lab work comprising of 10-15% of job tasks.
7) Packing/shipping comprising of 1-5% of job tasks.
8) Ice comprising of 1-5% of job tasks.

17. Ms. Adams determined no primary or secondary risk factors were present per the MTG.

18. On August 9, 2021, Jonathan L. Sollender, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Sollender reviewed Claimant's medical records dated June 22, 2020 through March 24, 2021, including the JDA conducted on February 25, 2021. Claimant reported to Dr. Sollender that her daily tasks depended on her assignment. If assigned for the day as a technician, she reported spending 5-10 minutes registering patients typing and taking vital signs. If drawing blood, she reported she would inflate, deflate, and reinflate a blood pressure cuff and insert a needle. Dr. Sollender noted that, at the time of her work incident, was working three 12-hour shifts and would rotate positions every three hours, with two blocks of technician work and two blocks of drawing blood. He further noted that the blood pressure cuff in the technician room was automated, and thus did not require manual pumping of air by the technician. The blood pressure cuff in the blood drawing area was manual. Dr. Sollender noted Claimant could not tell him how many patients she would see, but estimated 15 patients in a three-hour period as a technician, and 8 patients in three-hour period when drawing blood. Based on the numbers estimated by Claimant, Dr. Sollender calculated that Claimant saw approximately 25 patients per day over a six-hour period at four patients per hour. Claimant reported that it would take 7-10 pumps to inflate the manual blood pressure cuff over a period of 5-10 seconds, twice per patient. He calculated this to total 80 seconds of pumping the blood pressure cuff per hour. Dr. Sollender further calculated Claimant was subject to eight minutes of potential exposure in a shift (noting that, a 12-hour shift alternating technician and blood drawing duties with six potential hours of 80 seconds/hour of exposure, totaled 480 seconds or eight minutes). Dr. Sollender concluded that such exposure was neither repetitive nor forceful under the MTG.

19. Dr. Sollender's impression was: mild bilateral medial epicondylitis, mild left radial tunnel syndrome moderate right radial tunnel syndrome, and right cubital tunnel syndrome. Dr. Sollender outlined the steps for a causation analysis under the MTG and analyzed Claimant's case with respect to each step. He concluded that Claimant's condition is unrelated to her work, and that Claimant did not have exposure to any occupational risk factor to cause, contribute, or aggravate an underlying condition to establish her condition is the result of an occupational disease. He remarked that the JDA was objective, unbiased and took into consideration all work flow performed by Claimant at her job. He noted that Claimant's description of her job duties to him did not vary to any significant degree from the JDA. Dr. Sollender concluded that Claimant's work did not include any sufficient exposure to repetition, awkward posture, application of force, mouse use, cold or vibration exposure as required for a primary or secondary risk factor under the MTG. Dr. Sollender determined from the job analysis and Claimant's job description as provided to him by Claimant at the IME, that Claimant's upper extremity complaints, medial epicondylitis, bilateral radial tunnel syndrome and right cubital tunnel syndrome were not caused by her employment with Respondent Employer. In his IME report, Dr. Sollender described Claimant's job duties, frequency and exertional levels

consistent with the Job Analysis and the information Claimant provided to Dr. Sollender during the IME.

20. Dr. Claassen testified at hearing on behalf of Claimant. Dr. Claasen obtained Level II certification approximately one month prior to hearing in this matter, and was not Level II certified at the time he diagnosed and treated Claimant. Dr. Claasen did not specifically review the MTG or perform a causation analysis pursuant to the MTG in Claimant's case. Dr. Claassen testified that prior to seeing Claimant, he saw only four or five patients with radial carpal tunnel syndrome and that he relied on Dr. Bierbauer for his diagnoses. Dr. Claasen opined that Claimant's radial tunnel syndrome is work-related. He further testified he did not discuss Claimant's non-work activities with her, despite acknowledging that a patient's non-work activities are relevant in making a causation opinion. Dr. Claassen testified he did not know how many pounds of pressure was required to operate a blood pressure cuff.

21. On January 21, 2021, Claimant reported to Insurer that Claimant continued to work out at the gym at her apartment complex and in her home. Claimant reported she worked out every day, and worked out with weights five days per week.

22. At hearing, Claimant denied she did anything outside of work at the time she reported her symptoms to Respondent Employer (in January 2021) that involved using her arms heavily like at work. Claimant testified she did not perform any weight lifting exercises between June 2020 and December 2020. Claimant testified she only had resistance bands at her home which she did not use during this time because she did not have the space to use them. Claimant denied having any barbells, dumbbells or curl bars at her home. Claimant testified she participated in paddle boarding a few years prior. She denied paddle boarding in 2019 and in the summer of 2020. Claimant's boyfriend purchased a paddle board for her for her birthday in July 2020. Claimant denied ever having used the paddle board her boyfriend purchased for her.

23. Since the denial of her claim by Respondents, Claimant has been treating with Daniel L. Masters, M.D. at Boulder Orthopedics.

24. The ALJ credits Dr. Sollender's opinion, as supported by the records, and testimony over the opinion of Dr. Classen and Claimant's testimony and finds that Claimant failed to prove it is more probable than not she sustained a compensable occupational disease.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Occupational Disease

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

Claimant failed to prove it is more probable than not she sustained an occupational disease as a result of her work activities. Claimant argues that the JDA fails to take identify gripping and squeezing the blood pressure bulb as part of Claimant’s duties, and failed to consider the increase in the number of patients Claimant saw at the end of 2020. Ms. Adams’ JDA notes she took into consideration that firm grip was frequently required. To the extent Ms. Adams did not note or consider the increase in patients in her analysis, Dr. Sollender performed a detailed and thorough causation analysis in which performed his own calculations based on Claimant’s reports of an increased number of patients. Dr. Sollender thoroughly detailed Claimant’s reports to him of her job duties, including the use of the blood pressure cuff. He conducted a detailed causation analysis pursuant to the MTG, and ultimately determined that Claimant’s exposure was neither repetitive or forceful under the MTG. Dr. Sollender’s opinion is more credible and persuasive than that of Dr. Claasen, who did not perform a causation analysis under the MTG, did not discuss Claimant’s non-work related activities, or consider the pounds of pressure used. The preponderant evidence does not establish Claimant’s condition was proximately caused by her work activities. As Claimant failed to prove she sustained a compensable occupational injury, the remaining issues are moot.

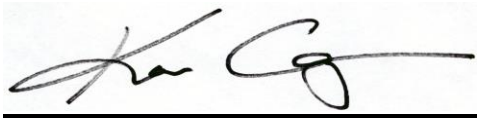
ORDER

1. Claimant’s claim for benefits is denied and dismissed.

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

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

DATED: July 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-010-900-002

ISSUES

The issues set for determination included:

- Is Claimant entitled to maintenance medical treatment?

PROCEDURAL STATUS

A Summary Order was issued on February 9, 2022. On February 28, 2022, Claimant filed a timely Request for Specific Findings of Fact, Conclusions of Law and Order. However, the case was inadvertently closed at the Office of Administrative Courts. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Employer as a janitor. On March 18, 2016, Claimant sustained an admitted industrial injury when he hurt his low back while lifting a carpet.

2. Claimant received medical treatment at Concentra for the injury, including conservative treatment which included physical therapy and chiropractic treatment, as well as injections.

3. Claimant also underwent right–sided L4 and L5 medial facet joint nerve branch RF neurotomy procedures on November 10, 2017.[1]

4. The parties reached a Joint Stipulation that resolved the issues of average weekly wage and PPD, which was approved by the Order issued by ALJ Broniak on April 9, 2018. In particular, Respondents agreed to increase Claimant's AWW based upon his concurrent employment. The Stipulation provided Claimant reached MMI on January 17, 2018 (as determined by ATP Stephen Danahey, M.D.) and Respondents agreed to admit for the 9% medial impairment rating provided by Robert Kawasaki, M.D. (also an ATP). As part of the Stipulation, the parties agreed that it would never be reopened, except on the grounds of fraud or mutual mistake of material fact.

5. On April 25, 2018, Respondents filed a Final Admission of Liability ("FAL") for a 9% whole person impairment rating, based upon the aforementioned Stipulation. The FAL admitted for post-MMI medical treatment provided by the authorized treating physician that was reasonably necessary and related to the compensable injury.[2]

[1] Exhibit J, p. 59.

[2] Exhibits 2, A.

6. There was no evidence that Claimant received medical treatment following the filing of the FAL through January 2019.

7. On January 15, 2019, Claimant underwent an independent medical evaluation ("IME") that was performed by Hugh Macaulay, M.D. at the request of his attorney. Claimant's chief complaint was low back pain to the right side, which he said sometimes was "stabbing" and to the right side. At that time, he was working for two employers, performing janitorial work.

8. On examination, Claimant had pain in the right sacroiliac joint and right hemipelvis, as well as right piriformis. Dr. Macaulay opined that Claimant continue to have right sacroiliac dysfunction. Dr. Macaulay stated Claimant was not at MMI. He thought Claimant would respond favorably to osteopathic manual therapy, as he had a mechanical issue in the sacroiliac joint. Dr. Macaulay's opinion was not as persuasive as the opinions offered by Dr. Danahey and Dr. Kawasaki.

9. Claimant filed a Petition to Reopen on or about October 25, 2019.[3] The stated basis for reopening was change in medical condition. Claimant subsequently withdrew this issue, which was confirmed by Order issued by Prehearing ALJ John Sandberg on May 6, 2020.

10. Claimant was evaluated by Dr. Danahey on February 19, 2020. At that time, he complained of pain in the right lower back/gluteal area with radiation to the right hip, along with right toe pain. He described the pain as being worse, but stated he had suffered no new injury. On examination, Dr. Danahey noted tenderness in the level L5 right paraspinal, right sciatic notch and right sacroiliac joints. Claimant had full range of motion ("ROM") in his lumbar spine.

11. Dr. Danahey's assessment was: lumbosacral strain, initial encounter; sacroiliac dysfunction. Dr. Danahey opined Claimant remained MMI, but agreed that osteopathic manipulation was appropriate. He also recommended a reevaluation with Dr. Kawasaki, along with possible repeat SI injection and/or repeat rhizotomy. Dr. Danahey did not believe Claimant's pain in the great right toe was related to the work injury.

12. On May 18, 2020, Claimant returned to Dr. Kawasaki for a follow-up evaluation. Claimant stated he continued to have pain in the right low back and buttock region, which he described as 8/10. On examination, Dr. Kawasaki noted tenderness to palpation in the right lower lumbar segments and the lumbosacral junction, the lumbar paraspinal musculature and over the gluteus. Claimant was able to forward flex and nearly touch his toes, but had pain on lumbar extension that was more than flexion. Claimant's neurologic exam showed 5/5 strength and intact sensation.

13. Dr. Kawasaki's impression was: lumbar spondylosis; status post lumbar rhizotomy procedure, with no long-term relief. Dr. Kawasaki reiterated Claimant was at

[3] Exhibit 3.

MMI as of January 2018. Dr. Kawasaki said he would not recommend repeating rhizotomies, as Claimant did not have expected relief for the first set of rhizotomies.[4] He did not believe there was be any significant treatment option for this patient which would alter his situation. The ALJ credited Dr. Kawasaki's opinion as to Claimant's need for maintenance treatment.

14. Claimant underwent an independent medical evaluation on February 13, 2020, which was performed by Lawrence Lesnak, D.O. at the request of Respondents. Claimant complained of constant central/midline lower lumbar pain with constant radiation to his right superior buttock region. Claimant related that the pain had remained the same since his date of injury.

15. On examination, Claimant was able to forward flex at the waist to 80–90°, with reproduction of mild to moderate central/midline lower lumbar pains. Backward bending was accomplished to 30° without reproduction of any symptoms. Sitting straight leg raising maneuvers were negative bilaterally at 90°. Supine straight leg raising maneuvers on the left at 70° reproduced no symptoms and on the right at 70° he reported some mild central/midline lower lumbar pains. Claimant's muscle strength was 5/5.

16. Dr. Lesnak stated Claimant had chronic midline/central lower lumbar pains extending into his right superior buttock region and occasional symptoms radiating to his right lateral thigh. He believed Claimant remained at maximum medical improvement and there was no evidence of a worsening of his condition. Claimant reported that his symptoms had essentially been the same since the date of injury and he continue to work full-time at two jobs with no restrictions. Dr. Lesnak opined that the recommendation of osteopathic manipulative treatment was not reasonable or necessary, given Claimant's clinical course.

17. Dr. Lesnak testified as an expert at hearing and his opinions were consistent with his written report. Dr. Lesnak is a board-certified physiatrist and Level II accredited pursuant to the W.C.R.P. He has been licensed to practice medicine since 1990 and 1996 in Colorado.

18. Dr. Lesnak reviewed his evaluation of Claimant which took place on February 13, 2020. Dr. Lesnak described this as a fairly normal exam. At that time, Claimant complained of constant central midline lower lumbar pains with constant radiation of pain into his right superior buttock, occasional pain radiating into his right lateral thigh occasional right great toe irritation. Claimant told Dr. Lesnak these symptoms were exactly the same as when he originally hurt his back in March of 2016. Dr. Lesnak testified there was no change or worsening of condition, but rather a continuation of his ongoing symptoms.[5]

[4] "Rhizotomy" and "RF neurotomy" are used interchangeably in this Order, as these describe the same procedure.

[5] Dr. Lesnak deposition, p. 18:5-18.

19. Dr. Lesnak noted Claimant was working in excess of sixty hours per week without restrictions. Dr. Lesnak reviewed Claimant's records from Kaiser and noted he had normal ROM of the lumbar spine. Dr. Lesnak stated that pursuant to the DOWC Medical Treatment, repeat rhizotomy procedures were not warranted because Claimant had a nondiagnostic response to the rhizotomies performed by Dr. Kawasaki. Dr. Lesnak said Claimant had not lost any function since reaching MMI. Dr. Lesnak opined Claimant remained at MMI and did not require maintenance medical treatment.[6]

20. On or about June 17, 2020, Dr. Danahey responded to a letter authored by Respondents' counsel, which referenced Dr. Kawasaki's May 18, 2020 evaluation. Dr. Danahey opined Claimant did not require maintenance treatment. The ALJ credited Dr. Danahey's opinion as to Claimant's need for maintenance treatment.

21. Dr. Kawasaki issued a report in a response to letter authored by Claimant's counsel on or about July 6, 2020. Dr. Kawasaki reiterated that he did not believe Claimant required any maintenance treatments. Dr. Kawasaki also noted that although an interpreter was not present, Claimant spoke English and the communication was sufficient. Dr. Kawasaki said he had no problem seeing Claimant back with an interpreter, but was doubtful that his opinion would change. Dr. Kawasaki respectfully disagreed with Dr. Macaulay's opinion that osteopathic manipulation would substantially change Claimant's symptomatology. This opinion was persuasive to the ALJ.

22. Claimant testified that because of the pain he feels, he is only able to do a single staircase per day and is very tired at the end of the day. He said it is very hard for him to carry the heavy items and he continues to have pain in his low back. He wishes to have additional treatment, as he wants his pain to be at the same level as when he stopped receiving treatment. Claimant was credible when describing his pain.

23. Based upon the totality of the medical evidence, the ALJ determined Claimant failed to meet his burden of proof to show he was entitled to maintenance medical benefits.

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

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

[6] Lesnak deposition, p. 22:2-13.

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

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

Grover Medical Benefits

As determined in Findings of Fact 1-3, Claimant suffered an admitted injury at work on March 18, 2016 in which he injured his low back. Claimant received conservative treatment, as well as right sided L-4 and L5 medial facet joint nerve branch RF neurotomy procedures that were performed by Dr. Kawasaki. *Id.* The rhizotomy procedures did not provide pain relief to Claimant. Claimant reached MMI on January 17, 2018 and was assigned a 9% whole person impairment rating by Dr. Kawasaki. (Finding of Fact 4). Respondents filed a FAL on April 25, 2018, which admitted for maintenance medical benefits provided by an ATP that was reasonably necessary and related to it the injury. (Finding of Fact 5).

In the case at bench, there was conflicting medical evidence on the issue of maintenance medical treatment. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Comm'n of Colorado,* 759 P.2d 705, 711-712 (Colo. 1988). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ concluded Claimant did not meet his burden of proof to show he was entitled to receive maintenance treatment. (Finding of Fact 23). Based upon the medical records admitted at hearing, the ALJ concluded Claimant did not require maintenance treatment to maintain MMI or prevent deterioration of his condition. More particularly, Dr. Danahey evaluated Claimant on February 19, 2020 and considered the recommendations made by Claimant's IME physician, Dr. Macaulay. At that time, Dr. Danahey stated Claimant remained at MMI and thought osteopathic manipulation was appropriate. He believed Claimant should be reevaluated by Dr. Kawasaki. (Findings of Fact 10-11).

Dr. Kawasaki evaluated Claimant on May 18, 2020 and opined he did not have significant treatment options and was not a candidate for repeat rhizotomy procedures. (Finding of Fact 13). On or about June 17, 2020, Dr. Danahey stated Claimant did not require maintenance treatment. (Finding of Fact 20). On July 6, 2020, Dr. Kawasaki stated that he did not believe osteopathic manipulation would change Claimant's symptoms. (Finding of Fact 21). Accordingly, the ALJ credited the opinions offered by ATPs, Dr. Kawasaki and Dr. Danahey, both of whom concluded Claimant did not require

maintenance treatment. The ATP-s conclusions were buttressed by the opinions expressed by Respondents' expert, Dr. Lesnak. (Findings of Fact 16-19). On balance, these opinions were more persuasive than those offered by Dr. Macaulay. (Finding of Fact 8).

Since Claimant failed to meet his burden of proof to show he was entitled to maintenance medical benefits, the claim for those benefits will be dismissed.

ORDER

It is therefore ordered:

1. Claimant did not establish by a preponderance of the evidence that he is entitled to *Grover* medical benefits under the Colorado Workers' Compensation Act.

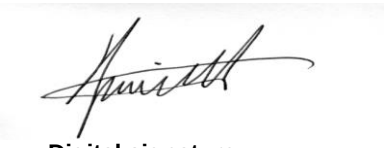
2. The claim for maintenance medical benefits is denied and dismissed.

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

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

DATED: July 14, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she is entitled to reopen her claim due to a change or worsening of condition.

II. If Claimant proves she is entitled to reopen her claim, whether Claimant established by a preponderance of the evidence that she is entitled to temporary indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 62-year old woman who has worked for Employer since 2001.

2. Claimant sustained an admitted industrial injury on November 19, 2016. While Claimant was scanning a 65-inch television in a shopping cart, the television tipped and struck Claimant on the head. Claimant fell to her knees and testified she "saw stars," became nauseated, and experienced blurred vision and dizziness.

3. Claimant was taken to North Suburban Medical Center the day of the injury with complaints of headache, lightheadedness, nausea and vomiting, upper neck pain and photophobia. CT scans of the head and cervical spine revealed degenerative changes with no evidence of a traumatic intracranial injury.

4. Claimant continued to complain of headache, neck pain, and numbness and tingling in her hands and upper back. Claimant underwent medical treatment including physical therapy, massage therapy, chiropractic treatment and acupuncture.

5. On July 27, 2017, Dr. Sacha performed right C4-7 intra-articular facet injections. On August 18, 2017, Dr. Sacha noted Claimant had 100% relief from the injections but then returned to baseline.

6. Claimant underwent a brain MRI on October 11, 2017 which revealed a single small FLAIR hyperintensity in the white matter bilaterally, nonspecific, which was noted might be a sequelae of chronic small vessel ischemic disease, small areas of gliosis from prior brain insult or chronic migraine headaches.

7. On October 12, 2017, Dr. Sacha performed right C4-7 medial branch blocks. Again, Dr. Sacha indicated Claimant had 100% temporary relief with the medial branch blocks. He recommend radiofrequency neurotomies.

8. Dr. Sacha proceeded with C5-7 radiofrequency neurotomies on November 30, 2017. At the next visit with Dr. Sacha on December 12, 2017, Claimant complained of postoperative pain, neuritis and burning since the radio frequency neurotomies.

9. On December 26, 2017, Claimant described minimal improvement from the rhizotomies.

10. On January 8, 2018, Dr. Sacha opined Claimant reached maximum medical improvement ("MMI") with an 8% whole person impairment to the cervical spine. Claimant reported that her headaches were nearly gone and that she had better neck range of motion, but still experienced pain. Dr. Sacha's impression at the time was cervical facet syndrome, occipital neuralgia, and adjustment disorder. He released Claimant to work full duty. He recommended maintenance care in the form of a gym and pool pass, six more visits of physical therapy, and medication maintenance program for 6-12 months.

11. On June 13, 2018, Dr. Machanic performed an independent medical examination ("IME") at the request of Claimant. Claimant complained of daily headaches, bilateral neck pain, blurred vision and problems focusing, dizziness, difficulty with memory, anxiety and depression. Claimant reported that the rhizotomy performed by Dr. Sacha was unsuccessful and injections only helped temporarily. Claimant disagreed she was at MMI as she felt she still had problems that had not been properly addressed. Claimant indicated she awakes in the morning with headaches. Up to two times per week the headaches cause her to become nauseated and eventually lead to vomiting, photophobia and sonophobia which cause her to need to go to bed. Claimant stated she has headaches and neck pain every day. Dr. Machanic assessed Claimant with posttraumatic mixed headaches and chronic daily migraines. He opined Claimant was not at MMI. Dr. Mechanic recommended potential medications to treat the headaches and referral to a headache specialist.

12. On August 1, 2018, Claimant underwent a Division Independent Medical Examination ("DIME") with Linda Mitchell, M.D. Claimant complained of daily headaches described as a pressure sensation in the frontal region bilaterally. She indicated the headaches were "like a rod pressing on the top of her head." She also described pain from the back of her head to the retroorbital areas. The pain was worse with sleeping and caused sleep disturbances. The headaches also caused blurred vision and tearing and caused her to miss work. The headaches also affected her daily living. Claimant also complained of neck pain and soreness, numbness in the right upper trapezius.

13. Dr. Mitchell diagnosed Claimant with a mild traumatic brain injury, cervical strain with underlying spondylosis and facet arthropathy, cervicogenic headaches and adjustment disorder with anxious mood. She noted Claimant had underlying degenerative changes of the cervical spine. Dr. Mitchell opined Claimant reached MMI as of January 26, 2018 with 13% whole person impairment for the cervical spine and 1% psychological impairment.

14. Dr. Mitchell noted Claimant had a very thorough course of treatment but had persistent cervicogenic headaches. Dr. Mitchell recommended Claimant continue to see a physiatrist for chronic headache management as maintenance care. She noted Claimant had not sustained relief from the rhizotomies and thus did not recommend further invasive cervical procedures. She opined that Claimant could continue medications and an independent exercise program and attend 10 sessions with a psychologist if needed.

15. On September 10, 2018, Respondents filed an Final Admission of Liability ("FAL") consistent with the DIME. Respondents admitted for two days of temporary total disability ("TTD") benefits, and a 13% whole person impairment rating and medical benefits after MMI based upon the report from Dr. Mitchell.

16. Claimant filed an Application for Hearing to overcome the DIME.

17. Claimant continued to see Dr. Sacha for maintenance care. On January 7, 2019, Claimant stated she was seeing headache specialist Dr. McCranie and taking headache medication. But she described ongoing significant headaches. Claimant requested a TMJ referral, to which Dr. Sacha opined was unrelated to the work injury. Dr. Sacha recommended that Claimant undergo an ultrasound guided occipital nerve block. He discharged Claimant to the maintenance medication program and follow-ups and cleared Claimant for light duty.

18. Dr. Sacha performed the bilateral occipital nerve block on January 17, 2019.

19. On January 21, 2019, Claimant saw Dr. McCranie for a follow up of her headaches. Claimant stated she felt the same and rated her pain at a 6. Claimant reported no improvement following the occipital nerve block with Dr. Sacha. Dr. McCranie continued to see Claimant under maintenance care.

20. On March 9, 2019, Dr. Sacha recommended chiropractic and acupuncture as maintenance care. On March 11, 2019, Dr. Sacha noted Claimant had light duty restrictions that were permanent in nature.

21. On April 26, 2019, Claimant presented to Dr. McCranie for a follow up of her headache. Claimant stated she was doing the same and rated her pain at 6. Claimant described ongoing daily headaches with severe headache occurring once a week. Claimant was to follow up as needed.

22. Rather than proceeding to hearing on Claimant's application to overcome the DIME, the parties stipulated to a 16% whole person impairment for the cervical spine, 1% psychological impairment, and that Claimant's TMJ was unrelated. Respondents filed an Amended FAL pursuant to the stipulation on May 15, 2019. The FAL reflects an admitted average weekly wage of $973.78 and a corresponding TTD rate of $649.19 per week.

23. Claimant subsequently filed an Application for Hearing to reopen Claimant's claim.

24. On July 15, 2019, Dr. Sacha ordered chiropractic and acupuncture under maintenance care which was pending. He completed FMLA records.

25. On May 1, 2020, Claimant told Dr. Sacha she wanted to restart chiropractic and acupuncture to which he agreed. Claimant's work status was unchanged. Dr. Sacha specifically noted Claimant remained at MMI. He referred Claimant for six to eight visits of chiropractic care and acupuncture.

26. On November 12, 2020, Claimant reported to Dr. Sacha experiencing an increase in neck pain and headaches. He remarked, "At this point, we are going to get a repeat MRI of the cervical spine as the symptoms do seem somewhat different than prior symptoms, but I cannot rule out the possibility of doing a repeat neurofrequency procedure." (Cl. Ex. 8, p. 110).

27. On February 1, 2021, Claimant returned to Dr. Sacha with complaints of left-sided neck pain and headaches. Claimant was working her full duty job. Dr. Sacha recommended left C2-4 facet injections. Dr. Sacha noted that Claimant had recently undergone radiofrequency neurotomy and it was starting to wear off resulting in increased pain. Dr. Sacha noted different treatment options including more chiropractic care and acupuncture, repeat facet injections and occipital nerve blocks, or a repeat radiofrequency procedure. Claimant wanted to proceed with an injection and medication.

28. On April 6, 2021, Claimant reported to Dr. Sacha an increase in headaches on the left side. Dr. Sacha noted Claimant likely has some hypersensitivity or neuritis of the 3rd occipital nerve after the radiofrequency procedure, which he noted was noted uncommon.

29. Claimant returned to Dr. Sacha on April 26, 2021 with a flare in her left-sided occipital nerve with headaches. She also reported some increased ringing in the left ear and increased neck pain. Dr. Sacha performed a left occipital nerve block.

30. On May 10, 2021, Dr. Sacha noted he was seeing Claimant for a maintenance follow-up. Claimant's work status was unchanged. Claimant described no lasting relief with the nerve block. Dr. Sacha discussed with Claimant that her symptoms may or may not improve. He noted that Claimant appeared to have radicular pain, likely due to stenosis. Dr. Sacha recommended a one-time cervical epidural but not any more aggressive or interventional care. Claimant was to return in one month under maintenance program.

31. Claimant returned to Dr. Sacha for maintenance follow up on June 8, 2021. He noted Claimant was awaiting authorization for the cervical epidural.

32. On September 13, 2021 Dr. Sacha noted that the cervical epidural and cervical MRI were denied. He noted that he was unsure if the cervical injection would be enough to determine if it is facet pain causing Claimant's ongoing symptoms versus radiculopathy

pain. He reordered an MRI, injection and a medical branch block for diagnostic and therapeutic purposes.

33. On November 4, 2021, Dr. Sacha performed bilateral C2-5 medial branch blocks and a C7-T1 interlaminar epidural injection.

34. Respondents obtained surveillance of Claimant taken November 3, 9, 21, 28, 30, 2021. Claimant is observed turning her head, bending over, using her bilateral upper extremities to carry items, wipe frost from a car window, pull herself into a truck, and open a truck door. Claimant is also observed firing a large rifle attached to a stand with the butt of the rifle against her left shoulder.

35. At a follow-up appointment on December 6, 2021, Claimant Dr. Sacha noted Claimant had diagnostic responses to both the medial branch blocks and the epidural injection. He further noted that Claimant has both a facet pain generator causing her neck pain and headaches as well as a discogenic or radicular pain causing the radiating pain down the arm. Claimant reported ongoing neck and headache pain. Dr. Sacha noted that the MRI revealed significant straightening of her cervical lordosis and canal stenosis from C4-5 down to C6-7. He recommended radiofrequency neurotomy in the cervical spine.

36. On December 8, 2021, Michael Striplin, M.D. performed a medical record review at the request of Respondents. He reviewed and summarized Claimant's medical records since the DIME with Dr. Mitchell. He was asked whether Claimant suffered a worsening of her condition that would justify reopening of her workers' compensation claim. He noted Dr. Sacha recommended repeat cervical epidural steroid injections and cervical medial branch blocks even though Dr. Mitchell explicitly recommended no further invasive cervical procedures. Dr. Striplin noted Claimant had continued subjective complaints that had not substantially changed. The cervical MRI scan performed on 11/11/2021 only showed slight worsening compared to the one done five years earlier and were due to the natural progression of her underlying disease. Dr. Striplin opined that the treatment recommended by Dr. Sacha could be done under maintenance care.

37. Claimant testified at hearing that her symptoms began to worsen in 2020. Claimant testified she experienced headaches of longer duration that were more debilitating as to her functioning. She testified that the pain in her neck and arms with numbness affected her ability to grasp and hold objections and were more intense, causing the Claimant to have to miss work more often. Claimant testified she was unable to do "regular stuff" that she normally did. Claimant testified that the frequency and duration of her symptoms worsened. Claimant testified that her symptoms in 2020 were by far worse than those she had in 2017-2019.

38. Claimant missed work and incurred wage loss as a result of her worsened condition, as outlined in Claimant's Exhibit 5.

39. Dr. Sacha testified at hearing on behalf of Claimant as an expert in physical medicine and rehabilitation. Dr. Sacha testified that patients with cervical facet syndrome,

such as Claimant, often return for follow-up treatment. He testified that he recommended a follow-up MRI based on worsening and different symptoms and clinical findings noted at his November 12, 2020 evaluation. Dr. Sacha explained that he found worsening segmental dysfunction, forward head and shoulder posture, as well and firm endpoints to range of motion. Dr. Sacha confirmed that all of the Claimant's objective findings on MRI and other objective clinical exam findings were a natural progression of the work-related injury. Dr. Sacha testified that Claimant also presented with subjective symptoms supporting the objective findings, including worsening headaches, dizziness, ringing in the ears, light sensitivity, jaw pain, and arm numbness.

40. Regarding the MRI results, Dr. Sacha testified that there was straightening of the cervical lordosis as well as worsening of the canal and foraminal narrowing, consistent with Claimant's symptoms. He explained that it is not unusual for patients who have undergone radiofrequency ablation ("RFA") to experience a return of symptoms when the nerves grow back. He testified that in Claimant's case, she had additional symptoms, including arm numbness and paresthesia--that represented a "clinical red light." (Tr. Hearing at 53:8-19). Dr. Sacha further testified that Claimant now has symptoms of compressive pathology from the narrowing of the joints and bone being laid down. Dr. Sacha opined that the Claimant's condition was objectively worse both on inspection and examination, as well as radiographically on the MRI. He explained that another RFA procedure would help some of Claimant's symptoms but would not treat the compressive symptomatology. Dr. Sacha testified that Claimant needed a staged epidural steroid injection to address the compressive symptomatology. Dr. Sacha explained that diagnostic medial branch blocks were also needed to see if the RFA procedure would be effective. Dr. Sacha confirmed that the compressive pathology was new and a progressively worsening problem, and the recommended injections would be to treat Claimant's symptoms.

41. Dr. Sacha clarified that, to the extent his records refer to maintenance care, it is done for billing purposes. Dr. Sacha opined that Claimant is clearly and objectively worse and requires additional care. He testified that Claimant has symptoms she did not previously have that are consistent with the progression of the disease, requiring treatment not just to maintain Claimant's prior condition. Dr. Sacha disagreed with Dr. Striplin's opinion that Claimant's continued subjective complaints have not substantially changed.

42. The ALJ finds the opinion and testimony of Dr. Sacha, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Striplin.

43. Claimant proved it is more probable than not she sustained a worsening of condition entitling her to reopening her claim as of November 12, 2020.

44. Claimant proved she is entitled to temporary indemnity benefits from November 12, 2020 and ongoing.

45. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Reopening

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by

a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

As found, Claimant met her burden to prove she sustained a change in condition entitling her to reopen her claim. Claimant credibly testified her condition changed and worsened in 2020. There is no evidence Claimant sustained an any sort of intervening injury subsequent to being placed at MMI. Having treated Claimant over the course of multiple years, Dr. Sacha is familiar with Claimant's condition and course of treatment. Dr. Sacha was the first to place Claimant at MMI in 2018. Subsequently, Dr. Sacha continued to treat Claimant and had the opportunity to observe any changes in her condition. In November 2020, Claimant reported increased neck pain and headaches and Dr. Sacha noted that Claimant's symptoms appeared somewhat different than her prior symptoms. He credibly testified that Claimant has experienced worsening and different symptoms, which are supported by objective findings on examination and imaging. Dr. Sacha credibly testified that Claimant's worsening condition is related to the work injury. Dr. Sacha further credibly testified that Claimant required medial branch blocks and cervical injections to treat her new and worsening symptoms. The surveillance video showing Claimant participating in activities does not persuade the ALJ that Claimant has not sustained a change in her condition. The preponderant evidence establishes Claimant has sustained a change in her condition causally related to the original work injury, and thus is entitled to reopen her claim.

Temporary Indemnity Benefits

City of Colorado Springs Disposal v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997) stands for the proposition that a worsening of condition after MMI may entitle a claimant to additional temporary disability benefits if the worsened condition caused a "greater impact" on a claimant's temporary work capacity than existed at the time of MMI. *Root v. Great American Insurance Company*, W.C. No. 4-534-254 (April 15, 2009). ICAO has previously ruled that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss" where, for example, a claimant was not working immediately before the worsened condition. *Moss v. Denny's Restaurants*, W.C. No. 4-440-517 (September 27, 2006). As ICAO stated in *Lively v. Digital Equipment Corporation*, W.C. No. 4-330-619 (June 14, 2002): "[a]s we read *City of Colorado Springs*, in order to establish entitlement to additional temporary disability benefits the claimant must show the worsened condition resulted in increased physical restrictions (over those which existed on the original date of MMI), and that the

increased restrictions caused a 'greater impact' on the claimant's temporary 'work capability' than existed at the time of MMI."

In *Kreimeyer v. Concrete Pumping Inc.*, W.C. No. 4-303-116 (March 22, 2001), ICAO concluded that the critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." *See also El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993); *Ridley v. K-Mart Corp.*, W.C. No. 4-263-123 (May 27, 2003). The question of whether a claimant proved increased disability, as measured by actual wage loss or a reduction in her capacity to earn wages, is a question of fact for the ALJ's determination. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has established both actual wage loss and loss of earning capacity. Her actual wage loss and loss of earning capacity is greater since November 12, 2020 than it was at the time of MMI. Although Claimant had prior periods of absences, the medical and testimonial evidence establishes her entitlement to additional temporary disability benefits from November 12, 2020 for the hours missed in Claimant's Exhibit 5, pages 52-53 and continuing. The FAL reflects an admitted average weekly wage of $973.78 and a corresponding TTD rate of $649.19 per week. The temporary disability rate is $16.23 for each hour missed ($649.19/40). Respondents shall pay the Claimant at that rate for each hour or partial hour missed by the Claimant. Temporary disability benefits begin on November 12, 2020 for the missed hours set forth in Claimant's Exhibit 5, pages 52–53 and continue after that until terminated by operation of law.

ORDER

1. Claimant proved she sustained a change in condition entitling her to reopen her claim as of November 12, 2020.

2. Respondents are liable for Dr. Sacha's medical treatment beginning November 12, 2020 as medical treatment designed to cure and relieve Claimant as a result of her work-related injury and no longer as maintenance medical treatment.

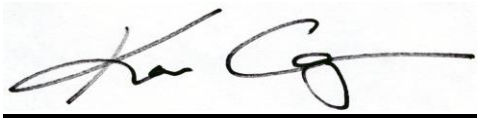
3. Respondents shall pay temporary disability benefits at the rate of $16.23 per hour for each hour or partial hour missed set forth in Claimant's Exhibit 5, pages 52-53 beginning on November 12, 2020 and continuing until terminated by operation of law.

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: July 14, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-195-283-001

ISSUES

I. Whether Claimant's temporary total disability benefits were properly terminated due to his failure to accept an offer of modified employment.

FINDINGS OF FACT

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

1. On January 25, 2022, Claimant suffered a compensable injury. Claimant was injured when he slipped on ice and fractured the left distal radius of his left arm.
2. On January 26, 2022, Claimant underwent surgery in which a left sided "ORIF" procedure was performed as well as a "C.T.R." of the left wrist.
3. On February 1, 2022, Claimant was evaluated at Denver Health Occupational Health by Douglas Scott, M.D. Dr. Scott returned Claimant to restricted duty. The restrictions precluded Claimant from using his left hand and arm. Claimant was also restricted from driving. (Ex. C, pp. 10-12)
4. Claimant kept treating with Dr. Scott. As a result, Dr. Scott was Claimant's attending physician.
5. On February 9, 2022, Employer, through TB[Redacted], wrote to Dr. Scott to see if he would approve Claimant performing a modified job. In the letter, Ms. TB[Redacted] stated that Claimant's restrictions included no left hand use and no driving. Ms. TB[Redacted] also stated that they identified a sedentary job for Claimant to perform. (EX. E, p. 41)
6. On February 10, 2022, Dr. Scott reviewed and approved the modified employment described by Employer–which consisted of sedentary work. (Ex. E, p. 41)
7. On February 10, 2022, Employer wrote to Claimant and offered Claimant modified employment which was to start no later than February 16, 2022. The letter also stated that Claimant's failure to start the modified employment would result in the termination of his temporary disability benefits. The letter provided:

> This will confirm that as of **Thursday, February 10, 2022**, the Employer[Redacted] has offered you a temporary modified duty assignment that must begin no later than February 16, 2022 (emphasis in original). Your temporary modified duty assignment will consist of sedentary work at the DOTI Leaf Drop Booth. Your shifts will be Monday thru Thursday from 6:30 a.m. to 5:00 p.m.

> The most recent restrictions recommended by the authorized treating physician include the following: no driving. No use of the left-hand or arm.
>
> Attached is correspondence signed by Dr. Scott from the Center for Occupational Safety and Health. He reviewed the modified duty assignment and restrictions as stated above and concurs that the temporary assignment is within your restrictions.
>
> . . .
>
> You will continue to receive your regular wages according to Career or Civil Service rules and statutory requirements while on modified duty. Pursuant to Workers' Compensation Rule of Procedure 6–1(A)(4), if you do not accept and begin this offer of modified duty, your wage continuation and/or temporary indemnity benefits will be terminated.

(Ex. E, pp. 39-40)

8. Since Claimant could not drive, he looked into alternative means of transportation to and from work. Claimant looked into taking public transportation – the bus – to and from work. Claimant contends that he did not want to take the bus because the weather was bad and he was afraid he might slip and fall while walking to and from the bus stop.

9. It took Claimant about 30 minutes to drive to work. Taking the bus to and from work would have taken Claimant about 1 hour and 15 minutes each way. At hearing, Claimant did not contend that the time to travel to and from work was unreasonable.

10. Claimant also looked into taking Uber and Lyft to work. Claimant, however, stated that using Uber or Lyft would cost approximately $23.00 each way to work and was cost prohibitive since he only made $23.00 per hour.

11. Because Claimant did not want to take the bus to work, and thought Uber or Lyft was too expensive, Claimant did not accept the offer of modified employment.

12. On February 23, 2022, Respondent filed a General Admission of Liability. Respondents admitted for a closed period of temporary total disability benefits (TTD). Respondent admitted for TTD from January 26, 2022, through February 15, 2022.

13. Despite Claimant being unable to drive due to his work injury, Claimant had access to public transportation to and from the modified job.

14. The ALJ finds that Claimant had reasonable access to public transportation and could have taken public transportation to and from work each day. Claimant, however, chose to not use it. The ALJ further finds that taking public transportation to and from work was a reasonable option for Claimant to get to work. Therefore,

the ALJ finds that the modified employment was reasonably available to Claimant under an objective standard.

15. Claimant failed to present credible and persuasive evidence that the weather conditions created an undue risk of falling while walking to and from the bus stop. As a result, Claimant's contention that walking to and from the bus stop was not a safe option and made accepting the modified employment impractical is neither credited nor found persuasive. Depending on the weather each day, Claimant could have also used a combination of Uber, Lyft, or the bus. Therefore, the ALJ finds, under an objective standard, Claimant's reason for refusing to accept the offer of modified employment was unreasonable. The ALJ finds that Claimant had reasonable access to public transportation – the bus - to get to work and chose not to use it. Thus, the modified employment was reasonably available to Claimant.

16. In this case, Dr. Scott, the attending physician, gave Claimant a written release to return to modified employment, approved the modified job, the modified job was reasonably available to Claimant and offered to Claimant in writing, and Claimant failed to begin the job. Moreover, Claimant's reason for refusing the offer of modified employment, which was reasonably available to Claimant, was not reasonable. Thus, Claimant's TTD benefits were properly terminated.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and

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

I. Whether Claimant's TTD benefits were properly terminated due to his failure to accept an offer of modified employment.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Where the employers seek to terminate benefits under this statute, they bear the burden of establishing the factual predicate for its application. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). It is a question of fact for the ALJ to decide whether a claimant has been released to return to work. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App.2016). There may be more than one "attending physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008); *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328, 330 (Colo. App. 2005). If there is a conflict between the attending physicians concerning whether or not the claimant is able to perform modified employment, the ALJ must resolve the conflict as a question of fact. *See Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000).

The offered modified employment must be reasonably available to the claimant under an objective standard. *Willhoit v. Maggie's Farm*, WC 5-054-125-01 at 4 (ICAO, July 26, 2018). A claimant's rejection of offered modified employment does not constitute responsibility for termination. The ALJ should consider the consequences of the industrial injury, the financial hardship that would be imposed on the claimant by accepting the modified employment and "[a]ny other reasons that would, in the opinion of the administrative law Judge, make it impracticable for the claimant to accept the offer of modified employment." § 8-42-105(4)(b)(II). Failure to inform the claimant of the modified employment starting date can be characterized as a reason for which it was "impracticable for the claimant to accept the offer." *Mccloud v. Progressive Insurance*, WC 4-980-200-01 (ICAO. Apr. 1, 2016); *see Aguilera v. Valley Nissan Subaru, LLC*, WC 5-112-736 (ICAO, Dec. 1, 2020) (the termination of temporary disability benefits is not contingent on a claimant's responsibility for termination because the termination of disability benefits requires the employer to comply with the statute and rules governing modified duty job offers).

As found, Claimant refused an offer of modified employment due to transportation issues caused by the injury. As further found, Claimant's work injury precluded Claimant from driving to and from work. On the other hand, Claimant had available public transportation – the bus - and chose not to use it. As also found, Claimant contended that he did not use the bus because he was afraid he might fall and reinjure himself. While the ALJ has considered such factor, Claimant failed to present sufficient credible and persuasive evidence to establish that the weather created an undue risk of walking to and from the bus stop and that the job was therefore not reasonably available. For example, Claimant presented no photographs documenting the bad weather conditions which he contends precluded him from taking the bus. Nor did Claimant call Employer to discuss his concerns about taking the bus to work on a particular day due to the weather. Therefore, the ALJ finds and concludes that Claimant's refusal to take the bus to get to work was not reasonable under the circumstances. Thus, the ALJ finds and concludes that the offer of modified employment was not too impractical to be considered a legitimate job offer.

As a result, the ALJ finds and concludes that Respondents established by a preponderance of the evidence that Claimant was released to modified employment, the Employer offered Claimant modified employment that was approved by his attending physician, the employment was reasonably available to Claimant under an objective standard, and Claimant failed to start the employment. Thus, the ALJ finds and concludes that Claimant's TTD was properly terminated.

ORDER

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

1. Claimant's TTD was properly terminated as of February 15, 2022.
2. Claimant's claim for additional TTD is denied and dismissed.
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: July 15, 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 proven by a preponderance of the evidence that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating.

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

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to a disfigurement award for his left ankle pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. On January 29, 2020 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer. Specifically, Claimant was on his way into Employer's building when he stepped in a crack with his left foot and fell to the ground.

2. Claimant began receiving treatment with Blake Hines, D.P.M. on February 5, 2020. Dr. Hines assessed a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle.

3. On November 6, 2020 Dr. Hines performed a left ankle arthroscopy with debridement, a modified Brostrom-Gould procedure and a synovectomy. His preoperative and postoperative diagnoses were left ankle anterior talofubular ligament tear, lateral ankle instability, chronic ankle pain and synovitis. Claimant subsequently received additional physical therapy and steroid injections.

4. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant also exhibited a noticeable limp while walking.

5. By June 7, 2021 Dr. Hines determined that Claimant's structures were stable and his left ankle was solid. He noted that Claimant's return to full activities would not disturb the surgical correction. Dr. Hines felt Claimant was nearing Maximum Medical Improvement (MMI). He recommended Claimant return to work as he was able and suggested follow-up on an as-needed basis.

6. On June 22, 2021 Claimant visited Authorized Treating Physician (ATP) Carlos Cebrian, M.D. for an evaluation. Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. The 7% extremity rating converted to a 3% whole person rating. Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions.

7. On August 2, 2021 Insurer filed a Final Admission of Liability (FAL) acknowledging an MMI date of June 22, 2021, medical benefits previously paid, and Permanent Partial Disability (PPD) benefits for an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report. The FAL also denied liability for maintenance care after MMI because it was not reasonable, necessary or related. The admitted PPD benefits totaled $4,672.30 (208 x $320.90 x .07), to be paid from June 22, 2021 through October 4, 2021.

8. On April 12, 2022 Claimant underwent an independent medical examination with John Burris, M.D. Dr. Burris agreed with Dr. Cebrian that Claimant reached MMI on June 22, 2021. He assigned a 6% lower extremity impairment rating for range of motion loss that converted to a 2% whole person rating. Dr. Burris noted there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Moreover, Dr. Burris determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident.

9. Dr. Burris testified at the hearing in this matter. He explained that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program.

10. Dr. Burris reiterated that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

11. Claimant testified at the hearing in this matter. He explained that he has difficulties ascending and descending stairs because his left leg. Claimant commented that standing for more than three hours results in so much pain in his leg that he is not able to walk for the rest of the day. He has changed careers and is working as a tattoo artist because his new profession allows him to change positions and does not require static standing. Claimant remarked he has difficulties functioning at home and performing chores because of the need to rest his leg. He also commented that he is unable to participate in sports and hobbies because of his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, climbing up and down stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. Claimant seeks physical therapy and pain medication for his continuing symptoms.

12. Claimant has failed to prove that it is more probably true than not that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating. Initially, on January 29, 2020 Claimant suffered a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle while working for Employer. Claimant subsequently underwent left ankle surgery.

13. Claimant testified that he has a number of difficulties functioning at home and performing chores because of pain and discomfort associated with his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, ascending and descending stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. However, the record reveals that Claimant's functional limitations pertain to his left leg and do not extend to portions of his body beyond the schedule of impairments.

14. The medical records reveal that Claimant's industrial injury is limited to his left lower extremity. At a June 22, 2021 evaluation with ATP Dr. Cebrian Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. Respondents subsequently filed a FAL noting an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report.

15. Dr. Burris reasoned that Claimant warranted a 6% lower extremity impairment rating for his left ankle based on range of motion loss. He remarked there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Dr. Burris reiterated during his hearing testimony that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

16. The preceding medical records reflect that Claimant's functional disability is limited to his left leg. Both Drs. Cebrian and Burris persuasively determined that Claimant's June 29, 2021 industrial injury warranted an extremity rating based on loss of range of motion. As Dr. Burris remarked, Claimant's injury was limited to his left ankle region. Moreover, Claimant's testimony reveals that the primary catalyst for his pain is using or standing on his left leg. The record reflects that Claimant's pain does not extend to a portion of the body beyond the schedule of impairments. The situs of Claimant's functional impairment is thus in his left lower extremity. Specifically, Claimant's left lower extremity symptoms are limited to his leg and do not extend into a portion of his body beyond the schedule of impairments at the hip. Accordingly, Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

17. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant seeks physical therapy and pain medication for his continuing symptoms. However, the record reveals that Claimant does not require medical maintenance benefits to relieve the effects of his industrial injury or maintain his condition.

18. In his June 22, 2021 MMI report Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions. Dr. Burris also determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident. Dr. Burris specifically testified that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program. The persuasive medical opinions of Drs. Cebrian and Burris reflect that Claimant has failed to demonstrate that he is entitled to receive medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

19. Claimant has established that it is more probably true than not that he is entitled to a disfigurement award for his left ankle pursuant to §8-42-108, C.R.S. On November 6, 2020 Claimant underwent left ankle surgery as a result of his January 29, 2020 admitted industrial injury. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The

scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant's surgical scarring is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Furthermore, Claimant exhibited a noticeable limp while walking. Based on Claimant's surgical scarring and limp, he is entitled to a disfigurement award in the amount of $1,800.00.

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).

Left Lower Extremity Conversion

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the "loss of a leg above the foot including the ankle." *See* §8-42-107(2)(w.5), C.R.S. However, when an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. The dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). The question of whether a claimant has sustained a scheduled "injury" compensable under §8-42-107(2)(w.5), C.R.S. or a whole person impairment compensable under §8-42-107(8)(c), C.R.S. depends on whether the claimant sustained "functional impairment" beyond the leg at the hip. *See* §8-42-107(2)(w), C.R.S. Whether a claimant has suffered the "loss of a leg above the foot including the ankle" under §8-42-107(2)(w.5) , C.R.S. or a whole person medical impairment is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional

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

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68.

8. As found, Claimant has failed to prove by a preponderance of the evidence that his 7% scheduled lower extremity impairment rating should be converted to a 3% whole person rating. Initially, on January 29, 2020 Claimant suffered a closed fracture of the base of the fifth metatarsal bone of the left foot and a sprain of the anterior talofibular ligament of the left ankle while working for Employer. Claimant subsequently underwent left ankle surgery.

9. As found, Claimant testified that he has a number of difficulties functioning at home and performing chores because of pain and discomfort associated with his left leg. He summarized he has trouble standing for long periods of time, showering, walking long distances, ascending and descending stairs, lifting heavy weight, engaging in recreational activities, and performing household chores such as sweeping and lawn work. However, the record reveals that Claimant's functional limitations pertain to his left leg and do not extend to portions of his body beyond the schedule of impairments.

10. As found, the medical records reveal that Claimant's industrial injury is limited to his left lower extremity. At a June 22, 2021 evaluation with ATP Dr. Cebrian Claimant reported discomfort in his left ankle with extended activity. He described the pain as mild. Dr. Cebrian determined that Claimant had reached MMI. He concluded Claimant had a 7% left lower extremity impairment rating for loss or range of motion. Respondents subsequently filed a FAL noting an impairment rating of 7% of the leg at the hip pursuant to Dr. Cebrian's report.

11. As found, Dr. Burris reasoned that Claimant warranted a 6% lower extremity impairment rating for his left ankle based on range of motion loss. He remarked there was no evidence of functional impairment beyond the site of Claimant's left ankle. There was thus no medical reason for conversion. Dr. Burris reiterated during his hearing testimony that Claimant's injury was limited to his left ankle region. Notably, at the independent medical examination Claimant only reported left ankle pain. Claimant did not have subjective complaints beyond the ankle and there were no other impaired areas on examination.

12. As found, the preceding medical records reflect that Claimant's functional disability is limited to his left leg. Both Drs. Cebrian and Burris persuasively determined that Claimant's June 29, 2021 industrial injury warranted an extremity rating based on loss of range of motion. As

Dr. Burris remarked, Claimant's injury was limited to his left ankle region. Moreover, Claimant's testimony reveals that the primary catalyst for his pain is using or standing on his left leg. The record reflects that Claimant's pain does not extend to a portion of the body beyond the schedule of impairments. The situs of Claimant's functional impairment is thus in his left lower extremity. Specifically, Claimant's left lower extremity symptoms are limited to his leg and do not extend into a portion of his body beyond the schedule of impairments at the hip. Accordingly, Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

Medical Maintenance Benefits

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

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant seeks physical therapy and pain medication for his continuing symptoms. However, the record reveals that Claimant does not require medical maintenance benefits to relieve the effects of his industrial injury or maintain his condition.

15. As found, in his June 22, 2021 MMI report Dr. Cebrian did not recommend maintenance medical care or impose permanent work restrictions. Dr. Burris also determined Claimant did not require permanent work restrictions or maintenance medical care. He concluded that no further treatment was reasonable or necessary for the January 29, 2020 work accident. Dr. Burris specifically testified that there was no objective evidence that Claimant required any form of care to maintain MMI from the effects of his industrial injury. He remarked that it was Claimant's responsibility to improve his conditioning and endurance through a home exercise program. The persuasive medical opinions of Drs. Cebrian and Burris reflect that Claimant has failed to demonstrate that he is entitled to receive medical maintenance benefits designed to cure or relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for maintenance medical benefits is denied and dismissed.

Disfigurement

16. Section 8-42-108(1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view" he may receive a disfigurement award "in addition to all other compensation benefits provided in this article." As found, Claimant has established by a preponderance of the evidence that he is entitled to a disfigurement award for his left ankle. On November 6, 2020 Claimant underwent left ankle surgery as a result of his January 29, 2020 admitted industrial injury. As a result of the surgery, Claimant has four scars and a slight limp. He specifically has a long scar along his left ankle measuring approximately 2 and 1/4 inches long by ½ inch wide. The scar is a bit raised and brownish in color. Moreover, Claimant has two small circular scars and one scar that is approximately 1/2 inch in length. Claimant's surgical scarring is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Furthermore, Claimant exhibited a noticeable limp while walking. Based on Claimant's surgical scarring and limp, he is entitled to a disfigurement award in the amount of $1,800.00.

ORDER

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

1. Claimant's request to convert his 7% left lower extremity scheduled impairment to a 3% whole person rating is denied and dismissed.

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

3. Claimant shall receive a disfigurement award in the amount of $1,800.00.

4. 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: July 15, 2022.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-384-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable work injury on February 3, 2022?

FINDINGS OF FACT

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

1. Claimant is a 57 year-old man who is a Lieutenant with the Denver Fire Department. Claimant has worked for Employer for 17 years. Claimant credibly testified that Employer requires him to work out one hour per shift.

2. On February 3, 2022, Claimant was walking on the elliptical machine at the firehouse. About eight minutes into his workout, Claimant felt a pain in his chest above his heart. Claimant's colleague checked his blood pressure and it was 166/110, so the paramedics were called. When the paramedics arrived, Claimant's blood pressure had gone up to 178/120. The paramedics recommended that Claimant go to the emergency room because of his elevated blood pressure.

3. The paramedics transported Claimant to Denver Health. According to the Emergency Department report, Claimant had "left-sided exercise-induced chest pain with radiation to left shoulder." Claimant told the physicians that over the past few months his blood pressure had been "slowly creeping up." According to the Emergency Department record, Claimant's chest pain resolved after 10 minutes of rest. In the ambulance he received 324 mg Aspirin and 0.4 mg nitroglycerin. The Emergency Department noted Claimant had no prior history of chest pain, a normal ECG, normal blood work (troponin protein), and no evidence of a pulmonary embolism. (Ex. B).

4. The hospital discharged Claimant and instructed him to see his primary care physician to coordinate outpatient cardiology follow up and cardiac risk stratification. (Ex. B).

5. Claimant testified that on-the-job injuries are to be reported via the City of Denver's OUCH line. Right after being discharged, Claimant contacted the OUCH line to report his injury for workers' compensation purposes. Claimant explained that he was not able to call the OUCH line prior to seeking treatment because the paramedics took him to the Emergency Room. Claimant reported that he was "walking on the elliptical machine to start [his] morning workout . . . and [he] started experiencing tightness and pain in [his] chest and around [his] heart." Claimant was advised to see one of the following doctors at COSH: Koval, Pula, Mankowski, or Keen.

6. Claimant saw ATP, Joan Mankowski, M.D. at COSH that same day. Dr. Mankowski diagnosed Claimant with chest pain, unspecified. Dr. Mankowski noted that based upon the history Claimant provided, his chest pain occurred while walking on the treadmill, and there was no unusual exertion. She further noted "[c]hest pain is a symptom, etiology unclear, as is cause of his HTN. His symptoms while manifested at work, are not necessarily work related." Given Claimant's hypertension, Dr. Mankowski instructed Claimant to contact his primary care physician for further evaluation, and work clearance. (Ex. C).

7. Claimant testified that he told his immediate supervisor he was not cleared to work. This was reported to Captain Erik Haag who recommended that Claimant see Dr. Koval. Claimant testified that he saw Dr. Koval on February 8, 2022, and she recommended multiple tests. Claimant testified that he followed the recommendations of Dr. Koval since she was one of names given by the OUCH line, and she was recommended by Captain Haag. Dr. Koval, however, is not Claimant's primary care physician.

8. Claimant testified that he has returned to work and has had no similar incidents.

9. The ALJ finds that Claimant did not have a diagnosed injury. At the time Claimant experienced chest pains, he had just begun his workout by walking on the elliptical. There is no evidence that this form of exercise required any unusual exertion.

10. The ALJ finds that Claimant did not suffer a compensable work injury on February 3, 2022.

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).

For an injury to be compensable it must arise out of, and in the course of, employment. § 8-41-301(1)(c) C.R.S. These are two separate requirements that create a two-pronged test for compensability. "In the course of" refers to the time, place and circumstances under which a work-related injury occurs. *Wild West Radio, Inc. v. ICAO*, 905 P.2d 6 (Colo. App. 1995). "Arising out of" deals with the casual connection between the employment and injury. *Gen. Cable Co. v. ICAO*, 905 P.2d 6 (Colo. App. 1995). The "arising out of" element requires that an injury have its origin in the employee's work-related functions and be sufficiently related to those duties to be considered part of the employee's service to the employer. *Price v. ICAO*, 919 P.2d 207 (Colo. 1996).

Claimant has the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. §8-41-301(1), C.R.S.; see *Younger v. Denver*, 810 P.2d 647 (Colo. 1991) and *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after consideration of all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Claimant also maintains the burden of proof to establish that the disability and need for treatment is proximately caused by the injury or occupational disease arising out of and in the course of employment. *Id*. citing *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985).

Here, claimant was in the course of his employment when he experienced chest pain and high blood pressure. The question that must be resolved is whether Claimant is able to prove the "arising out of" prong of the compensability test. Arising out of requires a connection between the employment and the injury. Here, there is no diagnosed injury, only Claimant's chest pain and high blood pressure, both of which resolved. Without an injury, the arising out of prong cannot be satisfied. Even if experiencing chest pain and high blood pressure is considered an injury for the purposes of a compensability determination, the medical records, the quick resolution of the chest pain, and Claimant's

own statement that his blood pressure has been increasing over time, show there is no connection between the underlying condition and Claimant's employment.

The mere fact that a claimant experiences symptoms at work, does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." *See also F.R. Orr Constr. v. Renta*, 717 P.2d 965 (Colo. App. 1995) (the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment).

In this case, Claimant did not sustain an injury in the workplace. Claimant experienced a symptom (chest pain and high blood pressure) at work and sought treatment through Employer. The symptoms were preexisting and underlying. Both the treating physician and the Emergency Department physicians could find no relation between the symptoms and Claimant's employment, nor could they diagnose any injury or illness. In this case, Claimant's condition was the natural progression of a pre-existing condition that was not altered by his employment and therefore cannot be found to have arisen out of employment.

Because there was no injury, only the natural progression of a pre-existing condition, this claim cannot be found compensable and must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits under the Act is denied and dismissed.

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

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

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

DATED: July 15, 2022

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

ISSUES

I. Whether Claimant overcame Dr. Hughes' DIME opinion on maximum medical improvement ("MMI") and permanent impairment by clear and convincing evidence.

II. Whether Claimant proved she is entitled to additional temporary indemnity benefits.

III. Whether Claimant proved additional medical treatment is reasonable, necessary and related to her work injury.

FINDINGS OF FACT

1. Claimant is a 73-year-old female who worked for Employer as a housekeeping attendant.

Prior History

2. Claimant's pre-existing conditions include endocrine disease, hypothyroidism, hyperlipidemia, GERD, musculoskeletal disorder, fibromyalgia, arthritis, high cholesterol, sinusitis, ear trouble, IBS, and headaches.

3. On June 17, 2009 Claimant reported to her primary care physician ("PCP") at Kaiser Permanente that she had an MRI of her head/ears approximately two years prior.

4. On February 9, 2010 PCP records note Claimant saw an ear, nose and throat ("ENT") specialist in 2007. Claimant reported that she wakes up every day with a headache that is gone by 10am for which she sometimes takes Advil. She reported that every day her entire body hurt, complaining that "everything hurts." Claimant reported feeling ear, mouth and nose problems. The PCP noted that Claimant was "Asking to be evaluated for disability – hurts too bad, is too fatigued to do job in housekeeping." (R. Ex. A, p. 8).

5. On May 19, 2010, Claimant reported complaints of arthritis to her PCP. She reported that she stopped taking arthritis medications because could not sleep and was so tired and got dizzy at work. Claimant complained of pain in her back, hips, knees, ankles, elbows, shoulders and hand. She requested a lung x-ray for tingling and numbness. She was assessed with fibromyalgia.

6. On August 30, 2010 Claimant presented to her PCP reporting “more and more problems.” (R. Ex. A, p. 18). Claimant reported that her right eye teared for two days in the morning and that she had a bit of headache on that eye and could not see the same out of the eye. She further reported severe pain in her neck and head and requested a CT scan or MRI of her head. She was quoted in the medical note as saying, “I want to get SSI and stop working – will you do the disability forms or write a letter to support me stopping working.” (Id.)

7. On December 2, 2011, Claimant reported having problems with her right eye. She reported that every day her vision worsened and that her right eye was blurry. Claimant was taking medication for depression.

8. July 25, 2012 Claimant complained of a stabbing pain in her left ear and ongoing headaches.

March 6, 2013 Work Injury

9. On March 6, 2013 Claimant sustained an admitted industrial injury when she tripped over a power cord and fell, striking her head on the concrete floor.

10. Claimant was taken to the emergency room at St. Anthony Hospital that same day. She reported falling backwards and hitting her head on the floor. Claimant complained of a slight headache and some neck soreness, but denied loss of consciousness, blurry vision, dizziness and weakness of her extremities. PA Mary Stults noted Claimant was not displaying any signs of symptoms of a concussion at the time. On neurological examination, Claimant was alert and oriented with no focal neurological deficits and was ambulatory with no problems. A CT scan of the head revealed a small to moderate right parietal subgaleal hematoma with no evidence of acute bony or acute intracranial injury, mass lesion, extra-axial fluid collection or acute hemorrhage, or acute ischemia or infarction. Incidental benign right basal ganglia calcification was noted. A cervical spine x-ray revealed facet arthrosis with no evidence of an acute fracture or subluxation. Claimant was diagnosed with closed head injury, subgaleal hematoma, and cervical sprain. She was prescribed Tylenol, discharged from care, and ordered to follow-up with her primary care physician.

11. A Kaiser note dated March 6, 2013 indicates Claimant’s daughter called Kaiser from the St. Anthony Hospital emergency room regarding the injury. It was noted Claimant was not having significant symptoms at the time other than a mild headache.

12. Claimant subsequently underwent evaluation and treatment at Concentra. On March 7, 2013, Claimant presented to Matt W Slaton, PA-C with complaints of pain in the head, upper right back, right shoulder and neck. Claimant reported falling backwards and hitting the back of her head and right side. On examination, PA Slaton noted decreased neck range of motion with pain on the posterior occipital temporal area and palpable muscular tenderness bilateral trapezius through the scapular region. Neurologic exam was normal. There was limited range of motion in the trunk. Palpation of the spine was

positive for pain at C7-T9 on the right. Cervical range of motion was decreased with pain. A large “goose egg” was noted over the occipital temporal area. PA Slaton gave the following assessment: concussion with no loss of consciousness, contusion of the thorax, trapezius strain, thoracic strain, and cervical strain. He prescribed Claimant Skelaxin and tramadol and removed Claimant from work.

13. Claimant returned to PA Slaton on March 11, 2013 reporting improvement in back pain but continuing stiffness and soreness in her neck. Claimant reported feeling better and that her symptoms were improving. PA Slaton referred Claimant for physical therapy and released Claimant to modified duty with restrictions of no lifting more than 20 lbs., no walking or standing more than 45 minutes per hour, no reaching over shoulder height, and sitting 25% of the time.

14. On March 13, 2013 Employer offered Claimant modified duty within her temporary restrictions.

15. On March 25, 2013 Claimant sought treatment at the emergency department of Lutheran Medical Center with complaints of headaches and dizziness and memory loss. Memory and speech were noted as normal. Claimant was diagnosed with post-concussion syndrome and a cervical strain and referred back to her workers’ compensation provider.

16. Later on March 25, 2013 Claimant saw Gary A. Landers, M.D. at Concentra reporting dizzy spells and periods of confusion. A CT scan of the brain with no contrast was obtained. The impression was: 1. No acute intracranial abnormality detected. No evidence for skull fracture or acute intracranial hemorrhage; and 2. Suspect changes of mild chronic microangiopathic ischemic disease. X-rays of the cervical spine revealed multilevel sclerotic facet arthrosis with no fractures. Dr. Landers assessed post-concussion syndrome and increased Claimant’s restrictions to no standing or walking for more than four minutes per hour.

17. A physical therapy note from Concentra dated April 10, 2013 notes Claimant had thus far attended seven sessions. Claimant was reporting throbbing and tingling on the right side of her head, neck pain, and dizziness.

18. On April 11, 2013 Claimant again presented to the emergency department at Lutheran Medical Center with complaints of dizziness. Claimant felt as though the muscle relaxants she was taking might be too strong. Examination of the neck revealed normal range of motion and her head was atraumatic. A CT scan of the head was obtained and compared to the March 25, 2013 CT scan. No significant intracranial abnormalities were noted. The emergency department physician opined Claimant was likely suffering from post-concussion syndrome but may also be feeling dizzy due to muscle relaxers. Claimant was diagnosed with dizziness and dehydration and discharged.

19. On April 12, 2013 Claimant presented to Julie Parsons, M.D. at Concentra with complaints of dizzy spells, increased forgetfulness and emotion, anxiety, depression, and

continued head and neck symptoms and balance issues. On examination Dr. Parsons noted an antalgic gait and positive Romberg's test. Dr. Parsons further noted Claimant could not do finger-to-nose without overshooting dramatically, trouble with diadochokinesis, and an inability to walk heel-to-toe. Dr. Parsons assessed Claimant with a closed head injury, concussion, and cervical strain. She restricted Claimant to working 100% seated duty and instructed Claimant to stop physical therapy. Dr. Parsons referred Claimant to John Burris, M.D., a physical management specialist. Dr. Burris is Level II accredited.

20. Claimant presented to Dr. Burris on May 14, 2013. Regarding the mechanism of injury, Claimant reported striking her back and the back of head on the floor, losing consciousness, and waking up while seated in a chair. Claimant complained of 8/10 throbbing pain and burning sensation throughout her head and neck, dizziness, and difficulty ambulating. Dr. Burris noted Claimant appeared very somatically focused and displayed moderate pain behaviors. On examination, Dr. Burris noted Claimant appeared to be somewhat unsteady on her feet. Her head was atraumatic and neck displayed full range of motion. Neurologic exam was grossly intact. Dr. Burris diagnosed Claimant with a cervical strain and scalp contusion. He recommended Claimant undergo an ear, nose and throat ("ENT") evaluation to assess her vestibular system, as well as a neurologic evaluation. Claimant's work restrictions of 100% seated work continued.

21. On May 16, 2013, Stanley H. Ginsburg, M.D. performed a neurological Independent Medical Examination ("IME") at the request of Respondents. Dr. Ginsburg is Level II accredited. Claimant reported falling backwards and hitting her head on concrete and being rendered unconscious. Claimant complained of headache on the posterior right with pounding/tingling/burning, neck discomfort, poor balance, and difficulty ambulating. Dr. Ginsburg noted,

> When I asked the patient to ambulate, she staggered even with casual ambulation and staggered even more prominently when I asked her to tandem or assume a Romberg position. This occurred in a way that would cause her to fall if her balance were not good. I believed that her gait disturbance is, from my observation, not organic.

(R. Ex G, p. 116).

22. Dr. Ginsburg reviewed Claimant's medical records, including a CT scan of Claimant's brain and cervical spine imaging. He documented that motor examination was unremarkable except for finger-to-nose testing which demonstrated some marked abnormalities that were corrected when Claimant's eyes were open, which he felt was nonorganic. Dr. Ginsburg diagnosed Claimant with a work-related minor closed head injury and a cervical strain with minor radicular symptomatology. He noted that he was unsure if Claimant was rendered unconscious as a result of the fall, so it may be regarded as post-concussion syndrome. He further noted there were complaints of memory issues that were not expressed frequently, so he was unsure of the significance. Dr. Ginsburg concluded that there was no evidence of myelopathic process and the restriction of

Claimant's neck movement was variable and not accompanied by neurological abnormalities on examination with some degree of pain behavior. He opined, "Clearly her gait disturbance is not organically based, according to my observations, but one cannot rule out the possibility she has post-concussion vertigo, which would probable (*sic*) ear related rather than brain related." (Id. at p. 118). Dr. Ginsburg recommended performing an MRI with careful posterior fossa views. He stated that if the MRI results were negative, he recommended obtaining an opinion from ENT consultant due to Claimant's persistent symptoms and possible consideration of some vestibular therapy. He recommended Claimant continue conservative therapy for her cervical strain.

23. On May 23, 2013, Claimant presented to Level II accredited Alan Lipkin, M.D. for an ENT evaluation. Claimant reported to Dr. Lipkin falling and hitting the right side of her head on the concrete floor and losing consciousness for an unspecified amount of time. Claimant reported that she began noticing dizziness about a week after the incident. She also complained of occasional right-sided ringing tinnitus. On examination, Dr. Lipkin noted Claimant walked using a walker with wide-based station and unsteady without lateralization. Dr. Lipkin performed a series of tests that revealed bilaterally symmetrical sensorineural hearing loss, but concluded that the test findings revealed that it was unlikely Claimant sustained a catastrophic vestibular injury. He diagnosed Claimant with vertigo, tinnitus, dizziness and giddiness, and cerumen impaction. Dr. Lipkin recommended that some additional vestibular testing be completed on a later date and that Claimant return after the testing had been completed.

24. Claimant underwent a neurological evaluation with Level II accredited Eric K. Hammerberg, M.D. on June 20, 2013. Claimant reported losing consciousness during the work incident. Her major symptoms were dizziness and light-headedness. Claimant complained of having trouble walking using a cane and that her head had a hot and burning sensation. Dr. Hammerberg's impression was: post-traumatic headache with cervical strain and post-traumatic vertigo. He recommended Claimant take analgesic medication as needed and continue physical therapy for the cervical spine. He opined that Claimant's major problem at the time appeared to be post-traumatic vertigo and stated he would defer to Dr. Lipkin for further evaluation and treatment in that regard.

25. On June 26, 2013, Claimant underwent a vestibular evaluation by Cara Fiske, Au.D. Dr. Fiske noted the following tests were performed: video onystagmogram; fistula test; brainstem evoked response; electrocochleography; spont nystag test with eccentric gaze fixation; nystag with red; positional nystag test, minimum of 4 positions; with red optokinetic nystag test; biodirectional foveal/peripheral stimulation, with red oscillating tracking test. All testing could not be completed due to Claimant's inability to stand without assistance and her keeping her eyes open. Dr. Fiske noted all gaze, positional and fistula tests were within normal limits. The right Dix-Hallpike was within normal limits, however the left could not be completed due to neck pain. Saccades and pendular tracking were abnormal. Bilateral bithermal air caloric stimulation revealed robust and symmetric labyrinthine function. Claimant was to follow-up with Dr. Lipkin regarding the test results.

26. On July 2, 2013, Claimant saw her PCP Heather Shull, M.D., at Kaiser for an annual exam. Claimant presented without acute complaints. It was noted Claimant stopped taking citalopram and her pain and depression were feeling better.

27. On July 23, 2013, Claimant returned to Dr. Lipkin, who reviewed the recent balance tests. He noted the Brainstem Auditory Evoked Response test and electrocochleography were normal. The electronystagmography was limited testing due to mobility and neck issues. Dr. Lipkin noted that symmetrical calorics and tracking problems could suggest central issues. Audiometrics showed symmetrical sensorineural loss. Dr. Lipkin's assessment continued to be vertigo, tinnitus, dizziness and giddiness, and sensorineural hearing loss. He again opined that it was unlikely Claimant sustained a catastrophic vestibular injury. He noted that if Claimant's problems persisted, the next step would be vestibular rehabilitation/physical therapy.

28. From August 20, 2013 through March 25, 2014 Claimant attended multiple sessions of vestibular rehabilitation/physical therapy at Select Physical therapy. From August 20, 2013 through March 25, 2014 Claimant presented for vestibular rehabilitation/physical therapy for a total of eighteen (18) visits. Rehab/therapy consisted of: Gait Training, Active Assistance Range of Motion Activities, Active Range of Motion Activities, Adaptive Equipment Education, Client Education, Home Exercise Program, Manual Range of Motion Activities, Manual Therapy Techniques, Neuromuscular Re-Education, Passive Range of Motion Activities, Proprioceptive/Closed Kinetic Chain Activities, Soft Tissue Mobilization Techniques, Stretching/Flexibility Activities, Therapeutic Activities, and Therapeutic Exercise. The physical therapist noted, "Pt seems to ambulate with less unsteadiness and less need for support when unaware that she is being observed versus requiring contact guard when observed." (R. Ex. J, p. 149). As of March 25, 2014, Cliamant was demonstrating slight improvement with decreased dizziness and improved balance and was discharged from care.

29. Dr. Burris reexamined Claimant on August 27, 2013. He noted that an August 12, 2013 brain MRI was essentially normal, but did identify some nonspecific white matter changes with no evidence of acute abnormalities. MRI of the cervical spine obtained on August 12, 2013 showed some degenerative changes with a small shallow disk protrusion at C6-7, but no clear evidence of foraminal stenosis. Dr. Burris noted that the most recent diagnostic testing was somewhat indeterminate as to why Claimant continued to have the severity of her reported symptoms. He opined that it may be possible Claimant has whiplash syndrome from the work injury, which could attribute much of her complaints, including dizziness. Dr. Burris recommended Claimant undergo an evaluation with an interventional spine specialist and noted she may be a candidate for facet injections or medical branch blocks. He referred Claimant to John T. Sacha, M.D. Dr. Sacha is Level II accredited.

30. Claimant first presented to Dr. Sacha on September 16, 2013. Dr. Sacha noted complaints of right neck pain, right-sided headaches, and mild dizziness. He noted there were no problems with concentration, memory or following directions. On examination, Dr. Sacha documented moderate to severe pain behaviors and a non-physiologic antalgic

gait. Dr. Sacha's impression was: cervical facet syndrome with headaches and reactive depression that is multifactorial. He opined there was no evidence of a closed-head injury at this point. He agreed with Dr. Burris that Claimant has cervical facet syndrome and dizziness secondary to that, which he noted happens frequently with whiplash syndrome. Dr. Sacha recommended Claimant take antidepressants and undergo a trial of cervical facet injections.

31. At a follow-up evaluation on October 7, 2013, Dr. Sacha noted Claimant decided not to proceed with the facet injections and thus was likely at MMI. He noted moderate pain behaviors and that Claimant's gait was normal when using her cane. Dr. Sacha remarked that Claimant was now seven months into her injury and had less than 10% improvement in her overall symptoms by her own report. Dr. Sacha's final impression was cervical facet syndrome with headaches and dizziness secondary to that. He discharged Claimant from his care and noted facet injections could be performed as maintenance treatment in the event Claimant chose to proceed with the injections at some future point.

32. On October 8, 2013, Claimant saw Dr. Burris and reported improvement with therapy. Dr. Burris noted that Claimant appeared to be responding to change of medicines and conservative measures directed at her neck. Work restrictions were changed to sitting 90% of the time.

33. Dr. Burris placed Claimant at MMI at a follow-up evaluation on November 19, 2013. Claimant reported improvement in her symptoms with no new complaints. She continued to note some dizziness when looking up and 3/10 neck pain and mild headaches. Dr. Burris noted, "Dr. Sacha describes (*sic*) all of her symptoms to cervical facet syndrome and therefore to avoid duplication of impairment, only a cervical spine impairment will be performed." (R. Ex. D, p. 77). Using the AMA Guides, Dr. Burris assigned a total 10% whole person impairment, comprised of 4% impairment under Table 53(II)(B) and 6% for range of motion deficits. He opined Claimant reached MMI as of November 19, 2013 for her work-related neck injury. Permanent work restrictions were assigned to limit overhead activities that cause an extension of the neck and exacerbation of symptoms. Claimant was to sit 25% of the time. As maintenance care, Dr. Burris recommended finalizing her remaining physical therapy sessions, medication management for three to six months, and injections within the next six months if Claimant changed her mind and wished to proceed with the injections. He noted no other maintenance care was otherwise required.

34. On January 9, 2014, Employer provided Claimant with modified duty within her temporary restrictions.

35. On June 5, 2014, Claimant underwent a DIME with Ronald J. Swarsen, M.D. Dr. Swarsen gave the following assessment: trip and fall; closed head injury with concussion without loss of consciousness; dizziness, likely vestibular in origin-partially treated; neck sprain with persistent pain; persistent head pain and point of impact; and symptoms magnification, depression with anxiety. He opined that Claimant was not at MMI with respect to her head and neck injuries. He provided a provisional impairment rating of 24%

whole person of the cervical spine (consisting of 21% for range of motion deficits and 4% for cervical specific disorder). He noted he did not provide a provisional mental impairment rating as Claimant was not at MMI and he did not have the applicable records for review. Dr. Swarsen recommended Claimant complete vestibular therapy and undergo a follow-up ENT evaluation. He noted Claimant's symptoms likely included a psychological component that had not yet been addressed comprehensively, and recommended Claimant undergo evaluation with a Spanish-speaking psychologist and at least six to eight sessions of counseling. He further recommended a one-time consultation with an ophthalmologist. Dr. Swarsen noted future medical needs of physical therapy twice a week for two months, medication for the next three to six months, and facet injections in the next six months.

36. On July 21, 2014, Claimant had declined to return to modified duty, but was still considered an employee of Employer.

37. On September 5, 2014, Claimant again declined to return to modified duty and voluntarily resigned from Employer.

38. On September 16, 2014, Claimant sought treatment at Swedish Medical Center with complaints of dizziness, headaches, unsteady gait and memory loss. CT scans of the head and neck revealed of the head revealed coarse calcification within the inferior aspect of the right basal ganglia with differential diagnosis and atherosclerotic disease without hemodynamically significant stenosis. There was atherosclerotic disease without hemodynamically significant stenosis.

39. On September 29, 2014, Stephen A. Moe, M.D. performed a psychiatric IME at the request of Respondents. Dr. Moe is board certified and Level II accredited. Based on his interview of Claimant and review of Claimant's records, Dr. Moe concluded that Claimant's current complaints suggesting multiple disabling neurological problems could not be explained by the physical injuries from the March 6, 2013 work injury. Dr. Moe explained that the available data was insufficient to either definitively determine or rule out a concussion, but that if Claimant did suffer a concussion, it was at the mildest end of the spectrum of severity, given that the impact did not result in loss of consciousness and it resulted in no more than a very brief period of a change in her cognitive functioning. Dr. Moe opined that Claimant's injury could not account for the problems to which Claimant attributes her disability. He opined that any probable neck injury was mild and not likely to cause significant pain or a sense of dizziness that persists for 18 months post-injury. He noted that, while vestibulopathy has not been definitively ruled out, if present, it was likely mild.

40. Dr. Moe noted Claimant reported multiple symptoms in the absence of any particular illness or injury, that her subjective experience of symptoms at times involved unusual characteristics, that a number of her pre-injury complaints were similar to those that have been her focus since the work injury, and that Claimant has previously expressed the desire to be declared disabled. He opined that Claimant suffered a mild work-related injury that subsequently grew into widespread symptoms and severe

disability, which represented an idiosyncratic, rather than normative, outcome. He opined that a reaction to a return to work and anxiety about her symptoms resulted in the transformation from symptoms that were limited in scope and expected to be time-limited to a presentation suggestive of profound disability.

41. Dr. Moe further opined that Claimant does not suffer from a psychiatric disorder manifested in overt depressive or anxiety symptoms. He noted that the contribution of non-injury factors to Claimant's current symptoms and impairment is great. He concluded that Claimant's current complaints are not caused by the work injury and strongly doubted that any interventions are likely to be of benefit so long as Claimant's claim remains unresolved. He disagreed with Dr. Swarsen that Claimant's condition is related to the work injury, opining that her symptoms were largely the product of reversible psychological factors.

42. On November 12, 2014, Douglas C. Scott, M.D. performed an IME at the request of Respondents. He assessed Claimant with a closed heard injury with possible post concussive syndrome; subgaleal hematoma without skull fracture, intracranial hemorrhage, or intracranial space occupying lesion with residual skin sensitivity; cervicothoracic muscle strain; and possible post traumatic vertigo with balance issues. He opined that Dr. Swarsen did not err in finding Claimant was not MMI or in his provisional impairment rating.

43. On November 21-22, 2014 surveillance video was obtained of Claimant. Claimant is observed at times walking without assistance and at other times using a cane, wall or shopping cart for assistance.

44. Dr. Sacha reviewed the video surveillance of Claimant as well as Dr. Swarsen's DIME report and issued a report dated April 29, 2015. He noted that on the surveillance video, Claimant had "quite good gait pattern was able to bend and twist without difficulty and hold balance." (R. Ex. K, p. 166). Dr. Swarsen remarked that Claimant's presentation in the surveillance video was clearly different than when he saw Claimant on April 22, 2015. He concluded, "This patient clearly has a significant nonphysiologic presentation in the office compared to what is viewed on the surveillance video. The patient clearly has no evidence whatsoever of any problems with balance or difficulty standing or walking, and it calls into question many of this patient's complaints." (Id.) He opined that "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim." (Id. at 168).

45. On June 11 and June 30, 2015, Claimant presented to Lupe Ledezma, Ph.D. for a Spanish-speaking psychological evaluation, per the referral of Dr. Sacha. Dr. Ledezma wrote a report dated June 30, 2015. Claimant's chief complaints included depression, anxiety, cognitive issues, and physical symptoms. Dr. Ledezma noted that Claimant was very unsteady and swayed while standing or walking and held onto furniture or walls when walking. She was able to recall 3/3 words on immediate recall. After 30 minutes, she remembered 1/3 words with two intrusions. She was unable to perform simple or complex mental calculations. Her judgment abilities and abstraction abilities were poor. Her short-

term memory skills were fair, but her mental control skills were poor. She was able to follow simple and multiple-step commands well. Dr. Ledezma further noted that on the physical symptoms scale Claimant scored in the 94th, 97th and 90th percentile indicating that she focuses mainly on her subjective pain complaints and deems them the most limiting factor in her life. Depressive and anxiety scales were also high, showing lack of motivation and fear of further pain. Her dependency score was in the high range. She noted Claimant is pessimistic about her future and feels she is incapable of managing her problems and looks to others for help. She is passive and unassertive. Dr. Ledezma wrote that, of greater concern, is that Claimant may be passive in her approach to her recovery and functioning, leaving it to others to "cure" her. She lacks trust in her providers and does not feel they are acting in her best interest. She noted significant psychological overlay to Claimant's physical issues. Dr. Ledezma diagnosed Claimant with major depression, moderate; generalized anxiety disorder; and psychological factors affecting other medical conditions. She recommended Claimant undergo psychotherapy, continue antidepressant medication, and undergo neuropsychological testing in Spanish to determine the presence of a neurocognitive disorder and provide treatment recommendations.

46. On June 25, 2015, Dr. Sacha issued an addendum after reviewing Claimant's medical records, Dr. Swarsen's DIME report, and video surveillance of Claimant. He opined, "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim." (R. Ex. K, p. 170). He agreed that Dr. Burris provided appropriate care at all points. Regarding whether he agreed or disagreed with Dr. Swarsen's DIME conclusion, Dr. Sacha stated "I wholly disagree with Dr. Swarsen, and my guess is that Dr. Swarsen did not have all the medical records or did not pick up that the patient has such a non-physiologic presentation, and he may not have seen the surveillance video on this patient." (Id. at 171). Dr. Sacha concluded Claimant was at MMI and did not require further medical care, including any further vestibular physical therapy and rehabilitation.

47. Claimant continued to see Dr. Ledezma on July 23, September 1, September 17, and October 8, 2015. She continued to report headaches, dizziness and cognitive issues, with intermittent improvement. Dr. Ledezma continued with her same recommendations.

48. On November 3, 2015, Dr. Hughes performed a follow-up DIME, as Dr. Swarsen had retired in the interim. A Spanish interpreter was present at the evaluation. As part of his evaluation, Dr. Hughes reviewed Claimant's medical records, including, *inter alia*, the March 6, 2013 emergency room report, Concentra records, Dr. Lipkin's May 23, 2013 report, the neurological reports of Drs. Ginsburg and Hammerberg, Dr. Burris' reports, Dr. Swarsen's DIME report, Dr. Moe's report, Dr. Scott's report, Dr. Sacha's reports and Dr. Ledezma's June 30 and July 23, 2015 reports. Regarding the mechanism of injury, Claimant reported tripping and falling over computer cables and having progressive symptoms of hearing voices but not being able to see. Claimant continued to report right-sided 4/10 head pain, balance issues, depression and anxiety. Dr. Hughes noted Claimant reported to him having no past history of traumatic injuries, headaches, neurological conditions or depression. He remarked Claimant's history understated the

severity of her preexisting conditions, which included active problems of depression, fibromyalgia, and headache disorder.

49. On physical examination, Dr. Hughes noted Claimant had a flat affect and neutral mood but did not exhibit word-finding difficulties, bizarre thought process or flights of ideas. Claimant reported tenderness to palpation over her right temporal head. Regarding the cervical spine, Dr. Hughes noted,

> There is a rather remarkable amount of discrepancy between informally observed and formally measured cervical spine ranges of motion, with formal measurements being fairly consistent with those obtained by Dr. Swarsen, using dual inclinometers, with cervical spine flexion and extension maximally 32 and 28 degrees, right and left lateral flexion 26 and 25 degrees, right and left rotation of the head and neck 37 and 34 degrees. Informally, I observed full right and left rotation of the head and neck as well as full flexion chin to chest.

(R. Ex. O, p. 236).

50. He further noted bilateral finger-nose testing was intact, and Romberg testing was grossly abnormal with Claimant demonstrably unable to stand without her cane. Under general appearance, Dr. Hughes noted, “She ambulates with a cane in her right hand, lurching back and forth and nearly falling in the clinic. This is quite variable from observed ambulation out to her car, although she had the assistance of a young female who walked with her.” (Id.)

51. Dr. Hughes reviewed surveillance video of Claimant from November 21 and November 22, 2014, noting the video showed ambulation without difficulties and without a cane to mailbox, and ambulation using a cane and then in the store walking briskly without cane while holding onto her cart. He remarked that he did not observe Claimant demonstrating any problems with balance while getting items off shelves and putting them into the cart without use of her cane.

52. Dr. Hughes gave the following assessment:

> (1) Past medical history of a depressive disorder, on citalopram, as documented in Kaiser notes. (2) Past medical history of headaches. (3) Work-related fall with multiple injuries sustained on March 6, 2013. (4) Closed head injury, secondary to #3, with documented symptoms consistent with a post-concussive syndrome, but without objective evidence of residuals of traumatic brain injury. (5) Cervical spine sprain/strain, resolved. (6) Progressive balance problems of unclear etiology with psychiatric features that suggested to Dr. Moe that she had a conversion disorder. (7) Hypothyroidism.

(Id.)

53. Noting "[Claimant] presents with a perplexing medical history that contains inconsistencies and non-documentation of persistent organic pathology," Dr. Hughes agreed with Dr. Sacha that residuals of all of Claimant's injuries reached MMI by April 29, 2015. (Id.) He opined that Claimant's previous cervical spine impairment had resolved, as there was no mention of cervical spine pain in recent medical records, during his interview of Claimant or on Claimant's pain diagram completed for his evaluation. He added, "This is further clouded by rather extreme inconsistencies between informally observed and formally measured cervical spine ranges of motion." (Id.)

54. Dr. Hughes stated he could not provide a medical explanation for Claimant's progressive balance problems. He wrote,

> I agree with Dr. Moe that findings are "bizarre" and perhaps consistent with a conversion disorder. I am not sure if a permanent impairment rating can be assigned for a conversion disorder, as it is virtually indifferentiable in many cases from exaggeration of signs and symptoms for the purpose of secondary gain. I would leave this up to a board certified psychiatrist to sort out. It does not appear that Dr. Moe felt that [Claimant] had sustained a permanent psychiatric impairment as a result of her injuries of March 6, 2013.

(Id. at 237)

55. Dr. Hughes concluded that Claimant sustained no permanent impairment as a result of the March 6, 2013 work injury. He reiterated that Claimant's headaches and depression were well-documented pre-existing problems, and "I really cannot objectify any changes in her condition that [Claimant] has sustained as a result of her injuries of March 6, 2013." (Id.) Dr. Hughes stated he agreed with Dr. Ledezma's recommendations for further counseling, but explained that the need for such psychological treatment was not attributed to the March 6, 2013 work injury. He noted that although much of Claimant's treatment appeared to be reasonable, it did not appear to be related to Claimant's March 6, 2013 work injury.

56. On November 12, 2015 Respondents filed a Final Admission of Liability ("FAL") admitting for $25,186.20 in temporary benefits ending April 28, 2015, but zero percent rating for permanent impairment benefits. Claimant objected to the FAL and applied for a hearing to challenge the DIME.

57. Claimant returned to Dr. Ledezma on December 14, 2015 Ledezma reporting decreased neck pain and stiffness but poor mood and increased depressive symptoms. Claimant feared she would worsen in the near future. Dr. Ledezma continued to recommend neuropsychological and follow-up, pending authorization of continued treatment.

58. Claimant continued vestibular rehabilitation through her personal health insurance with Heather Campbell, P.T. and other therapists. Claimant began treating with PT Campbell on May 5, 2016. Ms. Campbell's impressions included impairment in deceleration of head, adversely affecting gait stability; suggestion of otolithic impairment and central organization impairment; persistent recurrent right head scalp dysesthesia and headache with balance challenges due to co-contraction of neck musculature. Claimant presented for physical therapy on May 12, May 26, June 2, June 6, and June 16, 2016.

59. On September 16, 2016 PT Campbell issued a written report at the request of Claimant's daughter. PT Campbell reviewed records provided to her by Claimant's daughter, as well as Dr. Benson's reports, an IME report of Dr. Moses, and surveillance video of Claimant. She noted that Claimant's findings are consistent with reported head impact injury resulting in balance, oculomotor and processing disorders. She opined that Claimant's significant emotional overlay does not negate the underlying physical and functional impairments. PT Campbell concluded that the four months of physical therapy with her had resulted in improvements in various areas. She opined that Claimant remains impaired in deceleration of head, adversely affecting gait stability, suggesting otolithic impairment and central organization impairment; scalp dysesthesia and headache with balance challenges. PT Campbell recommended continued vestibular rehabilitation therapy. She noted that she observed the surveillance video of Claimant and Claimant's gait pattern and reliance on touch or support from a cane or grocery cart was the same gait pattern she observed in her clinic.

60. On June 9, 2016, Randall Benson, M.D. performed a neurological IME at the request of Claimant. He later issued a report. Dr. Benson reviewed Claimant's medical records and conducted an advanced MRI including Susceptibility Weighted Imaging (SWI), Gradient Echo (GE), Quantitative Diffusion Tensor Imaging (DTI), and Fractional Anisotrophy (FA). Claimant reported issues with memory, depression, increased anxiety, balance issues, light aversion, occasional tinnitus, and sleeping issues. Dr. Benson concluded that Claimant sustained traumatic brain injuries and continues to experience symptoms as a direct result of the work injury. He outlined five specific areas in support of his conclusion:

1) Biomechanical information along with the immediate alteration in sensorium. Dr. Benson summarized initial medical reports which noted complaints of blurry vision, dizziness, cervical spine pain, and memory loss, which he stated were characteristic of a TBI.

2) Post-traumatic symptoms, including those that are now permanent. Dr. Benson noted that Claimant endorsed various cognitive, psychological and physical symptoms including, *inter alia*, lower thought processes, issues with memory and multitasking and focus, fatigue, increased irritation, depression, balance issues, ringing in her ears, changes in vision, and gait disturbances.

3) Neurobehavioral findings on examination. Dr. Benson noted exam findings of decreased cognitive efficiency, mild PTSD, poor balance with retropulsion, and tremor, along with evidence of right hemisphere damage such as decreased empathy, social interaction and general change in personality.

4) Dr. Perrillo's August 26, 2016 neuropsychological assessment.

5) Neuroimaging. Dr. Benson opined that the combined findings of the imaging showed an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres.

61. On June 23, 2016, Richard J. Perrillo, Ph.D. performed a neuropsychological IME at the request of Claimant. Dr. Perrillo issued a report dated September 19, 2016. Part of the assessment was conducted with an interpreter. Claimant's results were compared with updated "NeuroNorma" norms for Spanish-speaking individuals. Dr. Perrillo diagnosed Claimant with: mild/moderate brain dysfunction and damage with significant changes in white matter affecting efficient brain connectivity and some aspects of prefrontal and frontal functioning consistent with the effects of brain damage and inconsistent with baseline compared to normal brain at Claimant's age. He noted that Claimant gave optimal or adequate effort on neuropsychological measures. Dr. Perrillo opined that Claimant is 100% disabled on both a neuropsychological and psychological level. He explained that loss of consciousness is not a clinical requirement to establish a concussion. Dr. Perrillo opined that the radiological scans as performed by Dr. Benson as well as the previous MRI are positive and consistent with Claimant's functional brain impairment results as revealed by her current neuropsychological test data. He concluded that, by all neuropsychological and neurological standards of definition, Claimant continues to suffer from mild brain damage, which does not appear to be resolving with persisting mild/moderate organic brain dysfunction and changes as evidenced by the objective neuropsychological test results. Dr. Perrillo noted that Claimant's scores showed Claimant has "accelerated aging" with a significant risk for early dementia. He opined that Claimant's brain functioning is worse than the average 70 year-old with normal brain functioning.

62. Dr. Perrillo noted that there was nothing in Claimant's background that would have predicted such cognitive changes other than her brain injuries and the overlapping effects of aging. He further noted that the accident parameters, as well as the current comprehensive examinations and the results from the various scans including DTI as performed by Dr. Benson were consistent with the effects of axonal shearing, axonal bundling and cellular disturbances leading to 'slowness' of response times and information processing speed. Dr. Perrillo opined that Claimant should start with neuroexercise as soon as it is reasonable, as well as psychological intervention for moderate anxiety and depression including PTSD.

63. On August 24, 2016, X.J. Ethan Moses, M.D. performed an IME at the request of Claimant. Claimant reported to Dr. Moses that she fell and struck the right side of head on ground and lost consciousness for maybe 10-15 minutes. She reported that she could

hear people around her at the time but could not see them, and that she could not remember much regarding what happened for the next three hours or so. Claimant complained of 4/10 head pain with burning and tingling sensations, memory loss, blurry vision in the right eye, and a balance disorder. Dr. Moses reviewed medical records, physically examined Claimant and gave Claimant a psychological assessment and functional assessment. His assessment was: head contusion resulting in occipital neuralgia; mild traumatic brain injury resulting in diffuse axonal injury noted on MRI with DTI causing memory loss, vertigo and emotional disturbances; cervical sprain aggravating pre-existing facet arthrosis; and symptom magnification, likely a combination of culturally normative expressions of loss and function, psychological factors adversely affecting recovery, and a pre-existing desire to discontinue working.

64. Dr. Moses opined that, while it was clear some symptom magnification was present, Claimant was inadvertently magnifying her symptoms in order to receive the care she believes she needs. He noted that surveillance video provided clear evidence of Claimant's need for assistance with ambulation at all times and showed Claimant stumbling several times in precisely the same way she stumbled during his evaluation. Dr. Moses agreed with Dr. Ledezma that Claimant is experiencing psychological distress due to physical limitations and pain, which he noted presents a psychological barrier to recovery and is likely heightened by her emotional disturbance due to her traumatic brain injury and possibly compounded by her desire to discontinue working.

65. Regarding the reliance on MRIs with DTI, Dr. Moses noted that the current MTG for traumatic brain injuries do not currently recommend MRIs with DTI to diagnose mild traumatic brain injuries because there were no studies validating their clinical use to differentiate with mild traumatic brain injury patients with cognitive deficits from those without. Dr. Moses noted, however, that the MTG were last revised November 2012, and since that time there have been multiple studies demonstrating the usefulness and effectiveness of MRIs with DTIs in diagnosing and stratifying the severity of mild TBI. He opined that the MRI with DTI performed by Dr. Benson provides significant evidence of the physiological basis for Claimant's reported symptoms. He remarked that the opinions of Dr. Moe and Dr. Hughes may have been different if they had access to these results, and if a neuropsychological evaluation had been accomplished.

66. Dr. Moses concluded that Claimant's current functional deficits are proximately related to the March 6, 2013 work injury. He opined that Claimant likely reached MMI for her aggravated cervical facet arthrosis, unless Claimant desired to undergo the injections previously recommended. He further opined that Claimant was not at MMI for her other conditions and recommended additional evaluation and treatment in form of a consultations with a neuro-ophthalmologist, a physical medicine and rehabilitation specialist with traumatic brain injuries, neuropsychological testing, and a functional capacity evaluation. He assigned a 24% whole person provisional impairment rating consisting of 15% for the cervical spine and 10% for loss of function due to the brain injury.

67. On September 15, 2016, Dr. Benson performed a neurobehavioral evaluation. Claimant reported hitting her head and her first memory being waking up in a chair with people around her. Claimant reported she could not see for the first 4-5 minutes and when her sight returned it was blurry. Dr. Benson noted that his examination revealed decreased cognitive efficiency; mild PTSD; evidence of hemorrhage in an area of brainstem (lack of balance/retropulsion); evidence of R-hemisphere (frontal/parietal) damage (decreased empathy, decreased social interaction/communication, general change in personality); and binocular visual dysfunction caused by the head trauma. He recommended that Claimant undergo a neuro-optometric evaluation and prescription for prism lenses, as well as a trauma protocol MRI.

68. On October 27, 2016, Dr. Benson issued a comprehensive medical report after reviewing Claimant's medical records. Dr. Benson opined that Claimant sustained a traumatic brain injury and continues to experience symptoms as a result of that injury, as evidenced by biomechanical information, post-traumatic symptoms, neurobehavioral findings, neuropsychological findings, and neuroimaging. Regarding biomechanical information, Dr. Benson explained that the medical records documented evidence of symptoms characteristic of a traumatic brain injury including, but not limited to, headache, blurred vision, dizziness, extremity weakness, cervical spine pain and reduced cervical range of motion, a 2 centimeter "goose egg" over the occipital area, and memory loss. He noted Claimant endorsed most cognitive, psychological and physical symptoms consistent with a traumatic brain injury. With respect to neurobehavioral findings. Dr. Benson noted examination findings included decreased cognitive efficiency, mild post-traumatic stress disorder, poor balance with retropulsion, tremor and evidence of right hemisphere(oval/parietal) damage manifested by increased empathy, social interaction/communication in general change in personality. Dr. Benson summarized and relied on Dr. Perrillo's neuropsychological assessment and his own neuroimaging findings.

69. On January 18 & 20, 2017, board certified Jose M. Lafosse, Ph.D. performed a neuropsychological IME at the request of Respondents. Dr. Lafosse issued a report dated February 7, 2017. Dr. Lafosse, a native Spanish-speaker, conducted the IME of Claimant entirely in Spanish. Claimant reported to Dr. Lafosse being rendered unconscious after falling backwards and hitting her head. Claimant complained of memory issues, depression, lack of motivation and socialization, and difficulty sleeping. She reported not having much difficulty with concentration or slower thinking speeds. Physical complaints included headache, dizziness, disequilibrium, neck pain and blurry vision. Claimant advised Dr. Lafosse that she had no difficulties with activities of daily living. Dr. Lafosse reviewed Claimant's records and identified several perceived issues with Dr. Perrillo's June 23, 2016 report. He noted Dr. Perrillo is not board certified in clinical neuropsychology, only used an interpreter for portions of the evaluation, and did not adequately consider Claimant's status as an older Spanish-speaking Latina female from Mexico with only six years of formal education in a very small farming community school in Mexico. He further noted that Dr. Perrillo provided tests to Claimant in English and had them interpreted by a person rather than using the available testing documents in her native language of Spanish. Further inadequacies noted by Dr. Lafosse included

comparing Claimant's test results to individuals with more and better quality education than Claimant to determine she had lower ability. Dr. Perrillo gave Claimant multiple computer-based tests, requiring the Claimant to respond quickly when she had no previous experience with such technology via computer, gaming system, TV interface or joystick usage.

70. Dr. Lafosse conducted 26 tests, all in Spanish. He performed seven performance validity tests, of which Claimant failed all seven. Dr. Lafosse explained that failure of two or three performance validity tests could indicate malingering and lack of effort. Dr. Lafosse noted that 93% of patients with dementia scored higher than Claimant did, which he opined supports the likelihood of malingering. He opined that Claimant's behavior during testing was disingenuous, with a lot of exaggerated shrugging, opinging of her hands, facial gestures and confused looks. He noted that Claimant's speech was normal and fluid on the first day of testing but markedly slower and more confused on the second day of testing. Dr. Lafosse concluded that Claimant was clearly not performing to her true capability.

71. Dr. Lafosse noted that on language tests conducted in her native language, Claimant was very slow to respond; however, in her normal daily conversation she did not show any signs of word-finding difficulty, nor did she report any word-finding difficulty in her everyday life, which would be expected with the severely impaired score she received on the examination. Claimant failed to even complete the NeSBHIS Block Design test that required her to manually manipulate blocks to create a particular spatial pattern, however she scored in the average range when performing the test for Dr. Perrillo. Dr. Lafosse noted that, when Claimant was aware he was observing her walking, she leaned on the wall with her hand and walked in a cautious manner. When Claimant was unaware he was behind her, she appeared to walk normally with a good and rhythmic pace, then when she became aware he was observing her, she began walking more slowing and her movements became more irregular.

72. Dr. Lafosse concluded that Claimant's premorbid level of intellectual ability is estimated to be in the low average range. Within this context, her current level of cognitive functioning is at least within normal limits as compared to Spanish-speaking Latina women of similar age and education. In light of the empirical evidence of underperformance the Claimant normal range performance may well be an underestimate of her actual ability level. The findings from this evaluation are inconsistent with Claimant's numerous cognitive complaints, and in fact, contradict them. Dr. Lafosse concluded that Claimant may have suffered a concussion, but at almost four years since the date of injury, would no longer be suffering symptoms. He stated several factors that could account for Claimant's prolonged complaints, including depression, somatic symptom disorder, "cognitive and emotional vulnerabilities" mentioned by Dr. Perrillo, pre-existing history of fibromyalgia, iatrogenic effects creating an expectation for prolonged symptomology and litigation. He opined that Claimant demonstrates cognitive functioning within normal limits and at least in the same range as her premorbid cognitive abilities.

73. On July 27, 2017, Dr. Hammerberg issued an addendum report after reviewing additional medical records. Dr. Hammerberg disagreed with the determinations of Drs. Perrillo and Benson. He explained,

> …Dr. Perrillo attributed all of Claimant's neurological symptoms to a traumatic brain injury, apparently believing that the increased T2 signal in the MRI scans represented axonal sheering rather than chronic microvascular ischemia secondary to the patient's hyperlipidemia; he apparently also believed that Dr. Benson had conclusively documented brain injury on the basis of diffusion tensor imaging (DTI). However, diffusion tensor imaging has not gained wide acceptance in the neurological community because, when it comes to evaluation individual patients in whom mild traumatic brain injury is suspected, it cannot distinguish adequately normal from abnormal. It fact, this case is an excellent example of why DTI studies are not helpful – Dr. Benson has apparently convinced himself that the patient has a traumatic brain injury, when in fact she's merely psychiatrically ill.

(R. Ex. U, pp. 22-23)

74. Dr. Hammerberg noted that DTI can have both false positives and false negative results and that the medical community has not embraced the medical studies outside of a research setting. He opined that none of the requests for additional treatment, including traumatic brain injury therapy, vestibular therapy, imaging, and lifetime maintenance and meds, are reasonable or necessary. Dr. Hammerberg opined Claimant did not suffer a traumatic brain injury, she has returned to her pre-injury condition, and her current complaints are not causally related to the March 6, 2013 work injury. He noted that individuals with traumatic brain injuries have cognitive symptoms immediately and then usually slowly improve, especially when the initial imaging studies are entirely normal. He explained that Claimant, to the contrary, has exhibited progressive worsening of her condition with bizarre highly variable symptoms and findings. Dr. Hammerberg stated that Claimant is at MMI without impairment consistent with the opinion of Dr. Hughes.

75. On October 16, 2017, Dr. Moe issued a supplemental report after reviewing additional records, including Claimant's IME reports and Dr. LaFosse's report, and surveillance video. He opined that the breadth, severity, duration and/or treatment-resistance of Claimant's complaints are grossly in excess of what is reasonably ascribed to the injury in question. Dr. Moe explained that such extensive symptomatology argues strongly against a medical explanation and instead to the influence of noninjury factors. He opined that Dr. Benson, Dr. Perrillo and PT Campbell ignore Claimant's transition from one with mid, episodic postural dizziness and a subjective sense of cognitive impairment in the weeks following the injury to someone who has subsequently reported significant balance problems, a dramatically abnormal gait, and severe cognitive deficits. Dr. Moe pointed out Claimant's inconsistent reporting of information i.e. loss of consciousness and loss of vision. He further noted that Claimant's gait was independently judged to be non-

physiological by Drs. Sacha, Ginsburg, himself, Dr. Hughes and Dr. Moses. He also noted that physical therapists commented on various inconsistent behaviors.

76. Dr. Moe explained that DTI research remains at a preliminary research level of understanding, and the papers referenced by Dr. Moses in support of using DTI implicitly or explicitly acknowledge that DTI as applied to concussions remains investigational rather than clinically applicable. Dr. Moe referred to two recent papers that he noted substantiate the reason that DTI is not an accepted diagnostic measure in assessing injured workers in Colorado. Dr. Moe opined that the DTI technique cannot be used diagnostically as of yet, and currently is only an investigational tool with no clinical utility at this time. He stated,

> In brief, whereas DTI is a sensitive measure for detecting changes in the structure of white matter tracts, the findings are highly nonspecific, insofar as all manner of causes can result in such changes, including non-medical conditions such as depression, PTSD, and low socioeconomic status. Hence the interpretation of positive DTI findings following a possible or confirmed concussion remains to be determined.
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> Dr. Benson has sought to use DTI to detect at-most subtle microscopic structural changes to the axons in the brain ostensibly due to a concussion in the presence of grossly-apparent, pre-existing macroscopic axonal damage. Such a mission is impossible.

(R. Ex. W, p. 103)

77. Dr. Moe noted that Claimant's 8/12/2013, 9/17/2014, and 6/9/2016 MRIS were consistent in revealing the presence of white matter hyperintensities, and opined that it was probable the brain MRI findings are due to microvascular disease that resulted in grossly-apparent damage of the white matter. He opined that there is no evidence to support Dr. Benson's claim of evidence of hemorrhage in the brain stem. He disagreed with PT Campbell's assessment that Claimant lacked ability to perceive acceleration when she walked, noting that Claimant invariably is able to sense her movement in space and take appropriate corrective actions when she is about to fall. Dr. Moe again opined that Claimant's current complaints were not caused by the work injury. He concluded that Claimant has no incentive to recover as she would then be expected to return to work, and that her symptoms are largely the product of reversible psychological factors.

78. On November 28, 2017, board certified neuroradiologist Eric Nyberg, M.D. performed an independent medical record review at the request of Respondents. Dr. Nyberg concluded that there was no evidence of TBI on the initial CT scan of March 6, 2013, nor on the several subsequent CT scans and conventional MR examinations. He opined that there was no evidence of TBI or diffuse axonal injury (DAI) on subsequent conventional MR imaging performed by Dr. Benson on June 9, 2016, and that the MR

diffusion tensor imaging (DTI) study by Dr. Benson does not demonstrate evidence of TBI or DAI. Dr. Nyberg stated that the points elucidated by Dr. Benson failed to demonstrate evidence of a TBI in general, DAI in particular, and that his conclusions that perceived findings on the DTI to Claimant's fall is misguided. He opined that the methods used by Dr. Benson are seriously misguided, have no support in the scientific literature, and have no basis in clinical practice. He noted that the neuroradiology community has explicitly warned against the misuse and misinterpretation of the DTI data as committed in Dr. Benson's analysis.

79. On July 6, 2018, Dr. Hammerberg issued an addendum report after reviewing Dr. Nyberg's November 28, 2017 report and Dr. Moe's October 16, 2017 report. He agreed with the conclusions of both Dr. Nyberg and Dr. Moe, noting Claimant's presentation is indistinguishable from someone who is malingering.

80. On August 18, 2018, Dr. Nyberg issued a response to Dr. Benson's response regarding his initial opinion. Dr. Nyberg opined that there is no evidence of TBI on either the clinical MRI performed in 2013, or on the MRI performed by Dr. Benson in 2016. He noted that subcortical changes are highly characteristic for changes related to high blood pressure and high cholesterol, both of which Claimant has had for years. Dr. Nyberg explained that DTI will always pick up abnormalities found in a FLAIR image, as DTI magnifies at a greater scale than FLAIR – meaning if it is on the FLAIR it will show in a DTI – but not necessarily the other way around. Dr. Nyberg noted that calcification was evident, but not edema; without both, there is no evidence of a hemorrhage.

81. Surveillance video of Claimant's was taken September 1-3, 2019 and was viewed and discussed at hearing. Claimant is observed by the ALJ no longer exhibiting retropulsion in her walk. She is exhibit a wide stance when standing or walking. Claimant is observed walking without assistance, shopping by herself for groceries, bending over, looking up, reaching up, and picking up objects. Claimant is observed walking stairs and babysitting. Claimant is observed occasionally using a shopping cart for assistance and on one occasion is accompanied by her cane.

Testimony of Claimant's Experts

Heather Campbell, PT

82. PT Campbell testified at hearing on behalf of Claimant as an expert in physical therapy with a specialization in vestibular rehabilitation. She testified that she saw Claimant on 23 occasions, and Claimant saw someone else at the same clinic on 11 more occasions. A Spanish interpreter was present. PT Campbell testified that she did not see evidence that Claimant's vision and motor skills to control eye balls was evaluated. She acknowledged that Dr. Lipkin performed two tests for the eyes (saccades and smooth pursuit), which were abnormal, but there was no follow-up on Dr. Lipkin's tests. She testified that Dr. Lipkin did not perform a vestibular evoked myogenic potential test – which is a test different from those others administered by Lipkin to test particular function vestibular systems.

83. PT Campbell further testified that Dr. Hughes did not have access to a clinical vestibular testing, gait testing, ocular motor testing and intervention at the time he issued his DIME opinion. She opined that Dr. Hughes erred in failing to have Claimant undergo a neuropsychological evaluation before placing Claimant at MMI. She stated that Claimant's presentation in the November 2014 surveillance video was the same as it was in her clinic. She stated that Claimant's gait presentation is one of the many types of abnormal presentations TBI patients may demonstrate, including retropulsion. She testified that she performed eight tests on Claimant, all industry standard, at which Claimant provided valid effort and provided objective evidence explaining Claimant's gait disorder. She testified that none of the other providers administered the complete battery of tests that she did. PT Campbell opined that her findings are consistent with the reported head impact resulting in balance, oculomotor and processing disorders.

84. PT Campbell stated that Claimant did experience improvement from vestibular rehabilitation, including increased neck range of motion, better response to balance changes, improved gait and walking pattern. She reviewed the September 2019 surveillance and observed Claimant consistently demonstrating a wide base of support, abnormally short stride, swaying. She testified that the video showed Claimant walking unsupported for no longer than about four or five feet, and need about 10 meters for comprehensive and useful actual gait analysis. She opined that Claimant did not have proper physical therapy before she began treating Claimant, as Claimant's gait had not changed in three years. She opined that Claimant did not have adequate and consistent physical therapy before being placed at MMI. On cross-examination, PT Campbell acknowledged that Claimant did not have catastrophic loss of vestibular function although she was displaying catastrophic symptoms.

X. Ethan Moses, M.D.

85. Dr. Moses testified at hearing on behalf of Claimant as an expert in occupational medicine. Dr. Moses is Level II accredited, including teaching courses on how to rate neurologic impairment ratings. Dr. Moses disagreed with Dr. Hughes that there is no objective evidence of residuals of a TBI. He testified that the medical records revealed multiple specialists have found organic findings and the DTI MRI showed diffuse axonal injury which provides clear organic physiological evidence for Claimant's symptoms. Dr. Moses explained that, while the current MTG do not recommend DTI MRI for diagnostic purposes, he believes they will in the future based on his review of the medical literature.

86. Dr. Moses opined that Claimant suffered an acceleration/deceleration-induced closed head injury. He testified that Dr. Hughes erred by not having Claimant undergo neuropsychological testing, explaining that the MTG state that a neuropsychological evaluation should occur in such circumstances. Dr. Moses testified that, even if Dr. Hughes was relying on Dr. Moe's statement regarding a conversion disorder, he would still be required to perform neuropsychological testing for a differential diagnosis. Dr. Moses explained that conversion disorder can be assigned an impairment rating, and opined that if the conversion disorder was proximately related to Claimant's work injury it

therefore could be rated under the AMA Guides using the DOWC worksheet that allows physicians to classify what level of impairment a person suffers as a result of a psychiatric disorder. He clarified that he does not believe Claimant has conversion disorder and further treatment would not be helpful for Claimant. Dr. Moses disagreed the November 2014 surveillance footage showed Claimant walking normally. On cross-examination Dr. Moses testified that Claimant case is atypical in that the normal progression of TBI is "worst first", with the vast majority of symptoms resolving within three days to six weeks, and that very few individuals have residual symptoms beyond that time.

Richard Perrillo, Ph.D.

87. Dr. Perrillo testified at hearing on behalf of Claimant as an expert in clinical and neuropsychology. Dr. Perrillo disagreed with Dr. Hughes' determination that there is no objective evidence of residuals of TBI, noting that Dr. Hughes' ultimate determination was inconsistent with Dr. Hughes' prior statement that there are documented symptoms consistent with post-concussion syndrome. Dr. Perrillo testified that the MTG provide that you need to collect neuropsychological data if there is a differential diagnosis and to determine if the work event has affected the individual's memory, spatial relations, processing speed or reaction time. He disagreed with Dr. Hughes' statement that Claimant's balance problems are of unclear etiology. Dr. Perrillo testified that the etiology was clear based on the radiological findings of Dr. Benson and the neuropsychological data. He further disagreed that Claimant has conversion disorder.

88. Dr. Perrillo explained that because there is no normative data from Mexico, used neurotrauma norms from Spain. He testified that he was satisfied that the language difference was not a barrier to proper administration of his tests. Dr. Perrillo testified that he administered multiple validity tests and that there was no evidence of suboptimal effort, malingering, negative or positive impression management or bias. He stated that his testing revealed issues with Claimant's working memory, processing speed and cognitive proficiency, selective attention deficits, simple focus and immediate recall and auditory recall. There were no impairments in fine and gross motor ability or verbal fluency. Dr. Perrillo testified that his neuropsychological test data demonstrates Claimant's brain experienced axonal shearing along with metabolic and cellular imbalances. He remarked that the age of someone who sustains a TBI is important to the outcome, noting that older individuals have less time and capacity to heal. Dr. Perrillo opined that Dr. Benson's DTI results corroborate his neuropsychological findings. He testified that the November 2014 surveillance video shows imbalance, and retropulsion.

89. Dr. Perrillo opined that Dr. Hughes erred because he did not refer Claimant for a neuropsychological evaluation before placing Claimant at MMI. He explained that the MTG state that individuals with a TBI warrant neuropsychological evaluation, and that it is necessary when there is a differential diagnosis, for proper cognitive rehabilitation and to rule out exaggerating or malingering.

90. Dr. Perrillo disagreed with Dr. LaFosse that a Spanish speaker is required to administer the tests. He stated that Dr. LaFosse was incorrect in his assessment that he

only used an English language test developed in the United States for English-speakers with at least 12 years of education. He explained that he used tests that assumed an education level of 8 years or less. Dr. Perrillo testified that because Claimant has lived in United States for at least 25 it was more appropriate to use neuronorma norms that he used in his testing. Dr. Perrillo testified that, for at least one test, Dr. Lafosse used an African American norm instead of Caucasian norm, which was inappropriate. He testified that Claimant actually passed two of the seven validity tests given by Dr. Lafosse, and at least three were not internally reliable. Dr. Perrillo explained that there are numerous articles that dispute the theory of "worst first." He opined that both his and Dr. LaFosse neuropsychological evaluation demonstrated cognitive impairment and brain damage. On cross-examination Dr. LaFosse stated that he did not take into consideration that before the work injury Claimant had twice requested that her personal doctors determine her disabled because she did not want to work anymore. He testified that such behavior could fit the definition of malingering.

Randall Benson, M.D.

91. Dr. Benson testified at hearing as expert in functional MRI and DTI MRI and susceptibility weight imaging. Dr. Benson testified that he was able to diagnose Claimant with a TBI based on neurological evaluation alone. Dr. Benson explained that the video he took of Claimant in his office shows Claimant lurch backwards when she stops and when she turns. Claimant was videotaped with her knowledge. He stated Claimant's gait was plodding, which is a typical response to the type of neurological problem in Claimant's case. Dr. Benson testified that his observations of Claimant on surveillance footage were virtually identical to her gait at his examination.

92. Dr. Benson explained that DTI-MRI is an imaging test used to identify alteration in axonal structure and is able to detect microscopic changes in white matter constitution. He testified that standard, conventional MRIs do not identify microscopic changes, but rather visible, macroscopic changes in the structure of the brain. DTI scans look at water diffusion at the microscopic level, which is associated with axonal change, an indicator of brain damage. Dr. Benson opined that the findings on various scans revealed: an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres; diffuse axonal injury; evidence of a deep hemorrhage in the brain in an area called the basal ganglia, which is an area of the brain that is critical for motor function; and significant damage to the right hemisphere of Claimant's brain. He opined that there is objective evidence of permanent residuals due to the TBI suffered by Claimant.

93. Dr. Benson testified that CT scans obtained after the industrial injury will not reveal the same findings of the DTI images because CT scans are not sensitive enough to identify the deep hemorrhage or to alteration in the white matter. Dr. Benson testified that there are clinical manifestations of the injury including loss of cognitive efficiency, alteration in Claimant's emotional processing, and motor dysfunction. He stated that the objective data obtained from radiological scans demonstrated "three different hits to the center of the brain", a bleed in the basal ganglia, an area of DTI abnormality of the

cerebellum right side, and an abnormality in the visual fibers the occipital lobe close to where Claimant fell. He opined that these three issues resulted in the movement disorder or motor problem that Claimant has. Dr. Benson testified that Clamiant's movement pattern, including retropulsion, was bizarre, but organically based. He testified that he conducted a thorough examination of Claimant in which he found similar findings that were organic, including the cerebellar tremor that she had, one of the right side left side, which is consistent with the ipsilateral (on the same side) lesion that she had in the cerebellum; her gait exam was very internally consistent with no deviation, embellishment, emotion or histrionics; and her eye movements were consistently abnormal, meaning that her right gaze was very abnormal. Dr. Benson opined that Claimant's condition is not consistent with a congenital disorder, early dementia or something other than TBI because clearly Claimant's symptoms began after the work injury and she was able to work before the injury. He testified that a congenital problem would have manifested earlier in life, and that Claimant does not have a degenerative problem because she is not necessarily getting worse.

94. Dr. Benson testified that his findings correlate with those of Dr. Perrillo. He opined that Dr. Hughes erred by concluding that Claimant's balance problems were of unclear etiology because we know the etiology. He believes that the battery of tests he administered for identification of motor dysfunction were helpful for his diagnosis, and he determined that Claimant had cerebellar problems and that she most likely had a basal ganglia lesion to explain the retropulsion that she had. He stated he did not witness any symptom magnification. Dr. Benson testified that, while the actual course of recovery after a TBI is improvement, in the short term many patient's concussions get worse over the ensuing days to even a few weeks. He explained that a pituitary injury and symptoms secondary to a pituitary injury can manifest in the delayed fashion and can be progressive; people with brain injuries often develop maladaptive strategies that can cause problems down the road; and TBIs are associated with ongoing inflammation that accelerates the aging process. Dr. Benson opined that Dr. Hughes erred in is conclusion that there are documented symptoms consistent with a post-concussive syndrome without objective evidence of residuals of TBI, as he and PT Campbell found objective signs and symptoms consistent with an organically based injury. On cross-examination Dr. Benson acknowledged that Claimant's case is not the norm in terms of expected recovery time, and that if Claimant did not have gait disturbance right after the fall, would not expect her to suddenly develop gait disturbance three years later.

Testimony of Respondents' Witnesses

95. Dr. Hammerberg testified at hearing on behalf of Respondents as a Level II accredited expert in neurology and electromyography. Dr. Hammerberg testified that medical literature establishes DTI should not be used by neurologists to determine whether someone has suffered a TBI. He explained that Dr. Benson's MRI revealed tiny spots at three different levels of the scan, which are not seen in TBI and are common spots resulting from microvascular ischemia caused by high blood pressure and/or high cholesterol, of which Claimant has a history. Dr. Hammerberg further explained that the calcification evidenced on Claimant's CT scan was pre-existing and chronic and had no

bearing on whether there was a TBI. Dr. Hammerberg opined that Claimant did not sustain any brain injury. He testified that Claimant could have a problem with her balance mechanism of the ear, but that Claimant does not truly have a neurological problem causing imbalance. He agreed Claimant's abnormal gait presentation was not organic, which he stated suggests a psychological problem. Dr. Hammerberg offered two possible explanations for Claimant's condition: psychosomatic or malingering, stating that he believes both are occurring. He testified that Claimant's ongoing fear regarding imbalance is not malingering, but that her exaggerated lurching appears to be.

96. Dr. Hammerberg testified that the Select Physical Therapy records indicating Claimant ambulated with less unsteadiness and less need for support when unaware she is being observed was consistent with his opinion in regard to his observations of Claimant's behavior in the September 2019 surveillance video. Dr. Hammerberg also discussed the difference in Claimant's presentation in the surveillance video taken at the store versus taken in Dr. Benson's office, noting the former showed much better ability. Dr. Hammerberg testified that neuropsychological testing would assess the cognitive and emotional problems at the time of testing and that, in the total context of the case where there is no TBI, it would not likely have changed Dr. Hughes' opinion. He opined that Dr. Hughes was not in error for failing to refer Claimant for a neuropsychological evaluation under the MTG because the MTG are merely guidelines. He explained that, while a neuropsychological evaluation may have been helpful prior to the follow-up DIME, it would not be related to the work injury because there was no TBI.

97. Dr. Hammerberg greed with Dr. Hughes that Claimant is at MMI with zero impairment and no need for further treatment as related to the work injury. He testified that Claimant's current conditions are not causally related and that her ongoing issues are the result of a psychiatric illness that is not related to her work injury. He explained that Dr. Hughes only should have deferred for a psychiatric evaluation if the thought the psychiatric problem was caused by the closed head injury, which both Dr. Hughes and Dr. Hammerberg concluded was not related. He testified that Dr. Hughes did defer to a psychiatric evaluation when he incorporated into his own opinion that of Dr. Moe. Dr. Hughes had it as a separate category from the workers' compensation injury indicating it was not related.

Stephen Moe, M.D.

98. Dr. Moe testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Moe explained the concept of "worst first," stating that the clinical course of mild TBI is that symptoms are worse closest to the injury. He testified that this was not the case for Claimant. Dr. Moe testified that, if Claimant does have conversion disorder, it is not related to the work injury. He explained that preexisting factors and "very idiosyncratic" features of Claimant's presentation are the two overriding reasons why the conversion disorder is not work-related. He opined that Claimant did not sustain a TBI and that Claimant's continuing symptoms are not the result of TBI. Dr. Moe reiterated his opinion that Claimant is at MMI with no impairment. He testified that the collective information at the time of the follow-up DIME indicated more information is not needed to arrive at a

conclusion about the reason for Claimant's gait problems. He explained that Dr. Hughes had determined the symptoms were not work related. Dr. Moe testified that it was very clear to him that Dr. Hughes did not believe any additional psychiatric or neurological evaluations were needed as a result of the work injury.

99. On cross-examination, Dr. Moe testified that the most likely cause of Claimant's symptoms is functional neurological symptom disorder, formerly called conversion disorder. He testified that Dr. Hughes could have recommended a neuropsychological evaluation and referred Claimant to a vestibular expert if he so chose. He explained that the mental evaluation worksheet would not be used in this case to rate conversion disorder as it is not work related. He testified that if Dr. Hughes was unable to rate the conversion disorder, could have referred the task out to someone board certified in psychiatry and Level II accredited.

Eric Nyberg, M.D.

100. Dr. Nyberg testified at hearing on behalf of Respondents as an expert in neuroradiology. Dr. Nyberg testified that there was no evidence of TBI on the initial CT scan of March 13, 2013 or the several subsequent CT scans and conventional MRIs. He explained that the first CT scan showed abnormalities in the white matter which were chronic and commonly from vascular risk factors. He explained that the abnormalities shown on the DTI were the same abnormalities resulting from the pre-existing chronic vascular risk factors, not a TBI. Dr. Nyberg testified that calcification was already present as of the first CT scan. He explained that calcification occurs as a result of hemorrhage and takes months to develop, indicating that the calcification was not the result of the work fall. Dr. Nyberg testified that diffused axonal injury (DAI) is an imaging pattern that can be seen in the setting of moderate to severe brain injury and sometimes be seen in the setting of mild TBI as well. He concluded that there was no evidence of brain injury on the imaging studies. He acknowledged on cross-examination that the absence of objective evidence on radiological imaging does not prevlude the possibility of a concussion.

Jose LaFosse, Ph.D.

101. Dr. LaFosse testified at hearing on behalf of Respondents as an expert in neuropsychology. Regarding Dr. Perrillo's testing, he testified that Dr. Perrillo would have difficulty applying the appropriate tests for the applicable population group because Dr. Perrillo does not read or speak Spanish or know how to conduct the tests that were in Spanish. He opined that Dr. Perrillo should have referred Claimant to a Spanish-speaking neuropsychologist. Dr. LaFosse testified that the tests used by Dr. Perrillo were inappropriate for Claimant because they were English language tests developed in the United States for evaluating English speakers. Dr. Perrillo stated that, in contrast, the norms he used took into account Claimant's age, gender, level of education and were developed in the border region between Mexico and the United States. He testified that neuropsychology professional standards require that, when evaluating Spanish speaking individuals, that the evaluator be Spanish-speaking and appropriate Spanish norms be

used when testing, including testing conducted in Spanish and the test be created for Spanish speakers. He opine that Dr. Perrillo used a "completely inappropriate" battery of tests to evaluate Claimant, noting Claimant is from Mexico and had six years of education, whereas Dr. Perrillo's tests were more appropriate for someone from Spain with 13 years of education.

102. Dr. LaFosse testified that Claimant failed all seven of his tests of performance validity, explaining that Claimant did worse on the validity tests than people with dementia and severe brain injuries, which is unexpected for the nature of Claimant's injuries. He testified that Claimant failing all seven validity tests indicate that the likelihood of Claimant's tests being accurate indicators of her level of cognitive functioning is not trustworthy. He opined there was a high probability Claimant was not putting her best efforts forward on the tests. He explained that, generally, two failures indicate that the likelihood of an individual not putting in good effort is higher than 90%, and that three failures indicates about 99%. Dr. LaFosse testified that the kind of responses Claimant provided are scientifically extremely improbable. Dr. LaFosse testified that Dr. Perrillo applied standards from cognitive testing to validity testing.

103. Dr. LaFosse further testified that in one observation, Claimant on the first day of testing had normal cadence and speed of speech fluency, but on the second day she was – speaking much more slowly, much more deliberately, much more cautiously that represented a pretty significant departure from the way she communicated with him on the first day. In another observation of behavior Dr. Lafosse recounted that he and Claimant were walking from the parking lot to his office building – he approached her from behind and saw her walking normally. But then as he caught up to her and said hello, she suddenly started walking in a very awkward manner - suddenly appearing unstable in her gait.

104. Dr. LaFosse opined that Claimant not have a TBI or any cognitive impairment. He stated that there is a possibility Claimant may have had a concussion, but that there is not a significant amount of support for that in the records. On cross-examination, Dr. LaFosse testified that neuropsychological evaluation should come as early as possible in cases when there is a differential diagnosis. He agreed with Dr. Hammerberg that it is a good idea as a part of treatment to make referrals for neuropsychological evaluation when there's a question about diagnosis. Dr. LaFosse testified that he does not think there is a diagnosis of conversion disorder in this case and there is strong empirical basis for the possibility of malingering.

Testimony of Claimant's Lay Witnesses

Claimant

105. Claimant testified at hearing that her neck pain has resolved, but she continues to experience issues with balance. She testified that she uses a cane daily, except when at the grocery store, at which time she utilizes a shopping cart for balance. Claimant stated that she is able to walk straight but feels as though she is being pulled

back when she stops. She testified that her balance problem is better now than it was before. Claimant demonstrated walking to the Court – she was observed taking a few steps forward then lurching backwards. She walked with a cane. Claimant testified that her ongoing symptoms include aversion to light, blurry vision, burning pain on the right side of her head, and issues sleeping. Claimant testified that after the work injury she returned to work for two to three weeks but experienced pain in her head which made it difficult to perform her job duties. Claimant stated that she did not intend to stop working before the accident and that she wanted to work until age 65 or 66. She testified that prior to the work injury, was tired at the end of the day due to a lot of work at her job. Claimant testified she babysits her six year old grandchild on a daily basis.

Claimant's Daughter

106. Claimant's daughter testified at hearing that, prior to the work injury, her mother was more energetic, independent, and capable of doing things she is currently incapable of doing. She testified that her mother has exhibited physical and mental changes, noting that Claimant no empathy regarding her husband's death in January 2015. She testified that, prior to the injury, Claimant did not complain consistently about any physical problems and was not seeking medical care for the year prior for any serious mental or physical condition. She stated that, within a few weeks after the work injury, Claimant to walk with an altered gait, which has continued for several years but improved with PT Campbell's therapy. Her understanding is that her mother signed the resignation letter to receive accrued vacation time as a lump sum payment. She testified that her mother now has to be supervised and cannot be responsible for anything. She believes Claimant's condition was caused by the work injury.

Testimony of Respondents' Lay Witnesses

Heidi Hill

107. Ms. Hill was the Human Resources Manager for Employer. Ms. Hill testified that Claimant was offered modified duty after her work injury. She testified that on July 21, 2014, Claimant declined to return to modified duty, but was still considered an employee of Employer. Ms. Hill testified that, at that point, Claimant still had the option to return to work performing modified duty, or that Claimant could resign and receive a lump sum payment. She testified that on September 5, 2014, Claimant again declined to return to modified duty and voluntarily resigned from Employer.

Keith Doberstein

108. Mr. Doberstein has worked as an investigator for over 21 years and is licensed in California and Colorado. He authenticated that he took the surveillance video of Claimant on September 1-3, 2019. He testified that he personally observed Claimant taking care of a child; only once having her cane with her that she did not actually use; and not using a cane to walk in and out of the grocery store.

Ultimate Findings

109. The ALJ finds the testimony of Ms. Hill and Mr. Doberstein more credible and persuasive than the testimony of Claimant and Claimant's daughter.

110. The ALJ finds that the reports and testimony of Drs. Hammerberg, LaFosse, Moe, and Nyberg, as supported by the medical records and the opinions of Drs. Hughes, Burris, Ginsberg, Lipkin, and Sacha, are more credible and persuasive than the reports and testimony of Drs. Benson, Moses, and Perrillo, and PT Campbell.

111. The ALJ finds that Claimant failed to prove it is highly probable Dr. Hughes erred in his DIME determination regarding MMI and impairment.

112. The ALJ finds that Claimant failed to prove it is more probable than not further medical treatment is causally related to her work injury.

113. The ALJ finds that Claimant failed to prove it is more probable than not she is entitled to additional temporary indemnity benefits.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals*

Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME

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). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. 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); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). 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. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

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,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The 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*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter

of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

The finding of a DIME physician concerning the claimant's whole person medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

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,* WC 4-631-447 (ICAO, 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. Deviations from the *AMA Guides* constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). 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,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Pursuant to WCRP 17-2(A) health care practitioners are to use the MTG when furnishing medical care under the Act *See* §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the MTG as an evidentiary tool. *Logiudice v. Siemans*

Westinghouse, W.C. 4-665-873 (ICAP, Jan. 25, 2011). Howeverm the ALJ is not required to grant or deny medical benefits based upon the MTG. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the MTG may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011).

Claimant argues Dr. Hughes committed the following errors in finding Claimant is at MMI with no permanent impairment:

1) Dr. Hughes failed to refer Claimant for a neuropsychological evaluation before placing Claimant at MMI. He further failed to mention that Dr. Ledezma consistently recommended a neuropsychological evaluation.

2) Dr. Hughes failed to order final vestibular reports/evaluation, which would have yielded objective evidence on which to base diagnosis, MMI and treatment.

3) Dr. Hughes improperly disregarded objective evidence which indicated Claimant has significant vestibular difficulties.

4) Dr. Hughes improperly disregarded or was not competent to appreciate objective evidence of altered gait and retropulsion in the surveillance video.

5) Dr. Hughes failed to rate the vestibular disorder/altered gait.

6) Dr. Hughes misdiagnosed a conversion disorder.

7) Dr. Hughes failed to rate “mental impairment.”

8) Dr. Hughes failed to send Claimant to a board certified psychiatrist for a psychiatric rating.

9) Dr. Hughes failed to rate Claimant’s cognitive difficulties.

As found, Claimant failed to prove it is highly probable Dr. Hughes erred in his DIME opinion regarding MMI and impairment. Dr. Hughes diagnosed Claimant with a closed head injury with symptoms consistent with a post-concussive syndrome, but without objective evidence of residuals of traumatic brain injury; a resolved cervical spine sprain/strain; and progressive balance problems of unclear etiology with psychiatric features that suggested to Dr. Moe that she had a conversion disorder. Regarding Dr. Hughes not noting recommendations for and referring Claimant for a neuropsychological evaluation, there is not clear and convincing evidence Dr. Hughes was in error because he determined that there was no objective evidence of residuals of a TBI. Dr. Hughes reviewed various medical records, including those of Dr. Ledezma and Dr. Moe. He specifically referred to and relied on Dr. Moe’s analysis, which determined that Claimant’s current complaints were unrelated to the work injury. Dr. Hughes specifically noted that Dr. Moe did not feel Claimant had sustained permanent psychological impairment. He noted that he agreed with Dr. Ledezma’s recommendation for continued counseling, but reiterated that such treatment was not related to the work injury. Accordingly, Dr. Hughes’

failure to specifically note Dr. Ledezma's recommendation for neuropsychological evaluation and failure to refer Claimant for such is not highly probable in error, considering Dr. Hughes did not attribute Claimant's psychological issues to the work injury. Dr. Hughes' opinion that Claimant's condition and symptoms are unrelated to the work injury are shared by Drs. Hammerberg, LaFosse, Moe, and Nyberg. While there is testimony from some of Respondents' expert witnesses that Dr. Hughes "could" have ordered additional testing if he so chose, the evidence does not establish it is highly likely Dr. Hughes erred in not doing so. As credibly testified to by Dr. Hammerberg, neuropsychological testing under the MTG would apply if Dr. Hughes determined that Claimant's psychological issues were a result of the work injury, which he did not.

The same analysis applies regarding Dr. Hughes' failure to refer Claimant for vestibular evaluation or wait for a final report from Dr. Lipkin. Claimant underwent vestibular testing and vestibular therapy prior to Dr. Hughes' evaluation. Dr. Hughes reviewed the records from this testing and treatment. He diagnosed Claimant was "progressive balance problems of unclear etiology with psychiatric features." Various physicians opined that Claimant had a non-organic/non-physiologic gait disturbance and presentation and that her balance problems were not the result of the work injury. Dr. Hughes himself remarked on inconsistencies in Claimant's presentation based on his personal observation of her at his clinic, in the clinic parking lot, and on surveillance video. Dr. Hughes' failure to obtain additional vestibular testing or information or failure to provide an impairment rating was not in error, as Dr. Hughes did not find any potential vestibular problems or balance issues work-related.

Regarding an alleged misdiagnosis of conversion disorder, Dr. Hughes did not actually diagnose Claimant with conversion disorder. He stated that Claimant's findings were "bizarre" and "perhaps consistent" with a conversion disorder. Moreover, even assuming arguendo, that Dr. Hughes did diagnose Claimant with conversion disorder, he did not opine that such condition or any psychological condition, was related to the work injury. To the extent he stated that he would leave it up to a board certified psychologist, Dr. Hughes relied on Dr. Moe's opinion that there was no permanent psychological impairment. Dr. Hammerberg credibly testified that Dr. Hughes should have deferred a finding of MMI for psychological evaluation *if* Dr. Hughes attributed Claimant's psychological symptoms to the work injury (emphasis added). Here, Dr. Hughes clearly concluded that Claimant's ongoing issues were not work related Dr. Moe credibly opined that Claimant did not sustain any psychological impairment as related to the work injury. Dr. Moe corroborated Dr. Hammerberg's explanation with his credible testimony that a mental condition is not rated if it is deemed not work-related. While Dr. Hughes could have referred out, not in error failing to do so. Dr. LaFosse credibly opined that Claimant does not have conversion disorder and is likely malingering.

Similarly, the evidence does not establish it is highly probable Dr. Hughes erred in failing to rate Claimant's alleged cognitive difficulties. Again, Dr. Hughes did not find any residual conditions related to the work injury. Dr. LaFosse credibly opined that Claimant's cognitive functioning is at within the normal limits and at least in the same range as her premorbid cognitive abilities.

The varied opinions of the multiple treating physicians and experts in this case, which support both the positions of Claimant and Respondents, emphasize the myriad differences of medical opinions that have been reached in this case, including that of DIME physician Dr. Hughes. There was extensive evidence offered regarding, *inter alia*, the use and efficacy of DTI imaging and the intricacies neuropsychological testing, with attacks from experts on both sides regarding everything from testing methods to formatting of reports. To the extent there is disagreement with Dr. Hughes' DIME opinion, the evidence indicates that these are differences of opinion that do not rise to the level of clear and convincing evidence. That Dr. Hughes "could have" taken a different approach or come to a different conclusion here does not establish, based on the totality of the evidence, that he clearly erred by finding Claimant MMI with no impairment.

The records indicate Claimant underwent extensive evaluation and treatment after her work injury and prior to being placed at MMI by Dr. Hughes, including CT scans, MRI scans, ENT evaluation, neurological evaluations, vestibular evaluations, vestibular therapy, physical therapy, and psychological evaluation and counseling. Dr. Hughes reviewed these medical records, and based on his review and evaluation, ultimately opined that Claimant reached MMI and that any ongoing issues and need for treatment was unrelated to the work injury. The need for deferring MMI for additional testing and treatment applies when there is a determination that conditions are work related. Similarly, the assignment of an impairment rating also necessitates a finding that the condition is work related. Here, Dr. Hughes found that there was no objective evidence of residuals of a TBI, that Claimant's cervical spine sprain/strain had resolved, and there were psychiatric features unrelated to the work injury. Dr. Hughes opinion is consistent with those of Drs. Hammerberg, Sacha, Burris, Moe, Nyberg and LaFosse. Drs. Hughes, Sacha, Burris, Moe and Hammerberg agree Claimant may need ongoing medical treatment that is unrelated to the work injury.

Based on the totality of the evidence, Claimant failed to overcome Dr. Hughes' DIME opinion on MMI and permanent impairment by clear and convincing evidence.

Medical Treatment

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, WC's 4-947-316-01 & 4-935-813-03 (ICAO, July 31, 2015) (where the claimant had not reached MMI, ALJ's

finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous).

As found, Claimant failed to prove by a preponderance of the evidence further medical treatment is reasonable, necessary or related to cure and relieve Claimant's effects or maintain Claimant's condition. Drs. Hughes, Sacha, Moe, Nyberg and Hammerberg have credibly opined that Claimant's ongoing condition is not related to the work injury. Accordingly, any need for ongoing treatment is not causally related to Claimant's industrial injury.

Temporary Total Disability

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

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

As Claimant failed to overcome Dr. Hughes' determination regarding MMI, she failed to prove by a preponderance of the evidence she is entitled to temporary indemnity benefits for any additional period of time.

ORDER

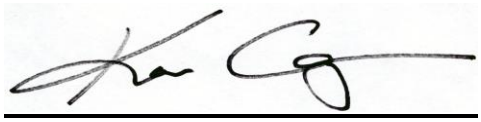
1. Claimant failed to overcome Dr. Hughes DIME opinion on MMI and permanent impairment by clear and convincing evidence.

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

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

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

DATED: July 19, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment with Employer on October 15, 2019. (Ex. G).

2. Following the injury, Claimant received treatment through Concentra Medical Centers, where he saw Paula Pook, M.D., John Sacha, M.D., Lacie Esser, PA-C, and Jonathan Claasen, D.O., among others. (Ex. A & C).

3. On January 21, 2021, Dr. Claasen placed Claimant at MMI with a whole person impairment rating of 13%. On February 11, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for a 13% whole person impairment, and permanent partial disability (PPD) benefits of $51,327.86. Respondents also admitted to previously-paid temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits. (Ex. G).

4. Subsequently, Claimant requested a Division Independent Medical Examination (DIME). On July 21, 2021, Eric Shoemaker, M.D., performed the DIME and issued a report dated August 11, 2021. Dr. Shoemaker placed Claimant at MMI effective November 4, 2019. Dr. Shoemaker also determined that Claimant had no permanent impairment rating attributable to Claimant's work-related injuries. (Ex. A).

5. On September 8, 2021, Respondents filed an second FAL, consistent with Dr. Shoemaker's DIME opinions. Respondents admitted to an MMI date of November 4, 2019, with a 0% impairment rating. Respondents asserted an overpayment in the amount of $71,731.90, for TTD, TPD, and PPD benefits paid after November 4, 2019. (Ex. G).

6. Claimant filed an Application for Hearing on October 6, 2021, endorsing as issues compensability, medical benefits and "the alleged overpayment, compensability, and denial of maintenance care described in the Final Admission of Liability." Claimant did not endorse the issue of challenging Dr. Shoemaker's DIME opinion or otherwise contest the September 8, 2021 FAL. (Ex. J). The October 6, 2021 Application for Hearing was

designated as W.C. Case No. 5-128-511-001. Office of Administrative Courts' records indicate no further action was taken in W.C. 5-128-511-001, and the matter was closed.[1]

7. Insurer's claims adjuster, MR[Redacted], testified at hearing that Insurer paid Claimant $71,731.90 in combined indemnity benefits. Ms. MR[Redacted] credibly testified that Insurer's payment log, Exhibit I, is an accurate statement of the amounts Insurer paid to Claimant for PPD, TTD, and TPD benefits. For the period of January 20, 2020 through December 7, 2020, Insurer paid Claimant $42,937.52 in TTD benefits. Insurer paid Claimant $65.00 in TPD benefits for the period of October 26, 2020 through February 1, 2021, and $28,729.38 in PPD benefits for the period of January 21, 2021 through August 26, 2021. (Ex. I).

8. Claimant did not appear at hearing and did not present evidence in defense of Respondents' claims.

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

[1] The ALJ takes judicial notice of the Office of Administrative Courts' files related to this claim, including the absence of entries. *See Habteghrigis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAO March 31, 2006) ("A court can take judicial notice of its own records and files.").

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).

OVERPAYMENT

Respondents' Entitlement to Repayment of Disability Benefits

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[2] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009).

Respondents have established by a preponderance of the evidence that Claimant received overpayments in the amount of $71,731.90, and that Respondents are entitled to repayment of that amount. Respondents initially paid Claimant's TTD and TPD benefits based on the date of MMI and work restrictions assigned by Dr. Claasen. Respondents initially admitted to the 13% impairment rating assigned by Dr. Claasen, filed an FAL consistent with that rating, and began paying PPD benefits in corresponding to the ATP's impairment rating. Claimant then requested a DIME. The DIME physician found that Claimant had no impairment rating attributable to his work injury, and was at MMI on

[2] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive " from the definition of "overpayment." However, the matter before the ALJ is based payments and events prior to January 1, 2022, consequently the applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities); *Martinez v. People*, 484 P.2d 792 (Colo 1971) (repealed statutory provisions remain in force as far as pending actions, suits and proceedings are concerned).

November 4, 2019. On September 8, 2021, Respondents filed a second FAL consistent with the DIME's opinions admitting for an MMI date of November 4, 2019 and a 0% impairment rating. Pursuant to § 8-43-203 (2)(b)(II)(A), C.R.S., Claimant had thirty days to contest the FAL and request a hearing seeking more compensation. Claimant failed to do so, consequently Claimant's claim automatically closed with respect to the admitted date of MMI and impairment rating on October 8, 2021. Because Claimant did not challenge the DIME's MMI date or impairment rating of the DIME, Claimants benefits are controlled by the DIME's impairment rating and MMI date. *See In re Claim of Mattorano,* W.C. No. 4-861-379-01 (ICAO July 25, 2013)

Pursuant to § 8-42-103, and 8-42-105, respondents are required to pay temporary disability benefits while a claimant is under a disability that prevents the claimant from earning his or her full average weekly wage. Such benefits continue until the claimant reaches maximum medical improvement. § 8-42-105 (3)(a), and § 8-42-106 (2)(a) C.R.S. Respondents paid Claimant TTD and TPD benefits for the period of January 20, 2020 through February 1, 2021, in the aggregate amount of $43,002.52. Because all of the Claimant's TTD and TPD benefits were paid after the date of MMI assigned by the DIME, the benefits exceeded the amounts should have been paid or were amounts Claimant was not entitled to receive. *See Wheeler, supra* ("respondents are allowed to recover as an overpayment the TTD benefits that were due and owing when paid but are later determined to be amounts the claimant was not entitled to receive).

Similarly, Claimant received $28,729.38 in PPD benefits based on a 13% whole person impairment, which is inconsistent with the DIME's assignment of a 0% impairment rating, which would result in no PPD benefits. Claimant therefore received PPD benefits exceeding the amount that should have been paid or which he was not entitled to receive.

As found, Respondents have established by a preponderance of the evidence that Claimant received $71,731.90 in disability benefits to which he was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $71,731.90.

OVERPAYMENT RECOVERY

Section 8-42-113.5, C.R.S. governs the recovery of overpayments. Where a claimant receives any payments from any source which requires the reduction of any disability benefit, § 8-42-113.5 provides for different methods of recovery for respondents. Under § 8-42-113.5 (a), a claimant is required to provide written notice of learning of such payment within twenty days, and any resulting overpayment "shall be recovered by the employer or insurer in installments at the same rate as, or at a lower rate than, the rate at which the overpayments were made." "Such recovery shall reduce the disability benefits … payable after all other applicable reductions have been made." *Id*. Where no written notice is provided, "the employer or insurer is authorized to cease all benefit payments immediately until the overpayments have been recovered in full." § 8-42-113.5(1)(b). If, however, recovery under § 8-42-113.5 (a) or (b) is "not practicable," respondents are authorized to seek an order for repayment. § 8-42-113.5(1)(c), C.R.S.

The term “practicable” refers to a respondent’s ability to recover the overpayment from ongoing or unpaid benefits.” *In re Martin*, W. C. No. 4-453-804 (ICAO, Oct. 4, 2004).

When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). No evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate or the terms of repayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay to Respondents $71,731.90 in overpaid benefits.

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: July 18, 2022

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

ISSUE

1. If Claimant suffered residual medical issues because of opioid dependence, whether he requires continuing medical maintenance treatment to address his dependence.

2. If there are no remaining residual medical issues from opioid dependence, whether additional medical maintenance treatment is reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant is 62-year-old male who resides in Twain Harte, California. He has lived in California since July 16, 2017. Claimant previously lived in Denver, Colorado. Employer is a restaurant located in Sheridan, Colorado who hired Claimant as a Grill Cook on October 23, 2012.

2. On September 19, 2014 Claimant was injured while working for Employer. He specifically bent over to put away a grill scraper, stood up, twisted and felt a pop in his lower back. Claimant initially underwent medical treatment at Concentra Medical Centers. He received Percocet, physical therapy and a lumbar MRI. Claimant was subsequently referred to Authorized Treating Physician (ATP) John T. Sacha, M.D. for pain management.

3. Dr. Sacha is a Colorado licensed physician who is Board Certified in Physical Medicine and Rehabilitation, Electrodiagnostic Medicine, and Pain Management. He has been Level II accredited by the Colorado Division of Workers' Compensation (DOWC) for the past 25 years. Dr. Sacha is on the PDMP committee for opioids and the committee that develops guidelines for the safe use of opioids in the State of Colorado. He treats patients with acute and chronic complex spinal disorders and provides medication management as part of his regular practice.

4. Dr. Sacha first evaluated Claimant on November 21, 2014. He documented that Claimant's lumbar MRI revealed degenerative disc disease with facet spondylosis and bulging at L4-L5 and L5-S1 and left-sided foraminal narrowing. Dr. Sacha's initial plan included administration of left L5 and S1 transforaminal epidural steroid injections (TF ESIs)/spinal nerve blocks, immediate discontinuation of Percocet and utilization of Tramadol and Gabapentin.

5. Dr. Sacha subsequently administered left L5 and S1 TF ESIs/spinal nerve blocks. Claimant also underwent lower extremity EMG/NCV testing that confirmed S1 radiculopathy. Dr. Sacha referred Claimant to Andrew Castro, M.D., for a surgical consultation.

6. Dr. Castro evaluated Claimant on February 18, 2015 and recommended repeat ESIs prior to surgical consideration. Dr. Sacha administered additional injections. On March 27, 2015 Dr. Sacha reported that Claimant's pain had worsened, the injections had not relieved his symptoms and the only remaining options were surgery or placing him at Maximum Medical Improvement (MMI).

7. On May 7, 2015 Claimant underwent lower back surgery with Dr. Castro. The specific procedure consisted of a bilateral laminectomy and discectomy at L4-5 and a left-sided laminectomy and discectomy at L5-S1.

8. Claimant received opioids immediately following surgery, but was quickly weaned from the medications. His condition improved slightly but his symptoms waxed and waned. Claimant suffered constant lower back pain and intermittent left leg symptoms.

9. On September 28, 2015 Dr. Sacha concluded that Claimant had reached MMI because his symptoms had plateaued. Dr. Sacha determined that Claimant required medical maintenance care in the form of a medication maintenance program, a gym pass, a couple of psychological visits and medications over the next 12–24 months. He explained that the preceding recommendation constituted a standard maintenance care plan for patients who have undergone spinal surgery. On October 5, 2015 Dr. Sacha assigned 13% lumbar spine and 2% mental permanent impairment ratings.

10. On November 13, 2015 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Sacha's MMI and impairment determinations. The FAL also acknowledged medical maintenance care. Following the parties' stipulation to resolve residual issues, Respondents filed an Amended FAL on January 21, 2016. Claimant did not challenge the Amended FAL and his claim closed by operation of law on all issues other than medical maintenance benefits.

11. Claimant continued to receive maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. His maintenance care during the period included non-opioid medications, utilization of a TENS unit, chiropractic treatment, acupuncture, an additional lumbar MRI, further sets of TF ESIs, another EMG and a surgical reevaluation.

12. On July 14, 2017 Claimant visited Dr. Sacha for the final time before moving to California. Dr. Sacha noted that Claimant's condition remained unchanged, his symptoms were tolerable and he experienced good and bad days. Claimant's treatment involved continued medications for two months, a gym pass and a new ATP for maintenance management in California.

13. On November 8, 2017 ATP Tariq Mirza, M.D. located in Modesto, California, began treating Claimant. He noted that Claimant's symptoms included pain in his back

and legs as well as reactive depression. Dr. Mirza immediately prescribed medications, including Duragesic (Fentanyl) patches of 50 micrograms (mcg)/hour, Soma and Neurontin.

14. On November 22, 2017 Dr. Mirza conducted a physical examination that revealed findings virtually identical to Claimant's previous visit. He continued to prescribe the same medications. Dr. Mirza recommended repeat lumbar ESIs, continued utilization of the TENS unit and physical therapy.

15. On February 14, 2018 Claimant returned to Dr. Mirza for an examination. He reported "as long as I have medications in my system I am functional, without medication pain in my lumbar spine is 8-9 or even 10, however with the help of medication it [decreases] to 3-4 and it is manageable." Dr. Mirza increased Claimant's Fentanyl patches to 100 mcg/hour and continued the other medications.

16. On April 11, 2018 Dr. Mirza noted that Claimant had completed therapy but had not noticed any improvement in flexibility. Claimant remarked that his lower back pain was 7-8/10, but with medication it diminished to 3-4/10. Dr. Mirza continued to prescribe the same medications at the same dosages.

17. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha to determine whether his condition had worsened so that he was no longer at MMI. Dr. Sacha obtained an updated history from Claimant, reviewed Dr. Mirza's records and performed a physical examination. He was critical of Dr. Mirza's renewed prescription of opioids. Dr. Sacha detailed that Claimant "was opioid naïve and on non-opioid analgesics from this practitioner [and] is now on 100 mcg Fentanyl patches."

18. Dr. Sacha explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He emphasized that Fentanyl is a particularly dangerous drug and the State of Colorado recommends never exceeding 50 Morphine Milligram Equivalents (MMEs) per day. Notably, on July 5, 2018 Claimant was taking 240 MMEs/day or five times the recommended limit. Dr. Sacha further explained that opioid medications were 100% contraindicated for patients like Claimant who suffer lung issues.

19. Dr. Sacha testified at the hearing in this matter that during his July 5, 2018 evaluation Claimant acknowledged that his functioning had decreased while taking opioids. He explained that opioids increase a patient's pain receptors. Dr. Sacha attributed Claimant's decreased functioning to opioid dependence from taking high levels of Fentanyl prescribed by Dr. Mirza. Claimant's functional decline was thus no longer related to his original lumbar spine injury.

20. Dr. Sacha explained that when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance care plan to address Claimant's opioid dependence that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He further recommended a gym pass for 12 months, one further ESI and one to three visits with a physical medicine or pain management specialist. Dr. Sacha

emphasized that his 12-month maintenance care plan was not directed at a spinal issue, but at the problem of increased pain receptors caused by opioid analgesics. He testified:

> [Claimant] probably wouldn't have needed anymore maintenance care beyond that point, once the large offending agent, which was the opioid analgesics, was discontinued. And the danger was still the biggest problem, and I was of the opinion, and still am of the opinion, that the decline in function, the worsening symptoms were a direct result of using the fentanyl rather than the actual lumbar spine issues. So we were really treating the problem, which was the opioid analgesics, not his spine, when I made the recommendations for that year of maintenance care.

21. On August 30, 2018 the parties conducted a hearing before ALJ Goldman. He issued an order dated October 1, 2018 denying Claimant's petition to reopen based on a worsening of condition.

22. After the hearing, Dr. Mirza began decreasing Claimant's opioid analgesics. He gradually reduced Claimant's Fentanyl from 100 mcg/hour patches to 75 mcg/hour patches on October 24, 2018, then to 50 mcg/hour patches on November 28, 2018 and finally to 25 mcg/hour patches on May 17, 2019. Dr. Mirza stated that his goal was to discontinue opioid analgesics "in a few months." However, over the next 22 months between May 17, 2019 and March 24, 2021 Dr. Mirza continued Claimant on 25 mcg/hour Fentanyl patches without providing any other maintenance medical care.

23. On February 5, 2021 Claimant returned to Colorado to visit Dr. Sacha for an evaluation. Dr. Sacha reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant's continued use of Fentanyl was "surprising" because he was clearly not a candidate for opioids. Dr. Sacha explained that the 25 mcg/hour patch constituted 60 MMEs/day. The amount exceeded the State of Colorado recommended dosage of 50 MMEs/day. Dr. Sacha remarked that Claimant's continued Fentanyl usage placed him at high risk for opioid misuse and sudden respiratory depression. He proposed an updated maintenance treatment plan that included the following: (1) immediate discontinuation of Fentanyl; (2) three months of non-opioid analgesics; and (3) other treatment modalities including chiropractic care and acupuncture treatment for symptom control during the weaning period.

24. On February 25, 2021 Respondents applied for a hearing on the issue of medical benefits. Respondents specifically sought "an order compelling discontinuation of opioids (Fentanyl), with a weaning/tapering schedule, and then discontinuation of maintenance care under this claim as per Dr. Sacha."

25. On March 24, 2021 Dr. Mirza noted that he had a long discussion with Claimant about discontinuing Fentanyl patches and replacing them with Suboxone films. Claimant testified and the record reflects that he has not taken any Fentanyl since March 24, 2021.

26. On May 8, 2021 Dr. Sacha issued a report following his review of Dr. Mirza's March 24, 2021 report. He noted that Dr. Mirza had discontinued Fentanyl and started Claimant on Suboxone. Dr. Sacha commented that it was reasonable to provide Claimant with a one month supply of Suboxone before weaning him off the medication over a four-week timeframe. He explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury.

27. Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Dr. Sacha remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Specifically, the opioid medications caused an increase in Claimant's pain receptors. Dr. Sacha explained that, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Claimant thus required three months of Buprenorphine to wean him from Fentanyl.

28. Dr. Sacha remarked that treatment for Claimant's original lumbar spine injury was no longer required. He emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." Dr. Sacha thus remarked that, after the three-month period, no further maintenance care would be necessary for either Claimant's lumbar spine or opioid dependence. He emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean Claimant from pain medications. Dr. Sacha determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment was necessary for Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

29. Dr. Sacha testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's current problems were iatrogenic in nature because he became dependent on opioids. Claimant thus required additional treatment, beyond the original 24 months, to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment. Claimant's weaning from Fentanyl was thus covered as part of his Workers' Compensation claim. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Any continuing functional limitations are reflected in his impairment rating. Dr. Sacha summarized that a three month weaning period for opioid dependence is reasonable and allowing Claimant to receive additional medical maintenance care beyond the three-month weaning period will cause harm. He explained that Claimant will be better off functionally, mentally and from a pain standpoint if his care is discontinued and he stops visiting doctors.

30. Claimant testified at the hearing in this matter. He explained that he has suffered constant pain since his September 19, 2014 industrial injury. Although his

symptoms have waxed and waned over time, they have persisted. Nothing other than opioid medications have decreased his severe pain and improved his function.

31. Although Claimant suffered residual medical issues because of opioid dependence, Respondents have proven that it is more probably true than not that additional medical maintenance treatment for his dependence is no longer causally related, reasonable or necessary to address his symptoms or prevent further deterioration of his condition. Respondents have also established that additional medical maintenance treatment is no longer reasonable or necessary to relieve the effects of Claimant's original lumbar spine injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

32. Claimant initially injured his lower back on September 19, 2014 while working for Employer. He received conservative treatment and was referred to ATP Dr. Sacha for pain management. By May 7, 2015 Claimant underwent lower back surgery. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

33. On November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed Claimant opioid medications in the form of Fentanyl patches. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He emphasized that the maintenance care plan was not directed at Claimant's original lumbar spine injury, but at the increased pain receptors caused by opioid analgesics.

34. Dr. Sacha persuasively testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's medical problems were iatrogenic in nature and he became dependent on opioids. Claimant thus required additional treatment beyond the original 24 months to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment.

35. Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was still suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Dr. Sacha emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean

Claimant from pain medications. Therefore, removing the cause of Claimant's pain receptor increase by eliminating Fentanyl diminishes within three months and ameliorates the condition.

36. Dr. Sacha also remarked that treatment for Claimant's original lumbar spine injury was no longer required. He persuasively remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, Claimant's subsequent symptoms and functional limitations were caused by the medications. Referring to his February 5, 2021 report, Dr. Sacha emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." In his May 8, 2021 report Dr. Sacha explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury. The record thus reveals that Claimant does not require additional treatment for his original lumbar spine injury because his only remaining problems are related to opioid dependency. Dr. Sacha therefore persuasively determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment is necessary for either Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

37. The preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Claimant has received reasonable and necessary medical maintenance care for both his original lumbar spine injury and his subsequent development of opioid dependence. Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. By July 5, 2018 Claimant's maintenance care plan was no longer directed at his original lumbar spinal condition, but at the increased pain receptors caused by opioid analgesics. While Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Because the three-months period of opioid cessation began on March 24, 2021, the appropriate weaning period has now ended. Therefore, no further maintenance care is necessary to address Claimant's lumbar spine or opioid dependence. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

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. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012). Because Respondents seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's September 19, 2014 industrial injury or prevent further deterioration of his condition.

5. As found, although Claimant suffered residual medical issues because of opioid dependence, Respondents have proven by a preponderance of the evidence that additional medical maintenance treatment for his dependence is no longer causally related, reasonable or necessary to address his symptoms or prevent further deterioration of his condition. Respondents have also established that additional medical maintenance

treatment is no longer reasonable or necessary to relieve the effects of Claimant's original lumbar spine injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

6. As found, Claimant initially injured his lower back on September 19, 2014 while working for Employer. He received conservative treatment and was referred to ATP Dr. Sacha for pain management. By May 7, 2015 Claimant underwent lower back surgery. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

7. As found, on November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed Claimant opioid medications in the form of Fentanyl patches. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He emphasized that the maintenance care plan was not directed at Claimant's original lumbar spine injury, but at the increased pain receptors caused by opioid analgesics.

8. As found, Dr. Sacha persuasively testified that Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. However, because Dr. Mirza prescribed excessive opioids, Claimant's medical problems were iatrogenic in nature and he became dependent on opioids. Claimant thus required additional treatment beyond the original 24 months to wean from medications. Dr. Sacha acknowledged that Claimant's opioid dependence was related to his original lumbar spine injury because it occurred during the course of his medical treatment.

9. As found, Dr. Sacha testified that during his February 5, 2021 evaluation, Claimant was still suffering from opioid dependence. Notably, although Claimant was experiencing pain, it was attributable to Fentanyl usage. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Notably, when Claimant is weaned from Fentanyl he will return to his pre-opioid level of function. Dr. Sacha emphasized that three-months of post-Fentanyl care was reasonable because it was the humane way to wean Claimant from pain medications. Therefore, removing the cause of Claimant's pain receptor increase by eliminating Fentanyl diminishes within three months and ameliorates the condition.

10. As found, Dr. Sacha also remarked that treatment for Claimant's original lumbar spine injury was no longer required. He persuasively remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, Claimant's subsequent symptoms and functional limitations were caused by the medications.

Referring to his February 5, 2021 report, Dr. Sacha emphasized that "the problem that I made recommendations for was getting off the opioid analgesics, because that's what we were treating, not the spinal problem, and they didn't follow that." In his May 8, 2021 report Dr. Sacha explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury. The record thus reveals that Claimant does not require additional treatment for his original lumbar spine injury because his only remaining problems are related to opioid dependency. Dr. Sacha therefore persuasively determined that, at the conclusion of the three-month weaning period, no additional medical maintenance treatment is necessary for either Claimant's September 19, 2014 lumbar injury or subsequent opioid dependency.

11. As found, the preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Claimant has received reasonable and necessary medical maintenance care for both his original lumbar spine injury and his subsequent development of opioid dependence. Claimant initially required up to 24 months of medical maintenance care after his industrial injury and subsequent surgery. By July 5, 2018 Claimant's maintenance care plan was no longer directed at his original lumbar spinal condition, but at the increased pain receptors caused by opioid analgesics. While Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his subsequent symptoms and functional limitations were caused by the medications. Claimant thus required three months of Buprenorphine to wean him from Fentanyl. Because the three-months period of opioid cessation began on March 24, 2021, the appropriate weaning period has now ended. Therefore, no further maintenance care is necessary to address Claimant's lumbar spine or opioid dependence. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

ORDER

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

1. Although Claimant suffered residual medical issues because of opioid dependence, he no longer requires continuing medical maintenance treatment to address his dependence.

2. Additional medical maintenance treatment is no longer causally related, reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Respondents' request to terminate Claimant's medical maintenance benefits is thus granted.

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

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

DATED: July 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 has proven by a preponderance of the evidence that the left wrist condition is causally related to the June 19, 2020 work accident?

II. Whether Claimant has proven by a preponderance of the evidence that surgery to Claimant's left wrist, which took place on August 2, 2021 as recommended by Dr. Scott, was reasonably necessary and related to the admitted June 19, 2020 work accident?

III. Whether Claimant has proven by a preponderance of the evidence that Claimant's migraines and headaches are causally related and is entitled to treatment under the admitted June 19, 2020 work accident?

PROCEDURAL ISSUES

The parties entered into a stipulation on September 4, 2020 specifically agreeing that Respondent's failed to provide a Designated Provider list (DPL); Claimant treated at Concentra, which was paid for by Respondents; the authorized treating provider (ATP) was to be Kristin Mason, who was immediately authorized; Claimant waived penalties associated with failure to provide a DPL; and temporary total disability benefits were to be terminated as of September 4, 2020. The Order approving the stipulation was issued by this ALJ on September 16, 2020 while employed by Division in her capacity as a PALJ.

Claimant filed an Application for Hearing dated October 15, 2021 on issues of medical benefits, including relatedness of body parts and authorization of Dr. Scott for left wrist surgery.

Respondents filed a Response to Application for Hearing on December 21, 2021 listing issues of preexisting condition, causation and relatedness.

FINDINGS OF FACT

Based on the evidence presented at hearing including exhibits, testimony and a deposition, the ALJ enters the following findings of fact:

1. At the time of this order, Claimant reached the age of 57. Claimant worked for Employer for a period of approximately three months at the time of the admitted work related injury of June 19, 2020. Claimant performed work activities for Employer which included work as a trainer, machine operator, boxing up and shipping parts and testing materials.

2. The medical records showed a long history of multiple sclerosis (MS) causing back, neck and shoulder pain as well as lower extremity pain beginning in 2009. Claimant's records show that she was taking narcotic medications and had a narcotics contract with her primary provider, Dr. Melanie Metcalf, who would frequently state that Claimant's pain and MS was adequately controlled. There was also a consistent pattern of headaches for many years, including in 2012 due to the secondary effects of taking Gylenya for her MS and in 2013 when she was having rebound headaches. She had multiple diagnostic tests that were consistent with MS. In early 2019 she was having sinus pain and headaches, which Dr. Metcalf treated with oral medications.

3. Claimant also had prior orthopedic complaints including a right knee condition for which was surgically repaired with a right knee arthroscopy in 2012. Medical records from University of Colorado Hospital (UCH) document Claimant's ongoing neck and back issues including steroid injections in 2012 and 2013. Claimant was diagnosed with occipital neuralgia as early as December 18, 2014 by Dr. Metcalf and December 4, 2012 by Dr. Jason Krutsch.[1] The UCH records show she was also previously diagnosed with tinnitus by Dr. Ronald Olsen on November 22, 2013, headaches on December 14, 2012 by Dr. Krutsch, and migraines variant by PAC Wall on March 19, 2014.

4. On February 14, 2013 Dr. Metcalf documented that Claimant had had recurrent headaches starting in September 2012, which were not improved with ibuprofen or tylenol or imitrex and had similar headaches which lasted for several months in their intensity. Headaches were again documented on March 14, 2013, including left eye feeling cold and blurry vision. She ordered a brain MRI at that time to rule out underlying process causing headaches. On April 24, 2013 Claimant reported to Dr. Metcalf that she had worsening headaches for the prior 72 hours. On October 15, 2014 Claimant reported to Dr. Metcalf that she had "daily headaches" and Dr. Metcalf ordered a sleep study.

5. On February 15, 2015 she reported headaches to Dr. Mathew Gerlach of Front Range Orthopedics. In fact, on March 31, 2015 Dr. Gerald Rupp documented that his neurological exam showed, speech and swallowing problems, changes in sensation, balance, dizziness, headaches, incoordination and tremors.

6. On June 6, 2016 Claimant was attended at the UCH Spine Center with a plethora of complaints, including headaches, for which she had received trigger point injections. On August 31, 2016 she reported headaches which were constant for the past week. Claimant was evaluated in 2016 at UCH for continued MS, frequent falls and muscle spasms. Diagnostic testing and exam at the neurology clinic were consistent with demyelination including dysesthesias, spasticity, dysphagia, and supported the diagnosis of multiple sclerosis, which was consistent with MRI. Claimant was also seen at the UCHospital Spine Center in 2016 for acute pain of left knee, lumbar pain, cervical radiculopathy, thoracic axial neck pain, bilateral hip pain, headaches, right shoulder pain, bilateral anterior knee pain, peripheral neuralgia, and chronic pain syndrome.

7. Claimant was further evaluated by UCHealth Hand Clinic for bilateral wrist pain due to infusions to treat her MS on February 13, 2018. Dr. Matthew Lorio stated that the infusion effects were temporarily caused symptoms. On April 3, 2018 Dr. Timothy

[1] See Dr. Timothy Vollmer report at UCHealth February 1, 2016, Exhibit C, bate 491.

Vollmer, her UCH Rocky Mountain MS Center Neurologist, documented that Claimant had a variety of problems including moderate recurring episode of depressive disorder, arthralgia of the knee, bilateral hip pain, MS, chronic pain, and peripheral neuralgia. Dr. Vollmer provided a history that Claimant's osteoarthritis pains were worsening with the rituximab infusions, causing both bilateral knee and hand pain and had also noted eye jerking for about 4 months. On May 1, 2019 Claimant also presented with headaches to Dr. Metcalf.

8. Claimant was seen by her primary provider on October 9, 2019 after having been treated in the emergency room following an assault by an individual at her employment. Claimant was complaining of headaches, neck and left forearm pain at that time. On exam Dr. Metcalf noted that Claimant had a bruise under her chin and normal range of motion of both her neck and left forearm. On October 15, 2019 Dr. Metcalf noted the left hand x-rays were negative. Claimant followed up with Dr. Metcalf on January 29, 2020 but made no mention of left wrist or hand problems other than generalized pain caused by her MS in her neck, back and lower back, which were being treated and symptoms controlled adequately with her narcotic pain treatment. On April 14, 2020 Claimant had a virtual checkup appointment with Dr. Metcalf regarding her medications. She noted no different symptoms and noted diagnosis of MS, hyperlipidemia and medial epicondylitis but there was no exam to corroborate ongoing epicondylitis symptoms.[2]

9. Claimant was seen by Dr. Jason Krutsch of Colorado Pain Care on March 3, 2020. Claimant reported to Dr. Krutsch that she had a history of headaches, as well as on April 2, 2020, April 30, May 14, May 28, and June 22, 2020. Dr. Krutsch documented a long history of multiple medial branch block (MBB) of the cervical spine related to her ongoing chronic pain, going back to 2015 with at least 11 with his office and another 7 with Aprima. On April 30, 2020 Claimant had another MBB for the cervical spine spondylosis and chronic pain followed up by another cervical spine MBB on May 28, 2020.

10. On June 19, 2020 Claimant was speaking to a coworker at work. When she was done with the conversation, she turned around and tripped over a pallet and as she was falling, she reacted by protecting her face with her left hand and arm. She fell on her knees and left wrist, with her head bouncing twice off of her left hand, causing a wrist injury. She also sustained a cut on the inside of her lip and cheek. Claimant testified that following the fall, her knees, her hand and her head hurt.

11. Claimant was seen on June 19, 2020 at UCHealth Longs Peak Hospital (LPH) Emergency Services by Physician Assistant Coleen August, who noted Claimant had tripped over a pallet, injuring her knees and catching herself with her left hand. She noted Claimant denied hitting her head and had no neck pain or back pain or other injuries. Ms. August ordered x-rays of the left wrist and bilateral knees, which showed a possible fracture of the left wrist but normal findings of the bilateral knees. Ms. August documented prior medical history that included depression, headaches, high cholesterol, multiple sclerosis, incontinence, right elbow surgery, hysterectomy, knee arthroplasty,

[2] This ALJ notes that April 14, 2020 was the height of the COVID-19 pandemic when the State of Colorado was in shut down.

pelvic laparoscopy, right shoulder surgery and prior right wrist surgery for a tendon repair in 2003.

12. Claimant was attended by Dr. Lori Long-Miller, of Concentra Medical Cetners-Longmont, on June 22, 2020 for the complaints of bilateral knee, left wrist, and a right-side lip contusion. The neck pain was described as dull, aching in nature and radiating to the occiput with associated headaches. The left wrist pain was located in the left dorsal wrist with weakness of the hand, wrist, decreased range of motion (ROM), stiffness, swelling and tenderness. On exam, Dr. Long-Miller documented that Claimant had left wrist swelling and anatomic snuff box swelling, diffuse dorsal and snuff box pain, and ROM was deferred due to pain. Dr. Long-Miller assessed a contusions of her bilateral knees, a left elbow contusion, left wrist injury and cervical strain. She stated that the objective findings were consistent with history and work related mechanism of injury. Dr. Long-Miller referred Claimant for an orthopedic evaluation, physical therapy at the Boulder Concentra Clinic, which Claimant attended from June 22, 2020 through July 25, 2020, and provided Claimant with a shoulder sling. Upon review of the multitude of records submitted in this matter, this ALJ finds that Dr. Long-Miller failed to document Claimant's significant prior history of cervical spine, chronic pain of the cervical spine, the long history of headaches as well as the occipital neuralgia or the cervical MBBs which were as recent as May 28, 2020.

13. On June 22, 2020 Claimant was again seen by Dr. Metcalf via telehealth. She noted that Claimant had fallen forward on both knees and left wrist at work and fractured her left wrist. She diagnosed MS and insomnia.

14. On June 23, 2020, the Claimant was evaluated by Peter D. Wood, M.D. of Front Range Orthopedic and Spine who requested an MRI of the left wrist and took a history that Claimant fell onto her outstretched left hand. She had swelling in her wrist and pain at the base of her thumb as well as an irregularity of the scaphoid area. He placed her in a short arm thumb Spica splint, and ordered an MRI scan.

15. Claimant was evaluated by Nurse Practitioner Keith Meier, of Concentra Medical Centers, on June 26, 2022, documenting that Claimant had been evaluated by the orthopedic surgeon and that he had requested an MRI of her left wrist. Nurse Meier's examination of the wrist revealed left wrist and radial wrist pain which was constant, moderate described as dull, with grip weakness, hand weakness, decreased ROM and tenderness in the scapholunate interval and the radial aspect as well as dorsal aspect at the scaphoid. Mr. Meier, continued to note ongoing cervical strain including muscle spasms with palpation and associated cervical headaches. He limited Claimant's use of her left upper extremity.

16. Respondents filed a General Admission of Liability on July 2, 2020 admitting for temporary disability benefits and medical benefits related to the June 19, 2020 work accident.

17. The MRI took place on July 10, 2020 and was read by Brian Cox, M.D., who noted that Claimant had active de Quervain's tenosynovitis, age indeterminate bone marrow edema surrounding the scapholunate interval, cystic changes in the proximal lunate with a small distal radioulnar joint effusion suggesting changes of ulnocarpal

abutment without ulnar variance, and a large dorsal ganglion cyst arising from the triscaphe articulation, deep to the second extensor compartment. Dr. Cox also noted thickening and increased signal within both first extensor compartment tendons extending from the radial styloid process to the level of the thumb CMC joint with regional tenosynovial fluid indicative of active tendinosis.

18. Dr. Wood documented on July 14, 2020 that symptoms had been gradually improving with moderate left wrist pain, characterized as a dull aching and sharp stabbing type of pain. Claimant described symptoms located in the radial aspect of the wrist, aggravated by any movement and relieved by rest, ice and modification of activity. Dr. Wood noted on exam that Claimant's left wrist showed significant tenderness over the first dorsal compartment with mild swelling and pain with resisted thumb extension and abduction, a positive Finkelstein's test[3], and limited range of motion of her wrist secondary to discomfort, but not her digits. Dr. Wood recommended proceeding with conservative treatment, following review of the MRI films, including providing a steroid injection into the 1st dorsal compartment to treat the De Quervain's tenosynovitis and prescribed physical therapy.

19. Nurse Meier saw Claimant on July 21, 2020 noting she presented for recheck of her knee, wrist and lip. Claimant reported that she hurt so bad that she was crying following the wrist injection and that it did not help. With regard to the neck, Mr. Meier noted that injury history was previously documented, that symptoms were unchanged with continuous right posterior neck and right trapezius pain.

20. Claimant was attended by Mr. Keith Meier at Concentra on July 23, 2020 for cervical spine x-rays, which Dr. William McCuskey read as showing degenerative changes, otherwise unremarkable. It is not apparent in the medical records submitted by the parties, that Claimant's workers' compensation Concentra providers were aware of her pre-existing neck and headache issues.

21. Claimant returned to Concentra on July 24, 2020 and was evaluated by Kevin Riedel, P.T., who reported Claimant continued having headaches and was in therapy for her hand. He stated that Claimant was not progressing with PT, reported she had no change with her neck pain. They provided functional dry needling and manual therapy, which she tolerated well, and suggested that she be progressed with work restrictions.

22. On September 4, 2020 the parties entered into a Stipulation. Respondents conceded they did not provide Claimant with a list of designated medical providers, but Claimant had been treated a Concentra, which was paid for by Respondents. The parties stipulated that Dr. Kristin Mason would immediately be authorized as Claimant's authorized treating physician, so long as Dr. Mason accepted Claimant as a patient.

23. Claimant was initially seen by Dr. Kristin Mason on September 28, 2020 who took a history of relapsing-remitting MS and an on the job injury on June 19, 2020 when she tripped over a pallet, falling on both knees, onto concrete, banging her right ankle and falling onto her left hand and wrist, hitting her face on her hand, causing a cut

[3] Finkelstein's test is a provocative test for diagnosis of De Quervain's disease.

inside her lip. Claimant complained that headaches increased by movement seemed to emanate from the occipital area. She complained of left hand and wrist pain, had an MRI which showed some bone edema but not a clear fracture of the scaphoid. She saw Dr. Wood, and he placed her in a thumb Spica splint. He prescribed hand therapy, but it never happened. Claimant denied previous trauma to the left wrist. She noted pain with turning her head while driving, walking, and picking anything up increased her left wrist and hand pain. On physical exam, Dr. Mason noted that Claimant was pleasant and cooperative with few pain behaviors. Dr. Mason noted Claimant did have decreased sensation in the median distribution of the left hand with a positive medial Tinel's, and a somewhat ratchety quality on manual muscle testing. On neck exam, Dr. Mason found tenderness over the upper cervical segments and to a lesser extent the suboccipital muscles. The left wrist showed some diffuse swelling, mild tenderness over the TFCC[4], and more significantly tender over the scaphoid. Finkelstein's test was also positive. She also found that flexion/extension were quite limited. Dr. Mason assed probable cervical sprain-strain, with likely cervicogenic headaches; left wrist sprain vs. occult scaphoid injury with some degree of underlying de Quervain's; left knee contusion; and right ankle contusion. Dr. Mason prescribed trial medications for the headaches, stating that it was often somewhat of a process to find the appropriate treatment for posttraumatic headaches. She provided restrictions of five lbs., including no lifting greater than five lbs., limited standing and walking, and no crawling, kneeling, squatting or climbing.

24. An x-ray report issued by Dr. William Wahl on September 30, 2020 showed advanced disc disease at the C5-C6 and C6-C7, reversal of normal cervical lordosis centered at C5, and no compression fractures.

25. Dr. Mason evaluated Claimant again on October 20, 2020. She changed Claimant's headache medication, prescribed an MRI of the cervical spine in order to not aggravate an underlying condition with physical therapy and continued restrictions.

26. Dr. Mason reviewed Claimant's left wrist MRI on November 9, 2020 and noted possible lunotriquetral ligament tear, edema in the lunate and a TFCC tear. She documented that following physical therapy Claimant was complaining of increased headaches and that Claimant denied having similar headaches before. Claimant described the headaches as left greater than right, occipital radiating to frontal, at times associated with visual changes and nausea. Claimant reported an incident where she fell against a wall after losing balance due to headaches. Dr. Mason continued to assess cervical strain, left wrist injury and post migraine headaches. She referred Claimant to Dr. Drewek, regarding her neck and changed her headache medication again.

27. On November 30, 2020 Dr. Mason conducted a telemedicine visit with Claimant, noting that Claimant had potentially been exposed to COVID. They discussed sending Claimant to Dr. Frank Scott, a hand orthopedist, as well as for a neurologic evaluation related to ongoing headache concerns, as Claimant had been seen by Dr. Drewek who opined that the headaches were an unlikely consequence of neck problems.

[4] The TFCC stand for triangular fibrocartilage complex, a structure in the wrist that supports the carpal bones on the wrist.

28. Claimant was evaluated at the UCH Hand Clinic on January 12, 2021 by Dr. Frank Scott and Dr. Thomas Ergen, who documented that Claimant's symptoms were consistent with left De Quervain's, left thumb CMC arthritis and left ulnar abutment syndrome. They ordered three x-ray views of her left thumb and confirmed that they showed left thumb CMC[5] arthritis that was moderate. They proceeded with corticosteroid injection for the left thumb CMC only, as Claimant reported she only had temporary relief with the De Quervain's injection.

29. Dr. Mason evaluated Claimant on February 25, 2021. Claimant reported feeling better after the left wrist injection with Dr. Scott, still having certain pain with movement. Dr. Mason documented a taut band in the upper cervical and middle paraspinals bilaterally. She noted that wrist ROM following the injections was better than on previous examinations, and Claimant had less left wrist swelling. Dr. Mason proceeded with trigger point injections into the cervical spine at that time.

30. Claimant had an independent medical evaluation, at Respondents' request, by Dr. Carlos Cebrian on February 25, 2021, who issued a report on March 17, 2021. He documented a mechanism of injury consistent with prior records wherein Claimant reported falling over a pallet, falling first on her knees and raising her left hand to protect her face, then falling on her left hand, hitting her face on her hand and causing a small cut on her upper lip. He completed a medical records review which spanned over ten years and was approximately 88 pages long. Dr. Cebrian opined that the work related June 19, 2020 claim diagnoses included the bilateral knee contusions, the left wrist sprain, de Quervain's tenosynovitis, and the lip abrasion. He provided a list of 25 non work related diagnosis including the headaches, vertigo, tinnitus, cervical spine, chronic pain and the occipital neuralgia based on the medical records reviewed.

31. On March 18, 2021 Dr. Mason documented that Claimant had followed up with Dr. Oyoung from Neurology, who had previously recommended discontinuation of medications for headaches. On examination Dr. Mason noted significant tenderness in the area of the snuffbox and lunotriquetral ligament area. On April 8, 2021, Dr. Mason noted she received the IME from Dr. Cebrian and discussed the results with Claimant. She found that Claimant continued to have tenderness in the snuffbox and lunotriquetral ligament area and to a lesser extent the scapholunate area as well as the TFCC. She continued to recommend follow up with Dr. Scott and Dr. Oyoung.

32. On April 26, 2021 Dr. Scott noted that Claimant had excellent short term results with her left thumb CMC osteoarthritis injection. They discussed treatment options and determined to perform repeat injection of the left thumb CMC.

33. Claimant was attended by Dr. Thomas France at the UCH Hand Clinic on June 14, 2021 who documented that Claimant's last left thumb CMC injection was not as effective as the first one. They discussed surgical options at that time. While there were indications of past medical history of chronic pain in the feet, arms, hands as well as depression, headaches and MS, they were not explained in the context of time or referenced a work injury. Dr. France noted Claimant was tender to palpation at the thumb

[5] Carpometacarpal joint.

CMC joint but had no pain with "A1 pulley of the thumb."[6] She also had pain along the TFCC and with ulnar deviation of the wrist.

34. Claimant's July 12, 2021 follow-up report with Dr. Mason noted that Claimant continued to have major problems with headaches that were constant left-sided hemi-cranial, which seemed to be constant and daily. She continued to diagnose posttraumatic headaches, changed her headache medication and discussed the upcoming surgery with Dr. Scott set for August 2, 2021.

35. On August 2, 2021 Claimant proceeded with the left wrist arthroplasty-LRTI (ligament reconstruction and tendon interposition), and left first dorsal compartment release-De Quervain's release by Dr. Frank Scott.

36. On August 17, 2021 Dr. Scott noted that Claimant was post left thumb CMC arthroplasty with left de Quervain's release on August 2, 2021. He noted that Claimant fell and landed on her wrist on her bed. He removed the splint and sutures, and stated she was stable.

37. The last record by Dr. Scott is dated September 27, 2021 and he continued to diagnose De Quervain's disease and localized primary osteoarthritis of the CMC joint of the left thumb. He documented that Claimant was approximately eight weeks post left thumb CMC arthroplasty and left first dorsal compartment release. Dr. Brady Williams coauthored the report. The exam of the left upper extremity documented that the incision was clean, dry, intact and well-healed, thumb was in good functional position and stable, Claimant had thumb opposition to the distal palmar crease of the small finger, persistent paresthesia on both the ulnar and radial aspect of the thumb. He noted that Claimant was progressing as expected.

38. Dr. Mason examined Claimant on January 3, 2022 noting that following surgery, she was doing much better with left wrist movement, with no swelling or deformity. She recommended Claimant continue with physical therapy for her wrist and change headache medications, though she had not been very successful with prior prescriptions.

39. Kristin Mason, M.D. testified by deposition on January 24, 2022, as Claimant's authorized treating physician. She is board certified in physical medicine and rehabilitation as well as electrodiagnostic and neuromuscular medicine. She has been Level II Accredited by the Division of Workers' Compensation since 2001. Dr. Mason is accepted an expert in physical medicine and rehabilitation, electrodiagnostic and neuromuscular medicine, as well as a Level II Accredited physician. Dr. Mason stated that Claimant was complaining of headaches increased by movement and associated with ringing in her ears, as well as some eye pain, nystigmus, left hand and wrist pain, soreness in her left knee and tenderness on the outside of her right ankle during her first evaluation. She opined that the surgery performed by Dr. Scott was reasonable, necessary and related to the June 19, 2020 work related injury. She specifically opined that Claimant sustained multiple insults to her left wrist including causing the aggravation of the left thumb CMC joint, and left first dorsal compartment injury or De Quervain's

[6] A test to identify trigger finger symptoms.

tenosynovitis. She stated that Claimant had undergone conservative care and required surgery, and in hindsight, she improved since the surgery with less swelling, tenderness, better capacity to use her hand and improved range of motion.

40. Claimant testified at hearing that she injured her left wrist when she fell causing pain. She stated that, she had some problems with her wrist before this injury, but the problems she had after the injury caused swelling, tenderness and loss of range of motion and had not experience that kind of pain in her wrist until this fall. She stated that she had had no other injuries between June 19, 2020 and the date of her surgery. She explained that the symptoms she had had prior to this injury into the left hand or wrist were resolved before this accident happened, including the tingling which was resolved by the MS medication. Claimant explained that the surgery helped relieve the pain in her wrist and thumb areas where she hurt herself during the fall. Claimant also testified that she had had headaches before the accident but that they were different after the accident but acknowledged that she did not remember about all the treatment she had received for headaches. She stated that she had given herself whiplash during the fall and that was what was causing the headaches.

41. Dr. Cebrian testified at hearing consistent with his report. Dr. Cebrian was accepted as an expert in occupational medicine and as a Level II Accredited physician by the Division since 2001. He opined that Claimant had sustained an injury to her left wrist but that only the surgical intervention for the first dorsal compartment release (de Quervain's disease) was related to work event and that the surgical intervention for the CMC arthroplasty was not a result of Claimant's work injuries. Dr. Cebrian explained that MS caused nerve pain that weakens the muscles and places more pressure on the joints for the body's support, in turn causing osteoarthritis to develop. Dr. Cebrian is persuasive with regard to the need for the first dorsal compartment surgery but not with regard to his opinion of the surgical intervention of the CMC joint.

42. Dr. Cebrian also testified regarding Claimant's headaches. He attributed the headaches partially to her preexisting cervical pathology, which was actively being treated, including shortly before the work related accident. He also opined that it was likely that the preexisting and diagnosed multiple sclerosis and nystagmus (eye jerking), previously diagnosed migraines, occipital neuralgia, and chronic opiod use were also contributing to Claimant's ongoing headache condition and need for medical care. He explained that these were preexisting conditions not related to the accident. Dr. Cebrian is found persuasive with regard to the headache condition.

43. As found, on June 19, 2020 Claimant injured her left wrist, causing de Quervain's tenosynovitis (first dorsal compartment) and aggravated the preexisting condition of the CMC joint and TFCC on June 19, 2020. While Claimant did suffer from aches and pains in her bilateral wrists due to her MS and arthritic or degenerative joints, the fall on her left wrist on June 19, 2020 aggravated her preexisting condition. Claimant was persuasive in her testimony that she had pain, swelling and loss of range of motion in her left wrist and hand as a consequence of her June 19, 2020 fall on her left wrist. As found, the fall caused an aggravation of her preexisting arthritic condition of her left wrist. As found, this was documented by the emergency room visit on June 19, 2020, on June 22, 2020 by Dr. Long-Miller and in subsequent reports issued by Dr. Mason. Dr. Mason

documents multiple times that claimant continued with pain at the base of the thumb, snuffbox area and swelling of the left wrist. As found, Dr. Wood credibly opined on July 14, 2020 that Claimant's left wrist showed significant tenderness over the first dorsal compartment with mild swelling and pain with resisted thumb extension and abduction, a positive Finkelstein's test, and limited range of motion of her wrist secondary to discomfort. As found, Dr. Frank Scot on January 12, 2021 opined that Claimant's symptoms were consistent with left De Quervain's, left thumb CMC arthritis and left ulnar abutment syndrome. As found, this is supported by Dr. Long-Miller's medical records, which go into extensive description of having had left wrist swelling and anatomic snuff box swelling, diffuse dorsal and snuff box pain. Nurse Meier's examination of the wrist revealed left wrist and radial wrist pain which was constant, moderate, with grip weakness, hand weakness, decreased ROM and tenderness in the scapholunate interval and the radial aspect as well as dorsal aspect at the scaphoid. These medical providers are found persuasive. Even Dr. Cebrian opined that the De Quervain's tenosynovitis was related to the injury. As found, Claimant has proven by a preponderance of the evidence that the left wrist De Quervain's disease, aggravation of the CMC joint are related to the June 19, 2020 work relate injury.

44. As found, the left wrist De Quervain's tenosynovitis and the aggravation of the arthritic CMC joint are found to be compensable and causally related to the June 19, 2020 work related injury. Dr. Wood and Dr. Scott performed injections in both sites and Claimant had only temporary relief with the injections. Claimant was also involved in physical therapy with little relief. As found, Dr. Scott complied with the requirements of the Division's Medical Treatment Guidelines in proceeding with applicable conservative care before recommending surgical repair. As found, Dr. Scott's opinion of Claimant's need for surgery of these conditions is found persuasive and therefore, the surgery is found to be reasonably necessary and related to the June 19, 2020 event. Dr. Scott performed the surgical intervention on August 2, 2021 including the left wrist arthroplasty with left de Quervain's release. Claimant has proven by a preponderance of the evidence that the surgery performed by Dr. Scott on August 2, 2021 was reasonably necessary and related to the admitted compensable workplace injury of June 19, 2020 and was performed in order to address the aggravated CMC joint and De Quervain's disease.

45. As found, Dr. Cebrian is persuasive that, in this matter, Claimant clearly had a long history of headaches. As found, as early as June 22, 2020 Claimant stated to Dr. Long-Miller that her headaches were in the occiput. Dr. Mason's testimony indicated that sleep apnea and occipital neuralgia can cause headaches. Claimant was diagnosed with both of these conditions as early as December 18, 2014 by Dr. Metcalf and December 4, 2012 by Dr. Jason Krutsch.[7] She was also previously diagnosed with tinnitus by Dr. Ronald Olsen on November 22, 2013, headaches on December 14, 2012 by Dr. Krutsch, and migraines variant by PAC Wall on March 19, 2014. As found, Dr. Mason stated in her initial report on September 28, 2020 that Claimant's headaches "seemed to emanate from the occipital area." Claimant had headaches affecting her occipital area for many years as documented in the medical records. As found, Claimant's need for continuing medical care for the headaches and migraines are not causally related to the June 19,

[7] See Dr. Timothy Vollmer report at UCHealth February 1, 2016, Exhibit C, bate 491.

2020 work related injury. Claimant has failed to prove causation of the migraines and headaches to the work related June 19, 2020 claim.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Medical Benefits

The three issues to be determined in this case are intertwined in a claim for reasonably necessary medical benefits related to the admitted compensable work related injury of June 19, 2020.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

A claimant has a compensable injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produces a disability for which benefits are sought. § 8-41-301(1)(c), C.R.S. See *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff*, 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). 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). However, Claimant must prove by a preponderance of the evidence that her symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant may have suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

When a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The finding of a compensable injury or a compensable disability does not require a finding that all medical treatment after the industrial injury is authorized or causally related to the industrial injury. *Briggs v. Williard Plumbing & Heating Inc.*, W.C. No. 4-526-000 (I.C.A.O. Nov. 26, 2003). This is true even where the there is an admission of liability as to medical care and medical care has been provided despite denial, and merely because there is an admitted injury it cannot be construed as a concession that all medical care which occurred after the injury were caused by the injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012).

Claimant's fall onto her left wrist did cause injury to Claimant's tendons in her first dorsal compartment in her left wrist, and aggravated her underlying arthritis in her wrist including the CMC joint, aggravation of the left ulnar abutment syndrome and the aggravation of the tendons of the TFCC. This is supported by Claimant's persuasive testimony in this matter as well as the opinions of Dr. Mason, and the medical records from Dr. Scott, Dr. Long-Miller, Dr. Wood, and Nurse Meier as stated above. This is supported by the orthopedic specialists' opinions above, Dr. Wood and Dr. Scott. It is also supported by the limited persuasive evidence by Dr. Cebrian regarding the first dorsal compartment or de Quervain's tenosynovitis. Claimant has shown that both the de Quervain's tenosynovitis and the aggravation of the preexisting osteoarthritis, which became symptomatic and which required medical care following the June 19, 2020 fall, were proximately caused by the June 19, 2020 workplace injury. Claimant has further shown that the need for the surgery performed by Dr. Frank Scott was reasonably necessary and related to the June 19, 2020 fall at work.

In this matter, Claimant has a long history of painful, unrelenting MS, cervical spine complaints, headaches, and occipital neuralgia, which caused ongoing headaches or migraines. None of these conditions were caused by her fall at work. None of these conditions were worsened by her June 19, 2020 work related fall despite the extensive medical care provided by authorized treating providers and paid for by Respondents. This is supported by the lengthy preexisting records of Dr. Metcalf as well as Dr. Cebrian's opinions regarding the headaches, which are persuasive in this matter. Claimant has failed to show the causal relationship between the work related injury and the ongoing headaches from which Claimant suffers. As found the ongoing headache condition and the need for medical care related to the ongoing headaches are not reasonably necessary and are not proximately caused by the June 19, 2020 workplace accident.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the left first dorsal compartment release (de Quervain's release) and the left CMC joint arthroplasty as completed by Dr. Scott in August 2021, and all costs associated with the reasonably necessary and related medical care, subject to the Colorado Workers' Compensation Fee Schedule.

2. Claimant's migraines and headaches are not causally related to the June 19, 2020 industrial accident, and thus, medical benefits for her migraines and headaches are denied and dismissed.

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

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

DATED this 21st day of July, 2022.

Digital Signature

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

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that the C4 to C7 anterior cervical discectomy and fusion (ACDF) recommended by Dr. Ewell Nelson is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 17, 2020 work injury?

FINDINGS OF FACT

1. The claimant works at the employer's ranch as a ranch manager. His job duties include conditioning five to seven horses and overseeing other ranch employees.

2. On July 17, 2020, the claimant was operating a skid steer to move a 1,400 to 1,600 pound bale of hay. This bale of hay rolled off the skid steer forks, causing the skid steer to pitch forward and then back in a forceful manner. The claimant's initial symptoms included headaches, as well as pain in his neck, shoulders, and arms.

Medical Treatment Prior to July 17, 2020

3. The claimant has spent most of his life riding, breaking, and training horses. This included many years working as a jockey racing horses in the United States and Canada. During his lengthy horse related career, the claimant has been thrown from horses, resulting in injuries. Due to such injuries, the claimant has undergone surgery on both of his arms.

4. In 2007, the claimant was thrown from a horse and injured his left wrist, necessitating surgery. During that treatment, the claimant was diagnosed with carpal tunnel syndrome. The claimant also experienced neck pain following the 2007 incident. On June 18, 2007, he underwent magnetic resonance imaging (MRI) of his cervical spine. The MRI showed mild multilevel degenerative changes with stenosis.

5. In 2018, the claimant suffered a right wrist fracture while working as a gate trainer at a horse track. This injury also necessitated surgery. On April 16, 2019, the claimant's surgeon recommended carpal tunnel surgery. The claimant testified that he did not undergo carpal tunnel surgery because he was able to perform all of his job duties, at that time.

6. The claimant further testified that after recovering from these prior injuries and related surgeries, he was able to return to full duty work. The claimant testified that prior to July 17, 2020, he was never off a horse for more than a few days and did not have to take any medications.

Medical Treatment Beginning July 17, 2020

7. The claimant's authorized treating provider (ATP) for this claim is Concentra Medical Centers (CMC). On July 20, 2020, the claimant was seen at CMC by Dr. Felix Meza and Devin Jacobs PA-C. On that date, the claimant described his mechanism of injury and reported tightness and pain in his neck, intermittent headaches, tingling in his left fourth and fifth fingers, and pain in his right elbow. The claimant was diagnosed with a neck strain and right elbow contusion. He was referred to physical therapy.

8. Cervical spine x-rays taken on July 20, 2020 showed degenerative changes, with significant disc space narrowing in the lower cervical segments.

9. On July 24, 2020, the claimant returned to PA Jacobs and reported improved symptoms with physical therapy.

10. On August 7, 2020, the claimant reported to PA Jacobs that he continued to have neck tension and aching, with worsening right upper extremity aching. PA Jacobs ordered x-rays of the claimant's right elbow and right shoulder.

11. On August 10, 2020, the claimant was seen by PA Jacobs at the request of the claimant's physical therapist. The claimant reported continuing headaches and intermittent tingling and numbness in his hands. On this date, PA Jacobs added right cervical radiculopathy to the claimant's list of diagnoses and ordered an MRI of the claimant's cervical spine.

12. On August 22, 2020, the cervical spine MRI was reviewed by Dr. Elizabeth Carpenter. In her report, Dr. Carpenter identified moderate cervical spondylosis with multilevel thecal sac stenosis; an 8 mm AP thecal sac at the C3-C4 level; moderate multilevel facet arthropathy; a degenerative bone cyst on the left at the C3-C4 level; and severe foraminal stenosis on the left at C3-C4; right from C4 to C6, and bilaterally at C6-C7.

13. On August 31, 2020, the claimant was seen by Dr. Robert Kawasaki. At that time, the claimant reported pain in his upper cervical spine, headaches, and occasional numbness and tingling in his hands. On examination of the claimant's cervical spine, Dr. Kawasaki noted tenderness to palpation of the occipitoatlantal junction. He also noted that specific facet loading caused increased pain in that same area, and reproduced headaches. Dr. Kawasaki opined that the claimant's underlying cervical spondylosis was the result of the claimant's career as a jockey. He also opined that the July 17, 2020 "whiplash injury" created the claimant's cervicogenic headaches. Dr. Kawasaki recommended acupuncture and chiropractic treatment. He also discussed possible future treatment, concluding injections and medial branch blocks.

14. On September 18, 2020, the claimant was seen by PA Jacobs. At that time, the claimant reported worsening neck pain, with shooting pain from his neck down his right arm to his elbow, right hand numbness, and headaches.

15. On September 28, 2020, the claimant returned to Dr. Kawasaki and reported persistent neck pain, headaches, and pain in his bilateral shoulder girdles. The claimant also reported that he had been seen at the Orthopedic Center of Colorado by Maria Kaplan, PA, who referred him for an interlaminar epidural steroid injection (ESI). Dr. Kawasaki recommended ongoing conservative care, including chiropractic treatment and physical therapy.

16. On October 22, 2020, Dr. Kawasaki performed bilateral upper extremity electromyography (EMG) testing. These tests did not show evidence of cervical radiculopathy. In the medical record of that date, Dr. Kawasaki noted, "[a]lthough the patient's EMG did not show evidence of axonal losses, the patient can have radiculitis causing some nerve irritation with pain, numbness, and tingling in the upper extremities." Dr. Kawasaki opined that the claimant has some increased pain in his neck with potential radiculopathic symptomatology. Dr. Kawasaki recommended an interlaminar ESI at the C7-T1 level. This injection was administered on November 25, 2020.

17. On November 2, 2020, and November 30, 2020, the claimant was seen at CMC by Dr. Meza. The claimant continued to report persistent pain in his neck, right trapezius, and right shoulder.

18. On December 24, 2020, the claimant was seen by Dr. Kawasaki and reported some temporary relief from the injection. However, the claimant continued to report persistent neck pain and headaches. Dr. Kawasaki opined that the claimant's ongoing pain was related to the work injury. Dr. Kawasaki recommended bilateral C2-C3 and C3-C4 medial branch blocks. The recommended medial branch blocks were administered on January 29, 2021.

19. For a period of time in 2021, the claimant relocated with the employer to Florida. During that time, the claimant's treatment was transferred to CMC providers in that state. On March 5, 2021, the claimant was seen at CMC in Florida by Rosemarie Schanel, PA-C. The claimant described his work injury and reported headaches, pain in his neck, trapezius, right shoulder, and right arm. PA Schanel diagnosed the claimant with right cervical radiculopathy, made a referral for a neurological consultation, and prescribed cyclobenzaprine and gabapentin.

20. On April 6, 2021, the claimant returned to PA Schanel and reported that the medications were helping him sleep and reducing his pain. However, he also reported continued pain in the base of his skull and left hand numbness. Between April and June 2021, the claimant continued to report increased pain, numbness, and tingling in his bilateral upper extremities.

21. On June 14, 2021, the claimant returned to CMC in Colorado and was seen by Dr. Meza. The claimant continued to report persistent neck and right upper extremity symptoms.

22. On July 7, 2021, the claimant was seen by Dr. Kawasaki. At that time, Dr. Kawasaki noted that the claimant had increased symptoms with range of motion and referred the claimant to a neurosurgeon. Dr. Kawaski noted that if surgery was not recommended, the claimant would be a maximum medical improvement (MMI). Dr. Kawaski opined that it was unlikely that the claimant would need surgery.

23. On August 31, 2021, the claimant was seen at Boulder Neurological and Spine Associates by PA Michael Kiley. The claimant described his injury and reported bilateral hand weakness and numbness. He also reported bilateral shoulder and triceps pain. PA Kiley ordered x-rays and an MRI of the claimant's cervical spine.

24. On September 15, 2021, the cervical spine x-rays showed moderately severe diffuse cervical spondylosis, multilevel disc space narrowing, endplate sclerosis, degenerative spurring, and degenerative facet joint arthropathy. A cervical spine MRI was also performed on that date and showed findings similar to the prior MRI.

25. On October 12, 2021, the claimant returned to Boulder Neurological and Spine Associates and was seen by Dr. Ewell Nelson. At that time, the claimant reported persistent neck and upper extremity pain. Dr. Nelson reviewed the September 15, 2021 MRI and recommended a C4 to C7 anterior cervical discectomy and fusion (ACDF) to address the claimant's bilateral radicular symptoms. On October 21, 2021, a request for authorization of a C4 to C7 ACDF was sent from Dr. Nelson's practice to the insurer.

26. On October 25, 2021, the claimant attended an independent medical examination (IME) with Dr. B. Aaron Castro. In connection with the IME, Dr. Castro reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his November 7, 2021 IME report, Dr. Castro opined that the claimant's need for cervical surgery is not work related. Rather, it is Dr. Castro's opinion that the need for surgery is related to pre-existing degenerative changes in the claimant's cervical spine. In addition, it is possible that some of the claimant's symptoms are not coming from his cervical spine, but rather from carpal tunnel syndrome. Based upon Dr. Castro's report, the respondents denied authorization for the recommended spinal fusion surgery.

27. On June 1, 2022, Dr. Justin Green administered EMG testing of the claimant's bilateral upper extremities. In his report, Dr. Green noted that the claimant had moderate carpal tunnel syndrome in the right wrist, without ongoing denervation. The EMG also showed no evidence of ongoing right upper extremity radiculopathy.

28. Dr. Castro's testimony was consistent with his written report. Dr. Castro reiterated his opinion that the surgery is not reasonable or necessary medical treatment. In support of this opinion, Dr. Castro noted that the claimant does not have spine instability. Dr. Castro noted that it is unclear if the claimant's symptoms are coming from

his cervical spine. In addition, the EMG studies showed evidence of carpal tunnel syndrome, but did not show evidence of cervical radiculopathy. Dr. Castro opined that it is more likely that the claimant's hand related symptoms are due to carpal tunnel syndrome.

29. During Dr. Castro's testimony a clarification was made regarding two medical records he referenced in his IME report as occurring in 2017. Specifically, medical records identified as June 20, 2017 and September 21, 2017, were in fact records from those dates in 2007. Dr. Castro testified that this was a typographical error in his report, and it did not change his ultimate opinion regarding the claimant's cervical spine and the recommended surgery.

30. The claimant testified that his current symptoms differ from those he experienced from his prior injuries. His current symptoms are more severe and are constant. As a result, he has to take medications (including gabapentin). Prior to his 2020 injury, the claimant rode horses virtually every day. Since his injury, he now rides once or twice a month. The claimant explained that he rides at those times because he is not comfortable letting his boss, (a woman in her 70s), ride alone. The claimant wants to undergo the recommended surgery.

31. The ALJ credits the claimant's testimony regarding the nature and onset of his symptoms. The ALJ also credits the medical records and the opinions of PA Jacobs, PA Schanel, PA Kiley, and Dr. Nelson over the contrary opinions of Dr. Castro. The ALJ finds that the claimant has demonstrated that it is more likely than not that he suffered an injury to his cervical spine on July 17, 2020. Specifically, the ALJ finds that the claimant's pre-existing cervical spine condition was aggravated by the July 17, 2020 injury. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that the C4 to C7 ACDF recommended by Dr. Nelson 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. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

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

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

6. As found, the July 17, 2020 injury aggravated the pre-existing condition of the claimant's cervical spine, necessitating treatment. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the C4 to C7 anterior cervical discectomy and fusion (ACDF) recommended by Dr. Nelson is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 17, 2020 work injury. As found, the claimant's testimony, and the opinions of PA Jacobs, PA Schanel, PA Kiley, and Dr. Nelson are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the recommended C4 to C7 anterior cervical discectomy and fusion (ACDF), pursuant to the Colorado Medical Fee Schedule.

Dated July 22, 2022.

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

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

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

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

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
Workers' Compensation No.: 4-956-021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In the Matter of the Workers' Compensation Claim of:

[REDACTED],
Claimant,

v.

[REDACTED],
Employer,

and

[REDACTED],
Insurer,
Respondents.

THIS MATTER has come before the undersigned on Respondents' Motion for Summary Judgment.

FINDINGS OF FACT

1. [Redacted] ("Claimant") sustained a work-related injury on July 7, 2014. Liability was admitted and claimant underwent medical treatment until he was placed at maximum medical improvement by Dr. Joseph Morreale on July 10, 2017 at a follow-up Division Independent Medical Examination ("DIME"). *Resps. Ex. A, pp. 6-11.* Pinnacol Assurance filed a Final Admission of Liability ("FAL") on September 5, 2017. *Id., pp. 1-5.*

2. Respondents admitted for maintenance medical treatment in the FAL. *Id.* However, claimant has not received medical treatment from any authorized medical providers of which respondents are aware since being placed at MMI on July 10, 2017. *See Resps. Ex B, pp. 12-13,* ¶3. The last payment made by Pinnacol Assurance for medical treatment rendered to Claimant was a payment made on May 4, 2017 to Concentra Medical Centers for an April 28, 2017 date of service. *Id.* No medical benefits have become due and payable since that time. *Id.* Two other later payments made to Concentra, one on November 3, 2017 for a listed date of service of October 16, 2017, and the second on January 26, 2018 for a listed date of service of January 5, 2018, were for reimbursement of time spent by treating providers responding to inquiries made by representatives

of respondents without corresponding medical treatment rendered to Claimant. *See Id.; see also Resps. Ex. C.* No payments of any kind have been made to Claimant's treating medical providers since that time, nor have any bills been submitted for payment. *Resps. Ex B, pp. 12-13, ¶3.*

3. Claimant filed an Application for Hearing on December 19, 2017, endorsing the issues of overcoming the DIME, permanent partial disability ("PPD") benefits, and challenging an offset respondents had taken against the PPD award. *Resps. Ex. D.* The parties resolved the issues by stipulation, which was granted on September 7, 2018. *Resps. Ex. E.* Pinnacol Assurance issued a check to claimant in the amount of $7,489.59 on September 12, 2018, representing the remaining balance of PPD benefits as per the resolution agreed upon by the parties. *See Id; see also Resps. Ex. B, p. 13, ¶4.*

4. Claimant filed a subsequent Application for Hearing on November 14, 2018, endorsing the issues of petition to reopen, permanent total disability benefits, "impairment rate," and medical benefits. *Resps. Ex. F.* The parties went to hearing on the issues of petition to reopen and medical benefits. Hearing occurred May 24, 2019. Administrative Law Judge Margot W. Jones presided. ALJ Jones issued her *Findings of Facts, Conclusions of Law, and Order* on July 31, 2019, served on the parties on August 2, 2019. *Resps. Ex. G.* ALJ Jones denied and dismissed claimant's request to reopen his claim and his request for medical benefits. *Id. at p. 11.*

5. This claim was thereafter dormant for nearly three years until Claimant filed an Application for Hearing on April 5, 2022, endorsing issues of compensability and permanent total disability benefits. *Resps. Ex. H.* Prehearing Administrative Law Judge Marcus J. Zarlengo struck the Application by Order dated April 25, 2022. *Resps. Ex. I.*

6. Claimant has now filed the instant Application for Hearing on May 10, 2022, endorsing issues of petition to reopen, compensability, and temporary partial disability benefits from July 9, 2014 ongoing. *Resps. Ex. J.* Respondents filed their Response to Application for Hearing on May 23, 2022, endorsing as a defense that Claimant's request to reopen his claim is time-barred by the applicable statute of limitations contained in C.R.S. §§ 8-43-303 (1)& (2). *Resps. Ex. K.*

CONCLUSIONS OF LAW

1. OACRP 17 provides for summary judgment when the pleadings and supporting documents demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to establish that no genuine issue of fact exists. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005).

2. C.R.C.P. 56 applies to motions for summary judgment filed with the Office of Administrative Courts to the extent it is consistent with OACRP 17. *Fera v. ICAO*, 169 P.3d 231 (Colo. App. 2007). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. C.R.C.P. 56; OACRP 17. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Ballesteros v. Westaff, Inc.*, W.C. No. 4-475-838 (ICAO Nov. 24, 2008).

3. A claim may be closed by a "final award" resulting from an admission or order after a contested hearing, and an "award" includes an order that grants or denies benefits. *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994). Unless an "award" of benefits expressly reserves other issues for future determination, the "award" closes the claim and requires the parties to satisfy the reopening requirements of § 8-43-303, C.R.S., before litigation of any further issues. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. 2003); *See Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780, 784 (Colo. App. 1991).

4. Pursuant to § 8-43-303(1), C.R.S., "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition…." Also, § 8-43-303(2)(a), C.R.S., allows an administrative law judge to reopen a claim on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition "at any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable…." Similarly, § 8-43-303(2)(b), C.R.S., allows an administrative law judge to reopen a claim for medical benefits only on the grounds of error, mistake or change in condition "at any time within two years after the date the last medical benefits become due and payable…."

5. Therefore, a petition to reopen a claim on the ground of fraud, overpayment, error, mistake, including mistakes of law, or change in condition is subject to time limitations and must be filed either within six years of the date of injury, or within two years of the last payment of benefits or compensation, on the ground of fraud, overpayment, error, mistake, including mistakes of law, or change in condition. *Eichstedt v. King Soopers*, W.C. No. 4-528-268 (ICAO May 27, 2011) (internal citations omitted). "The time limits set for in § 8-43-303, C.R.S. operate as a statute of limitations, and apply when complications develop directly from the original injury, even if the claimant attempts to classify the condition as a new disability." *Calvert v. Industrial Claim Appeals Office*, 155 P.3d 474, 476 (Colo. App. 2006).

6. Claimant's request to reopen his claim, inclusive of a request for temporary partial disability benefits, is time barred by the applicable statute of limitations in C.R.S. § 8-43-303. Respondents are entitled to a judgment as a matter of law dismissing Claimant's claim for benefits, because Claimant's request to reopen the claim falls outside of any of the permissible reopening timeframes.

7. The combined provisions of §§ 8-43-303(1) & (2), C.R.S., provide three separate timeframes in which a claim may be reopened: (1) within 6 years of the date of injury; (2) within 2 years after the date the last disability benefit becomes due or payable; and (3) within 2 years after the date the last medical benefits become due and payable.

8. Each of the three referenced events in this claim well exceed the permitted timeframe in which a claim can be reopened. The date of injury, July 10, 2014, is nearly 8 years from the date of the May 10, 2022 Application for Hearing in question.

9. The date the last disability benefits became due or payable was via the stipulation approved on September 7, 2018, with associated payment made on September 12, 2018, which is approximately 3 ½ years from the May 10, 2022 Application for Hearing.

10. The date the last medical benefit became due or payable was related to the April 28, 2017, date of service with Concentra Medical Centers, paid on May 4, 2017. No payments for the rendering of medical treatment to Claimant have come due and payable since, which is approximately 5 years from the May 10, 2022 Application for Hearing. Even using the date of the last payment to medical providers for costs unrelated to medical treatment rendered, January 26, 2018, Claimant's May 10, 2022 Application for Hearing and request to reopen the case is nearly 4 ½ years later.

11. Claimant's claim was closed by the FAL filed on September 5, 2017. Claimant must reopen his claim to obtain the pre-MMI benefits he is seeking. Claimant previously attempted to reopen his claim within the applicable limitations period. His claim was denied and dismissed. Three years after the hearing for Claimant's prior reopening attempt, and well after the expiration of the limitations period for reopening a claim, Claimant has filed a new Application for Hearing endorsing issues of petition to reopen and temporary partial disability benefits.[1] Claimant's request to reopen his claim and receive pre-MMI medical benefits is clearly time barred.

12. As found, Claimant's request to reopen his claim and receive pre-MMI medical benefits is time barred. The summary judgment evidence establishes that there is no genuine issue of material fact Claimant's request to reopen his claim is time barred by application of the statute of limitations in § 8-43-303, C.R.S. Respondents are therefore entitled to judgment as a matter of law dismissing Claimant's claim for benefits set forth in his May 10, 2022 Application for Hearing.

ORDER

1. Respondents' motion for summary judgment is hereby granted. Claimant's application for hearing dated May 10, 2022, on the remaining issues of petition to reopen, compensability, and temporary partial disability benefits is hereby denied and dismissed.

2. The hearing which has been set for September 6, 2022 at 1:30 p.m. in Denver is hereby vacated.

3. All other issues and defenses not addressed within this order are preserved for potential future determination.

DATED this 22nd day of July, 2022.

/s/ Glen Goldman

Administrative Law Judge

[1] The endorsement of "compensability" is moot due to the fact that liability has been admitted.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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 petition to review form at: http://colorado.gov/dpa/oac/forms-WC.htm**.

OFFICE OF ADMINISTRATIVE COURTS CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was served upon the following party by email on 7-22-22.

Jeff C. Staudenmayer, Esq.
rs3@rs3legal.com

Mr. Peter Anderson
andersonpeter64@gmail.com

/s/ Fabiola Mendez

ISSUES

I. Whether Claimant proved by a preponderance of the evidence Decedent's death proximately resulted from his industrial injury, entitling Decedent's dependents to death benefits under Section 8-42-115, C.R.S.

II. In the event Claimant proved entitlement to death benefits, determination of Decedent's average weekly wage ("AWW").

III. In the event Claimant proved entitlement to death benefits, whether Respondents are entitled to an offset for social security benefits for death benefits owed to Claimant.

PROCEDURAL MATTERS

1. Prior to the hearing, Respondents submitted a motion for summary judgment, and Claimant submitted a response. The ALJ did not rule on the motion prior to the hearing, and determined that she would address the motion in her Findings of Facts, Conclusions of Law, and Order.

2. The parties stipulated that Decedent never requested authorization for his third lumbar spine surgery, and Claimant has not requested payment of medical benefits.

The Parties stipulated that no medical treatment from the date of the arbitration (April of 2017) forward was paid for under the Decedent's workers' compensation claim. Moreover, the parties stipulated that the decedent made no request for authorization for any medical treatment after April of 2017.

FINDINGS OF FACT

1. Decedent sustained an admitted industrial injury to his low back on September 8, 2011.

2. Decedent underwent conservative treatment and was initially placed at maximum medical improvement ("MMI") on October 8, 2012 with a 10% whole person impairment rating.

3. Decedent continued to experience issues with his back and subsequently reopened his worker's compensation claim.

4. On February 26, 2014, Decedent underwent a L4-5, L5-S1 transforaminal lumbar interbody fusion and a posterior fusion at L4-5, L5-S1, performed by Donald S. Corenman, M.D. The surgery was to treat L4-5 and L5-S1 isolated disk resorption and radiculopathy. During this procedure Dr. Corenman placed a cage around the L4-5 and L5-S1 fusion. Decedent was removed from work completely and never returned to work.

5. Decedent experienced continued back and increased left leg pain after the February 2014 surgery. Imaging revealed continued compression of the nerve root.

6. Decedent subsequently underwent a second surgery with Dr. Corenman on January 30, 2015 to redo the decompression of the L5 and S1, as well as to remove a portion of the extruded cage.

7. Decedent's pain continued following the second surgery. Decedent underwent additional treatment, including medial branch blocks, injections, physical therapy and medication.

8. On July 8, 2015, Allison Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall noted Decedent continued to experience ongoing left lower extremity radicular complaints. She opined that Decedent was approaching MMI. Dr. Fall remarked that her only concern was Decedent's lack of a good pain management regimen, given that he did not have one provider providing pain management and was not on an opioid agreement with routine screening in accordance with the Medical Treatment Guidelines. Dr. Fall noted that Decedent reported he was obtaining opioid medications from multiple providers. Dr. Fall opined that Decedent was taking a significant amount of short-acting opioid medications, and that it would be preferable for him to be on long-acting medications.

9. On May 17, 2016, Michael Janssen, D.O. conducted a 24-month Division Independent Medical Examination ("DIME"). Dr. Janssen opined that Decedent reached MMI on April 30, 2015 with 16% whole person permanent impairment. He concluded that additional injections, facet blocks and diagnostic studies that had occurred since such date were considered maintenance care. Dr. Janssen noted that the Decedent was on a "substantial amount" of narcotics, including Oxycontin, oxycodone and Lyrica. He recommended Decedent detoxify from the narcotics, which Dr. Janssen stated did not appear to increase Decedent's overall function at the time. He recommended Decedent undergo maintenance care of injections and medication for three to five months. Dr. Janssen noted Decedent did continue to have some neuropathic pain and symptomatology secondary to the extruded cage that migrated and, at some point in the future, he may be considered a candidate for a spinal cord stimulator.

10. On June 22, 2016, Dr. Fall performed a medical record review, including Dr. Janssen's DIME report. Dr. Fall opined that Decedent was at MMI with no further indication for additional interventions. She remarked that Decedent remained on a high level of opioids.

11. On July 5, 2016, Respondents filed a Final Admission of Liability ("FAL") reflecting an AWW of $1,387.80. Claimant was paid temporary indemnity benefits and permanent partial disability benefits based on that AWW.

12. On April 7, 2017, then-counsel for Decedent and Respondents jointly filed an Arbitration Agreement and Stipulated Summary and Facts, agreeing to participate in binding arbitration pursuant to Section 8-43-206.5, C.R.S. The parties identified the issue for arbitration as "medical benefits, and specifically what past, present and future treatment is reasonable, necessary, and related to the work injury." (R. Ex. B, p. 8).

13. On April 3, 2017, Decedent presented to Bruce Lippman, M.D. at Glenwood Medical Associates, who noted Decedent entered into a short-term pain agreement with him, and was to undergo a urine screening. Dr. Lippman prescribed Lyrica 150mg, four times per day for thirty days, Cymbalta 60mg, once per day for 30 days, Oxycodone HCI ER 30mg, twice a day for thirty days, and Oxycodone HCI 5MG, 1 tab 4 times daily for thirty days.

14. The parties' attorneys attended an arbitration hearing before ALJ Thomas DeMarino on April 10, 2017. Decedent was not in attendance.

15. ALJ DeMarino issued an Amended Arbitration Order on May 1, 2017. ALJ DeMarino based his determinations on the Stipulated Findings of Fact presented by the parties, Dr. Janssen's DIME report, and Dr. Fall's IME reports. ALJ DeMarino concluded that Decedent reached MMI for his September 8, 2011 occupational injury on April 30, 2015, and that his maintenance care ended five months after his date of MMI, or on September 30, 2015. ALJ DeMarino ordered that all medical treatment after September 30, 2015 is not reasonable or necessary as a result of the occupational injury on September 8, 2011, nor is it related to the occupational injury occurring September 8, 2011. ALJ DeMarino further ordered that Respondents were not liable to pay any medical treatment expense after September 30, 2015; including, without limitation, OxyContin, oxycodone, and Lyrica, and any other opioid medication.

16. On August 1, 2017, Decedent and Respondents entered into a voluntary settlement agreement settling Decedent's worker's compensation claim on a full and final basis for $34,999. As part of this settlement, Decedent agreed that he "rejects, waives, and forever gives up the right to claim all compensation and benefits to which [Decedent] might be entitled for each injury . . . claimed here, including: . . . (h) Medical, surgical, hospital, and all other health care benefits . . ." (R. Ex. C, pp. 20-21).

17. The Division of Workers' Compensation approved the settlement on August 4, 2017.

18. At no time was Claimant or E.G. party to the arbitration or settlement.

19. Decedent continued to experience low back and left lower extremity symptoms related to his work injury for which he continued to treat with Dr. Lippman. Decedent did

not make any requests to Respondents for authorization of treatment after April 2017. All medical treatment from the date of the arbitration, April 10, 2017 forward, was not paid for under Decedent's workers' compensation claim.

20. On October 17, 2017, Dr. Lippman noted that Decedent's pain medications were taken over by a pain specialist in Denver. Decedent's medications included Oxycodone 5mg oral tablet 1 tab, 4 times per day for 30 days, and Oxycodone ER 30mg Oral Tablet ER 12 Hour abuse-deterrent twice a day for 30 days.

21. Decedent presented to Dr. Lippman on January 15, 2018, reporting that he can no longer see his pain management doctor in Denver, and that he needs a new referral as well as pain medication refills. Decedent was prescribed increased dosages of narcotics, including Oxycodone HCI 10mg, twice per day for 30 days and Oxycodone HCI ER 30mg, three times per day.

22. On January 19, 2018, Decedent returned to Dr. Lippman to discuss medications. Dr. Lippman noted he last prescribed Oxycodone 10mg, but that Decedent reported he had taken Percocet 10/325 and thought this worked better. Dr. Lippman opined that, because he already has a filled prescription for Oxycodone 10mg, he will continue with that and then in a month he can have Percocet filled rather than Oxycodone alone.

23. Decedent again saw Dr. Lippman on March 2, 2018, reporting that he was probably going to go off CIGNA and is going to have to find somebody other than Dr. Carley to prescribe his narcotics, and that he will need a referral for that in addition to short-term prescriptions pending the determination of a new pain management specialist.

24. On March 13, 2018, Decedent presented to Dr. Lippman to discuss symptoms and medications. Dr. Lippman noted that Decedent was on high doses of narcotics and that there is a trend toward moving down from high doses so that this may happen in the future.

25. Chad Prusmack, M.D. at Rocky Mountain Spine Clinic assumed care for Decedent from Dr. Corenman. Decedent first presented to Dr. Prusmack on May 21, 2018. Dr. Prusmack noted Decedent's back and left leg symptoms had not improved after undergoing two surgeries as a result of a work-related incident. Dr. Prusmack reviewed Decedent's CT scan and MRI, noting evidence of significant left-sided lateral recess ectopic bone overgrowth encroaching on the descending L5 nerve roots at L4-5, causing foraminal stenosis and significant excessive L5-S1 ectopic bone growth. He further noted good decompression posteriorly on the MRI but significant moderate foraminal stenosis at L4-5 and L5-S1, as well as significant encroachment on the L5 nerve roots. Dr. Prusmack further noted that inspection of the L5-S1 area showed that there is pseudarthrosis, most likely at L5-S1. Dr. Prusmack assessed Decedent with significant persistent stenosis due to ectopic bone formation; epidural scar causing severe left-sided dysfunction, radiculopathy and footdrop; and pseudoarthrosis potentially at L5-S1. Dr. Prusmack noted Decedent was on 55mg of Oxycodone per day. He recommended Decedent undergo surgery.

26. On August 14, 2018, Dr. Lippman stated,

> [Decedent] has a done a good job dropping by a large amount of mEq of morphine a day, and we will go ahead and hold him at the current dose of 90mEq of morphine a day, up his Lyrica to 50 milligrams twice a day, and follow up in two weeks with the intention of trying to taper him down a little bit further on his Oxycodone and possibly go up on his Lyrica dose.
>
> (Cl. Ex. 14, p.159).

27. Decedent presented to Dr. Lippman on August 29, 2018 to discuss pain management. Dr. Lippman noted that Decedent reported Oxycodone 30mg along with Percocet 10mg in the morning worked well, but that he did not get much release from Oxycodone 20mg extended release in the afternoon. Dr. Lippman noted that Decedent's current dose of oxycodone was 90mg equivalents of morphine, which he remarked was a "significant drop" from the 180mg equivalents Decedent was taking just two months prior. Decedent reported that he was a little leery of reducing medication any further at that point.

28. On October 24, 2018, Decedent presented to Elizabeth Jackson, PA, presenting for a prescription refill. PA Jackson only provided a one-week refill of medications due to a follow-up the following week. Decedent was to take Olanzapine 5mg, 1PO once a day for 30 days, Percocet 5-325mg tablet, once a day for 7 days, and there are two different 7 day prescriptions for Oxycodone HCI ER 20 and 30mg tablets, once a day for 7 days.

29. On October 29, 2018, Decedent returned to Dr. Lippman reporting worsening low back pain. Decedent reported that he felt he needed more oxycodone for break through pain. Dr. Lippman prescribed Decedent Oxycodone HCI ER 20mg, twice a day for 30 days, and Percocet 7.5-325mg, twice a day for 30 days.

30. Decedent returned to Dr. Prusmack on December 17, 2018. Dr. Prusmack noted that new CT scans, MRI and x-rays showed pseudoarthrosis at L5-S1, as well as ectopic bone causing stenosis with significant peridural fibrosis. He recommended Decedent undergo a left re-exploration, L5-S1 laminectomy with decompression of the L5 nerve roots, posterolateral fusion L5-S1 with re-instrumentation of L5-S1.

31. On January 17, 2019, Dr. Prusmack performed the following surgery on Decedent: (1) Re-exploration left L5-S1 laminectomy for decompression of nerve roots, stenosis, and ectopic bone; (2) left transfacet decompression of nerve roots, L5-S1; (3) posterolateral arthrodesis using BMP and iliac autograft, L4-5, L5-S1; (4) bilateral segmental instrumentation using Globus percutaneous pedicle screws and rods, L4-5; and (5) harvesting of iliac autograft.

32. On January 30, 2019, Decedent spoke via telephone with David Whatmore MMS, PAC, of Rocky Mountain Spine Clinic, P.C., for his first postoperative visit. Decedent's

medications at the time of this appointment included, *inter alia,* OxyContin 30mg three times a day and oxycodone 10mg three times a day. PAC Whatmore documented,

> We talked extensively about his pain control. This is a patient who has been on OxyContin and oxycodone for several years and does have chronic pain management up in Eagle. The patient feels though he has been getting a rash possibly due to some adverse reaction to the oxycodone although he has been on this for several years. He has also been taking Robaxin that we prescribed for him. . .
>
> PLAN: Based on the severity of the back pain being his primary complaint and difficulty sleeping, we will switch him to valium 5 mg with 1 tablet every 4 to 6 hours as needed for back pain and muscle spasms. We will attempt to switch him down to Norco although he understands that this may be a transition over time due to his current level of oxycodone use. We will also prescribe a course of oral steroids and see if this helps reduce the inflammation in the back to allow him to have better pain control. The patient will be recommended to start physical therapy next week once his pain is a little bit better controlled and he is sleeping better.

(Cl. Ex. 15, pp. 212-213).

33. On February 17, 2019, Claimant found Decedent unresponsive after Decedent went to take a nap. Eagle County Paramedic Services ("EMS") were called to the scene and attempted resuscitation, to no avail. Decedent was pronounced dead. The EMS report notes Decedent's family reported that Decedent had been using hydromorphone for pain control and had a "possible" history of prescription drug and alcohol abuse.

34. Claimant testified that Decedent did not drink and that she was unaware of anyone making such statement to the EMS. She further testified that she never saw Decedent take medication that he was not prescribed, nor in a non-prescribed amount.

35. Kelly C. Lear, M.D. performed an autopsy of Decedent on March 21, 2019. Dr. Lear concluded that Decedent died of mixed drug intoxication including the following: morphine, hydromorphone, and diazepam. She noted other significant conditions included chronic back pain and severe hypertensive cardiovascular disease. She stated,

> Toxicologic analyses of body fluid obtained at autopsy revealed a mildly elevated concentration of morphine, and hydromorphone and diazepam/nordiazepam within therapeutic ranges. Although he likely had some established tolerance to opioids, particularly oxycodone, he had not been on chronic morphine maintenance; this in combination with a new second opioid (hydromorphone) and benzodiazepine (diazepam) is therefore felt to be significant. His heart was also markedly enlarged, and therefore he was also susceptible to fatal cardia arrhythmia.

(R. Ex. E, p. 63).

36. Decedent's Certificate of Death issued on April 29, 2019 listed his cause of death as mixed drug intoxication. Chronic back pain and hypertensive cardiovascular disease were listed as other significant conditions contributing to but not resulting in the underlying cause of Decedent's death.

37. On September 30, 2020, Claimant filed a Dependent's Notice and Claim for Compensation, listing an injury date of September 8, 2011.

38. Dr. Prusmack performed a medical record review and issued a report on May 20, 2021. Dr. Prusmack opined that all medical care Decedent received subsequent to September 8, 2011 that was pain or neurologically-related (including back pain, leg pain, weakness and sensory loss) was medically necessary and related to Decedent's September 8, 2011 work injury, including the February 2014 and January 2015 surgeries, Dr. Prusmack's January 2019 surgery, and all non-surgical conservative medical treatment. He specifically opined that any surgical or medical complications sustained by Decedent during his treatment for his back condition after September 8, 2011 are related to the work injury, including the reoperation and the mixed drug intoxication that lead to Decedent's death.

39. Dr. Prusmack noted that Decedent developed severe low back and leg pain after the work injury and underwent extensive and appropriate conservative care that did not alleviate Decedent's back pain and underwent two surgeries medically necessary to relieve the effects caused by the injury. Dr. Prusmack explained that he proceeded with surgery in January 2019 because Decedent failed to improve from the 2015 surgery and continued to have severe back and left leg pain, as well as left leg weakness and numbness. He noted that findings on CT scans included excessive "ectopic bone" which is caused by the product used in the first surgery called BMP. This product can cause excessive delayed bone growth which surrounds and injures the nerve roots. He further explained that, a CT scan also suggested that the L5-S1 had not fused and Decedent developed pseudarthrosis. Dr. Prusmack noted that each of these issues are within the accepted complications of lumbar surgery and because the initial surgery was related to the injury, the treatments and complications are therefore related to the injury. Dr. Prusmack determined that all of the drugs in Decedent's system when he died, in accordance with the autopsy and toxicology reports, were prescribed as a part of relieving Decedent's pain following surgery, and that combination of drugs caused Decedent's death.

40. Dr. Prusmack provided testimony at a post-hearing deposition. Dr. Prusmack testified as an expert in neurosurgery on behalf of Claimant. Dr. Prusmack explained that "pseudarthrosis" means a lack of fusion, and that the lack of fusion seen on Decedent's CT was at L4-5 and L5-S1, which had, supposedly, been fused in Decedent's 2014 and 2015 surgeries. Dr. Prusmack further explained that approximately eight percent of fusion surgeries involving two levels run the risk of not fusing, which then results in continued pain, continued bone spur growth, and stenosis. Dr. Prusmack testified that Decedent

experienced these ramifications as a result of the his 2014 and 2015 surgeries. He testified that imaging his surgery revealed Decedent had not fused from the prior surgeries. Dr. Prusmack explained that items moving around that should be fused caused more bone to be grown around the nerves, which is called stenosis. Further, if the bone does not grow at the fusion, but rather grows on the nerves, that is called ectopic bone. He testified that both of these conditions could be Decedent's surgery and CT scan. He further testified that ectopic bone would cause pain or additional pain in the situation of a lack of a fusion.

41. Dr. Prusmack testified that, at the time Decedent presented to him in 2018, Decedent was on 30 milligrams of Oxycontin three times a day, and 10 milligrams of Percocet three times a day for his pain management. Dr. Prusmack stated that the dosages were not untypical for patients who had the type of pain Decedent had. Dr. Prusmack explained that one of the major elements of narcotics is that people grow a tolerance to them, which means they get less effective at higher doses as time goes on. There are a high-moderate range of patients that Dr. Prusmack sees that have chronic pain and have needed to be on the narcotics long enough to grow both a dependence and a tolerance. Dr. Prusmack explained that when there is a patient on a long-acting narcotic, Oxycontin, and a short-acting narcotic, Percocet, it means that the patient is tolerant-dependent and has been on the pain medications for a protracted period of time. Dr. Prusmack stated that "surprise" or "alarm" would not be appropriate terminology when seeing the doses that Decedent was taking but, rather, it provided him with context that Decedent had been in pain for a very long time. Dr. Prusmack testified that although Decedent was on a higher dose than most chronic pain patients, he has seen higher doses; more than anything, the doses showed Dr. Prusmack that Decedent was in a very difficult pain syndrome that obviously multiple doctors have failed to help. Dr. Prusmack testified that when seeing bone spur growth after an attempted fusion, the type of medication regimen that Decedent was on was appropriate, and that after the second failed surgery, Decedent would not have been able to address his pain without the narcotics.

42. Dr. Prusmack further testified that, per Dr. Lippman's August 14, 2018 medical note, Decedent was significantly reducing his narcotics. He explained that Lyrica is used for nerve pain and is not a narcotic. Based on this note, Dr. Prusmack determined that Dr. Lippman was doing an effective job of decreasing the narcotics, and exchanging them for medication less risk and less side effects. Dr. Prusmack testified that the CDC makes recommendations and suggestions, but does not take into consideration the context for this particular case. He stated that in an ideal world, everyone would detox off of narcotics, but that is not feasible.

43. Dr. Prusmack explained that his office changed Decedent's medication to a more effective anti-spasmatic drug (Valium) and tried to downgrade Decedent's narcotics to a milder morphine equivalent (Norco). He testified that the medications listed in Decedent's autopsy report were medications prescribed by doctors and consistent to his recently changed prescriptions. He testified that there was nothing out of the ordinary in the type of prescription or recommendation, and that the amounts and combinations used were

extremely common and that he would not have foresaw the eventual outcome. Dr. Prusmack further testified that all of the drugs prescribed to Decedent in his system at the time he died were the result of his prior failed surgeries and/or the surgery he performed. He explained CDC are guidelines that don't take into account every specific case. Ideal world would want everyone to detox off of narcotics, but just not feasible and is very hard to do. Dr. Prusmack explained the difference between short-acting and long-acting opioids. He testified that the long-acting medicines Decedent was on was indicated for chronic pain.

44. Dr. Fall testified by deposition on behalf of Respondents as expert in physical medicine and rehabilitation. She agreed with Dr. Janssen's determination in May 2016 that Decedent should consider detoxification as he was on a substantial amount of narcotics that did not appear to increase his overall function. Dr. Fall explained that opioid medication has inherent risks and that Decedent was on high doses without documented associated improvement or functional benefit. She testified that the risk outweighed the benefits in Decedent's case and medication should not have been continued. Dr. Fall stated that her opinion is consistent with CDC guidelines. She explained that in 2017 and 2018, the dose of OxyContin had gotten up to 30mg three times a day and 30 mgs from Percocet. As it got closer to surgery, Dr. Lippman decreased the meds to total of 55 mg of oxycodone per day up to time of surgery. She explained this went from 180 MME to 90 MME to 83 MME, which is above the CDC guidelines.

45. Dr. Fall testified that she did not review the lumbar x-rays or CT scan but would go by Dr. Prusmack's expertise regarding the failed fusion. She stated that the failed fusion did not mean Decedent was required to be on narcotics above what is recommended by the CDC because there is no direct correlation between anatomical pathology and the need for pain medications. Dr. Fall testified that she has seen patients with pseudarthrosis that did not have pain and did not take medications, while some have been on very high levels of opioid medications even in the case of no pathology. Dr. Fall opined that the narcotics Decedent was taking at time of death were in excess and not medically necessary. She testified that the medications were not indicated merely because Decedent had surgery and were not indicated for his chronic pain. Dr. Fall explained that certain medications like Benzodiazepine, Valium or Diazepam can interact with opioids and can have greater risk of respiratory failure and death when used together.

46. Dr. Fall testified that, at the time of her follow-up report, Decedent was set up with a pain management specialist, Dr. Sohn, and was having urine drug screens and being switched to a long-acting opioid medication. She stated that the ectopic bone growth that Decedent experienced was an ongoing process and could have started after the second surgery, or even as early as after the first surgery. She agreed with Dr. Prusmack that the pseudarthrosis was "possibly" the pain generator, and if the pseudarthrosis was the pain generator, then an additional revision surgery would be necessary.

47. Claimant testified that, at the time of the settlement, Decedent's pain was ongoing and subsequently worsened. Her belief was that Decedent required the medication to

have any quality of life. She testified that, by the end of 2017, there were days that Decedent could not function due to his symptoms.

48. At the time of death, Decedent left behind his wife, Claimant, who he had been married to since July 14, 2009; as well as four children. Only one of the children, E.G., was under 18 at the time of Decedent's passing. E.G.'s date of birth is August 11, 2001. On the date Decedent died, E.G. was 17 years old and living with Decedent and Claimant. E.G. continued to live with Claimant through the age of 18. He received social security benefits when he was 17 years old as a result of the death of his father. Decedent did not provide any substantial support to the three older children who were between the ages of 18 and 22 at his time of death.

49. Claimant proved by a preponderance of the evidence that Decedent's death was the proximate result of his September 2011 work injury.

50. Claimant and E.G. are found to be dependents of Decedent. E.G. was a dependent until he reached the age of 18 following Decedent's death.

51. Decedent's wage records indicate Decedent's earning varied by week based on the amount of overtime Decedent worked. The ALJ finds that a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,387.80, based on 51 weeks of pay leading up to the work injury.

CONCLUSIONS OF LAW

Generally

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

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

testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Summary Judgment

Respondents argue that Claimant should not be able to pursue this claim as Decedent settled his claim on a full and final basis in 2017.

It is undisputed Decedent entered into a full and final settlement of his workers' compensation claim in August 2017, which served to close his claim on a full and final basis. Pursuant to the settlement agreement and §8-42-204(1), C.R.S., such settlement shall not be reopened other than on the ground of fraud or mutual mistake of material fact. Here, Claimant is not alleging fraud or mutual mistake of material fact with respect to Decedent's claim. Claimant is also not attempting to reopen Decedent's claim or appeal ALJ DeMarino's Arbitration Order. Instead, Claimant has filed a separate claim for death benefits as a dependent.

Pursuant to the Rule of Independence and the Act, Decedent's actions in settlement, compromise, or release under the Act do not legally bar the rights of Decedent's dependents to bring and pursue a separate independent death claim. See In re Claim of Clubb, 033115 COWC, 4-952-696-01 (Colorado Workers' Compensation Decisions, 2015), Larson's Workers' Compensation Law, § 98.01 [2], "The settlement, compromise, or release by the deceased of his or her rights under the Act cannot bar the statutory rights of any dependents, since these rights are independently created by statute."

Section 8-41-504, C.R.S. provides, "No dependent of an injured employee, during the life of the employee, shall be deemed a party interest to any proceeding by said employee for the enforcement of any claim for compensation nor with respect to any settlement thereof by said employee."

"Disability benefits awarded to a worker and death benefits awarded a worker's dependents are entirely independent of one another." *Richards v. Richards & Richards*, 664 P.2d 254, 255 (Colo. App. 1983). "Under th[e] rule [of independence], death benefits provided to dependents, and wage loss and disability benefits provided to an injured

worker, are considered to create distinct rights and compensate for separate losses. *City of Loveland Police Dep't v. Indus. Claim Appeals Off.*, 141 P.3d 943, 954 (Colo. App. 2006). For the past fifty years, the Colorado courts have consistently held that the "the settlement, compromise, or release by the deceased of his rights under the Act does not bar the rights of the dependents since they are independently created by statute." *Richards*, 664 P.2d at 255 (emphasis added); *Hampton's Claimants v. Director of Division of Labor & Empl.,* 31 500 P.3 1186, 1188 (Colo. App. 1972); *Clubb v. Re Monks*, W.C. Nos. 4-952-696-01 & 3-850-643, *4 (ICAO Dec. 24, 2014) (claimant does not have standing to attack the settlement for the reason that she is not a party to the settlement agreement and that agreement does not affect her claim for death benefits).

Respondents further argue that Claimant's death benefits claim is subject to the arbitration between Decedent and Respondents, contending that ALJ DeMarino's definitively ordered that Respondents are not liable for any medical treatment after September 30, 2015, including OxyContin, oxycodone, and Lyrica, or any opioid medication, as he found such treatment not reasonable, necessary or related to Decedent's work injury. Respondents contend that ALJ DeMarino's binding Arbitration Order relating to reasonably necessary medical treatment absolves Respondents of any liability for the cause of the Deceased's death and entitles Respondents to judgment as a matter of law.

The ALJ disagrees, as the Act and the Rule of Independence again applies. C.R.S. § 8-43-206.5 provides that "Any arbitration award pursuant to this section shall be binding on the parties, and no other procedure . . . shall be available to the parties for the further review of such award." Claimant was not a party to the arbitration, thus, the arbitration is not binding on Claimant's claim for death benefits in this case.

Summary Judgment is a drastic remedy and is not warranted unless the moving party demonstrates that there is no genuine dispute to material fact and it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987).

Respondents failed to prove there is no genuine dispute to material fact and they are entitled to judgment as a matter of law.

Death Benefits

Respondents further contend that Claimant's claim fails because Decedent's death was the result of unauthorized medical treatment that was not reasonably necessary or related to his work injury, as determined by the Amended Arbitration Order and Settlement Agreement.

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question

of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch 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). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

When a claim is denied and medical treatment is not offered by employer, the claimant may choose his own medical provider. After proving compensability the provider will be considered an authorized treating physician and his charges compensable. However, if the claimant changes to another physician for non-medical reasons before compensability has been determined, he is still required by §8-43-404(10) to notify the employer in writing so that the employer may designate a new treating physician. The failure of the claimant to provide notice renders the treatment by the subsequent physician unauthorized. *Rush v. Enterprise Leasing Company*, WC 5-081-615 (ICAO, Sept. 6, 2019).

As discussed above, pursuant to the Act and the Rule of Independence, Claimant's claim is a separate claim from that of Decedent. Thus, while the Amended Arbitration Order finding no further treatment reasonable, necessary or related to Decedent's work injury can be taken into consideration with respect to other evidence presented, it is not dispositive for purposes of Claimant's claim. Claimant is not requesting authorization or payment of treatment Decedent underwent after closure of his claim. More importantly, Section 8-42-115, C.R.S does not require that the injured worker, at the time of death, be treated by an authorized provider.

Section 8-42-115, C.R.S. provides that, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. For a death to proximately result from a compensable injury or occupational disease, there must be a nexus between the death and the injury or disease. *Subsequent Inj. Fund v. Indus. Claim Appeals Off.*, 131 P.3d 1224, 1228 (Colo. App. 2006). With regard to the sufficiency of a nexus between an injury and a disability, a division of this court has held that an injury must be "significant" and that there must be a direct causal relationship between the injury and the resulting disability. *Subsequent Inj. Fund v. Indus. Claim Appeals Off.*, supra; *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo.App.1986).

Although ALJ DeMarino previously determined no further treatment was reasonable, necessary and related to Decedent's work injury, his determination was based on the determinations of Dr. Janssen and Dr. Fall which were based on the circumstances and conditions that existed at the time. Although Decedent's condition continued and worsened after closure of his claim, he was unable to reopen his claim for additional treatment due to the Settlement Agreement. The medical records indicate that Decedent's ongoing and worsening symptoms and need for treatment was the result of result of his work injury and failed surgeries prior to being placed at MMI.

Prescription medication, including opioids, were prescribed to Decedent both during and after closure of his claim for pain management as a result of the work injury. Decedent was participating in chronic pain management and Decedent and his physicians were attempting to decrease his amount of narcotics after closure of his claim. In August 2018, Dr. Lippman noted there had been a significant drop in Decedent's amount of narcotics and that Decedent had been dropping his morphine dosage and attempting to taper on Oxycodone. Dr. Prusmack credibly opined that the high dose of long-acting narcotic of Oxycontin, and a short-acting narcotic of Percocet, were appropriate to help mitigate Decedent's pain.

It was subsequently determined, as credibly explained by Dr. Prusmack, that Decedent's spine did not fuse from the second surgery. This resulted in Decedent developing pseudarthrosis, ectopic bone growth, and stenosis with corresponding additional back and leg pain. Dr. Prusmack credibly opined that these conditions and symptoms were the result of Decedent's work injury and failed surgeries. Due to Claimant's condition, Dr. Prusmack determined a third surgery was required to relieve the effects of the failed fusion, with the goal of reducing Decedent's pain and allowing Decedent to wean of narcotic medications. As Dr. Prusmack performed the third surgery to treat the complications from the second lumbar surgery, the need for the third surgery was proximately caused by Decedent's initial work-related injury.

The medical records indicate Decedent experienced improvement in nerve pain after the third surgery. Dr. Prusmack credibly explained that, due to Decedent's lessened radicular symptoms and expected post-operative back pain, PA Whatmore began to wean Decedent off of opioid medication and transition him on to Valium, as well as Norco, which has a milder morphine equivalent, for his back pain and muscle spasms. Dr. Prusmack

credibly opined that the medications and doses Decedent was taking, as well as the combination of those medications, were common and appropriate. Decedent died one month after undergoing the third surgery. The coroner concluded that Decedent's death was the result of mixed drug intoxication. Dr. Prusmack credibly opined that the drugs present in Decedent's system at the time of death were drugs that were prescribed to Decedent as a result of the industrial injury and subsequent surgeries.

It is undisputed Decedent was on high doses of opioid medication. Dr. Prusmack credibly testified that, while Decedent's dosages were in excess of the CDC recommendations, they were appropriate for Decedent, as the CDC guidelines apply on a case-by-case basis. Here, the totality of the evidence establishes a significant nexus between Decedent's death and his work injury. Decedent underwent treatment specifically for conditions that resulted from his work injury and failed surgeries. Decedent was taking medication as prescribed as related to this treatment, which resulted in his death. There is no evidence of any intervening event or other direct cause of death to indicate Decedent's work injury was not a consequential causative factor in his death. The preponderant evidence establishes that Decedent's death proximately resulted from his September 8, 2011 work injury.

Dependents

A person is presumed to be wholly dependent if they are a widow or a minor child of the deceased under the age of eighteen years. § 8-41-501(1)(a)&(b), C.R.S.

Where one or more dependent is entitled to receive a decedent's benefits, the benefits are to be apportioned between such dependents in a "just and equitable" manner. § 8-42-121, C.R.S.

The preponderant evidence establishes that, at the time of Decedent's death, Claimant was married to Decedent and E.G. was a minor child for whom Decedent recognized and financially supported. As the widow and son of Decedent, Claimant and E.G., respectively, are dependents of Decedent and are entitled to Decedent's death benefits. As E.G. was a dependent of Decedent until he reached the age of eighteen (18) following Decedent's death, he is entitled to death benefits for such time period.

The ALJ apportions Decedent's death benefits 50% to Claimant and 50% to Decedent's son, E.G., until such time E.G. reached 18 years of age. Subsequently, the death benefits are apportioned 100% to Claimant.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a

fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Section 8-42-114, C.R.S. provides, that dependents entitled to death benefits shall receive sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

Claimant argues for an AWW of $1,518.29 (based on 12 weeks of pay periods from 6/11/2011-9/3/2011, while Respondents argue for an AWW of $1,361.10 (based on a 53 weeks of pay periods).

As found, the wage records indicate the number of hours of overtime Decedent worked varied weekly, thus resulting in varied weekly earnings. No evidence was offered indicating Decedent received a pay raise or some permanent increase in overtime hours around the time of the work injury. Accordingly, the ALJ concludes a fair approximation of Decedent's wage loss and diminished earning capacity is an AWW of $1,387.80, based on the 51-week pay period leading up to Decedent's work injury.

As E.G. received social security benefits when he was seventeen (17) years old, those benefits may be offset under 8-42-103(c)(II).

ORDER

1. Respondents' Motion for Summary Judgment is denied.

2. Decedent's death was the proximate result of his work injury.

3. Claimant and E.G. are dependents of Decedent and entitled to Decedent's death benefits.

4. Decedent's death benefits are apportioned 50% to Claimant and 50% to E.G., until such time E.G. reached 18 years of age and ceased being a dependent. After such time the death benefits are apportioned 100% to Claimant.

5. Respondents are entitled to an offset for social security benefits paid to E.G. out of the portion of death benefits paid to E.G. only.

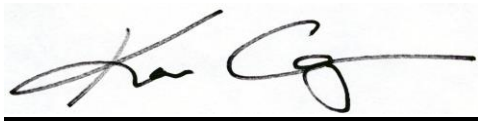
6. Decedent's AWW was $1,387.80.

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

8. 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: July 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Is Claimant entitled to TTD benefits commencing November 6, 2020?
- Did Respondent prove TTD was properly terminated on November 5, 2020 because Claimant was put at MMI by an authorized treating physician?
- Did Respondent prove Claimant was released to regular employment by the attending physician?
- Did Claimant prove entitlement to a general award of reasonably necessary medical treatment for his compensable injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Corrections Officer.

2. In the first week of October 2020, Claimant began experiencing flu-like symptoms. He tested positive for COVID-19 on October 8, 2020.

3. Claimant quarantined at home for several weeks after receiving the positive test result.

4. Claimant's initial respiratory symptoms improved by the end of October 2020, but he continued to struggle with other symptoms including conjunctivitis, photophobia, and progressive "brain fog." He received ongoing treatment from his personal providers.

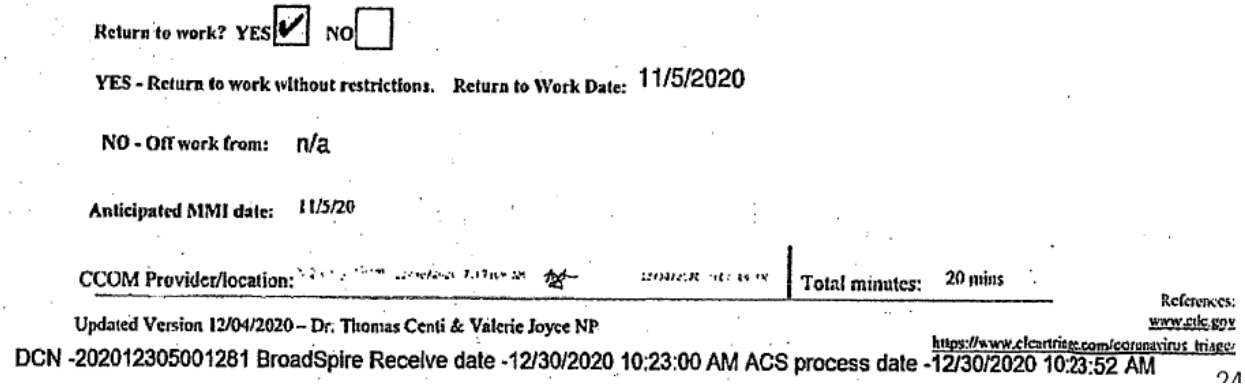
5. On December 15, 2020, Claimant requested an appointment with his PCP to discuss his residual symptoms and to complete paperwork for Short Term Disability (STD) benefits. Claimant described persistent "COVID brain fog," manifested by difficulties with attention, concentration, and memory.

6. Claimant saw PA Becky Kueter on December 17, 2020. Ms. Kueter documented multiple ongoing symptoms since contracting COVID, including headache, myalgias, conjunctivitis, and memory issues. Claimant told Ms. Kueter, "He does not feel safe going back to work" in a correctional setting. Ms. Kueter ordered blood work and a brainstem MRI, and referred Claimant for psychological and neurological evaluations.

7. On December 22, 2020, Claimant's wife (Ms. [Redacted, hereinafter Ms. M]) emailed Employer's HR department requesting assistance because Claimant was still having medical issues and "we don't know what to do."

8. There is no persuasive evidence Employer responded to Ms. M's email. However, on December 29, 2020, Claimant was contacted by Valerie Joyce, FNP at CCOM for a telehealth appointment. Claimant and Ms. M described Claimant's ongoing symptoms, treatment, and work status. Ms. Joyce provided no treatment recommendations and scheduled no follow up.

9. CCOM issued two reports based on the telehealth evaluation. The first report bears the heading "COVID-19 TELEHEALTH APPOINTMENT," and briefly documents the information provided by Claimant and Ms. M. The form also contains the following notations:



Return to work? YES ☑ NO ☐

YES - Return to work without restrictions. Return to Work Date: 11/5/2020

NO - Off work from: n/a

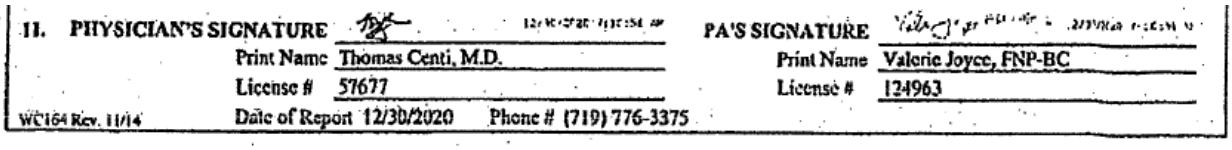
Anticipated MMI date: 11/5/20

CCOM Provider/location: Total minutes: 20 mins

References:
Updated Version 12/04/2020 – Dr. Thomas Centi & Valerie Joyce NP www.cdc.gov
https://www.cleartriage.com/coronavirus_triage/

DCN -202012305001281 BroadSpire Receive date -12/30/2020 10:23:00 AM ACS process date -12/30/2020 10:23:52 AM

10. The second document is a WC164 form dated December 30, 2020, stating Claimant was at MMI and released to regular duty as of November 5, 2020. The form also stated Claimant requires no maintenance care but should continue to follow up with his PCP "for personal health issues." The form contains the following signature block:



11. PHYSICIAN'S SIGNATURE — PA'S SIGNATURE

Print Name: Thomas Centi, M.D. — Print Name: Valerie Joyce, FNP-BC

License #: 57677 — License #: 124963

WC164 Rev. 11/14 Date of Report: 12/30/2020 Phone #: (719) 776-3375

11. Dr. Centi's signature on both documents is an electronic "stamped" signature, rather than handwritten. The signature dates and times are illegible on all versions of exhibits offered into evidence.

12. CCOM sent the forms to Broadspire on December 30, 2020 but gave no copies to Claimant. Claimant was unaware of the content of either report until he received them months later attached to a Final Admission of Liability.

13. On January 20, 2021, the Division issued a letter advising that a Notice of Contest had been filed and the claim was denied.

14. As instructed during the telehealth appointment with Ms. Joyce, Claimant pursued additional evaluation and treatment in 2021 under the direction of his PCP.

15. Claimant had an IME with Dr. Gary Zuehlsdorff at his counsel's request on January 10, 2022. Regarding the December 29, 2020 appointment at CCOM, neither Claimant nor Ms. M were told Claimant could return to work. They were advised to follow up with Claimant's personal physicians for any ongoing issues. Claimant and Ms. M confirmed they spoke only with Ms. Joyce and had no contact with Dr. Centi. Dr. Zuehlsdorff documented that Claimant was approved for short-term disability in November 2020, and started receiving benefits in January 2021. Dr. Zuehlsdorff opined Claimant probably contracted COVID from exposure at work. He diagnosed "long COVID syndrome" and opined Claimant is not at MMI because he requires additional treatment.

16. Claimant saw Dr. Allison Fall on April 14, 2022 for an IME at Respondent's request. Dr. Fall concluded Claimant probably contracted COVID at work. She opined the COVID resolved and none of Claimant's ongoing symptoms are work-related.

17. Respondent filed a Final Admission of Liability (FAL) on May 26, 2022. The FAL stated, "Pursuant to the enclosed medical report by Dr. Centi dated 12/29/2020, claimant has been placed at MMI as of 11/5/2020 with no impairment and no maintenance care requirement."

18. Respondent filed an Amended FAL on June 6, 2020, admitting for TTD benefits from October 8, 2020 through November 5, 2020. The admitted average weekly wage (AWW) is $1,289.19, with a corresponding TTD rate of $859.50. Claimant stipulated to the admitted AWW at the hearing.

19. Claimant has not worked in any capacity since October 8, 2020. Employer paid Claimant's salary through October 2020, but paid no wages thereafter. Employer terminated Claimant on September 24, 2021.

20. Respondent failed to prove Claimant was put at MMI on November 5, 2020 by "an authorized treating physician."

21. Respondent failed to prove "the attending physician" released Claimant to return to work on November 5, 2020.

22. No ATP has placed Claimant at MMI or released him to regular duty since his work injury.

23. Claimant is entitled to ongoing TTD benefits commencing November 6, 2020.

24. Claimant received STD benefits commencing in approximately January 2021. The parties presented no evidence regarding whether Claimant must repay any of the STD benefits based on a concurrent award of TTD. It cannot be determined on the present record whether Respondent make take an offset for STD benefits.

25. Claimant is entitled to a general award of medical treatment from authorized providers reasonably needed to cure and relieve the effects of his compensable injury.

CONCLUSIONS OF LAW

A. Preliminary issues

Although the claim was fully contested when Claimant filed his Application for Hearing, Respondent subsequently admitted liability in a FAL dated May 26, 2022. This resolved the threshold question of compensability.

Respondent filed an Amended FAL on June 6, 2022, admitting for a closed period of TTD from October 8, 2020 through November 5, 2020. Respondent made no request at hearing to withdraw its admission. By filing the admission, Respondent conceded that Claimant was entitled to temporary disability benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3) or (4).

Respondent denied TTD after November 5, 2020 on the theory that Claimant was put at MMI and released to full duty. Termination of TTD under § 8-42-105(3)(a) or 105(3)(c) are affirmative defenses that the Respondent must prove. Section 8-43-201(1); *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990); *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004). Accordingly, Claimant is entitled to reinstatement of TTD benefits effective November 6, 2020 unless Respondent proves a legally sufficient terminating event.

B. Is TTD after November 5, 2020 barred by a determination of MMI?

Entitlement to TTD terminates when the claimant reaches MMI. Section 8-42-105(3)(a). Under § 8-42-107(8)(b)(I), the initial determination of MMI must be made by "an authorized treating physician." Once an ATP declares a claimant at MMI, no additional TTD may be awarded unless a DIME is completed. Section 8-42-107(8)(b)(II); *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

Even though an ATP's determination of MMI cannot be questioned absent a completed DIME, the ALJ has jurisdiction to consider the threshold factual question of whether the claimant has been put at MMI by "an authorized treating physician." *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996), *Briley v. K-Mart Corporation*, W.C. No. 4-494-519 (March 12, 2003).

A handful of ICAO cases have addressed whether and under what circumstances a determination by a non-physician can substitute for that of an authorized treating "physician." In *Flake v. JE Dunn Construction Co*., W.C. No. 4-997-403-03 (September 19, 2017), the ICAO upheld an ALJ's finding that a declaration of MMI was valid even though it was initially made by a physician assistant ("PA"). The Panel noted that PAs are statutorily authorized to provide medical services "under the personal and responsible direction and supervision of a [licensed physician]." Sections 12-240-107(6)(a), (6)(b)(I), C.R.S. Because the ATP had later countersigned the WC164 form and stated in a report that he agreed with the PA's determination of MMI, the Panel concluded that substantial

evidence supported the ALJ's finding that the claimant had been put at MMI "by an authorized treating physician."

The Panel in *Flake* referenced several previous ICAO decisions for the proposition that "medical determinations made by physician assistants . . . *may be adopted by the physician* and relied upon as a decision of the physician himself." (Emphasis added). One case, *MacDougall v. Bridgestone Retail Tire Operations LLC*, W.C. No. 4-908-701-07 (April 12, 2016), involved a penalty claim against the insurer for filing an FAL based on an MMI determination from a PA. In *MacDougall*, Dr. Olson had previously evaluated the claimant and opined he would probably be at MMI at the next office visit. Dr. Olson was out of the office at the next appointment, so the claimant saw Dr. Olson's PA instead. The PA determined the claimant was at MMI "as per Dr. Olson's previous note." Dr. Olson later wrote a report stating he agreed the claimant was MMI as of the date determined by the PA. He explained that his electronic signature was placed on all WC164 forms completed by PAs in his office, and gave no indication the electronic signature had been applied to the form inappropriately. Dr. Olson. The ALJ interpreted Dr. Olson's subsequent report as ratifying the PA's declaration of MMI. In dicta, the Panel indicated these facts supported the ALJ's decision not to impose a penalty against the insurer for filing the FAL based on the PA's report.

The other cases cited in *Flake* involved issues other than determinations of MMI. In *Bassett v. Echo Canyon Rafting Expeditions*, W.C. No. 4-260-804 (April 3, 1997), the Panel held that the supervising ATP was "responsible" for work restrictions imposed by a PA because the PA's report was addressed to the ATP and stated, "we saw" the claimant and "we ordered x-some rays." And in *Terry v. Captain D's Seafood Restaurant*, W.C. No. 4-226-464 (December 9, 1997), the Panel held that a full-duty release by a PA could be ascribed to the ATP where the report stated the PA had "discussed" the examination findings with the ATP. The Panel determined that, "the ALJ could, and did, reasonably infer that [the ATP] authorized the physician's assistant to sign for him in releasing the claimant to regular employment."

The critical common element in these cases was persuasive evidence that the treating physician was involved in, adopted, or ratified the determination by the non-physician working under their supervision.

As found, Respondent failed to prove Claimant was put at MMI by an "authorized treating physician." Numerous factors lead the ALJ to conclude the December 30, 2020 pronouncement of MMI is invalid. First, the statute plainly requires that an MMI determination be made by a "physician." Because of this clear language, and considering the significant ramifications that can attend a declaration of MMI, it is highly doubtful this function be delegated to a non-physician. Although a PA or other medical support personnel may make a preliminary assessment, the ultimate decision must reflect some independent judgment by a treating physician.

This point seems even more salient where, as here, the MMI determination was made by a nurse rather than a PA. The ICAO decisions discussed earlier rested in part

on the statutory requirement that PAs be directly supervised by a physician.[1] But nurse practitioners are not subject to a similar requirement of physician oversight. See § 12-255-104(9)(c); 3 CCR 716-1 § 1.9.C.11. Although such supervision may occur in certain medical facilities, it cannot simply be presumed, as it can with PAs.

Most important, there is no persuasive evidence that Dr. Centi was contemporaneously or subsequently involved in the determination of MMI by Ms. Joyce. Dr. Centi's "stamped" electronic signature was probably applied by Ms. Joyce, by CCOM office staff, or by an automated process. There is no persuasive evidence Dr. Centi had any knowledge of Ms. Joyce's determination, much less approved, adopted, or ratified it. The persuasive evidence shows Claimant was put at MMI by a nurse rather than a physician.

C. Is TTD after November 5, 2020 barred by a full-duty release?

Section 8-42-105(3)(c) provides that TTD terminates when "the attending physician gives the employee a written release to return to regular employment." Whether the claimant was "given" a full-duty release by "the attending physician" are questions of fact for resolution by the ALJ. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

As found, Respondent failed to prove Claimant was given a full-duty release by "the attending physician." The prior finding that Dr. Centi was not involved in determining MMI is equally dispositive of whether the full-duty release can terminate TTD.

D. General Award of Medical Benefits

Respondent admitted Claimant suffered a compensable injury on October 11, 2020. As a matter of law, Claimant is entitled to a general award of medical treatment from authorized providers reasonably needed to cure and relieve the effects of his injury. Claimant neither requested nor tried any specific medical benefits. Consequently, no order regarding specific medical benefits is warranted or appropriate.

E. Short-term disability offset

Claimant received STD benefits commencing in January 2021 from a disability policy provided by Employer. Section 8-42-103(d)(I) provides a dollar-for-dollar offset against temporary disability benefits unless the claimant contributed to the premiums or must repay the STD carrier because he received a concurrent award of TTD benefits. The parties presented no evidence regarding the disability policy terms or whether Claimant contributed to the premiums. Accordingly, no specific order can be issued regarding whether or to what extent Respondent may be entitled to an offset.

[1] Section 12-240-107(6)(a) provides that a physician may "delegate to a physician assistant . . . the authority to perform . . . acts that physicians are authorized by law to perform." Section 12-240-107(6)(b)(I) requires that a physician assistant may only exercise delegated authority "under the personal and responsible direction and supervision" of a licensed physician.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant TTD benefits at the weekly rate of $859.50, commencing November 6, 2020 and continuing until terminated by law.

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

3. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

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

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

DATED: July 22, 2022

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that additional chiropractic and massage treatment are reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. On April 25, 2018, Claimant was sustained admitted injuries arising out of the course of his employment with Employer in a work-related motor vehicle accident. As a result of the accident, Claimant sustained extensive injuries, including a fracture of the left humerus, lung contusions, right acetabular fracture, thoracic rib fracture, closed head injury and ligamentous injuries to both knees. (Ex. 2). Claimant's injuries necessitated multiple surgeries between May 1, 2018 and December 8, 2020. (Ex. 1 & 2).

2. On June 9, 2020, Claimant's authorized treating physician (ATP), Brian Beatty, D.O., placed Claimant at MMI, and assigned impairment ratings for both lower extremities and Claimant's left elbow. Dr. Beatty also noted that Claimant would need additional maintenance care including follow up orthopedic care for anticipated bilateral knee arthroplasties, and follow-up medical care. Dr. Beatty did not provide an impairment of Claimant's thoracic spine or brain injury. (Ex. 1).

3. On July 13, 2020, Respondents filed a Final Admission of Liability (FAL). Claimant filed an objection to the FAL on August 11, 2020, and requested a Division Independent Medical Examination (DIME). (Ex. 9).

4. On September 17, 2020, Claimant returned to Dr. Beatty. Dr. Beatty performed osteopathic manipulations to the thoracic and lumbar spine, and noted that Claimant would continue with a home exercise and stretching program. (Ex. 1)

5. On January 26, 2021, Claimant had a Division independent medical examination (DIME) with David Yamamoto, M.D. Claimant reported his then-existing symptoms as thoracic spine pain, knee pain, mild depression. Dr. Yamamoto opined that as a result of his work-related accident, Claimant had a thoracic spine sprain/strain with ongoing stiffness, bilateral knee internal derangements requiring surgery, comminuted left humerus fracture requiring surgery, adjustment disorder, and mild traumatic brain injury (resolved). Dr. Yamamoto opined that Claimant was not at MMI, and that Claimant required a future right knee total arthroplasty. Dr. Yamamoto did not recommend or offer an opinion regarding Claimant's need for massage therapy or chiropractic treatment. (Ex. 2).

6. Following the DIME, Claimant continued to receive care, including physical therapy. On July 7, 2021, Dr. Beatty referred Claimant to Dr. Wolff for "a few sessions" of

chiropractic care, and indicated he would see Claimant back in two months for follow up. (Ex. E).

7. From September 10, 2021 to January 7, 2022, Claimant was seen at Green Mountain Chiropractic and Massage on nine dates. At each visit Claimant requested a "full body massage" and received massage therapy from Jessica Cain, CMT. At each massage therapy visit, Ms. Cain recorded Claimant's reported symptoms for six areas, including the left shoulder and arm (twice), upper back, neck, lower back, legs and thighs, and right knee. With the exception of Claimant's right knee and neck pain increasing from 4/10 to 5/10 at the November 12, 2021 visit, and Claimant's reported pain level in his legs increasing from a 3/10 to 4/10 on December 16, 2021, Claimant's reported pain levels were identical at each visit with Ms. Cain. Despite no documentation of Claimant reporting improvement in symptoms at any visit, Ms. Cain documented the following statement at each visit: "Patient is showing improvement since the prior visit. He is progressing as anticipated. Intensity is decreased since the prior visit." Claimant's only documented chiropractic treatment during this time was a November 12, 2021 visit with Dr. Wolff. At that visit, Claimant's only reported complaint was low back pain rating 5/10. (Ex. 3).

8. Claimant's next documented visit with Dr. Beatty was on December 28, 2021, when Claimant reported he was continuing to see a chiropractor for his back pain "which is not helping." Claimant also was attending physical therapy 3 times per week. At this visit, Dr. Beatty recommended Claimant continue physical therapy and follow up with Dr. Dayton. Dr. Beatty did not recommend or prescribe additional chiropractic care or massage. (Ex. 1).

9. The parties stipulated that Insurer denied authorization for chiropractic and massage treatment as of February 24, 2022.

10. Claimant returned to Dr. Beatty on March 15, 2022, reporting continued right knee pain with stiffness and swelling. Dr. Beatty noted that Claimant was receiving benefit from physical therapy, and that Claimant would follow up with Michael Dayton, M.D. Dr. Beatty did not recommend or prescribe additional chiropractic care or massage. (Ex. 1)

11. Claimant next saw Dr. Beatty on April 26, 2022. Claimant reported improvement in his symptoms, but that he had developed increasing low back pain over the last several days. Dr. Beatty diagnosed Claimant with a lumbosacral strain and performed osteopathic manipulation. He made no recommendations for chiropractic care or massage. (Ex. 1).

12. On May 31, 2022, Claimant saw orthopedist Dr. Dayton at UC Health. Referred Claimant for sixteen sessions of physical therapy. Dr. Dayton did not recommend or refer Claimant for chiropractic or massage. (Ex. 5).

13. Respondents requested that, Allison Fall, M.D., performed a record review and comment on the issue of whether chiropractic and massage care were reasonable and necessary to relieve the effects of Claimant's work injuries. Dr. Fall opined that the chiropractic care and massage therapy Claimant received from Green Mountain Chiropractic was not medically reasonable and necessary to relieve the effects of

Claimant's injury. Dr. Fall noted that Claimant's massage treatments were directed to multiple body parts, and was not specifically addressing the thoracic spine diagnosis provided by Dr. Yamamoto. She further opined that Claimant's records did not document a sustained long-term benefit from the massage therapy. (Ex. F).

14. With the exception of Dr. Beatty's referral for chiropractic care on July 7, 2021, the record contains no documentation of a referral or recommendation for chiropractic care or massage care from an ATP.

15. Claimant testified that he has been receiving weekly massages for at least six months, which he characterized as helpful. Claimant also testified that he continues to receive chiropractic care, which he believes is helpful to his overall recovery. Claimant testified he believed such treatment is reasonable and necessary. No records of either chiropractic or massage after January 7, 2022 were offered or admitted into evidence. Claimant also testified Dr. Beatty has performed spinal adjustments when he sees Claimant. Claimant also testified that Dr. Dayton has recommended massage, although no documented recommendation was offered or admitted into evidence.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to

conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

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

An ALJ lacks jurisdiction to order an ATP to provide or recommend a particular form of treatment which has not been prescribed or recommended by the ATP. *See Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

Claimant has failed to establish by a preponderance of the evidence that additional chiropractic treatment or massage therapy is reasonably necessary to cure or relieve the effects of Claimant's industrial injuries. Claimant was last referred for chiropractic care on July 7, 2021, when Dr. Beatty referred Claimant for "a few sessions." Claimant was then seen at Green Mountain Chiropractic and Massage for nine massage therapy visits and one chiropractic treatment. The record contains no credible evidence that any ATP has recommended either massage therapy or chiropractic care for Claimant since July 7, 2021.

Claimant's massage and chiropractic records do not credibly document improvement in Claimant's symptoms resulting from such treatment between September 10, 2021 and January 7, 2022. Claimant's testimony that he is currently receiving chiropractic and massage that he finds helpful is not persuasive evidence of the reasonableness or necessity of such treatment.

Claimant contends his testimony that chiropractic and massage are reasonable and necessary is sufficient to permit authorization of treatment. In support of this position, Claimant cites *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) and *Gelco Courier v. Indus. Com. of Colo*., 702 P.2d 295 (Colo. App. 1985). In both *Lymburn* and *Gelco*, the Court of Appeals found that a combination of medical evidence and claimant testimony was sufficient to support an award of temporary disability benefits. Neither *Lymburn* nor *Gelco* stand for the proposition that an ALJ may authorize medical care based solely on a claimant's testimony. To the contrary, an ALJ lacks jurisdiction to order an ATP to provide or recommend a particular form of treatment which has not been prescribed or recommended by the ATP. *See Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). Because no credible, persuasive evidence was presented demonstrating a current, existing recommendation for massage therapy or chiropractic treatment from Claimant's ATPs, the ALJ lacks authority to order such treatment.

With respect to Claimant's position that Insurer improperly denied benefits, Claimant's Application For Hearing does not assert a rule violation, statutory violation, or penalty claim. As such, those issues are not properly before the ALJ. Claimant cites no authority, and the ALJ has found none, supporting the proposition that an ALJ has the authority to authorize treatment based solely on an insurer's alleged failure to follow WCRP standards for denial. To the extent Claimant asserts that Respondents' denial of chiropractic and massage constitutes "an act of bad faith claims adjusting," (as stated in Claimant's position statement) claims of bad faith are not within the ALJ's jurisdiction. *In re Claim of Horiagon*, W.C. No. 4-985-020 (ICAO Mar. 15, 2015).

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of massage therapy and chiropractic treatment is denied.

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: July 25, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-544-001

ISSUES

The issues set for determination included:

- Did Respondents overcome the conclusions of Stephen Lindenbaum, M.D., who performed the Division-sponsored Independent Medical Examination ("DIME"), by clear and convincing evidence?

- Whether Claimant proved by a preponderance of the evidence that she suffered compensable injuries to her right shoulder, cervical spine, and left hip?

- Is Claimant entitled to TTD benefits from July 15, 2019 to the present?

PROCEDURAL STATUS

A Summary Order was issued on April 11, 2022. As part of the Summary Order, the ALJ ordered that the hearing transcript be filed with the Court, as it was cited by the parties in their briefs. On April 12, 2022, Respondents submitted a Request for Specific Findings of Fact, Conclusions of Law and Order. Respondents filed an Amended Proposed Order on April 15, 2022. A hearing transcript was then lodged with the Court on May 13, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she sustained injuries in prior motor vehicle accidents which occurred in 1992 and the record had evidence of treatment for her low back in 2001 (at the emergency room of the Community Hospital (Munster, IN.) Claimant was treated for neck, right shoulder and low back pain after a MVA in 2004. There was also an indication Claimant was injured in an accident in 2010, however, those records were not admitted into evidence.

2. There was no evidence in the record that Claimant required treatment after approximately 2010, nor was there evidence she had permanent work restrictions as a result of those accidents/injuries.

3. Claimant worked for Employer as a delivery driver. She started working for Employer in April 2019. Her job duties include delivering sandwich orders as well as helping with various side work in the store, including cleaning and stocking products.

4. On June 24, 2019, Claimant suffered an admitted injury when she was injured in an MVA while working for Employer. This was a T-bone collision in which the

other vehicle struck the rear passenger side and spun Claimant's vehicle around. Claimant testified that the collision was severe and she felt pain in her neck, back and shoulder, as well as her arm.[1]

5. Claimant was treated later that day at the Emergency Department of UC Health-Green Valley Ranch. Claimant reported pain in her neck, lower back, arms and legs, along with tingling in her hands. She had underlying tight spasm-like quality with a sharp lancinating pain. Edward Cetaruk, M.D. evaluated Claimant and noted tenderness, pain and spasm in the cervical, thoracic and lumbar spine, but normal range of motion ("ROM"). Dr. Cetaruk noted the pain was localized to her lower lumbar area and spine, with some tingling to her fingers and toes.

6. Dr. Centaruk's assessment was: back strain, initial encounter. He opined her pain was due to soft tissue injury of the muscles and connective tissues of her spine and back. The ALJ found the Cr. Centaruk's findings supported the conclusion Claimant injured her back, including the lumbar spine.

7. Claimant was evaluated by Kartik Patel, M.D. at UC Health on July 2, 2019. Dr. Patel reviewed the imaging of Claimant's thoracic spine and lumbar spine. He ordered physical therapy ("PT") and pain management, as well as prescribing Celebrex.

8. TF[Redacted] is the General Manager for Employer. They worked in the same store. After taking one day off, Claimant returned to work and her normal job duties. Mr. TF[Redacted] testified he saw Claimant and talked to her daily. Mr. TF[Redacted] testified she did not ask for accommodations or do her job any differently than before the accident. He testified she was a hard worker and would run to her car from the store; and this continued after the accident.[2]

9. Claimant testified she returned to work, but felt pain doing her job duties and walked with a limp. She said had trouble completing all of duties and left work early. Claimant testified she felt severe pain in her back and hip on July 10, 2019 and was not been able to work. Claimant texted Mr. TF[Redacted] to advise that she had pinched her sciatica and the pain in her leg was so bad she could not work. Her pay records reflected that she last worked on July 11, 2019.[3]

10. Claimant was evaluated by Tom Ashar, M.D. at the UC Emergency Department on July 10, 2019. She reported standing at the counter at work and experienced severe pain in her left hip. Dr. Ashar administered an Ativan injection to Claimant's hip. Dr. Ashar noted Claimant was scheduled for a pain specialist and PT

[1] Hearing Transcript ("Hrg. Tr.") p. 72:10-13.

[2] The testimony of Mr. TF[Redacted] from the prior hearing as admitted as Exhibit Q.

[3] Exhibit 6, p. 280.

evaluation for her injuries. The PT notes from UC Health on July 17 and 31, 2019 reflected pain complaints in the cervical and lumbar spine, as well the left leg and right shoulder.

11. On July 30, 2019, Claimant filed a Worker's Claim for Compensation that listed several body parts injured in the work-related accident, including the neck and right shoulder.

12. On July 29, 2019, Claimant underwent an MRI of her cervical spine. The films were read by Joseph Ugorji, M.D., whose radiology summary included: C3-4: 3 mm posterior disc herniation protrusion with tiny posterior annular tear-disk material gently contacted ventral spinal cord contributing to low-grade spinal canal stenosis; C4-5: 2 mm chronic posterior disc osteophyte complex low-grade biforaminal stenosis; C5-6: 2.8 mm posterior disc bulge with superimposed shallow inferior disc extrusion and posterior radial-type annular tear and moderate spinal canal stenosis was present, as well as low grade interspinous ligament swelling. The ALJ noted the MRI documented objective findings with respect to Claimant's cervical spine.

13. An MRI of the lumbar spine was also performed on July 29, 2019. Dr. Ugorji noted there was a 7.5 mm right facet synovial cyst, bilateral facet hypertrophy and low grade right facet arthropathy present at L4-5. Dr. Ugorji also noted preserved disc morphology and hydration, with no spinal canal or foraminal stenosis present at T11-12, T12-L1, L1-2, L2-3, L3-4, and L5-S1.

14. On July 30, 2019, Claimant underwent an MRI on her left hip. Dr. Ugorji stated no fracture or dislocation was present involving the bony pelvis or either hip. A greater than 50% thickness intermediate signal at chondro-osseous junction posterior labrum and superior labrum, with no paralabral pseudocyst or swelling. The findings were longer than the expected for a paralabral sulcus. Dr. Ugorji said given the absence of fluid insinuating the labral tissue, the differential diagnosis favored labral scar although a recent tear would be difficult to exclude. The ALJ found this opinion raised the question of a recent injury and documented a potential pain generator.

15. On August 5, 2019, Claimant was evaluated by Ryan Mansholt, PA-C and the report was counter-signed by Usama Ghazi, D.O. At that time, Claimant had low back pain, with radiation to the left groin and lower extremity, as well as left buttock. She also had neck pain, which radiated to the right arm down to the wrist, along with sleep disturbance. The ALJ noted Claimant's report of symptoms corresponded to all body parts which were Claimant alleged were injured over the course of the claim. Myofascial pain and spasm was noted in the thoracic spine and Claimant's right shoulder had limitations in its ROM, with positive supraspinatus, Hawkins and Neer signs. Examination of the low back showed loss of lumbar lordosis and severe spasm. Tenderness was present in Claimant's left hip into the trochanteric region. The ALJ found the presence of spasms was objective evidence of injury.

16. The diagnoses were: muscle spasm, headache, post-concussive syndrome, cervical sprain/strain; lumbar sprain/strain, sacral sprain/strain; brachial neuritis/radiculitis, sciatica, left hip pain; sprain/strain left hip; cervical spondylosis without myelopathy; thoracic spondylosis without myelopathy; lumbar spondylosis without myopathy; lumbar radiculitis; right shoulder sprain/strain; cervical radiculitis. PA-C Mansholt and Dr. Ghazi noted there was a causal relationship between the accident and Claimant's complaints/diagnoses, based upon the available information. An orthopedic consult for the left hip was recommended, along with a MRI arthrogram for the right shoulder. Claimant was taken off work for two weeks.

17. Claimant was evaluated by various physicians at Advanced Orthopedic & Sports Medicine Specialists, starting with Michael Shen, M.D. on August 7, 2019. At that time, she complained of severe low back and left leg pain and hypoesthesia. On examination, Claimant had normal lower extremity strength, with an antalgic gait. She had moderate spasm and tenderness in the paraspinous area. Dr. Shen noted Claimant's lumbar MRI showed some early facet arthropathy, but was essentially normal. Some effusion was note in her SI joints. Dr. Shen stated he did not see indications for surgical intervention, as Claimant was mechanically stable and neurologically intact. He opined her pain was out of proportion and believed she would benefit from physiatry and pain management.

18. Similar findings were made in an evaluation on August 14, 2019 by Christopher D'Ambrosio, M.D., who evaluated Claimant for lumbar and left hip pain. Restrictions in Claimant's left hip ROM were documented by Dr. D'Ambrosio, who also opined Claimant's pain as out of proportion to her diagnostic testing. Dr. D'Ambrosio prescribed Diclofenac Sodium.

19. Claimant was evaluated by Barry Ogin, M.D. on August 16, 2019, at which time she complained of pain in her left buttock and radiating down her leg. She also had pain along the back of her head and her neck, which radiated along her right shoulder. Dr. Ogin's impression were: back and right leg pain, negative lumbar MRI, negative hip MRI, subjective complaints as noted; mild cervicothoracic strain; severe anxiety and probable depression; history of left sided hip and pelvis fractures in 2010.

20. Dr. Ogin discussed the results of the MRI-s with Claimant and believed her prognosis was good. He suspected there was a strong psychological basis to her pain. Dr. Ogin recommended PT and electrodiagnostic testing for the lower extremity.

21. Claimant was then seen for follow-up on September 11, 2019 by Teresa McDonald PA-C at Advanced Orthopedics for lumbar and right shoulder pain. The ALJ found the medical records from Advanced Orthopedics documented Claimant's report of pain in her low back, left hip/leg, cervical spine and right shoulder. An injection was administered for left hip and thigh pain.

22. The ALJ found there was evidence of psychological issues which impacted Claimant's report of symptoms and treatment. Claimant was evaluated on August 26, 2019 and diagnosed with an adjustment disorder by Aggie Poznanska, MA, LPCC, NCC.

Claimant received psychological treatment with Ms. Poznanska through November 8, 2019.

23. Claimant underwent an MRI on her right shoulder on August 27, 2019. Dr. Ugorji noted it showed a 4 mm. greater than partial thickness tear in the undersurface of the glenohumeral ligament and a 28 mm. greater than partial thickness tear of the superior labrum with extension into the biceps-labral anchor. The infraspinatus, teres minor, subscapularis and supraspinatus tendons were intact.

24. In a follow-up evaluation on September 20, 2019, Dr. Ogin's impression included lumbosacral strain; possible left sacroiliac joint strain; right shoulder strain, small labral tear identified; subjective complaints. Dr. Ogin administered a right shoulder injection and ordered a left SI joint injection for diagnostic and therapeutic purposes.

25. The ALJ concluded there were clinical indications in the form of pain in the, which led to request for the MRI-s made by the physicians treating Claimant. These physicians, including Dr. Ogin, recommended and oversaw treatment. The ALJ inferred that that the physicians who evaluated Claimant and ordered MRI-s of those areas were of the opinion these were injured on June 24, 2019.

26. On December 19, 2019, Claimant was evaluated by John S. Hughes, M.D. who performed an independent medical examination. Dr. Hughes recounted that Claimant suffered a motor vehicle accident on June 24, 2019. He explained that at her June 24, 2019 emergency room visit Claimant reported lower back pain. Claimant reported current symptoms of lower back, left hip and right shoulder pain. Dr. Hughes concluded that Claimant had received reasonable, necessary and related medical treatment for her June 24, 2019 injuries. He reasoned that Claimant had not reached MMI.

27. Also on December 19, 2019, Robert Messenbaugh, M.D. conducted an Independent Medical Evaluation of Claimant, at the request of Respondents. Claimant reported pain in her right shoulder, cervical spine, lumbar spine and left hip. Dr. Messenbaugh opined Claimant sustained some degree of injury to her left hip, lumbar spine, cervical spine and left shoulder in the June 24, 2019 accident. In the initial report, Dr. Messenbaugh found Claimant was not at MMI and opined she needed further evaluation.

28. On March 3, 2020, ALJ Cannici issued an Order which concluded that Claimant suffered a "compensable back strain" during the course and scope of her employment on June 24, 2019. This Order found Claimant did not sustain injuries to the cervical spine, thoracic spine, right shoulder or left hip.[4]

[4] Exhibit C, p. 11.

29. On March 12, 2020, Respondents filed a General Admission of Liability ("GAL") which admitted for medical benefits only.

30. Dr. Messenbaugh issued supplemental reports dated January 16 and March 13, 2020. In the January 16, 2020 report, Dr. Messenbaugh stated Claimant suffered a lumbar spine soft tissue myofascial strain and sprain, without associated neurological deficit. He opined Claimant did not suffer an injury to her cervical spine, shoulder or hip as a result of the MVA.

31. In the March 13, 2020 report, Dr. Messenbaugh said Claimant was at MMI and assigned a 0% impairment to her lumbar spine. Dr. Messenbaugh said Claimant was at MMI as of July 15, 2019. Dr. Messenbaugh opined that Claimant did not require maintenance treatment, including any treatment for her neck, shoulder or hip.

32. On March 25, 2020, Claimant was placed at MMI by Nathan Faulkner, M.D. and he agreed with Dr. Messenbaugh that the date of MMI was July 15, 2019. This was not a particularly credible conclusion since it was before the date Dr. Faulkner initially evaluated and provided treatment to Claimant (September 26, 2019).

33. On May 19, 2020, Respondents filed a Final Admission of Liability ("FAL"), based upon Dr. Faulkner's report.

34. On September 25, 2020, Claimant underwent a DIME, which was performed by Dr. Lindenbaum. At the time of the evaluation, Dr. Lindenbaum noted Claimant entered the room with an extremely antalgic gait and used a cane. Dr. Lindenbaum reviewed both the treatment records, as well as the IME reports from Dr. Messenbaugh and Dr. Hughes. Claimant reported pain in the cervical spine, lumbar spine and right shoulder.

35. On examination, no paracervical spasm was present in the cervical spine. ROM testing showed 44° of cervical flexion was present, 22° of extension, 40° of right lateral flexion, 39° of left lateral flexion, 60° of cervical rotation to the right and 59° to the left. Claimant reported severe hip pain during the examination. Dr. Lindenbaum was not able to examine Claimant's thoracic spine.

36. Examination of Claimant's right shoulder there was a questionable positive speed test, with mild pain on ROM in the areas of impingement. Claimant's ROM of the right shoulder showed 130° of flexion, 35° of extension, adduction of 40°, abduction of 90°, internal and external rotation of 80° and 70° respectively. The motor and sensory exam was essentially normal.

37. Dr. Lindenbaum expressed his concern that as a result of his examination as well as the opinions of multiple physicians that Claimant's pain was out of proportion to the examination and she had a significant functional disability related to psychological factors. Dr. Lindenbaum stated Claimant had findings from the MVA compatible with pain

related to an injury to the cervical spine and over six months with treatment that was not successful; with the associated MRI findings of some disc abnormalities, which would imply that an impairment rating was indicated. There was also a suggestion of right shoulder dysfunction, based upon the MRI and the physical exam would qualify for a rating. He concluded Claimant was not at MMI, as she needed to be evaluated by Dr. Ogin or another orthopedic surgeon with regard to her right shoulder. Dr. Lindenbaum said there was no evidence, based on the presence of Waddell findings for extreme hyperthesia, as well as complaints of severe pain that could warrant a rating for the thoracic or lumbar spine or left hip. However, Dr. Lindenbaum did not say that the lumbar and thoracic spine and hip were not injured in the accident.

38. Dr. Lindenbaum provided a provisional rating of 8% for ROM loss in the right shoulder, which would convert to a 5% whole person rating. Dr. Lindenbaum, while noting this was a very difficult case, found Claimant had an 11% impairment for loss of ROM in the cervical spine and 4% for a specific disorder for a total of a 15% whole person impairment. Dr. Lindenbaum stated there was no evidence for apportionment at that time. By the provision of a medical impairment rating to this area of the body, the ALJ concluded that Dr. Lindenbaum found Claimant's cervical spine and right shoulder were causally related her work injury. Dr. Lindenbaum assigned no impairment rating to Claimant's thoracic spine, hip, or lumbar spine. Dr. Lindenbaum's opinion was persuasive to the ALJ.

39. There was no evidence in the record that Claimant returned to her ATP-s and received additional treatment after the evaluation by Dr. Lindenbaum.

40. Dr. Messenbaugh testified at hearing as an expert in orthopedic surgery (the specialty in which he is board certified) and was Level-II accredited pursuant to the W.C.R.P. Dr. Messenbaugh testified he did not think Claimant injured her hip, neck, or shoulder in the MVA. This was because when she was evaluated at the emergency room at UC Health, her complaint was of low back pain. Dr. Messenbaugh stated there was no indication Claimant hit her head and he had not seen injuries involving the right shoulder in similar accidents where it was nontethered. He opined Claimant would have had much greater pain in the right shoulder had it been injured in the subject accident. Dr. Messenbaugh said Claimant did not suffer severe whiplash as a result of this accident.

41. Dr. Messenbaugh noted that Dr. Lindenbaum and four other physicians concluded Claimant's pain complaints were out of proportion to the physical and radiographic findings. Dr. Messenbaugh stated he disagreed with Dr. Lindenbaum that the shoulder should be rated, as he did not believe any shoulder issues were related to the June 24, 2019 accident. He also disagreed with the provisional rating to the cervical spine, as Claimant did not report head or neck pain in the Emergency Department after the accident.

42. The ALJ determined that Dr. Messenbaugh's reports and testimony did not establish Dr. Lindenbaum's conclusions were in error, but rather were an alternate opinion.

43. The ALJ found Claimant was evaluated by multiple physicians, who although they found symptom magnification and psychological issues, nonetheless ordered diagnostic testing and treatment. The referrals made by these physicians led the ALJ to conclude they believed Claimant required treatment for her neck, shoulder, low back and hip. The ALJ determined Claimant suffered an injury to each of those areas.

44. The ALJ found the March 3, 2020 Order issued by ALJ Cannici was issued prior to the DIME performed by Dr. Lindenbaum, who was able to review the evaluations/opinions of the physicians who examined Claimant before September 2020.

45. Claimant met her burden of proof and proved she was entitled to TTD benefits.

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

CONCLUSIONS OF LAW

General

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

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

Compensability of Right Shoulder, Cervical Spine and Left Hip

As determined in Findings of Fact 3-4, Claimant suffered an admitted industrial injury when she was involved in a MVA on June 24, 2019 when she was working for Employer as a delivery driver. The ALJ found Claimant had previously injured her neck, low back and right shoulder in other MVA-s, however, there was no evidence in the record she had continuing treatment or work restrictions as a result. (Findings of Fact 1-2.)

Claimant required treatment as a result of the June 24, 2019 accident at the Emergency Department of UC Health, where x-rays were taken and medications were prescribed. (Finding of Fact 5).

Subsequently, Claimant required treatment when she returned to UC Health on July 2 and 10, at which time she was evaluated for thoracic spine, lumbar spine and hip pain. As found, Claimant's pain complaints in the cervical spine, right shoulder, lumbar spine and left hip prompted her ATP's to order MRI-s, which were taken of the cervical and lumbar spine, as well as left hip. (Findings of Fact 12-14). An MRI of the right shoulder was done on August 27, 2019. (Finding of Fact 23). The ALJ found Claimant's physicians made the referrals for diagnostic testing because of her pain complaints.

Claimant was evaluated by orthopedic specialists at Advanced Orthopedics in August and September, 2019. Concerns were raised by physicians that Claimant's report of pain was out of proportion to what was shown on diagnostic testing; nevertheless treatment was recommended and Claimant treated with ATP, Dr. Ogin. The ALJ found there were psychological issues, as referenced in the medical records, but the medical showed Claimant consistently reported symptoms in the neck, shoulder, low back and hip.

A dispute arose concerning the areas Claimant's body which were injured in the subject accident. A hearing was held and ALJ Cannici concluded Claimant suffered a compensable back strain. (Finding of Fact 28). ALJ Cannici concluded Claimant did not suffer compensable injuries to the cervical spine, thoracic spine, right shoulder or left hip. Respondents then filed a GAL on March 12, 2020 for the low back only. (Finding of Fact 29). On March 25, 2020, Claimant was placed at MMI by Dr. Faulkner, who said the date of MMI was July 15, 2019. After Claimant requested an DIME, which was performed by Dr. Lindenbaum, he concluded she was not at MMI. Respondents then disputed that conclusion.

At the outset of the hearing, there was a disagreement between the parties regarding the issue of compensability and allocation of burdens of proof on those body parts which had not been admitted. Respondents argued it was Claimant's burden of proof to establish compensability. They asserted a DIME physician's opinion was not entitled to special weight on the issue of compensability. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). Respondents argued that in *Faulkner,* the Court of Appeals held that *Qual-Med* was limited to a situation where the correctness of the DIME opinion was the sole issue, not an initial compensability or causation finding. *Faulkner v. ICAO* at 846. Therefore, *Faulkner* stood for the proposition that Claimant had the initial burden of proving entitlement to benefits by a preponderance of the evidence by demonstrating that the injury arose out of and in the course of employment.

Claimant argued she did not have the burden to prove that each body part affected by the admitted industrial injury is compensable prior to a DIME. Rather, she averred the DIME physician has the authority to determine what body parts are related to the claim and cited *Gray v. Dunning Construction*, W.C. No. 4-516-629 (ICAO 2005), Qual-Med v.

ICAO, 961 P.2d 590 (Colo. App. 1998). Claimant also cited *In re Claim of Sharpton*, W.C. No. 4-941-721-03 (November 29, 2016) for the principle that the DIME process contemplates the DIME physician will evaluate all components of Claimant's condition and determine the cause of the various medical components.

To determine which body parts were injured in the subject accident, the ALJ reviewed the medical records admitted at hearing. Based upon a totality of the evidence, the ALJ found that there was sufficient evidence to establish that Claimant suffered a compensable injury to the following body parts: right shoulder, cervical spine, and left hip. (Finding of Fact 43). This was found first in the medical records admitted at hearing where Claimant's evaluating physicians made treatment recommendations. (Finding of Fact 25). The ALJ also inferred that that the physicians who evaluated Claimant and ordered MRIS of those areas were of the opinion these were injured in the subject accident. *Id.*

Second, Dr. Lindenbaum specifically analyzed each of the body parts in question, as well as determining whether each had a permanent medical impairment. As found, Dr. Lindenbaum had the benefit of the previous medical providers, including the physicians who performed IME-s. (Finding of Fact 43). Therefore, based upon the medical records admitted into evidence, the ALJ concluded Claimant suffered a compensable injury/aggravation to her right shoulder, cervical spine, and left hip as a result of the June 24, 2019 accident.

Overcoming Dr. Lindenbaum's Opinions

The question of whether Respondents overcame Dr. Lindebaum's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the findings of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Respondents had the burden of proof to overcome Dr. Lindenbaum's conclusion on MMI. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004). Respondents had the burden of proof to overcome Dr. Lindebaum's conclusion on MMI, as well as on causation/relatedness.

The ALJ also found Dr. Lindenbaum's report included an identification of areas of the body impacted by the accident, as well as an analysis of the findings on MRI. (Findings of Fact 34-37). As determined in Finding of Fact 37, Dr. Lindenbaum concluded Claimant was not at MMI with regard to her shoulder and noted there was evidence of pathology on the MRI. Dr. Lindenbaum likewise found there was evidence of pathology on the MRI of Claimant's cervical spine. *Id.* Dr. Lindenbaum specifically addressed the question of Claimant's exaggerated pain complaints *Id.* Dr. Lindenbaum provided a provisional rating for Claimant's cervical spine and shoulder. The ALJ concluded Dr. Lindenbaum was of the opinion that the injuries to those parts of the body were caused by the work injury and the ALJ found Dr. Lindenbaum's opinions persuasive. (Finding of Fact 38).

In summary, the ALJ determined that Dr. Lindenbaum addressed each of the body parts implicated by the work injury and provided an opinion on causation/relatedness. As found, Respondents did not meet their burden of proof to show that Dr. Lindenbaum's conclusions were more probably wrong. (Finding of Fact 42). The ALJ determined that what was offered into evidence was a differing expert opinion (Dr. Messenbaugh) that disagreed with Dr. Lindenbaum's opinion. (Finding of Fact 41). This difference between the opinions of Dr. Lindenbaum and Dr. Messenbaugh did not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*, WC-s 4-532-166 & 4-523-097.

TTD Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits.

The ALJ determined Claimant was entitled to TTD benefits based upon the opinion of the DIME physician, Dr. Lindenbaum. (Finding of Fact 44). This was also based on the fact there was no evidence in the record that Claimant worked after July 11, 2021 and she had work restrictions at various times while she was being treated. (Finding of Fact 9). Accordingly, Respondents will be ordered to pay TTD benefits from July 12, 2019 until terminated by law.

ORDER

It is therefore ordered:

1. Respondents shall provide medical benefits to Claimant, including the evaluation by Dr. Ogin (or other orthopedic surgeon) for her cervical spine, and right shoulder.

2. Since Clamant is not at MMI, Respondents shall pay TTD benefits from July 12, 2019 and continuing.

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

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

DATED: July 25, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-161-807-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

FINDINGS OF FACT

1. Claimant was properly served with the Application for Hearing in this matter on April 1, 2022 by mail addressed to Claimant's home address and email address. Notice of Hearing was also sent to Claimant by mail and email to his address of record on April 22, 2022. Claimant has not filed any entry of appearance or response with the Office of Administrative Courts or otherwise participated in this matter.

2. On January 11, 2021, Claimant sustained an admitted lumbar spine injury arising out of the course of his employment with Employer. Following a course of treatment, Claimant's authorized treating physician (ATP) Jeffrey Baker, M.D., placed Claimant at maximum medical improvement (MMI) effective November 23, 2021. (Ex. 1).

3. Over the course of Claimant's claim, Insurer paid Claimant temporary partial disability (TPD) benefits through January 9, 2022. At hearing, KJ[Redacted], the claims adjuster Insurer assigned to Claimant's claim testified that Insurer paid Claimant a total of $4,033.28 in TPD benefits from November 23, 2021 until January 9, 2022.

4. On February 23, 2022, Respondents filed a Final Admission of Liability (FAL) asserting an overpayment of $4,033,28 in TPD benefits. (Ex. 1). This overpayment claim represents the TPD benefits Insurer paid Claimant after the date of MMI until January 9, 2022. (Ex. 1). Claimant did not object to the FAL, or request a hearing related to the FAL.

5. Based on the amendment to §8-40-201 (15.5), C.R.S., that modified the definition of "overpayment" effective January 1, 2022, Respondents limited their request for repayment to only those overpayments that occurred prior to January 1, 2022. Ms. KJ[Redacted] credibly testified that the total amount of TPD paid from November 23, 2021 to December 31, 2021 was $3,791.61.

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. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The 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).

OVERPAYMENT

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[1] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such

[1] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive," from the definition of "overpayment." As noted, Respondents have limited their claim to payments occurring before January 1, 2022, consequently the applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo. 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities).

recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish by a preponderance of the evidence that a claimant received an overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); *See In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009).

Respondents have established by a preponderance of the evidence that Claimant received overpayments of temporary partial disability benefits in the amount of $3,791.61, and that Respondents are entitled to repayment of that amount. Pursuant to § 8-42-103, and 8-42-106, respondents are required to pay temporary disability benefits while a claimant is under a disability that prevents the claimant from earning his or her full average weekly wage. Such benefits continue until the claimant reaches maximum medical improvement. § 8-42-106 (2)(a) C.R.S. Respondents paid Claimant TPD benefits for the period of November 23, 2021 through December 31, 2021, in the amount of $3,791.61. Because these TPD benefits were paid after the date of MMI assigned by Claimant's ATP, the benefits exceeded the amounts should have been paid or were amounts Claimant was not entitled to receive. *See Wheeler, supra* ("respondents are allowed to recover as an overpayment the TTD benefits that were due and owing when paid but are later determined to be amounts the claimant was not entitled to receive. Respondents are, therefore, entitled to recover the overpayment.

OVERPAYMENT RECOVERY

Section 8-42-113.5, C.R.S. governs the recovery of overpayments. Where a claimant receives any payments from any source which requires the reduction of any disability benefit, § 8-42-113.5 provides for different methods of recovery for respondents. Under § 8-42-113.5 (a), a claimant is required to provide written notice of learning of such payment within twenty days, and any resulting overpayment "shall be recovered by the employer or insurer in installments at the same rate as, or at a lower rate than, the rate at which the overpayments were made." "Such recovery shall reduce the disability benefits … payable after all other applicable reductions have been made." *Id*. Where no written notice is provided, "the employer or insurer is authorized to cease all benefit payments immediately until the overpayments have been recovered in full." § 8-42-113.5(1)(b). If, however, recovery under § 8-42-113.5 (a) or (b) is "not practicable," respondents are authorized to seek an order for repayment. § 8-42-113.5(1)(c), C.R.S. The term "practicable" refers to a respondent's ability to recover the overpayment from ongoing or unpaid benefits." *In re Martin*, W. C. No. 4-453-804 (ICAO, Oct. 4, 2004).

When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the

authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). No evidence exists in the record from which the ALJ can determine whether a payment schedule is appropriate or the terms of repayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay to Respondents $3,791.61 in overpaid temporary disability benefits.

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: July 26, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-188-909-001

ISSUE

1. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury on November 2, 2021, while in the course and scope of her employment?

2. If Claimant suffered a compensable injury, was the medical treatment Claimant received on January 24, 2022 from Dr. Romero reasonable, necessary and related to her injury on November 2, 2021?

3. Did Claimant prove by a preponderance of the evidence that she is entitled to TTD benefits and TPD benefits?

STIPULATIONS

1. Claimant's AWW is $1,219.00.

FINDINGS OF FACT

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

1. Claimant is a 31 year-old female. On November 2, 2021, Claimant was working in the course and scope of her employment as a registered nurse for Employer.

2. On November 2, 2021, CNA HL[Redacted] called Claimant at approximately 7:00 p.m., and asked her to come to a patient's room to assist with moving the patient (KW) to a recliner chair. KW was too weak to move on his own as he had dialysis earlier in the day.

3. Claimant had been KW's nurse that day, so she was familiar with KW and the care he was receiving at the hospital. Claimant had no issues with KW throughout the day. Claimant noted that KW had not ambulated all day because he was too weak.

4. When Claimant entered KW's room, he was sitting on the edge of the bed, and Ms. HL[Redacted] was standing to his side. Ms. HL[Redacted] moved so Claimant could talk to KW. KW was hunched over, so Claimant assessed his health status to see if he was in pain, nauseous, etc. before moving KW to the recliner with Ms. HL[Redacted] 's assistance. Before Claimant could move him, however, KW started getting agitated. (Tr. 22:1-18).

5. Claimant testified that KW started yelling at her and saying that it was his body and he could do what he wanted. She further testified that KW was waving his finger at her and tapping the tip of her nose. When she stepped back and asked him not to do that,

he grabbed her left arm to pull her forward, yanked her back and forth, to the point she was off balance. She further testified that KW's other hand brushed against her chest and hit her chin. Claimant testified that it was a quick interaction, maybe 10 to 30 seconds. She told KW he could not treat staff that way, and she called security. (Tr. 24:2–25:21).

6. According to the incident report, when security arrived, KW was sitting up in bed and staff was trying to verbally de-escalate him. Security was told that Claimant "was grabbed by the patient, pushed, then hit by the patient." It is not clear from the incident report who made this statement. KW told security he was a grown man and was tired of being told what to do. KW felt disrespected by being told he could not do certain things. The report further states that KW's wife was very apologetic towards the staff for the incident. (Ex. 5).

7. Claimant completed a written statement that was included with the incident report. In her statement, Claimant explained that after she was called into the room and had checked on KW, he got verbally aggressive and said it was his body and he could do what he wanted. Claimant tried to explain that they were trying to keep him safe so he did not fall. KW got more agitated and aggressive. When Claimant tried to back away, KW grabbed her left arm, shoved her backwards, and pulled her forward. Claimant lost her balance, and KW struck her across the chest into her left arm with his other hand, and then struck her chin when he let go of her left arm. The narrative section of the incident report concluded with, "[f]urther review with CNA that witnessed event confirmed RN Stephanie's statement." (Ex. 5)

8. The following day, November 3, 2021, the Parker Police Department came to the hospital to investigate the report of an assault. The police interviewed Claimant. Her statement to the police was consistent with the written statement she provided to Parker Security the day before. (Ex. 6). Officer LM[Redacted] testified that Claimant had no visible redness, no bruising, swelling, abrasions, or cuts approximately 18 hours after the incident. (Tr. 62:10-19).

9. Officer LM[Redacted] also interviewed Ms. HL[Redacted] . She told Officer LM[Redacted] that she called Claimant for assistance because KW tried to stand up, but he was too weak and tired to stand on his own. Ms. HL[Redacted] said she was preparing the recliner when she overheard Claimant and KW arguing, and when she turned around to look at them she saw KW pointing at Claimant. Ms. HL[Redacted] said that she went back to preparing the recliner, as KW and Claimant continued to argue. When she turned around again, Ms. HL[Redacted] saw KW push Claimant with his right hand on her left shoulder, and this is when Claimant called a security alert. (Ex. 6).

10. Lastly, the police interviewed KW and his wife. KW's wife was not in the room on November 2, 2021, when the incident occurred. KW told the police that he did not remember anything about what happened the prior evening. According to the police report, Claimant was confused and easily distracted throughout the interview. (Ex. 6).

11. Officer LM[Redacted] completed the police report and concluded that "[a]fter speaking to [KW], I do not feel he had the mental culpability required for assault." (Ex. 6).

12. Ms. HL[Redacted] was the only other person in KW's room, in addition to KW, during the incident. Ms. HL[Redacted] testified at the hearing that as she was preparing the recliner, she was not facing KW or Claimant. She turned around when she heard them arguing, and specifically heard Claimant say something to the effect "you are not going to do this to me again." Ms. HL[Redacted] testified that she saw KW pointing at Claimant, but she did not see him push, pull or strike Claimant. (Tr. 72:2-21). The ALJ finds that Ms. HL[Redacted] had her back turned for the majority of the time Claimant was in KW's room.

13. Per the Hospital's Midas Statements, Ms. HL[Redacted] told her supervisor that KW pushed Claimant with his fingertips on the left side of her chest two times. Ms. HL[Redacted] said that KW never hit Claimant in the face, nor did he ever grab her arm. (Ex. H).

14. Ms. HL[Redacted]'s testimony at the hearing was inconsistent with her past statements regarding the events of November 2, 2021. At the hearing, Ms. HL[Redacted] testified that she did ***not*** see KW push, pull or strike Claimant. (Tr. 72:11-21). But shortly after the incident, Ms. HL[Redacted] told security that she witnessed the incident and agreed with Claimant's statement regarding the attack. (Ex. 5). The next day, November 3, 2021, she told her supervisor, DB[Redacted], that KW pushed Claimant with his fingertips on the left side of her chest, twice. (Ex. H). That same day, Ms. HL[Redacted] told the police that KW pushed Claimant with his right hand on her left shoulder. (Ex. 6/Ex. I). The ALJ discredits Ms. HL[Redacted] 's testimony and does not find her credible.

15. In contrast, Claimant's testimony regarding the events on November 2, 2021, was generally consistent with the statement she drafted after the incident and with what she told the police the following day. The ALJ notes that Claimant's statement varied as to which arm KW used to grab her left arm. The ALJ does not find this inconsistency to be significant, nor does it affect Claimant's credibility. The ALJ finds Claimant's testimony credible.

16. The ALJ finds that KW was too weak to stand on his own, but he became agitated when Claimant tried to help prevent him from falling. KW grabbed Claimant's left arm, he pushed and pulled on it, and he struck Claimant's chest and chin. Claimant did not have any visible bruising or redness the day after the incident.

17. Two years prior, on December 10, 2019, Claimant suffered a compensable work injury to her left shoulder when a patient attacked her. (Ex. N). Claimant had two MRIs, one shortly after the injury and another in August 2020. Both MRIs were negative for labrum or rotator cuff tears. Claimant had two surgeries on her left shoulder, one in October 2020 and the second in February 2021. (Tr. 48: 9-13).

18. Claimant was placed at MMI on January 29, 2021, with a zero percent (0%) impairment rating. She was released to work at full duty with no work restrictions, and a Final Admission of Liability was filed reflecting the same. (Ex. N).

19. Claimant testified that prior the incident on November 2, 2021, she had full range of motion and was able to do all of her duties at work with no issue. Claimant testified she "still had pain here and there . . . but overall it was doing great." (Tr. 27:2-9).

20. Ajay Vellore, M.D., evaluated Claimant on August 5, 2021. At this appointment, three months prior to her injury, Claimant noted that things had been fairly stable, and overall her shoulder was feeling better. She complained of "significant biceps tendon pain" which was quite "annoying." (Ex. E). The ALJ finds Claimant's testimony regarding the condition of her left shoulder prior to the November 2, 2021 injury is not inconsistent with what she reported to Dr. Vellore as Respondents allege.

21. On November 4, 2021, two days after her injury, Claimant went to Concentra and was treated by ATP, Jonathan Claassen, D.O. She reported pain with left elbow extension in the bicep and deltoid areas. She had pain trying to raise her left arm up and when getting dressed. Claimant's pain was an 8/10. Dr. Claassen diagnosed Claimant with a left shoulder strain, left biceps strain, and cervical strain. He ordered a left shoulder MRI. Dr. Claassen noted Claimant's history of left shoulder surgeries in October 2020 and February 2021. (Ex. 10).

22. Claimant had a left shoulder MRI on November 11, 2021. The impression read "[f]indings suspicious for a delamination type partial tear involving the anterior infraspinatus tendon."

23. The ALJ finds that Claimant reinjured her left shoulder in the course and scope of her employment on November 2, 2021.

24. On November 15, 2021, Claimant saw Landon Fine, D.O., who had treated her previously. Dr. Fine evaluated Claimant and reviewed her MRI. He noted that the "MRI is difficult to interpret and it is unknown if this tear is acute or chronic and it does not appear that there is a significant retraction and minimal other intra-articluar pathology." Dr. Fine recommended that Claimant begin with conservative treatment consisting of NSAIDs, injections, and physical therapy. (Ex. F).

25. On January 24, 2022, Alex Romero, M.D., evaluated Claimant and reviewed her November 2021 MRI. He noted that Claimant's shoulder findings were a bit inconsistent. According to Dr. Romero, Claimant had a small intrasubstance tear of her supraspinatus, but on examination her symptoms were very significant. He diagnosed her with chronic left shoulder pain and an incomplete tear of her left rotator cuff, unspecified whether traumatic. (Ex. F).

26. The ALJ finds that Claimant's appointment with Dr. Romero on January 24, 2022 was reasonable, necessary and related to her work injury on November 2, 2021.

27. Claimant was given work restrictions, and Employer gave Claimant a light-duty job that accommodated her work restrictions. (Tr. 32:22-33:3).

28. Claimant testified that sometime in December 2021, Employer informed her that her modified light-duty job could not be accommodated for a period of time. (Tr. 33:1-11). Claimant did not work from sometime between December 2021 and mid-January 2022. (Tr. 33:20-34:5).

29. Claimant testified that sometime in January 2022, Employer gave Claimant a modified job working in the corporate office of her Employer that accommodated her work restrictions. (Tr. 33:20-34:5).

30. Claimant testified that her current work restrictions include no lifting, no pushing and no pulling. (Tr. 35:4-7).

31. Claimant testified that prior to November 2, 2021, she worked approximately 36 hours a week. Currently, Claimant is working 20-30 hours per work in her modified position. Claimant's wages have been affected by a reduction in the overall hours she is working per week. (Tr. 35:8-23). This testimony in uncontroverted.

32. The ALJ finds that Claimant is entitled to TTD benefits and TPD benefits.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

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.; *Triad Painting Co. V. Blair,* 812 P.2d 638 (Colo. 1991). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. F*aulkner 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. 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. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *Univ. Park Care Ctr. v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

As found, the only three people in KW's room at the time of the incident on November 2, 2021, were Claimant, KW, and Ms. HL[Redacted] . KW was confused and did not recall anything regarding what happened in the hospital. Ms. HL[Redacted] had her back turned for most of the events that occurred. Moreover, Ms. HL[Redacted] 's version of what occurred was inconsistent. Ms. HL[Redacted] 's testimony was neither persuasive nor credible. (Findings of Fact ¶14).

In contrast, Claimant was credible and her testimony was persuasive. The ALJ credits the testimony of Claimant and her description of the events that occurred on November 2, 2021. As found, Claimant proved by a preponderance of the evidence that she suffered a work injury arising out of, and in the course and scope of her employment on November 2, 2021. The evidence demonstrated that even though KW was weak, he became agitated and grabbed Claimant left arm, and yanked it back and forth, causing

Claimant to reinjure her left shoulder. (Findings of Fact ¶ 16). While Claimant has a history of left shoulder issues, including two surgeries, Claimant credibly testified that she was able to work full duty without any restrictions, prior to the injury she sustained on November 2, 2021. (Findings of Fact ¶¶ 19-20). Claimant established by a preponderance of the evidence, that she suffered a compensable injury to her left shoulder on November 2, 2021. (Findings of Fact ¶ 23).

For an insurer to be liable for the payment of medical bills, the employee must have suffered a compensable injury arising out of and in the course of employment. Section 8-42-101, C.R.S. If the injury is compensable and the medical services are reasonable and necessary, then the insurer is responsible for the expenses incurred by the employee for the treatment of the injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant establish that a compensable injury occurred on November 2, 2021. As such, payment for the medical bill from Claimant's treatment with Dr. Romero on January 24, 2022 is reasonable, necessary, and related to her compensable injury. (Findings of Fact ¶ 26).

TTD and TPD Benefits

To qualify for TTD benefits under § 8-42-105, a claimant must establish three conditions: (1) the industrial injury caused the disability; (2) the injured employee left work as a result of the injury; and (3) the temporary disability is total and lasts for more than three working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo.1995).

Once a claimant establishes that the industrial injury is causing a temporary wage loss, that claimant is entitled to receive TTD benefits until: (1) the claimant reaches MMI; (2) the treating physician releases the claimant to return to regular employment; (3) the claimant actually returns to regular or modified employment; or (4) the treating physician authorizes a return to modified employment, the employer offers such employment to the claimant, but the claimant fails to begin that employment. *Colo. Springs v. Indus. Claim Appeals Office*, 954 P.2d 637, 639 (Colo. App. 1997).

As found, prior to November 2, 2021, Claimant was working full duty, without restrictions. Claimant was subsequently given work restrictions. Employer gave Claimant a modified job that accommodated her work restrictions. Sometime in December 2021, Employer was not able to accommodate these restrictions, and there was no work for Claimant until January 2022. In mid-January 2022, Employer gave Claimant a modified job in the corporate office of Employer that accommodated her restrictions. Claimant is still restricted from lifting, pushing and pulling, and she has not returned to full duty work. As found, Claimant's wages have been affected by a reduction in the overall hours that she is working per week. Claimant is entitled to TTD benefits and TPD benefits. (Findings of Fact ¶¶ 27-32).

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury while in the course and scope of her employment on November 2, 2021.

2. The medical treatment Claimant received on January 24, 2022 with Dr. Romero was reasonable, necessary and related to her injury on November 2, 2021.

3. Claimant is entitled to TTD benefits and TPD benefits from November 2, 2021 forward.

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: 7-26-22

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

ISSUES

I. Whether Respondents proved by a preponderance of the evidence that they are entitled to withdraw their December 14, 2021 and April 25, 2022 General Admissions of Liability pursuant to Sec. 8-43-201(1), C.R.S. (Cum. Supp. 2021).

II. Whether Claimant proved by a preponderance of the evident that he is entitled to a change of physician in accordance with Sec. 8-43-404(5)(a)(III), C.R.S. and W.C.R.P. Rule 8, 7 CCR 1101-3.

FINDINGS OF FACT

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

1. Claimant is a 53 year-old man with some college education. Claimant worked for Employer as an assistant manager. Claimant was hired on November 2, 2021. His responsibilities included learning every facet of the Employer's day to day business, waiting on customers, learning how to make every item on the menu, unloading supplies, training employees, learning the responsibilities of the store manager.

2. Claimant testified that, when hired, he was not aware that the assistant store manager's duties would involve heavy lifting and did not disclose any information related to his preexisting low back condition.

3. Claimant has an extensive, longstanding prior low back condition for which he was actively treating prior to this incident. Claimant testified he was already experiencing back pain on the day that he reported for work on November 12, 2021, prior to any work activity, and his left lower back, left leg, and left foot were bothering him on a daily basis prior to this incident. Claimant testified his back pain never fully resolved after his 2016 surgery, and he was routinely treating with gabapentin prescribed by Dr. Ludwig and Dr. Whittier for back pain since the 2016 surgery.

4. The medical records list a history that Claimant had back pain and left leg symptoms initially in 1991, when they performed an MRI but Claimant improved with conservative treatment. Approximately six years later he developed recurrent pain and was seen in Illinois where they obtained another MRI.

5. On December 8, 2015 Claimant's MRI, as read by Dr. Eric Lynders, showed a large, caudally directed left paracentral disc extrusion a the L5-S1, that contacted and impinged at the left S1 nerve root in the lateral recess, with disc material contacting the ventral surface of the left S2 nerve root, and moderate to severe central spinal canal stenosis and foraminal narrowing. He also noted fissuring of the L3-4 and L4-5 on the MRI.

6. Claimant was evaluated by neurosurgeon Stephen Johnson, M.D. on

December 30, 2015. Dr. Johnson took a history and noted Claimant's complaint of sharp pain in his left low back with radiation to his left buttock, posterior left thigh, posterior left calf and lateral and bottom of the left foot. He was able to walk fairly comfortably though had increased pain with sitting. Claimant revealed that he had significant weakness of the plantar flexion of the left ankle for the previous three weeks, with persistent numbness of the lateral and bottom of his left foot and numbness of his left saddle area. Claimant also reported some slowing of urination. On exam, Dr. Johnson noted an abnormal gait, not able to push off with plantar flexion of the left ankle and inability to toe walk. Claimant had positive straight leg raise on the left, diminished pin sensation over the dorsum of the lateral aspect of the foot and big toe as well as the saddle area on the left extending laterally from the midline and inferiorly along the medial left thigh suggesting an S1-S2 hypesthesia. Dr. Johnson recommended proceeding with surgery in light of the findings.

7. On January 12, 2016 Claimant was attended by Dr. Johnson, who documented a history as follows:

> [Claimant] was doing reasonably well until a car trip to Estes Park in early November, which brought on pain involving his left low back and left leg. The symptoms worsened in early December. He has had persistent radicular left leg pain. He had an epidural steroid injection, which did not significantly help his pan. He describes a sharp pain in the left low back radiating to the left buttock, posterior left thigh, posterior left calf, and into the later and bottom of the left foot.
>
> Pertinent findings at the time of the hospital admission include ability to toe walk on the left. His gait is abnormal because of the decreased strength with plantar flexion of the left ankle. Straight leg raising is positive on the left. There is significant weakness of plantar flexion of the left ankle. The left ankle reflex is absent. Pin sensation is diminished over the dorsum and lateral aspect of the left food as well as the plantar surface of the left foot.

8. Claimant proceeded with a semi-hemilaminectomy of the L5-S1 with excision of the disk herniation on January 12, 2016 performed by Dr. Johnson at SCLH. The postoperative diagnosis was herniated disc, L5-S1, left. During the surgery, Dr. Johnson identified the left S1 nerve root and performed a foraminotomy. He also identified a large disk herniation contained by the posterior longitudinal ligament. He made an incision in the ligament and discectomy was performed removing the extruded disk material as well as fragments within the disk that had migrated inferiorly to the disk and the additional fragments close to the midline. Dr. Johnson observed that the common dural sack and proximal S1 and S2 nerve roots then appeared decompressed.

9. On discharge on January 13, 2016 Dr. Johnson noted that Claimant, following surgery, was allowed to gradually progress his activities and made progress with ambulation. He was discharged home with plans for a follow-up visit.

10. Dr. Sean O. Bryant noted that the MRI of March 14, 2016 showed good decompression at the L5-S1 level, some post-surgical scarring around the nerve root, no recurrent herniation and the disc space was narrowed at L5-S1 with degenerative findings otherwise stable and no prevertebral mass or fluid collection. The same fissuring of the L3-4 and L4-5 was also seen on this MRI.

11. Claimant was seen by Dr. Johnson on March 16, 2016. He noted that

Claimant was doing well until one week prior, when he awoke with numbness involving his left foot. He was seen at Presbyterian/St. Luke's Medical Center, where they ordered X-Rays and an MRI. The X-Rays showed a lumbar spine partial laminectomy at L5-S1 on the left. Dr. Johnson was hopeful that sensation would improve with walking, physical therapy and time.

12. On April 8, 2016 Dr. Eric Whittier of SCLH Medical Group recommended gabapentin twice daily for nerve pain, as well as clonazepam three times a day and citalopram daily because of the insomnia and general anxiety. On April 12, 2016 Dr. Johnson agreed with Claimant's primary treating physician to start him on gabapentin twice daily.

13. On May 20, 2016 Claimant was admitted to the hospital with a generalized anxiety disorder, insomnia, and a severe episode of recurrent major depressive disorder and post-traumatic stress disorder (PTSD). Dr. Whittier noted that the PTSD was from childhood trauma and ongoing chronic anxiety. Upon discharge he recommended establishing therapy and psychiatric consult for medication control.

14. On June 20, 2016 Claimant continued with PTSD, generalized anxiety, insomnia and had an exacerbation of his back pain with left sided radiculopathy due to lifting in physical therapy. Dr. Whittier increased his gabapentin to four pills a day TID (three times daily), bupropion and tramadol every six hours for pain.

15. On January 16, 2017 Claimant reported to Dr. Whittier that he was having back pain and radicular symptoms that was likely worsening his PTSD as his mood was visibly worse. He increased his antidepressant and sleep medications. He was taking four tablets of gabapentin per day in addition to the tramadol as needed. He also made a referral to neurosurgeon Dr. Wong as Claimant declined to return to Dr. Johnson for his worsening lumbar spine pain and radiculopathy with muscle weakness. On February 17, 2017 Dr. Stephen Carmel also documented ongoing low back and left sided radiculopathy.

16. On July 25, 2017 Dr. Whittier again mentioned a referral to a second opinion neurosurgeon for the low back and radicular problems on the left. Claimant continued to have PTSD, generalized anxiety and insomnia. Claimant had an annual exam on October 24, 2017, with Dr. Whittier who noted that Claimant only taking one to two dozes of gabapentin at nighttime and had stopped most of his antidepressants but continued to see a therapist for depression. On physical exam he found mild tenderness in the low back and recommended that Claimant continue on gabapentin. This was also the recommendation on May 15, 2018 and December 10, 2018.

17. On January 10, 2019 Claimant had significant low back pain with radiculopathy and evidence of distal weakness on the lower extremity. Dr. Whittier recommended orthopedic evaluation with Western Orthopedics. On June 13, 2019 Claimant continued to have problems with anxiety, medications were restarted, and referrals to both therapy and a gastroenterologist were placed. On August 7, 2019 he continued to have insomnia, anxiety. Medications were changed. On September 16, 2019 he had continued low back and radicular symptoms despite continued use of two gabapentin pills per night, with some subtle weakness and pain when sleeping. On musculoskeletal exam, Dr. Whittier found chronic low back pain, positive for tenderness to palpation, with left leg radiculopathy and left leg numbness as well as deep tendon reflex

(DTR) on neurologic exam. He also noted depressed mood with tearfulness. Dr. Whittier referred Claimant to Denver Back Pain Specialists and recommended Claimant continue to take the gabapentin.

18. Dr. Whittier again evaluated Claimant on October 1, 2020. Claimant continued with anxiety, depression, insomnia and lumbar spine chronic pain and radiculopathy. He continued to take gabapentin. On October 15, 2020 he placed a prescription for gabapentin, two tablets per night. On November 19, 2020 Claimant continued with the same medications and same diagnosis of generalized anxiety, insomnia, PTSD. Claimant continued with gabapentin for the chronic pain.

19. Claimant was seen by Dr. Jacob Ludwig for the first time on March 25, 2021 and diagnosed chronic bronchitis, insomnia, generalized anxiety, hypertension, and Dr. Ludwig referred Claimant to a new therapist. On August 27, 2021 Claimant was seen by Dr. Ludwig and diagnosed with the same issues of generalized anxiety, PTSD, hypertension, insomnia, back pain with left sided radiculopathy with associated neuropathy controlled with gabapentin, and mild intermittent reactive airway disease. Dr. Ludwig noted that "He is in real distress related to the above situation and especially struggling without access to gabapentin, clonazepam, Lisinopril, doxepin and albuterol inhaler."

20. Just two months prior to this claim Claimant reported he was helping his cousin move boxes and felt increased back pain and left-sided sciatica. Claimant testified he helped his cousin lift and carry a variety of many items at a garage sale, and he felt back pain with pain into his left leg and left foot.

21. Claimant saw his primary care physician, Dr. Jacob Ludwig, at SCL Health Medical group on September 10, 2021, who recommended he change his gabapentin intake to three times a day. Dr. Ludwig documented that Claimant reported he was in a physically, mentally, and emotionally abusive relationship at that time. Claimant requested removal of the history that was recorded during the visit regarding his relationship. The report notes Claimant was hospitalized in the past for these (presumed harmful mental health) thoughts, and did not want to go back to the hospital. Claimant also reported his father was abusive as well. Claimant complained to Dr. Ludwig the sciatica was constant, and went down to the toes. Dr. Ludwig gave Claimant the suicide hotline information, and recommended he continue his medications including clonazepam and Lexapro and continue therapy.

22. Claimant reported he had chronic low back pain for years, and Claimant himself requested a referral for sports medicine and an MRI, and they offered him both. Dr. Ludwig noted Claimant had acute on chronic low back pain with severe left-sided sciatica symptoms and neuropathy. Dr. Ludwig reported that Claimant increased his gabapentin dosage to "TID" which means three per day from his regular dosage of twice per day. On exam, Dr. Ludwig found Claimant had tenderness in the back, and a positive straight leg raise ("SLR") test on the left. Given the neurologic symptoms in setting of prior laminectomy, Dr. Ludwig recommended an MRI to evaluate recurrent nerve compression. Dr. Ludwig recommended Claimant establish care with a sports medicine physician and a physical medicine rehabilitation specialist/physiatrist.

23. Claimant stated that his symptoms continued at that level for less than two weeks and then he went back to taking one to two pill at bedtime. Claimant testified the

back pain he experienced in September 2021 was new and different than what he experienced immediately before that incident in September 2021.

24. On November 12, 2021 Claimant reported to his Employer a low back injury while lifting boxes of dairy products. Claimant's manager was pushing the boxes towards him and he would rotate, lift them and then rotate to the opposite side to stack them. When lifting the last one, Claimant felt a pop in his low back. He felt immediate increasing pain in his low back going down his left leg and into his foot.

25. Claimant's manager, testified that she did not witness any incident or injury. She stated she worked alongside Claimant on November 12, 2021 putting away the mix in the walk-in. Although Claimant testified he was unable to continue working after the incident, the manager testified Claimant was able to complete the task of putting the frozen mix away, and after the frozen mix was put away, she and Claimant continued working on other tasks including putting away paper, dilly bars, and queso. Although Claimant testified he experienced "excruciating" pain while putting the mix away, the manager contradicted Claimant, stating she never witnessed Claimant cry out in pain, or exhibit any signs of an injury or pain. The manager stood next to Claimant to hand him the products, but did not hear his back pop or observe anything to indicate that Claimant hurt himself. The manager testified Claimant never told her about his prior back injury, any lifting restrictions, or any physical limitations when they went over the job duties.

26. When the manager was about to leave for the day, she let Claimant know he could stay and work or he could go home. Claimant looked at her funny, but did not report any injury at that time. After Claimant continued to look at her in a funny way, the manager asked Claimant to come with her to the office. She and Claimant spoke for a lengthy time, but Claimant did not tell her what happened. Ultimately, she was the first one to ask if he was hurt. Claimant then told her he felt a twinge while putting the supplies away, but felt a pop when he lifted the queso. Claimant initially declined to seek medical treatment, but the manager insisted.

27. Prior to working for Employer, Claimant had not worked since 2009 at a formal job. Claimant testified he listed employers on his job application, and misrepresented his work history through 2019. Claimant testified he did this as he wanted to work with the manager of Employer, whom he had previously met and with whom he had discussed a possible job.

28. On November 12, 2021, Dr. Brian Cooper of UCHealth – Harmony Emergency, noted a history that Claimant was lifting while at work and felt a pop in his left lower back. Before going to the emergency, he had been resting in bed, arriving at the ED via Uber. Claimant reported symptoms of low back pain with some weakness to his left leg. Dr. Cooper evaluated Claimant and found him to be in acute distress. Claimant was provided with prednisone (Medrol Dospak), flexeril and lidocaine patches. Dr. Cooper opined the evaluation showed a lumbar series with no acute findings other than degenerative changes at the L5-S1 level. Dr. Cooper recommended Claimant follow-up closely with his primary doctor to arrange further follow-up. His discharge medications were oxycodone (Percocet), Medrol Dospak, Lidoderm patches and cyclobenzaprine (flexeril).

29. Claimant received the designated provider list from Employer on November 12, 2021 by text message, and from Pinnacol on November 16, 2021. The designated

provider list included Concentra in Fort Collins, Workwell Occupational Medicine in Loveland, Workwell Occupational Medicine in Fort Collins, and UC Health Occupational Medicine in Fort Collins. Claimant chose to treat at Workwell Occupational Medicine in Loveland with Dr. Dupper.

30. Claimant was first seen by Dr. Robert Dupper at Workwell, Longmont. He took a history that Claimant was lifting crates and stacking them on November 12, 2021, which required Claimant to lift and twist repeatedly. As he lifted and twisted, he heard his low back pop. Then he developed significant left leg radiation that went into the foot with some numbness and tingling. He noted that in addition to using the flexeril and lidocaine patches received from the emergency room, Claimant was also taking Tylenol and ibuprofen as well as using ice packs. Dr. Dupper took a history from Claimant of back pain and treatment going back to 1991. Dr. Dupper listed Claimant's current medication as Gabapentin, Lisinopril, Clonazepam, vitamins, Tylenol, ibuprofen. On exam he noted that there was tenderness present in the lumbosacral area but no edema in the back or lower extremities. There was also an absent reflex at the ankles, altered sensation along the left lateral calf, a shuffling gait, absent toe and heel walking on the left, some hesitancy with urination, moderate limited range of motion and a positive SLR on the left. Dr. Dupper ordered a "STAT"[1] MRI and prescribed Tramadol for pain. While Dr. Dupper provided an opinion that the objective findings were consistent with the mechanism of injury, the record is devoid of notes stating that he had reviewed medical records or requested any prior records.

31. Dr. Virginia Scroggins Young read the November 15, 2021 MRI and observed post-operative changes and disc bulges with high signal annular fissuring at L3-4 and L4-5. Claimant already had annular fissuring with disc protrusions in his December 8, 2015 MRI at L3-4 and L4-5.

32. Claimant was seen by Dr. Dupper on November 18, 2021. He noted that Claimant was in severe distress and had weakness of the left calf when attempted to stand on his toes. Claimant reported this last symptom as new. Dr. Dupper refilled the cyclobenzaprine and diagnosed strain of the low back with radiculopathy. He referred Claimant to Dr. Shoemaker, a physiatrist as well as physical therapy.

33. After Claimant began treatment, he moved to Aurora, Colorado. Before he moved to Aurora, he spoke with Insurer to find out if there was a possibility of being treated in Denver or another areas. The Insurer's adjuster advised that a change in location does not result in a change of doctor. Insurer advised that the list of designated providers did not have any providers outside the Fort Collins/Loveland area but that there were many providers in Denver that could attend him and that the adjuster could provide a couple.

34. On November 22, 2021, Claimant sent his new address to the adjuster and asked when a list of clinics and/or doctors around his area could be emailed to him. On November 23, 2021 Insurer sent Claimant a list in his area and recommended calling them to find out if they would accept transfer of his care and then set up with whichever was easiest for Claimant. The list included Workwell in Aurora; CareNow in Denver and SCL in Denver.

[1] STAT is a medical abbreviation for urgent or rush, from the Latin word statim, meaning "immediately."

35. Claimant scheduled an appointment with Workwell in Aurora with Dr. Matus. Claimant testified that he wanted to maintain continuity of care. Claimant acknowledged in discovery that Dr. Matus was his treating provider, and testified SCL Health was not on the initial Employer's designated provider list in the Fort Collins/Loveland areas.

36. Claimant was first seen by Dr. Brenden Matus on December 3, 2021. He noted he was seeing Claimant as a transfer patient from another clinic. He reviewed the history and personal history as well as the MRI. He opined that the post-surgical findings were not acute and did not require a surgical consult. He agreed with the physical therapy and physiatrist referrals. He refilled the flexeril, ibuprofen and the patches.

37. After Claimant moved to Aurora and started seeing Dr. Matus at Workwell in Aurora, Claimant filed a Notice of "One-Time" Change of Physician form on February 2, 2022 requesting SCL Health Medical Group ("SCL") be his authorized treating physician. The objection by Respondents was that SCL was not a provider listed on the Employer's initial designated provider list in the Fort Collins/Loveland areas.

38. Claimant saw Dr. Shoemaker, a physical medicine and rehabilitation doctor/physiatrist, on December 14, 2021. Dr. Shoemaker reported there were no acute findings on MRI to indicate a new disc injury. Dr. Shoemaker documented a "challenging" conversation with Claimant regarding causation. Dr. Shoemaker noted Claimant "certainly openly disagreed" with Dr. Shoemaker's medical assessment that the annular fissures at the L3-L4 and L4-5 were incidental, known to be present in asymptomatic individuals, and that it was "highly unlikely" that Claimant simultaneously injured four separate structures during the discrete work-event. Dr. Shoemaker opined the annular fissures were probably incidental, asymptomatic, and unrelated to the work incident. However, he opined that Claimant likely had an aggravation of the previously existing chronic condition at the L-5 S1 level as well as hip injury, which was minor compared to the aggravation of the spine condition. Dr. Raschbacher agreed with this finding regarding the annular fissures. Dr. Shoemaker also noted Claimant "initially ramped up his usage [neuropathic pain medications] to 3 times a day, though as symptoms have been recently improving, he is back down to his normal gabapentin usage." Dr. Shoemaker opined Claimant's condition had not yet returned to his chronic baseline. Dr. Shoemaker recommended a pain psychology evaluation on December 14, 2021, and documented multiple times that Claimant "denied pain psychology." Dr. Shoemaker increased Claimant's gabapentin, cyclobenzaprine p.r.n., and a 10-day course of meloxicam. Nothing in this record shows that Dr. Shoemaker had Claimant prior treatment records.

39. On December 14, 2021 Respondents filed an Admission of Liability, admitting to reasonably necessary medical benefits and temporary total disability benefits.

40. On February 9, 2022, Dr. Shoemaker wrote "as per previous notes, I recommended pain psychology, and he declined." Dr. Shoemaker reported that the Claimant's pain disability score was 143 out of a highest possible score of 150, which would be extreme disability. Dr. Shoemaker opined Claimant's score was inconsistent with a patient who was capable of their own self-care, and was highly inconsistent with objective findings, including Claimant's physical function during their encounters. Dr. Shoemaker opined this indicated that Claimant was "not a reliable reporter of his degree of functional ability."

41. Dr. Jeffrey Raschbacher performed an IME on March 25, 2022. Dr. Raschbacher opined Claimant had a long history of prior similar problems, that there was no clear evidence that the reported history produced any change in symptomatology over and above his baseline, and there is no clear evidence radiologically or documented by physical examination that Claimant sustained a new injury or aggravation on November 12, 2021.

42. Claimant was ultimately placed at MMI by Dr. Brenden Matus on April 19, 2022 without impairment or maintenance care. Dr. Matus admitted it was "difficult to compare to his pre-injury baseline with a dearth of objective functional evidence from pre-injury."

43. Claimant was evaluated by Dr. Sander Orent, at Claimant's request on May 12, 2022. Dr. Orent took a history that Claimant was moving bulk soft serve ice cream on a platform. They were approximately 40 lbs. boxes. On the last lift, he felt a pop in the low back and severe pain. He reported he dropped the last crate while stocking. He went to pick up another box and had a sharp pain immediately going down the left leg. He noticed immediate weakness and started to limp. Dr. Orent opined that Claimant sustained an aggravation of his preexisting on November 12, 2021 based on the classic radicular findings that have worsened as a result of the lifting incident. He stated that Claimant required further care, including reimaging, an EMG nerve conduction study, antidepressants, counselling, and cognitive behavioral therapy.

44. Claimant testified he had moved from Denver to Windsor prior to being hired with Employer, but he had help and did not do much of the moving. Presumably, Claimant was unable to lift items and needed help because of his ongoing back injury and re-injury from September 10, 2021. Claimant testified that after this incident, he engaged in another activity that aggravated his low back pain while moving from one home to another in late November 2021 (from Winsor to Aurora), and testified this was not work-related. Claimant testified the pain from this aggravation was to his left lower back, left leg, and left foot, which is the same location that his pain has been consistently since before 2016. Claimant immediately tried to deny his testimony on cross examination, but ultimately agreed he aggravated his back while moving in November 2021. Claimant testified on re-direct he had a temporary worsening while moving, and also testified that activities of daily life aggravated his pain such as cleaning the bathtub, cleaning the toilet, and lifting more than he should and believed he lifted beyond what his capabilities were.

45. Dr. Raschbacher testified at hearing and opined that it was unlikely Claimant's condition was the result of a work injury, as his current condition was the same condition Claimant has treated for over many years prior to this claim. Dr. Raschbacher opined there was no objective basis to support a new injury or an aggravation on November 12, 2021, due to the lack of objective findings, and failure to provide physicians with a complete history of his prior physical and psychological condition. Dr. Raschbacher reviewed the MRI and opined it showed old post-operative changes, old scarring, no acute herniated discs, and nothing new or acute on it. Dr. Raschbacher testified if Claimant was in pain, it was the same pain he had experienced all along related to his prior condition. Dr. Raschbacher testified it was improbable that Claimant sustained a new injury, and that his symptoms were more likely the persistence of his pre-existing condition. Dr. Raschbacher testified Claimant was probably no different than his baseline condition.

46. Dr. Raschbacher testified Claimant's medical history showed a longstanding pattern of aggravation and reinjury, with a persistence of low back and left lower extremity complaints dating back to 2015, and the low back condition never resolved. Dr. Raschbacher testified there is nothing in the treating records showing Claimant's treating providers had access to his prior medical records or performed a prior medical record review. This ALJ agrees with the latter after having reviewed the exhibits provided.

47. Dr. Raschbacher testified Dr. Orent's opinion that Claimant's persistent low back pain since 2015 spontaneously resolved in September 2021 after 2 weeks does not make sense medically, and it would be quite unusual for a patient with longstanding pre-existing symptoms for years, with a severe new injury, to have a spontaneous resolution of the symptoms within 2 weeks. Finally, Dr. Raschbacher opined that, when performing a causation evaluations, it was important to analyze correlation of subjective and objective findings, and, in this case, there were no objective signs of injury.

48. As found, Dr. Raschbacher testified credibly that Claimant did not sustain a new work injury or an aggravation of his pre-existing condition as there were no acute findings of an acute injury, Claimant's complaints were the same as his pre-existing complaints, and there was no clear objective evidence Claimant was worse than his baseline condition.

49. As found, Dr. Raschbacher's opinion that there were no objective findings of a new, acute back injury related to a November 12, 2021 incident is credible and more persuasive than the contrary opinion of Dr. Orent. As found, while Dr. Shoemaker opined Claimant's condition had not yet returned to his chronic baseline, Dr. Shoemaker was not in receipt of the full medical history related to Claimant's longstanding prior complaints when he gave his opinion.

50. As found, although Dr. Orent and Claimant contended his psychological issues were not addressed in this case, Dr. Shoemaker recommended a pain psychology evaluation on December 14, 2021, and documented multiple times that Claimant "denied pain psychology." On February 9, 2022, Dr. Shoemaker wrote "as per previous notes, I recommended pain psychology, and he declined." As found, Dr. Raschbacher was persuasive in his assessment that Claimant already had delayed recovery and psychological issues which he was actively treating for prior to this claim related to chronic pain, PTSD, anxiety, abuse, generalized anxiety disorder, distressed marriage, which are unrelated to this claim.

51. As found, Dr. Orent's report lacks credibility. Dr. Orent's account of the mechanism of injury was not consistent with the Claimant's testimony, reports of mechanism of injury in the other medical records, or testimony of the manager.

52. As found, the manager testified credibly that there was no specific incident or accident at work, and she did not witness any accident or injury. As further found, she testified credibly that Claimant did not report a work injury until she suggested he may have been in pain.

53. As found, Claimant testified he experienced increased pain from this incident, and that he had not experienced pain like this, but this testimony is inconsistent with the medical records from September 2021 documenting "severe" pain, as well as the initial

hospital records showing that Claimant appeared uncomfortable, but was able to walk to the room without assistance.

54. As found, Claimant's testimony lacks credibility. Claimant testified inconsistently multiple times, and admitted to falsifying employment history to obtain an outcome he wanted and Claimant changed his testimony multiple times on the stand. As found, Claimant reported that he felt a pop when he lifted the queso on November 12, 2021. As found, some of the medical records indicate Claimant reported he injured himself while moving frozen mix.

55. As found, Claimant also told Dr. Raschbacher that he worked at a Thai restaurant before being hired with Employer, which is inconsistent with his testimony at hearing. As found, although Claimant had not worked for over 10 years, he testified he had an active lifestyle of backpacking through Europe, hiking, playing basketball, tennis, swimming, and skiing, which is inconsistent with his medical history of continual chronic low back pain and radiculopathy since 2015.

56. As found, the prior medical records from SCL Health showed a long-standing, chronic, pre-existing low back condition which never resolved after his back surgery in 2016, including on April 8, 2016 a recurrence of radicular pain to the left leg and foot numbness as well as increased anxiety and depression; on May 20, 2016 reports of continuing radicular symptoms as well as ongoing mood problems related to childhood PTSD and the pain from his back surgery, which brought his psych issues to the forefront; and multiple other instances of complaints of low back, left lower extremity radicular pain, anxiety, depression, PTSD related to childhood events and marital abuse, and insomnia. As found, Claimant continued to treat for the whole period of 2016 through 2021 for anxiety disorder, PTSD, insomnia, and back pain with left-sided radiculopathy as stated above. For example, on June 20, 2016 Claimant continued with PTSD, generalized anxiety, insomnia and had an exacerbation of his back pain with left sided radiculopathy due to lifting in physical therapy. Dr. Whittier increased his gabapentin to four pills a day TID (three times daily), bupropion and tramadol every six hours for pain. As found, Claimant was being treated on September 10, 2021 with the same dosage of gabapentin that Claimant testified he was told to increase his dosage to after the November 12, 2021 incident. He was on the increased dosage of gabapentin multiple times following his 2015 surgery.

57. The treatment plan recommended by Dr. Ludwig on September 10, 2021 was the same as the treatment plan Claimant had for November 12, 2021 as well as he was recommended on January 16, 2017, July 25, 2017, January 10, 2019, and September 16, 2019, with which Claimant failed to follow up to see specialists. As found, the September 10, 2021 mechanism of injury is similar to the mechanism of injury in this case- they both involve lifting incidents.

58. As found, Claimant reported symptoms of low back pain with some weakness to his left leg on November 12, 2021 to Dr. Brian Cooper, which were identical symptoms than those he complained of during his September 2021 incident and other prior lifting incidents. Further, as found, the X-rays of the lumbar spine which were taken at UCHealth showed no acute osseous or acute alignment abnormality of the lumbar spine and Dr. Cooper did not recommend follow-up with workers' compensation, but recommended Claimant work closely with his primary doctor to arrange further follow-up. This ALJ infers

from the information that Dr. Cooper did not opine that Claimant had an aggravation of his preexisting condition but an ongoing preexisting problem. Supporting this inference are the records that reflected Claimant did not have an impaired gait, and that he walked into his room without assistance. It is also supported by the fact that Claimant's MRI from November 15, 2021 had similar findings as the MRIs from December 8, 2015 taken before his surgery (with the exception of the subsequent surgical changes) and March 14, 2016 following the surgery.

59. As found, Claimant had a longstanding prior history of mental health issues as well, either affecting his chronic lumbar spine condition with radiculopathy or the lumbar spine chronic issues affecting his mental status.

60. As found, Claimant also reported to Dr. Orent that he began to limp, but the manager testified she did not witness any limping, and the UC Health records documented no limp.

61. As found, Dr. Shoemaker's opined that Claimant was not a reliable reporter of his own degree of functional ability is in accord with this ALJ's findings that Claimant was inconsistent in both his testimony and reporting of symptoms to his medical providers.

62. As found, Respondents have shown by a preponderance of the evidence that Claimant did not have a compensable event on November 12, 2021 that aggravated his preexisting condition and may withdraw their admission.

CONCLUSIONS OF LAW

A. Generally

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

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

for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Are Respondents entitled to withdraw their General Admissions of Liability

Respondents are bound by a General Admission of liability and are required to continue paying until the law permits them to terminate benefits, or they obtain an order from an ALJ. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Once an admission has been filed, the employer may not unilaterally modify that admission if the employer comes to believe an injury is not compensable. Sec. 8-43-203(2)(d); Sec. 8-43-303, C.R.S. Rather, the employer must request a hearing before an ALJ and continue to make benefits payments until the ALJ enters an order allowing modification of the admission, in full or in part. Sec. 8-43-203(2)(d); Sec. 8-43-303; *Rocky Mtn. Cardiology v. ICAO*, 94 P.3d 1182 at 1185 (Colo. App. 2004) (" An employer is required to continue paying pursuant to an admission of liability and may not unilaterally withhold payment until a hearing is held to determine whether there is sufficient evidence to permit withdrawal of the admission.") The party seeking to withdraw an admission carries the burden by a preponderance of the evidence. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Section 8-43-201(1), C.R.S., places the burden of proof on Respondents and to withdraw is the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-

754-838 (ICAO, Oct. 1, 2013); *Munoz vs. JBS Swift & Co.,* WC, 4-780-871-03 (October 7, 2014). Therefore, Respondents' attempt to withdraw their admission of liability becomes an analysis of compensability of the previously admitted injury. *Kelly v. Insta Flap*, W.C. No. 5-120-413, (ICAO, Mar. 30, 2022).

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory, supra.* However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities. Based upon the credible evidence in the record in this case, Claimant merely experienced symptoms of his pre-existing condition while at work which was the natural progression of his disease, in this case continuing low back and left lower extremity radiculopathy, which would produces symptoms any time Claimant lifted something beyond his capabilities. This happened multiple times after Claimant's surgical procedure and November 12, 2021, including on June 20, 2016, January 16, 2017, July 25, 2017, January 10, 2019, and September 16, 2019, and September 10, 2021.

There is a difference between an accident and an injury at work. *Wherry v. City & County of Denver*, W.C. No. 4-475-818 (ICAO March 7, 2002). Just because an accident may have occurred at work, does not necessarily mean Claimant suffered a compensable injury. *Id.* The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or un-designed occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." In *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO 2020), the Industrial Claim Appeals Office upheld the ALJ's order denying and dismissing Claimant's claim for compensation where Claimant had proven an accident occurred, but where

Claimant failed to prove the injury was causally related to the accident. In *Washburn*, Claimant had video evidence of a slip and fall at work, and it was clear there was an accident or incident at work. *Id*. However, the ALJ found Claimant failed to prove she sustained a work-related injury as a result of the fall, and dismissed the claim. *Id.*

The court examined a similar case in *Kelly v. Insta Flap*, W.C. 5-120-413 (ICAO March 30, 2022). In *Kelly*, Claimant alleged an injury at work while moving a rolling rack, when the pipe rack began to fall off the hook and Claimant reached for the pipe to catch it and hurt his back. Claimant described the pain as instant and shocking. Claimant went home after the incident and sought medical treatment the next day. Claimant had a history of longstanding back complaints. The ALJ allowed respondents to withdraw their admission, and found that Claimant did not sustain a work injury that necessitated treatment, and that the Claimant's pre-existing or chronic low back condition was not aggravated or accelerated by the incident at work.

Here, Respondents have proven by a preponderance of the evidence that Claimant's back condition was pre-existing. The preexisting medical records and subsequent independent medical examination and opinions showed that the preexisting condition was symptomatic, disabling, and required treatment before the work incident of November 12, 2021. Claimant's testimony to the contrary is not credible. Complaints described by him show him to have been in significant or severe pain with multiple recommendations and requests for treatment before the work incident. The opinions of medical providers reliant upon Claimant's representations after he brought a workers' compensation claim are not persuasive. Claimant's pre-existing condition was not caused, aggravated, or accelerated by the November 12, 2021 work event. It is found that Claimant did not experience a compensable work injury in the course and scope of his employment and that any low back and radicular symptoms, including weakness were the natural progression of the underlying preexisting condition.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Sec. 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). As found, Claimant's need for treatment pre-existed any work incident on November 12, 2021 as his treatment plan was the same as recommended by his primary care physician on September 10, 2021 and at other times following his 2016 surgery as stated above. It is found and concluded that Claimant did not sustain a compensable work injury.

C. Is Claimant entitled to a change of physician

"Section 8-43-404(5)(a)(I)(A) requires an employer to 'provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, from which list an injured employee may select the physician who attends the injured employee.'"

Under Workers' Compensation Rule of Procedure 8, such list must be provided to an injured worker within seven business days following the date the employer has notice of the injury. W.C.R.P. Rule 8-2(A)(1).

Substantial evidence in the record establishes that Claimant timely received the designated provider list, listing four providers in the Fort Collins/Loveland area. Claimant initially chose Workwell in Loveland and Dr. Dupper as his attending physician. Claimant then moved to Aurora, Colorado and requested a relocation of his treating provider. After consultation with the Insurer's adjuster, who provided a list of providers in the Denver/Aurora Area, Claimant was transferred to Dr. Matus at Workwell in Aurora. It was after this transfer of care, on February 8, 2022 (which is 88 days after November 12, 2021) that Claimant requested a change of physician by filing the appropriate form. The form designated one of the providers listed by Insurer, SCL Group, after he relocated to Aurora. Respondents argue that Claimant was not entitled to designate a "new" provider and that he was prohibited from listing a provider that was not on the "original" list of providers from Fort Collins/Longmont.

An employee may obtain a one-time change in the designated authorized treating physician pursuant to Section 8-43-404 (5)(a)III, C.R.S., after certain conditions are met, including that the notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement; the notice is in writing and submitted on a form designated by the director; the notice is directed to the insurance carrier and to the initially authorized treating physician; the new physician is on the employer's designated list; and the transfer of medical care does not pose a threat to the health or safety of the injured worker.

Sec. 8-43-404(5)(a)(III) allows for a one time change of physician by providing notice that meets multiple requirements. One of the requirements is Sec. 8-43-404(5)(a)(III)(D), which states that "the new physician is on the employer's designated provider list or provides medical services for a designated corporate medical provider on the list."

This statutory right is further explained in Rule 8, Colorado Workers' Compensation Rules of Procedure which includes the following procedural rules in Section 8-5(C) as follows:

> If the insurer or employer believes the notice provided pursuant to this rule does not meet statutory requirements and does not accept the change of physicians, it must provide written objection to the injured worker within seven (7) business days following receipt of the form referenced in paragraph (B). The written objection shall set out the reason(s) for the belief that the notice does not meet statutory requirements.
>
> > (1) If the employer or insurer does not provide timely objection as set out in this paragraph (C), the injured worker's request to change physicians must be processed and the new physician considered an authorized treating physician as of the time of the injured worker's initial visit with the new physician.
> >
> > (2) If written objection is provided and the dispute continues, any party may file a motion or, if there is a factual dispute requiring a hearing, any party may request that the hearing be set on an expedited basis.

The record shows that Respondent sent both Claimant and his counsel a letter stating that the Insurer would not authorize a change of physician and that Dr. Felix Meza

(one of the providers at Workwell Aurora) would remain Claimant's treating physician on February 10, 2022. This ALJ infers from this letter that Insurer was objecting to the change of physician. Despite the timely noticed objection, the objection does not set out the reason for the belief that the notice did not meet the statutory requirements as required by Rule 8-5(C). Therefore Claimant would be entitled to the change of physician in this case. However, the issue of change of physician is really made moot by the determination that Respondents have shown by a preponderance of the evidence that they are allowed to withdraw their admissions of liability as no compensable event occurred on November 12, 2021.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents have proven by a preponderance of the evidence that there was not a compensable work injury that occurred on November 12, 2021. Respondents' request to withdraw the general admission of liability is granted. Claimant's claim for compensation is *denied and dismissed* prospectively.

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 26th day of July, 2022.

Digital Signature

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the medial branch block recommended by authorized treating physician ("ATP") Bradley Duhon, M.D. is reasonable, necessary and related to his industrial injury.

FINDINGS OF FACT

1. Claimant has worked for Employer since August 2000. Claimant sustained an admitted industrial injury on June 21, 2019 when he was struck by a moving forklift.

2. Claimant underwent treatment with authorized treating providers Annu Ramaswamy, M.D. and Bradley Duhon, M.D. He was diagnosed with left lumbar radiculopathy, lumbar lateral recess stenosis, protruding lumbar disc, lumbar foraminal stenosis, and lumbar stenosis without neurogenic claudication.

3. On April 26, 2021 Claimant underwent minimally invasive left L4-5 laminotomy with bilateral sublaminar decompression and minimally invasive left L5-S1 foraminotomies, performed by Dr. Duhon.

4. Post-operatively Claimant complained of low back pain as well as pain, numbness and tingling in his bilateral lower extremities.

5. On June 9, 2021, Claimant saw Dr. Duhon via a telemedicine visit. Dr. Duhon noted that Claimant's left-sided pain had resolved, but that he continued to have issues on his right side. Dr. Duhon noted L5 post-operative radiculitis of unknown etiology.

6. Claimant subsequently saw Dr. Duhon for a telemedicine visit on July 14, 2021 and an in-person evaluation on July 15, 2021. Claimant complained of low back pain, stabbing pain in the legs, and alternating leg symptoms. Dr. Duhon noted that Claimant's surgery did not result in "excellent decompression" and believed Claimant's ongoing pain was likely facetogenic in nature. Dr. Duhon further noted that Claimant's symptoms were different than his preoperative symptoms. Dr. Duhon remarked, "While the facet pain was not really much of an issue preoperatively, decompression requires partial facet resection and secondarily could have developed facetogenic pain." (Cl. Ex. 3, p. 20). He commented that he strongly believed Claimant needed medial branch blocks L4-S1 to identify his L4-S1 facets as the source of pain. Dr. Duhon also recommended an EMG of Claimant's bilateral lower extremities and a lumbar MRI. The lumbar MRI and EMG were performed on August 18, 2021 and December 15, 2021, respectively.

7. Claimant underwent additional physical therapy beginning on October 14, 2021 and continued in physical therapy throughout the remainder of 2021.

8. On September 23, 2021, Siva Ayyar, M.D. issued a peer review report regarding the recommendation for L4-S1 medial branch blocks. Dr. Ayyar reviewed the medical records and spoke with Dr. Duhon. He noted that Dr. Duhon stated the medial branch blocks and EMG testing are recommended to confirm the levels of involvement and to determined whether a spinal fusion will be beneficial. Dr. Ayyar concluded that the recommended L4-S1 medial branch blocks are not medically necessary. He explained that the MTG regarding the low back notes that medial branch blocks are probably not helpful to determine the likelihood of success for spinal fusion and, thus, not indicated in Claimant's case.

9. On October 20, 2021, Leo Lombardo, M.D. issued a peer review report regarding the recommended medial branch blocks. Dr. Lombardo also opined that the medical branch blocks are not medically necessary. Like Dr. Ayyar, he noted that, per the low back MTG, medial branch blocks are probably not helpful to determine the likelihood of success for spinal fusion. Dr. Lombardo further wrote that, while the recommended injections are generally accepted diagnostic injections used to determine whether a patient is a candidate for a facet rhizotomy, here a facet rhizotomy is not planned. He stated that a negative response to prior medial branch blocks was also noted.

10. On February 2, 2022, Dr. Duhon opined that Claimant could benefit from medial branch blocks focusing on the lumbosacral spine at L4-S1. He explained that the blocks are medically necessary because Claimant has facet-mediated pain emanating from these levels. Dr. Duhon further explained that the medial branch blocks are primarily diagnostic and will assist in confirming the source of Claimant's axial back pain and would allow to proceed with more therapeutic options such as dorsal rhizotomies.

11. On February 16, 2022, Dr. Duhon continued to note Claimant's persistent mechanical low back pain, pain in the left buttock and lateral hip, and numbness and tingling in the feet. He noted that Claimant's December 2021 EMG revealed moderate to severe chronic right L4-5 radiculopathy and mild left L4-5 chronic radiculopathy without apparent active/ongoing denervation. Claimant's August 2018 lumbar MRI revealed prior decompression at L4-5 but secondary to broad-based disc bulge and facet arthropathy, with significant stenosis at L4-5. Dr. Duhon further noted that he reviewed the February 11, 2021 medical of a Dr. Drew, and that such note indicated that the L5 selective nerve root block gave excellent relief during the anesthetic window. He remarked that bilateral L4-S1 medial branch blocks performed in October 2020 gave partial response during the anesthetic window. Dr. Duhon continued to opine that medial branch blocks are necessary, with possible dorsal rhizotomies to follow.

12. The ALJ finds the opinion of Dr. Duhon, as supported by the medical records, more credible and persuasive than the opinions of Drs. Ayyar and Lombardo.

13. Claimant proved that it is more probable than not the medial branch block recommended by Dr. Duhon is related to his industrial injury and reasonably necessary to cure and relieve Claimant of its effects.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Treatment

Respondents are liable for medical treatment that causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant met his burden to prove he is entitled to undergo the medial branch block recommended by Dr. Duhon. Dr. Duhon recommended that Claimant undergo the medial branch block to identify and treat ongoing pain Claimant has

experienced as a result of his work injury and related surgery. Dr. Duhon credibly explained that the surgery did not result in excellent decompression, and that he suspects Claimant now has facetogenic pain. Dr. Duhon further credibly explained that the medial branch block is needed for diagnostic purposes to identify Claimant's source of pain and determine how to proceed regarding treatment. As Claimant's treating provider, Dr. Duhon is familiar with Claimant's condition and presentation. Dr. Duhon is also apprised of Claimant's medical records, including imaging.

Dr. Lombardo acknowledged that the recommended medical branch blocks are generally accepted as diagnostic injections to determine if a patient is a candidate for facet rhizotomies. Dr. Duhon specifically noted that, depending on the results of the medial branch blocks, a rhizotomy may be a consideration. Based on the totality of the evidence, Claimant has proven it is more likely than not the recommended medial branch block is related to his work injury and reasonably necessary to cure or relieve the effects of the injury. Accordingly, Respondents are liable for such treatment.

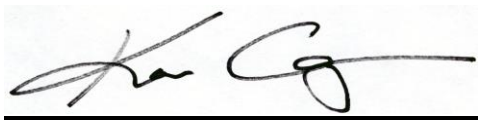
ORDER

1. Claimant proved by a preponderance of the evidence the medial branch block recommended by Dr. Duhon is reasonably necessary and related. Respondents shall authorize and pay for the medial branch block recommended by Dr. Duhon.

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: July 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Did Claimant prove an evaluation by an ATP is reasonably necessary medical treatment after MMI?

FINDINGS OF FACT

1. Claimant works for Employer as an automatic door repair technician. The job is physically demanding and routinely requires lifting heavy doors, motors, and other parts. It also requires extensive driving to perform on-site repairs at commercial establishments across Colorado.

2. Claimant suffered an admitted low back injury on December 1, 2020 while repairing an automatic door at a retail drug store.

3. Claimant received treatment at Concentra under the direction of Dr. J. Douglas Bradley and NP Jennifer Livingston. He was primarily treated for pain and muscle spasms around the lumbar spine and intermittent leg pain.

4. Claimant was initially prescribed NSAIDs, muscle relaxers, chiropractic treatment, and physical therapy.

5. By February 24, 2021, Claimant had completed chiropractic treatment but remained symptomatic. His pain was exacerbated by long drives and moving "wrong." He was prescribed a course of steroids and referred for massage therapy.

6. On March 17, 2021, Dr. Bradley documented that Claimant was slowly improving but he still "has to be careful" about his activities because he had "increased pain with working hard."

7. Claimant ultimately received the most benefit from a combination of dry needling, massage, and PT. On July 9, 2021, Ms. Livingston noted Claimant was "feeling significantly better" and "dry needling seems to be what turned his pain around." He had discontinued the muscle relaxers and was only using ibuprofen occasionally.

8. Claimant was released from therapy on August 2, 2021. The report noted he could perform his regular work with pain typically 3/10 or less.

9. Dr. Bradley put Claimant at MMI on August 23, 2021. Claimant had improved but reported, "If over work, get cramps or aches." His pain level that day was 1-2/10. Dr. Bradley released Claimant with no impairment and no restrictions. Dr. Bradley also wrote prescriptions for diclofenac gel and 800 mg ibuprofen, each with three refills.

Confusingly, despite writing two prescriptions, Dr. Bradley checked a box on the WC164 form stating Claimant required no maintenance care.

10. The prescriptions were transmitted to Claimant's pharmacy and he picked them up after the appointment with Dr. Bradley. Claimant found the diclofenac helpful with the muscle spasms, but tried to minimize use of the ibuprofen because it bothered his stomach. He used both medications sparingly for a couple of months until he "ran out." Claimant did not refill the medications because he did not realize he had refills available.

11. Claimant has worked his regular job continuously since being put at MMI. His back pain is generally well controlled but occasionally flares when working long shifts or driving long distances. Claimant's pain has increased recently because he has been "working a lot." Claimant credibly testified he would like to refill the diclofenac and discuss other maintenance care options with an ATP.

12. Claimant proved his ongoing back pain remains causally related to his admitted work accident.

13. Claimant proved entitlement to general award of medical treatment after MMI to relieve the effects of his injury, maintain function, and prevent deterioration of his condition.

14. Claimant proved an evaluation with an ATP to evaluate maintenance care options is reasonably necessary.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of his compensable injury and prevent deterioration of his condition. Although Claimant's condition improved, he remained symptomatic when he reached MMI. Dr. Bradley reasonably prescribed diclofenac gel and ibuprofen to allow Claimant to manage expected recurrences of his pain. Waxing and waning is to be expected given the demanding nature of Claimant's work. The "checkbox" on the WC164 stating Claimant

requires no maintenance care is unpersuasive and probably a mistake, given that Dr. Bradley wrote two prescriptions with three refills on the same date.

Having found that Claimant is entitled to a general award of post-MMI medical benefits, it naturally follows he must have the option to follow up with an authorized provider occasionally. Claimant's request for an evaluation with an ATP to discuss his maintenance options is reasonable at this time, particularly considering Respondents retain the right to contest the reasonable necessity or relatedness of any specific treatment that may be recommended.

ORDER

It is therefore ordered that:

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

2. Insurer shall cover an evaluation with Dr. Bradley or other ATP at Concentra to evaluate maintenance care options.

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: July 27, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-053-442-004

ISSUES

The issues set for determination included:

- Did Claimant establish by a preponderance of the evidence that he is permanently and totally disabled ("PTD") as a result of his work injury?

- Did Claimant establish by a preponderance of the evidence that he is entitled to post-MMI maintenance medical benefits.

PROCEDURAL STATUS

A Summary Order was issued on April 15, 2022 and served on April 19, 2022. On May 2, 2022, Claimant submitted a Request for Specific Findings of Fact, Conclusions of Law and Order. Respondents filed amended Findings of Fact, Conclusions of Law and Order on May 3, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant was fifty-three years old (D.O.B. October 7, 1967) as of the second day of hearing. Claimant testified he was born in Mexico and went to school (primary) for six years. He immigrated to the United States in 1985 and has no additional education since coming to the U.S. He said he can read and write Spanish. Claimant testified he cannot read/write English, but understands some English.

2. Claimant testified worked in the fields doing farm work. He also worked as a dishwasher, sewing, assembling cabinets and operated a forklift. He began working for Employer in June 2013. Claimant testified that his principal work duties involved driving an operating a water truck at construction sites. The ALJ inferred these jobs were physical in nature.

3. On March 1, 2017, Claimant was working in a trench, removing soil around a pipe. There was machinery operating and the accident occurred when nearby soil and rocks fell and struck Claimant, burying him in debris. His coworkers rescued him from the trench.

4. Claimant testified he did not initially think his injuries were serious, but he experienced pain when driving home. He was evaluated the next day at UC Health Harmony. Claimant complained of low back pain without radiation, but he denied neck pain. Mark Breen, M.D. evaluated Claimant and described the evaluation of the cervical spine as normal. Dr. Breen ordered X-rays, which were negative for acute fracture or acute osseous process. Claimant was to follow up with a workers' compensation physician.

5. Claimant received treatment from Ryan Otten, M.D. at US Healthworks Medical Group in Longmont starting on March 2, 2017. Claimant was initially diagnosed with lumbar and thoracic strain. Over the initial course of his treatment, Claimant also reported right shoulder pain and was diagnosed with right shoulder sprain/strain.

6. Claimant received physical therapy ("PT"), medications and other treatment, including chiropractic manipulation. Dr. Otten assigned work restrictions from the time he began treating Claimant, starting with a five (5) lb. restrictions for lifting, repetitive lifting, carrying, pushing/pulling, reaching overhead, repetitive motion, which was increased to fifteen (15) lbs. in each of those categories. These restrictions continued.

7. On May 31, 2017, Roberta Anderson-Oeser, M.D. evaluated Claimant. At that time, he was complaining of cervical and lumbar pain, right shoulder pain and right lower extremity numbness and weakness. Claimant reported physical therapy had not been helpful. The examination of the lumbar spine revealed palpable spasms in the lower lumbar paraspinals. Claimant had tenderness over the lower lumbar intradisk spaces, bilateral lower lumbar facet joints and bilateral PSIS.

8. Dr. Anderson-Oeser's impression was: cervical strain; right acromioclavicular joint sprain; lumbar strain; right lower extremity paresthesias. Claimatn was to continue taking Ibuprofen and work modified duty.[1]

9. The MRI of Claimant's lumbar spine on June 5, 2017 showed no disc herniation or spinal stenosis in the lumbar spine. Hypertrophic degenerative arthropathy was present from L2-L3 and L5-S1.

10. Claimant experienced continued right shoulder and scapular pain. He received conservative treatment including physical therapy and was referred to orthopedic surgeon, Robert Fitzgibbons, M.D.

11. Claimant underwent a right shoulder MRI arthrogram on June 22, 2017. The MRI which showed tendinosis of the infraspinatus tendon, mild tendinosis of the subscapularis tendon with minimal interstitial tearing, and acromioclavicular degenerative joint disease.

12. On June 22, 2017, Claimant underwent a right shoulder MRI, which showed tendinosis of the infraspinatus tendon, mild tendinosis of the subscapularis tendon with minimal interstitial tearing, and acromioclavicular degenerative joint disease.

13. Claimant returned to Dr. Fitzgibbons on July 17, 2017. The surgeon reviewed the MRI with Claimant and advised him that he was suffering from arthralgia of the right acromioclavicular joint. Treatment options, including arthroscopic repair, were discussed with Claimant.

[1] Exhibit J, pp. 210-212.

14. Dr. Fitzgibbons performed arthroscopic shoulder surgery on August 31, 2017, which included a distal clavicle resection, decompression and debridement. The pre-operative diagnosis was: right AC arthritis and post-operative diagnoses were: right AC arthritis; partial undersurface rotator cuff tear, supraspinatus; impingement.

15. Post-surgery, Claimant underwent treatment for his shoulder as documented in the medical reports admitted at hearing, as well as treatment for his cervical and lumbar spine. In particular, Peter Mars, M.D. evaluated Claimant October 3, 2017. At that time, Claimant reported pain in his right shoulder and back, with some improvement. Claimant was not working at that time and Dr. Mars kept Claimant off work through October 17, 2017. Dr. Mars opined Claimant's lumbar MRI showed "age appropriate facet arthritis" and his diagnoses were: complete tear of right rotator cuff; facet joint disease of lumbosacral region. Dr. Mars referred Claimant for PT and he was to continue with chiropractic treatments.

16. On October 27, 2017, Claimant returned to Dr. Fitzgibbons, who noted mild right shoulder pain. Dr. Fitzgibbons released Claimant to return to work with no restrictions and noted he needed four more weeks of PT. The ALJ inferred that this assessment of restrictions was for Claimant's shoulder only, as there was no indication Dr. Fitzgibbons evaluated Claimant's cervical and lumbar spine.[2]

17. Claimant returned to Dr. Anderson-Oeser on November 15, 2017, at which time Claimant reported symptoms of low back pain. Dr. Anderson-Oeser's impression was: cervical strain; right rotator cuff tear, status post repair; lumbar strain; lumbar facet arthropathy; right lower extremity intermittent paresthesias; muscle spasms. She recommended Claimant continue with PT, chiropractic treatment, osteopathic manipulation and dry needling. Claimant was to continue on modified duty.

18. The ALJ found Claimant had work restrictions issued by his ATP-s through May 2018. Claimant was able to work light duty for Employer.

19. Aaron Ontiveros testified at hearing. He works for the Employer as the HR Manager and assigned Claimant's light work duties. Mr. Ontiveros testified he does not speak Spanish and would speak with Claimant in English. Mr. Ontiveros said he would talk with Claimant in English of up to 30-45 minutes regarding his job duties and personal life. Mr. Ontiveros testified instructions were provided in English and Claimant was able to completed assigned tasks in accordance with those instructions.

20. On March 13, 2018, Claimant was evaluated by Ricardo Esparza, PhD, PLLC. Dr. Esparza diagnosed Claimant with adjustment disorder with anxiety and depression. He recommended six psychological counseling sessions with the focus on pain management, stress resiliency, mood improvement and anxiety reduction.

21. On May 8, 2018, Claimant underwent a FCE at WorkWell Occupational Medicine. Claimant reported bending forward exacerbated his pain and caused dizziness,

[2] Ex. I, p. 209.

blurred vision, and seeing spots. The FCE was not completed due to Claimant's symptoms.

22. On June 18, 2018, Dr. Otten placed Claimant at MMI. Dr. Otten assigned a permanent medical impairment rating, including a 10% whole person impairment of the lumbar spine, which included loss of range of motion ("ROM"), as well as a 22% scheduled impairment for the right shoulder.

23. Dr. Otten noted that because the FCE was terminated prematurely, it did not provide any useful objective measurements to inform permanent restrictions. Dr. Otten stated Claimant had a fifteen (15) lb. max lifting restriction. He said Claimant could continue to see Dr. Anderson-Oeser for medication management.

24. Surveillance video of Claimant taken on June 18 & 26, July 20, August 23 & 26, 2018 was admitted into evidence. The ALJ reviewed the videos. The ALJ found the videos showed Claimant was able to move and use his right upper extremity in several of these sequences. He also was able to stand for periods of time and could bend at the waist. The videos showed Claimant was able to do those activities on the days when the videos were taken. The ALJ inferred Claimant would be able to perambulate without difficulty and use his right arm in a job.

25. Claimant was terminated by Employer on or about August 30, 2018.

26. There was no evidence in the record that Claimant worked and earned wages after this time.

27. On September 18, 2018, Jeffrey Raschbacher, M.D. performed an IME, at the request of Respondents. Claimant reported 6/10 pain in his shoulders, neck, and low back, which had not improved from any treatment. Claimant said moving his neck hurt and he only "moves a little" due to his back pain. On examination, Claimant had negative impingement tests and full strength in his shoulders. No spasms were present in his low back. Claimant had non-physiologic findings. [3]

28. Dr. Raschbacher reviewed the surveillance video and noted Claimant did not appear to have residual pain or limitations. After reviewing the video, Dr. Raschbacher said Claimant's complaints made his subjective reports not a true indicator of his functional abilities. He did not believe Claimant required restrictions except for avoidance of repetitive strenuous overhead use of the right shoulder. He did not believe Claimant required maintenance medical treatment.

29. On December 14, 2018, Claimant was evaluated by Anjmun Sharma, M.D. for a Division-sponsored Independent Medical Examination ("DIME"). At that time, Claimant had pain in his neck, shoulder and back. Dr. Sharma concurred with Dr. Otten's MMI date of June 18, 2018. He assigned permanent medical impairment ratings to Claimant's right shoulder and lumbar spine. Specifically, Dr. Sharma found Claimant's

[3] Exhibit D, pp. 23-30.

right shoulder had a 10% specific disorder impairment and 8% ROM impairment, which gave a final and combined right upper extremity impairment of 17%, which converted to a 10% whole person impairment. Claimant's lumbar spine had a specific disorder impairment of 5% and a ROM impairment of 8% percent, which gave a combined impairment of 13%.

30. Dr. Sharma opined Claimant had permanent work restrictions of: maximum lift, repetitive lift, carry, push, pull no more than 40 pounds and no overhead lifting more than 10 pounds, as he had rotator cuff repair on the right shoulder. Dr. Sharma said Claimant did not require maintenance medical treatment.

31. Dr. Sharma testified as an expert in occupational medicine and family practice in connection with a prior hearing and the transcript was admitted into evidence. (Exhibit R). Dr. Sharma has been licensed since 2005, 2007 in Colorado. He estimated 50% of his practice was devoted to occupational medicine. He testified regarding his findings when he conducted the DIME of Claimant.

32. Dr. Sharma reviewed the videos of Claimant's activity. He described Claimant as being more active in the videos than what he observed in the DIME. Dr. Sharma testified that he believed the 40 lb. lifting restriction was still accurate along with a 15 lb. lifting restriction for overhead lifting. Dr. Sharma stated Claimant had no restrictions with regard to driving. Dr. Sharma's opinion regarding Claimant's restrictions was persuasive to the ALJ.

33. Claimant returned to Dr. Anderson-Oeser on May 2, 2019, at which time he reported pain in the posterior head and frontal region, as well as burning/aching sensations in the lower lumbar region, burning, pins and needles sensation in the posterior aspect of the right leg. He graded his pain as 7/10. On examination, Claimant had no evidence of swelling in the upper lower extremities. Increased tone with palpable spasms were found in the right cervical paraspinals, along with tenderness over the right occipital ridge and muscles. Cervical ROM was mildly restricted on extension.

34. Dr. Anderson-Oeser's impression was: cervical strain; right rotator cuff tear, status post repair; lumbar strain; lumbar facet arthropathy; lumbar facet pain and dysfunction; muscle spasm; adjustment disorder with depression and anxiety. Dr. Anderson noted Claimant should continue with the cyclobenzaprine for muscle spasms, lidocaine 5% topical ointment, Diclofenac for chronic pain, gabapentin for neuropathic pain and Topamax for headaches. Dr. Anderson-Oeser also recommended Claimant continue his program of stretching and home exercises.

35. The ALJ found Dr. Anderson-Oeser has treated Claimant since 2017 and her opinions regarding his need for maintenance medical treatment were credible.

36. Claimant underwent a psychological assessment on her about May 3, 2019, which was performed by Jesus Sanchez, Ph.D. to whom he had been referred by Dr. Anderson-Oeser. At that time, Dr. Sanchez noted Claimant's presentation was

remarkable for depressed, anxious mood and diminished self worth concept, as well as perceived loss of personal value. Dr. Sanchez' diagnostic impression was: adjustment disorder, with anxiety and depressed mood. Dr. Sanchez recommended 8 to 10 sessions of individual psychological counseling. The record was unclear whether Claimant completed this treatment. There was no evidence in the record that indicated claimant had restrictions based upon his psychological diagnoses.

37. A vocational assessment was conducted on behalf of Claimant by Gail Pickett, MA, QRC, ABDA, who authored a report dated August 11, 2019. Ms. Pickett noted Claimant completed six years of school and was able to read and write in Spanish. He was able to speak some basic work-related English and understood more English than he spoke. Claimant told Ms. Pickett that in order to complete job applications he required the assistance of his children. Ms. Pickett also noted Claimant had no computer skills and his work restrictions placed him within the light category. Ms. Pickett noted Claimant can operate a forklift and had skill in driving vehicles.

38. Ms. Pickett identified unskilled positions with the McLean Company for a Warehouse Candy Selector II position which required a GED, which Claimant did not have. In addition, BASF Corporation was looking for a packaging lead, which also required a GED. Emerson was looking for an assembler, which also required a high school diploma or GED.

39. Based upon the interview with Claimant, a review of medical records and labor market analysis, Ms. Pickett concluded Claimant was not able to return to the workforce. This was based on the fact the Claimant did not have English speaking, reading or writing skills on a competitive level and had only six years of education. All of his work history had been in jobs that were labor-intensive and this work experience did not provide him with transferable skills to lead to any employment within his work restrictions. Ms. Pickett concluded the Claimant was unable to earn any wages in any occupation.

40. On April 13, 2020, a Final Admission of Liability ("FAL") was filed on behalf of Respondents based upon a Stipulation of the parties and Order approving the Stipulation. Respondents admitted for a 13% whole person impairment and a 15% scheduled impairment. Liability for medical benefits after MMI were denied.

41. Dr. Raschbacher performed a follow-up IME of Claimant on June 5, 2020. Claimant reported pain levels of 5-7/10 for his "whole body in general". He reported not being able to lift more than 5 lbs. and not being able to reach up past his eye with his right arm. Claimant stated he had pain every day, could walk two blocks, drive for 20 minutes and said he had not functioned well in the prior 2-3 years. On examination, Claimant had with significant pain behaviors and lack of objective findings.

42. Dr. Raschbacher reiterated Claimant did not require restrictions other than avoidance of repetitive strenuous overhead work with the right arm. He stated Claimant did not require further maintenance care if he was to be believed that all of his medications

were of no help to him. The ALJ found this conclusion left open the possibility that some medications could help Claimant.

43. Roger Ryan performed a vocational evaluation on behalf of Respondents and issued an initial report on June 18, 2020. Mr. Ryan noted medical opinions of Claimant's capabilities were varied, but the surveillance videos indicated he was able to do physically more than he subjectively reported. He noted Claimant's physical capacities in surveillance appeared more in line with those reported by Dr. Sharma and Dr. Raschbacher.

44. Mr. Ryan issued a subsequent report on July 15, 2020. Mr. Ryan concluded he would use a "conservative approach," of correlating the varying opinions on restrictions to limiting his search to jobs requiring up to a 30 lb. lifting limit, and a 10 lb. overhead lifting limit for the right arm.

45. In his report, Mr. Ryan detailed that he contacted numerous employers for various positions, including fast food worker, driver, presser, office cleaner, and assembler/entry-level production jobs; these employers had job types were available to Claimant. These employers had open jobs at the time Mr. Ryan contacted them.[4] He noted if Claimant had some English skills, he could also work as a cashier, pizza delivery driver or automobile auction driver.[5]

46. Mr. Ryan compiled a list of 25 separate types of jobs, which Dr. Raschbacher reviewed and approved stating that Claimant could perform these within his restrictions. Mr. Ryan concluded Claimant could earn wages.

47. On July 15, 2020, Claimant underwent a FCE at Colorado In Motion. The testing was performed by Dona Leonard, MS, OTR, CEAS II. The testing was valid and Ms. Leonard indicated Claimant's maximum weight from waist height on the right side was 17.85 lbs; left-side 19.41 lbs. Claimant met the demand for material handling in the light demand category.

48. At the FCE, Claimant's other limitations were identified: occasional sitting with the opportunity to change positions and extend right leg and slightly recline; sitting with use of external support–either for bilateral light dexterity tasks leaning one or both arms, forceful gripping and pinching on an occasional basis. Claimant was not able to safely perform the task of looking upward to perform prolonged overhead work. The ALJ noted the particular restrictions with respect to sitting were not previously identified by Claimant's ATP-s

49. Dr. Raschbacher testified as an expert in Occupational and Family Medicine. Dr. Raschbacher agreed with Dr. Fitzgibbons' release of Claimant to work

[4] Exhibit E, pp. 70-72.

[5] *Id.*

without restrictions for the shoulder and opined there was no objective reason for Claimant's ongoing pain complaints in his shoulder.

50. Ms. Pickett testified as a vocational expert at hearing and said she used Dr. Otten's 15 lb. lifting restriction.[6] She also relied upon findings from the July 2020 FCE that found Claimant displayed additional limitations, such as requiring a cane and inability to maintain positions. Ms. Pickett testified that utilizing these restrictions limited Claimant's access to the labor market. She opined Claimant could not earn wages with his permanent restrictions and his work experience.

51. On cross-examination, Ms. Pickett agreed that if the 19.41 pounds listed as Claimant's max unilateral lift at the Colorado in Motion FCE was a bilateral lifting recommendation, he would have access to all light duty jobs and could probably find employment. [7] She also admitted Claimant would be able to work if he was functional in English, even if he required positional restrictions. Ms. Pickett noted her entire labor market research consisted of looking at job postings on Indeed.com.

52. Mr. Ryan also testified as a vocational expert at hearing. His testimony was consistent with his reports. More particularly, he identified specific employers who were hiring entry level employees. Mr. Ryan testified there were companies hiring within the light job classification and this included both full and part-time positions. There were two companies which had light assembly positions (no experience required), a part-time pizza delivery driver, office cleaner, and an automobile auction driver. Some of these positons did not require a G.E.D. In this last position, little to no English proficiency was required. Mr. Ryan also said that the positon at Emerson required a high school diploma or GED. Mr. Ryan noted entry level positions had openings with some frequency. Mr. Ryan's testimony about the availability of entry-level jobs was more persuasive to the ALJ.

53. Based upon the testimony of Mr. Ryan as a vocational rehabilitation and analysis expert, his report and the evidence in the record, the ALJ concluded there are jobs available in the Denver labor market within Claimant's restrictions in which he can earn wages.

54. Claimant testified he could not do some of the jobs identified by Mr. Ryan, including the light assembly jobs, as he still had consistent pain. Claimant's testimony did not refute Mr. Ryan's conclusions. Mr. Ryan opined there were assembly jobs available in the Denver labor market. Mr. Ryan testified Claimant was able to earn wages, despite his work injury. The ALJ found Mr. Ryan's opinions on Claimant's ability to earn wages were persuasive.

55. The ALJ found Claimant had permanent work restrictions that were attributable to his industrial injury. Based upon the available information, the ALJ found Claimant could not return to his former job and was limited to the light job category.

[6] Pickett deposition, p. 7:2-7; p. 37: 23-25; p. 61:1–14.

[7] Pickett deposition, p. 46:4-14; p. 47:24-48:4.

56. Claimant's work restrictions limited his access to the labor market and his ability to earn wages.

57. The ALJ concluded there were jobs within the Denver labor market within Claimant's restrictions.

58. The ALJ concluded Claimant was able to earn wages.

59. The ALJ determined Claimant failed to prove he was permanently and totally disabled as a result of the injury.

60. Claimant proved he was entitled to maintenance medical benefits.

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

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2020). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2020). 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). In the case at bench, there was conflicting expert testimony on the issue of Claimant's ability to earn wages.

Permanent Total Disability

As determined in Findings of Fact 3-7, Claimant suffered an admitted industrial injury on March 1, 2017 when soil collapsed on him when he was working in a trench. Claimant injured his neck, right shoulder and lumbar spine. Claimant required treatment at the Emergency Department and then received treatment from ATP's, Dr. Otten and Dr. Anderson-Oeser. *Id.* Claimant required surgery on his right shoulder, which was performed by Dr. Fitzpatrick on August 31, 2017. (Finding of Fact 14).

Claimant reached MMI on June 18, 2018 and was assigned by a permanent medical impairment by both Dr. Otten, as well as the DIME physician, Dr. Sharma. (Findings of Fact 22-23, 32). As found, Claimant had permanent restrictions as a result

of his work injury. (Finding of Fact 55). Claimant initially worked light duty following his injury, but left his employment with employer on August 30, 2018. (Findings of Fact 18, 25). Claimant has not worked since that time and alleged he was no longer able to earn wages as result of his work injury. Respondents, while conceding Claimant had permanent work restrictions, averred he could earn wages in the Denver labor market.

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2020). Claimant must also prove the industrial injury was a significant causative factor in the PTD claim by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997). In determining whether Claimant is permanently and totally disabled, the ALJ may consider “human factors”. *See Weld Cty. Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). “Human factors” include such elements as Claimant’s “education, ability, and former employment”. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701, 703 (Colo. App. 1999). In the case at bar, Claimant argued his restrictions, as well as lack of transferable skills prevented him from earning wages. Respondents averred Claimant could earn wages, as there were open jobs in the Denver labor market within his restrictions.

In the case at bench, the ALJ considered various “human factors” vis a vis Claimant to determine the issue of whether he could earn wages. As found, Claimant’s highest level of education was sixth grade. (Finding of Fact 1). Claimant could speak some English and could read/write Spanish. *Id.* Claimant’s vocational expert agreed Claimant had obtained some proficiency in English based on his work. (Finding of Fact 51). Mr. Ontiveros testimony also confirmed Claimant had some English proficiency. (Finding of Fact 19). Claimant’s employment experience was in labor-intensive positions. (Finding of Fact 2).

The ALJ found Claimant had permanent work restrictions as a result of his industrial injury and this limited his access to the labor market. There was a dispute regarding these restrictions. The ALJ determined Claimant’s restrictions, as identified by his physicians, were:

- Dr. Otten-15 pounds lifting;
- Dr. Sharma-maximum lift, repetitive lift, carry, push, pull of 40 lbs, 15 lbs overhead work;
- Ms. Leonard- lifting: right side was 17.85 lbs; left-side 19.41 lbs., light work category;
- Dr. Raschbacher-avoidance of repetitive strenuous overhead use of the right shoulder.

The ALJ concluded Claimant could not return to his prior position with Employer. (Finding of Fact 55). In addition, physically intensive positions beyond the light category were most probably beyond his restrictions. However, the ALJ credited Respondents' expert, Mr. Ryan and determined there were jobs within the local labor market (Denver). (Findings of Fact 43-46, 52-54). These potential employers had available openings and were within Claimant's permanent physical restrictions. *Id.* Ms. Pickett's expert testimony was also considered as part of this analysis (Findings of Fact 50-51), including her agreement that Claimant would have access to jobs if he was within the light category. The ALJ found Mr. Ryan's testimony that Claimant could earn wages to be more persuasive. (Finding of Fact 52). Based upon this evidence in the record, the ALJ determined Claimant could obtain and maintain employment. Accordingly, the ALJ found Claimant can earn wages and is not entitled to permanent total disability benefits.

When coming to this conclusion, the ALJ specifically considered Claimant's testimony that he could not perform specific jobs identified by Mr. Ryan. The ALJ determined some of Claimant's belief that he could not perform these jobs was subjective and not based upon work restrictions issued by his treating physicians. As found, Claimant is still able to drive and had other transferable job skills which supported the conclusion that he was employable and could earn wages, as confirmed by Mr. Ryan. (Finding of Fact 52). Utilizing the range of work restrictions of lifting from 15 pounds to 40 pounds (Dr. Sharma), as well as avoiding repetitive use of the right upper extremity, the ALJ determined Claimant could obtain and maintain employment, as identified by Mr. Ryan, perform the job and maintain such employment. *Id.* There were employers with these open positions available in the Denver labor market. Therefore, Claimant did not meet his burden of proof to show he was entitled to permanent total disability benefits.

Grover **Medical Benefits**

In the case at bench, there was conflicting medical evidence on the issue of maintenance medical treatment. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Comm'n of Colorado,* 759 P.2d 705, 711-712 (Colo. 1988). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ concluded Claimant met his burden of proof and is entitled to maintenance medical benefits. (Finding of Fact 60). As found, Dr. Anderson-Oeser evaluated Claimant at regular intervals since 2017 and the ALJ credited her opinions with regard Claimant's need for maintenance treatment, including medications. (Finding of Fact 35).

ORDER

IT IS HEREBY ORDERED:

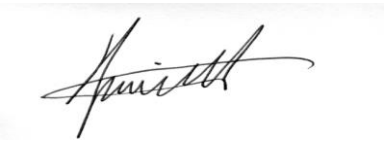
1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. Respondents shall provide *Grover* medical benefits to Claimant, including an evaluation by Dr. Anderson-Oeser for medication management.

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

DATED: July 27, 2022

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

STIPULATIONS

Prior to commencement of the hearing, Respondents raised the following procedural matters and the parties reached the following stipulations:

I. The parties stipulated to withdraw, without prejudice, the issue of temporary total and/or temporary partial disability benefits.

II. In the event that the claim is determined to be compensable, the parties stipulated that Claimant's average weekly wage (AWW) is $833.67.

These stipulations were approved and accepted by the ALJ.

REMAINING ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that he suffered injuries to his low back and right knee while in the course and scope of his employment with Respondent-Employer on July 8, 2021.

II. If Claimant established that he sustained compensable injuries to his low back and right knee, whether he also established his entitlement to all reasonable, necessary and related care to cure and relieve him from the effects of these injuries, including, but not limited to treatment directed to the low back and arthroscopic surgery directed to the right knee as proposed by Dr. Michael Simpson.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. D'Angelo, the ALJ enters the following findings of fact:

Claimant's Alleged July 8, 2021 Injuries

1. The record in this matter is voluminous and the testimony presented is substantially conflicting. Indeed, the parties submitted in excess of 800 pages of exhibits and the statements of Dr. Simpson and the testimony of Dr. Rook can aptly be described as being at odds with that of Drs. O'Brien and D'Angelo.

2. Claimant was employed by Respondent-Employer on July 8, 2021 as a commercial auto parts manager. As part of his duties, Claimant would pull auto parts from storage to fill orders and prepare the order for delivery. This occasionally required Claimant to climb a ladder to reach parts on the upper shelving.

3. Claimant testified that on July 8, 2021, he was using a three-step ladder to collect parts for an order. Claimant testified that as he was descending the ladder the bottom step, which was approximately 12 inches above the floor, broke causing him to fall backwards. According to Claimant, his right foot wedged between the ladder frame and the step causing him to twist and fall backward into some shelving and then onto the floor injuring his low back and right knee. The incident was unwitnessed. Nonetheless, Claimant testified that his fall created noise and a co-worker heard it but did not check on him.

4. Claimant testified that after he got up from the floor, he reported the incident to the store's Assistant Manager, Adam P[Redated]. He testified that approximately 10 minutes elapsed from the time of his fall to the time he reported his the incident to Mr. P[Redated]. Claimant admitted that he told Mr. P[Redated] that he did not think he needed medical treatment at the time of his alleged injury. (Hrg. Tr. 48:13-17).

5. Claimant testified that he showed the broken ladder to Mr. P[Redated] and subsequently completed an incident report around 4:00 p.m. He testified that his scheduled shift ended at 5:30 p.m. but he was sent home for the evening at around 5:00 p.m.

6. Claimant returned to work the next morning (July 9, 2021) reporting that he was "hurting" and "still in pain." Claimant testified that he was instructed to contact "HR" (human resources) and set a medical appointment. Claimant contacted HR in an effort to set a medical appointment. (Hrg. Tr. 25:19-23; 26:1-11)).

7. Claimant testified that during his phone call with HR on Friday July 9, 2021 he was instructed to go home and apply ice/heat to his injuries and rest. According to Claimant, he was off work Saturday, Sunday and Monday, returning to work on Tuesday (July 13, 2021). Upon his return to work on Tuesday, Claimant testified that he was instructed by Mr. P[Redated] and the store manager Rob H[Redated] to call UCHealth to schedule a doctor's appointment. According to Claimant, he was informed that he could not been seen until that coming Friday. (July 16, 2021). (Hrg. Tr. 27:1-19).

8. Between July 13, 2021 and July 16, 2021, Claimant testified that he worked full duty with low back and right knee pain. Moreover, he testified that he did not receive any medical treatment for eight days following the July 8, 2021 incident.

Claimant's Prior Low Back Injury, Prior Low Back Treatment and Lost Time

9. During the course of this case, Claimant has repeatedly told those involved in the process (including his medical providers) that he never had any prior back problems. Claimant specifically told all the medical providers (including his own IME physician) involved in this claim that he had no prior treatment for his back or any previous low back injuries. Based on the evidence presented, the ALJ finds that Claimant misrepresented his prior medical history as he actually filed and pursued a claimed injury to his low back occurring October 22, 2008.

10. The medical records from this prior undisclosed back injury demonstrate a consistent history of non-organic symptoms, inconsistent and varying presentations and provider concern for secondary gain issues. (RHE A, D & F).

11. Claimant presented to Dr. Suzanne Malis at Concentra on February 17, 2009 for a recheck related to his October 22, 2008 date of injury. (RHE D, p. 161). During this encounter, Dr. Malis reported that Claimant was observed to be standing upright and smoking outside the clinic but later in the exam room appeared to have difficulty standing up straight. (Id.) As a result, Dr. Malis was concerned that Claimant was intentionally faking or exaggerating his physical presentation.

12. Claimant also treated with Dr. Daniel Peterson in connection with his 2008 date of injury. Dr. Peterson too expressed concerns about the legitimacy of the case and specifically recommended that surveillance be performed. (RHE D, p. 163).

13. Dr. John Sacha also evaluated Claimant following the 2008 injury and expressed "serious doubts of the validity" of the claim. (RHE D, p. 154).

14. In short, Dr. Peterson, Dr. Malis, Dr. Sacha, Dr. John Ogrodnick, and Bernard Condevaux, PT all expressed concerns regarding the validity of Claimant's presentation and symptomology. (See generally, RHE A, p. 008, RHE D, pp. 154, 161, 163, 166, 180, Exhibit F, p. 198).

15. Claimant testified that he forgot about this prior injury and did not try to mislead anyone about it. (Hrg. Tr. 31:1-7). He did not recall any of the treating medical providers involved with the 2008 injury expressing any concern over the validity of his claim. He also testified that he did not remember missing 4-5 months of work as a result of this injury or settling this claim. (Hrg. Tr. 44:8-11; RHE N, p. 459).

16. The ALJ finds it unlikely that Claimant simply forgot about his prior 2008 injury. Here, the evidence presented supports a finding that the 2008 claim was highly disputed and that Claimant was represented by counsel. (RHE A & N). Retention of counsel to litigate a decidedly contested claim is not something that occurs every day. Accordingly, the ALJ finds it improbable that the claim would be easily forgotten. The evidence also supports a conclusion that Claimant was "very leery" of the doctors involved in the 2008 claim. He accused Dr. Sacha of turning him into a "pincushion" and complained that the doctors ignored his neck pain and reportedly told him that his symptoms were "all in his head." (RHE A, p. 4). During a Division Independent Medical Examination (DIME), Claimant informed Dr. Ogrodnick that he was told he was a surgical candidate. (Id.). He also reported that he had "endured" over 40 injections. (Id.). Claimant's frustration and distrust of the physicians assigned to the case coupled with his report of being a surgical candidate who had undergone in excess of 40 injections, whether he actually underwent that many injections or not, are not feelings and events one probably easily forgets about. Concerning this prior claim, the evidence presented also supports a finding that Claimant lost substantial time from work because of his 2008 low back injury and that he ultimately settled his 2008 claim. The ALJ finds the probable financial stress associated with losing months of time from work coupled

with Claimant's conscious decision to settle this significantly disputed claim, which involved events he once described as "all very ridiculous"[1], likely to serve as a constant reminder regarding the very existence of the claim itself. Accordingly, the ALJ is not convinced that Claimant simply forgot about the 2008 claim. Instead, the ALJ finds that Claimant probably intentionally failed to disclose this prior low back injury, due in part to the fact that the current claim involves a low back injury and the medical providers involved in the 2008 claim generally questioned his credibility and validity of that claim.

The Testimony of Adam P[Redated]

17. Mr. P[Redated] testified as Respondent-Employer's Assistant Manager. He was present at the store when Claimant fell but did not witness the incident. (Hrg. Tr. 106:1-5). Mr. P[Redated] testified that during the time Claimant reported the incident, he did not request medical care. According to Mr. P[Redated], Claimant requested medical care the day after the incident occurred. (Id. at 106:20-24).

18. Mr. P[Redated] testified that Claimant was upset when he reported the incident because a co-employee was laughing about the incident taking place. (Hrg. Tr. 107:10-13).

19. During cross-examination, Mr. P[Redated] testified he saw the ladder that Claimant testified had broken. (Hrg. Tr. 108:3-5). According to Mr. P[Redated], the ladder step had not "snapped in half" as Claimant suggested. Rather, the bolts attaching the step to the frame had slipped out of the step. (Hrg. Tr. 109:4-11).

Claimant's Initial Medical Care Following the July 8, 2021 Incident

20. Claimant presented to UC Health on July 16, 2021 for an initial evaluation with Dr. Kathryn Murray. (RHE H, p. 362). Dr. Murray's medical report indicates that Claimant reported that he did not have any previous trauma to his back or right knee and that Claimant was working full duty. (RHE H, p. 362). Dr. Murray's physical examination revealed no joint effusion in the right knee. (RHE H, p. 363). Indeed, there were no outward signs that Claimant had injured his knee. At the time of this evaluation, Claimant presented slightly hunched forward and leaning to the right side with 7-8/10 pain in his sacrum, buttocks and right knee. (RHE H, p. 359). The ALJ finds Claimant's presentation during this appointment concerning since he had been working full duty and exhibited no obvious signs of being injured or having limitations for more than a week before his first medical evaluation. Based upon the evidence presented, Claimant's symptoms appeared to worsen over the week prior to his initial medical evaluation.

21. On August 16, 2021, Claimant completed a pain diagram at UC Health. This diagram only depicts pain in the low back and buttock region. No complaints of pain are depicted as being present in the right knee. (RHE H, p. 331). During cross-examination, Claimant testified that he did not indicate that he had pain in the right knee because he did not know how to fill out the pain diagram. (Hrg. Tr. 55:15-17).

[1] See Ex. A, p. 4.

Interestingly and inconsistent with this claim, the medical record contains a pain diagram Claimant completed at the time of his initial evaluation on July 16, 2021. This diagram clearly depicts Claimant as indicating he was having pain in the right knee. (RHE H, p. 359). Based upon the evidence presented, the ALJ finds that contrary to his claim, Claimant probably knew how to fill out the pain diagram.

22. Claimant underwent an MRI of the right knee on August 25, 2021. This MRI demonstrated a "[d]egenerated medial meniscus" with a "nondisplaced tear involving the body and posterior horn of the medial meniscus. In addition to this degenerative tearing, the MRI revealed "edema superficial and deep to the medial collateral ligament", which in the "appropriate" clinical setting raised the potential for a "possible MCL strain." (RHE E, pp. 194-195).

23. Claimant also underwent MRI of the lumbar spine on August 25, 2021. The impression of the findings from this imaging was "moderate degenerative changes including mild-moderate T11-T12 and mild L3-L4 central canal stenosis and multilevel mild-moderate neural foraminal narrowing." No comparison to earlier imaging was done. (RHE E, pp. 196-197). Prior MR imaging of Claimant's lumbar spine was completed November 11, 2008, following Claimant's October 22, 2008 low back injury. This imaging revealed an L5-S1 disc protrusion and multilevel spondylosis and disc bulges at L1-L2, L2-L3, L3-L4, and L4-L5. Also identified was a sacral fracture at S3. (RHE E, p. 191-192). A follow-up CT scan obtained February 12, 2009 revealed no discrete fractures. Nonetheless, Claimant was noted to have L5-S1 degenerative disc disease. (Id. at p. 193).

24. Based upon the evidence presented, the ALJ finds that Claimant was likely suffering from pre-existing degenerative pathology in his low back and right knee prior to the July 8, 2021 incident. Moreover, although not disclosed to any treatment provider associated with the current claim, a medical report from Claimant's primary care provider (PCP) raises concern that Claimant continued to have trouble with his low back following the 2008 injury. Indeed, Dr. William Wilcox noted that during an appointment to establish care on May 3, 2021, Claimant advised that his back "bothers" him. (RHE G, p. 221). Claimant testified that that the report is inaccurate, that he had no back pain in May 2021 and he does not recall telling Dr. Wilcox that he did. (Hrg. Tr. 45:3-25; 46:1-16).

25. On September 20, 2021, Claimant presented to Centura Orthopedics for an examination with Dr. Michael Simpson. (RHE J, 437). Dr. Simpson's note from this date of visit reflects that Claimant's August 25, 2021 right knee MRI demonstrated a degenerative medial meniscus with a tear of the body in the posterior horn. (RHE J, 442). On September 23, 2021, Dr. Simpson requested authorization to perform a partial right sided medial meniscectomy. (RHE J, p. 436). The request would be denied based upon the opinions expressed by Dr. O'Brien following a September 30, 2021 medical record review. (RHE B, pp. 10-31).

The Medical Record Review Opinions and Subsequent Testimony of Dr. O'Brien

26. As noted above, Dr. O'Brien performed a records review on September 30, 2021. RHE B, 010. Following his review of Claimant's medical records, Dr. O'Brien opined that while Claimant suffered a mild, "self-limiting, self-healing", right knee sprain/strain, the July 8, 2021 incident did not cause an acute medial meniscus tear. According to Dr. O'Brien, Claimant's right medial meniscus tear was degenerative and pre-existing at the time of the July 8, 2021 incident. Per Dr. O'Brien, Dr. Simpson's indication that there is a causal relationship between the July 8, 2021 incident and Claimant's pre-existing degenerative tear and his recommendation to proceed with arthroscopic surgery was erroneous and should be rejected to two reasons. First, there is nothing on Claimant's MRI or in the clinical evidence to indicate that an arthroscopic surgery is warranted. Second, arthroscopic surgeries are not utilized to treat minor knee sprains/strains, which is the only injury causally related to the July 8, 2021 incident.

27. According to Dr. O'Brien, the meniscal tear revealed by MRI on August 25, 2021, is degenerative in nature and due to "attritional wear and tear over the course of many years, and is due to age-related desiccation and nicotine abuse." Dr. O'Brien supported this opinion by noting that because acute meniscal tears are always associated with bleeding and/or increased accumulation of post-traumatic joint fluid, (effusion), and Claimant had no visible effusion on his July 16, 2021 clinical examination, (eight days after the incident) and only minimal fluid accumulation[2] by MRI on August 25, 2021, the visualized tear is neither acute nor the result of a traumatic aggravation or acceleration of a pre-existing meniscus tear. (RHE B, pp. 13-14). Accordingly, the July 8, 2021, "work incident did not produce a meniscal injury." (Id. at p. 15).

28. Dr. O'Brien opined further that the recommended surgery would fail and expose Claimant to potential harm by accelerating arthritic changes and symptomology resulting in a premature need for a total knee arthroplasty. (RHE B, p. 15). He referred to scientific studies involving arthroscopic surgery in expanding on his opinion that the surgery proposed by Dr. Simpson was contraindicated and would only introduce additional trauma to the knee, which will create an intractable synovitis, which would likely aggravate Claimant's underlying mild osteoarthritis and increase his pain complaints. (Id.).

29. The ALJ interprets Dr. O'Brien's September 30, 2021, Medical Records Review report to indicate that not only is the need for the proposed surgery unrelated to the July 8, 2021 incident but also, based upon scientific and empirical evidence, the risk of proceeding with surgery outweighs any perceived/expected benefit of the procedure. Consequently, Dr. O'Brien's report can be read to indicate that the recommended surgery is contraindicated, i.e. it is unreasonable and unnecessary.

30. Dr. Simpson responded to Dr. O'Brien's records review report on November 15, 2021. (RHE J, p. 377). Dr. Simpson seemingly does not contest the conclusion of Dr. O'Brien that Claimant's right medial meniscus tear is degenerative in

[2] Which Dr. O'Brien attributed to mild underlying tricompartmental arthritis.

nature. Rather, Dr. Simpson notes that whether there is a degenerative component to Claimant's meniscal tear or not does not negate the fact that Claimant would be entitled to surgical treatment for a pre-existing condition if the condition became symptomatic after an industrial incident, as is the asserted case here. (Id. at p. 378). The ALJ infers from Dr. Simpson's November 15, 2021 record, that he believes Claimant's right knee was asymptomatic until the July 8, 2021 incident. Because the July 8, 2021 incident aggravated the underlying pre-existing degenerative meniscus tear causing the right knee to become symptomatic, Dr. Simpson concludes that Claimant is entitled to treatment, including surgery, for the right knee under the principals outlined in the medical treatment guidelines. (See RHE J, at p. 378). Careful review of Dr. Simpson's November 15, 2021 report fails to establish that he responded to Dr. O'Brien's concerns about the reasonableness/necessity of proceeding to surgery. Indeed, Dr. Simpson simply argued that Claimant's need for treatment (surgery) was causally related to the July 8, 2021 incident because this incident aggravated his underlying pre-existing condition resulting in his current symptoms.

31. Dr. O'Brien testified as a board certified, Level II accredited expert in orthopedics and orthopedic surgery. Dr. O'Brien testified that the August 25, 2021 MRI of Claimant's right knee showed myxoid degeneration of the lateral meniscus, which is a degenerative and chronic condition. (Hrg. Tr. 112:9 – 113:10). Dr. O'Brien further reiterated his opinions that Claimant's MRI showed a degenerative medial meniscus tear and that if this tear were acute, there would be an accumulation of blood in the knee joint. (Hrg. Tr. 113:11-25). The lack of hemarthrosis or bleeding indicates that Claimant simply had a chronic condition, not an acute tear. (Hrg. Tr. 115: 15-22). As set out in his medical records review report, Dr. O'Brien testified that an acute medial meniscus tear would cause immediate symptomology, but Claimant's report that he did not have a lot of symptoms in the knee and was able to work without limitation demonstrates that he did not sustain an acute medial meniscus tear. (Hrg. Tr.117:9-17).

32. Dr. O'Brien testified that on July 26, 2021, that Claimant had full range of motion in the right knee without pain. (Hrg. Tr. 118:2-12). Dr. O'Brien further testified that on August 16, 2021 Claimant had no complaints of pain in the right knee, which "is not consistent with a meniscus tear of that size that occurs acutely." (Hrg. Tr. 118:13-18). Dr. O'Brien then repeated his opinion that the surgery recommended by Dr. Simpson is not work related. (Hrg. Tr. 125:4-9). According to Dr. O'Brien, Claimant requires no further curative medical care or treatment related to the July 8, 2021 incident for his right knee. (Hrg. Tr. 128:17-19).

33. The ALJ has carefully considered Dr. O'Brien's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. O'Brien's opinions credible and persuasive.

34. The evidence presented, persuades the ALJ that Claimant failed to prove that he suffered an acute tear of the medial meniscus as a direct consequence of stepping awkwardly on his right foot/leg after a step broke while he was descending a

short ladder on July 8, 2021. To the contrary, the evidence presented persuades the ALJ that Claimant's meniscal tear is, more probably than not, degenerative in nature and probably pre-existed the July 8, 2021 incident.

35. The ALJ also credits the opinions and testimony of Dr. O'Brien to find that the surgery recommended by Dr. Simpson is not reasonable or necessary. Indeed, Dr. O'Brien's report and testimony demonstrate convincingly that the proposed surgery is contraindicated, as it would likely introduce additional trauma to the joint, which would aggravate the underlying condition of the knee and increase Claimant's pain complaints.

The Opinions and Testimony of Dr. D'Angelo

36. Dr. Kathleen D'Angelo performed an independent medical examination (IME) of Claimant at Respondents' request on December 6, 2021. As with the treating providers, Claimant denied having any prior workers' compensation treatment or having had other significant disabling problems or accidents Dr. D'Angelo. (Dep. Tr. 7:8-11, RHE C, p. 34).

37. Dr. D'Angelo testified that Claimant is an unreliable historian. (Dep. Tr. 7:19-21). She testified that due to Claimant's unreliability, his subjective complaints cannot be depended on and must be verified through objective evidence. (Dep. Tr. 10:11-15).

38. Dr. D'Angelo testified that during Claimant's 2008 injury, at least four doctors noted that he was not a reliable historian. (Dep. Tr. 15:4-6). She also noted that Claimant demonstrated self-limiting behaviors during his April 7, 2009 functional capacity evaluation (FCE) and did not demonstrate the expected increased heart rate during dynamic lift testing. (Dep. Tr. 15:21-24, RHE F, p. 198). According to Dr. D'Angelo, Claimant's FCE exam results would not be considered valid due to false representation and Claimant's exaggerated pain levels. (Dep. Tr. 17:20-25).

39. Dr. D'Angelo testified that Claimant's presentation to Dr. Murray on July 16, 2021 does not make sense and is inconsistent with blunt trauma because Claimant testified that he was able to work full duty following his injury without hunching over (but then later presented hunched over and in significant pain for the first time during his initial medical examination). (Dep. Tr. 21:5-17). Dr. D'Angelo testified that if Claimant had sustained an acute injury it would be acutely symptomatic and she would not expect the pain symptoms to be worsening one week later for the first time. (Dep. Tr. 21:5-14).

40. Dr. D'Angelo opined that objective evidence; including medical imaging did not exist to substantiate the finding/conclusion that Claimant suffered an acute traumatic injury to either the lumbar spine nor the right meniscus or knee condition. (RHE C, pp. 51, 56). She also rejected any suggestion that Claimant's current low back pain is due to an aggravation of his underlying pre-existing degenerative disc disease and non-work related facet arthropathy. (Id. at pp. 55-56).

41. Dr. D'Angelo testified that Claimant's subjective complaints could not be relied upon to establish a compensable injury due to Claimant's unreliability. (Dep. Tr. 23:13 – 24:10). Dr. D'Angelo testified that given Claimant's history of being unable to recall any of his prior injuries it would be wrong to accept his subjective complaints without support from objective findings. (Dep. Tr. 24:2-20).

42. Dr. D'Angelo testified that if Claimant's right medial meniscal tear were acute, then there would be swelling and bleeding and that this swelling would continue after the bleeding stopped given the size of the tear revealed on MRI. (Dep. Tr. 25:7-24). Dr. D'Angelo testified that there was no objective medical findings to support the presence of an acute injury to the right knee. (Dep. Tr. 26:12-17).

43. Dr. D'Angelo testified that Claimant did not sustain an injury requiring medical care. (Dep. Tr. 31:4-15). She testified that this conclusion is supported by Claimant's forgetting about his prior injury, the fact that he has continued to work the same position since his alleged injury, and that his pre-injury and post-injury functional capacity remains the same. (Dep. Tr. 31:16 – 32:9). According to Dr. D'Angelo, an acute injury requires acute treatment. (Dep. Tr. 32:13-14).

44. Dr. D'Angelo testified that regardless of whether the step broke and Claimant fell to the ground from several inches above, he did not sustain an injury that required treatment. (Dep. Tr. 40:19 – 41:4).

The Opinions and Testimony of Dr. Rook

45. At Claimant's request, Dr. Rook performed an IME on December 9, 2021. Following his evaluation, Dr. Rook authored the December 9, 2021 report contained at Claimant's Hearing Exhibit 7. In his report, Dr. Rook notes that Claimant had "no prior history of any problems with his right knee or lumbar spine and that he "never received any treatment for a low back injury prior to July 8, 2021. (CHE 7, p. 329). At hearing Dr. Rook conceded that Claimant did not inform him of his prior 2008 back injury and he (Claimant) admitted as much in his testimony to the court. (Hrg. Tr. 83:6-11). Accordingly, the ALJ finds that Dr. Rook wrote his report and reached opinions concerning Claimant's injuries with an inaccurate and incomplete understanding of Claimant's prior medical history.

46. After his evaluation, Dr. Rook concluded that Claimant had suffered acute injuries to his medial meniscus tear and low back as a consequence of the July 8, 2021 incident "because of the way he fell." (CHE 7, p. 328). In his report, Dr. Rook noted, "When the step of his ladder broke, [Claimant] fell to the floor landing with his entire body weight on his right foot. His right foot was planted as his body rotated and he fell backwards. His truck twisted acutely and he developed low back and right knee pain." According to Dr. Rook, 'rotational force on a fixed knee joint with the weight of the body bearing down on that joint is a common cause of meniscal injury. (CHE 7, p. 328). Concerning the low back, Dr. Rook opined, ". . . the patient sustained a compression injury to his lumbar structures at a time when he was acutely twisting. This resulted in

stretching and microscopic tearing of low back structures including muscles, ligaments, facet joint capsules, and potentially the intervertebral discs."

47. Dr. Rook testified as a Level II accredited specialist in physical medicine and rehabilitation (PM&R) and pain management. Dr. Rook testified that Claimant has a subjective presentation of pain superimposed over degenerative findings. (Hrg. Tr. 90:18-21). Dr. Rook also testified that Claimant's medial meniscus tear was degenerative. (Hrg. Tr. 96:7-11). Based upon the evidence presented, the ALJ agrees with Respondents that Dr. Rook generally had to admit that there were no acute structural injures to the lumbar spine or the right knee and instead that the validity of the current claim was dependent on whether Claimant's subjective presentation was credible and in keeping with the objective medical findings.

48. As detailed above, there are significant concerns regarding Claimant's credibility based on his failure to disclose his prior medical history to any of the medical providers, including his own IME in this case. Inconsistencies also exist between Claimant's reported history/complaints and the objective medical evidence.

49. The ALJ credits the opinions/testimony of Dr. D'Angelo and Dr. O'Brien to find that Claimant has failed to prove, by a preponderance of the evidence, that the workplace incident on July 8, 2021 caused Claimant's current right knee or low back pathology/symptoms and need for treatment. Accordingly, Claimant has failed to establish the he sustained compensable injuries and his claim must be denied and dismissed.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). 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), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. 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).

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).*

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. The weight and credibility to be assigned expert testimony is also 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). As found here, the opinions of Dr. D'Angelo and O'Brien are credible and more persuasive than the contrary opinions of Drs. Simpson and Rook. Indeed, the opinions of Drs. Rook and Simpson regarding the cause of Claimant's symptoms and need for treatment are substantially outweighed by the more persuasive objective medical evidence which convincingly demonstrates that Claimant's low back complaints are probably emanating from the natural progression of his pre-existing degenerative disc disease and that his medial meniscus tear is degenerative in nature. Furthermore, the evidence presented, specifically the testimony of Dr. O'Brien and journal articles cited in his September 30, 2021 report supports a conclusion that the surgery recommended by Dr. Simpson is contraindicated and unlikely to relieve Claimant of his pain or improve his function. Finally, for the reasons outlined above, Claimant's testimony that he did not remember his prior low back injury lacks credibility. His suggestion that he needs treatment for ongoing right knee and low back pain as a consequence of the July 8, 2021 incident is unpersuasive. Here, the persuasive evidence contradicts Claimant's

implication and establishes that he currently working in a physical job without restriction associated with either his low back or right knee. Consequently, the ALJ agrees with Dr. D'Angelo and Dr. O'Brien that there is no need for additional treatment directed to the low back or right knee for what has been convincingly established to be a self-limiting, self-healing right knee/low back sprain/strain.

Compensability

E. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain 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.*

F. 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 and scope 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). Conversely, 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). Based upon the evidence presented, the ALJ finds ample evidence to conclude that Claimant's alleged right knee/low back injuries may have occurred in the course of his employment after stepping down awkwardly from a ladder and falling backward to the floor while pulling parts to fill an order. Nonetheless, the question of whether Claimant's current low back/right knee symptoms and need for treatment, including arthroscopic surgery arose out of his employment must be answered before the claim can be determined compensable.

G. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and need for treatment and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract.

Popovich v. Irlando supra. 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 a conclusion that Claimant failed to prove he suffered a compensable injury.

- Claimant attempted to hide the fact that he had suffered a significant prior low back injury in 2008. Indeed, Claimant failed to disclose this prior injury to any medical provider involved in the current claim, including his own IME.

- The medical history associated with this prior low back claim is concerning for secondary gain. Nearly every medical provider involved in the 2008 claim raised concern for symptom exaggeration, prompting at least one physician to recommend that respondents obtain surveillance to ascertain the validity of the claim.

- Claimant's inconsistent presentation in the prior claim is similar to that in the instant case. Specifically, in the 2008 claim, Claimant was observed outside the doctor's office standing upright without any signs of pain but then minutes later presented bent over acting as if he was experiencing significant symptoms. Similarly, in the instant claim, Claimant was able to engage in restricted work without sings of pain/limitation for days but presented for his initial medical appointment hunched over and purportedly in 7-8/10 pain. These actions coupled with concerns over what the FCE provider under the prior claim felt were attempts by Claimant to manipulate his range of motion and Claimant's purported failure to remember anything about the 2008

claim are cause for concern and shed light on Claimant's credibility and his behavior in the current claim.

- There were no outward signs that Claimant suffered any injuries as a consequence of the July 8, 2021 incident. Indeed, there was no observable swelling (effusion) of the knee as would be expected if Claimant has sustained an acute injury on July 8, 2021. As noted by Dr. O'Brien, if Claimant had actually suffered an acute meniscal tear, he would have had immediate swelling, would have had difficulty walking, and would not have been able to perform the full range of his job duties.

- There is a paucity of objective medical evidence, including MR imaging that would support a conclusion that Claimant sustained an acute injury to either his right knee or low back. Indeed, all of the doctors, including Dr. Simpson and Dr. Rook agree that the meniscal tear and the changes noted throughout the lumbar spine are degenerative in nature. More importantly, that is the radiologists' reading of that MRI scans as well.

- The medical providers, including Dr. Rook, have generally admitted that there is no evidence of an acute structural injury. As a result, the controlling issue is whether Claimant's subjective reports of pain can be trusted and adopted in the context of failing to report his prior injuries and condition, the nature of his prior secondary gain issues, the minor reported mechanism of injury, his inconsistent presentation since the alleged work injury and the lack of objective findings of acute injury on examination and diagnostic testing.

J. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury in question 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). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident that merely elicits pain symptoms without a causal connection to the alleged injured workers employment activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 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. In fact, the panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation

exists between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. As presented, the evidence in the instant claim does not support that Claimant sustained a work related injury to his right knee or low back.

K. Rather, the evidence presented supports a conclusion that Claimant's alleged injuries occurring July 8, 2021 did not require medical treatment or cause him to lose time from work. Moreover, Claimant's presentation eight days after the alleged injury does not match the expected physiologic response if the pathology visualized on MRI were caused by an acute traumatic event. In this case, the medical providers essentially agree that Claimant's MRI scan demonstrate pathology that is objectively inconsistent with an acute injury to the knee or back. Rather, Claimant has a degenerative tear in the medical meniscus of the right knee and significant degenerative disc disease in the lumbar spine. While Claimant may need treatment for these conditions, the evidence presented, including the medical opinions of Dr. O'Brien and D'Angelo persuades the ALJ that Claimant's need for such treatment is unrelated to the July 8, 2021 incident occurring at work. Based upon the evidence presented, the ALJ concludes that Dr. O'Brien and D'Angelo's opinions concerning the cause of Claimant's right knee and low back pathology and the need for treatment are credible and more persuasive than Claimant, Dr. Simpson's and Dr. Rook's assertions to the contrary.

L. In addition to supporting a conclusion that no acute "injury", as defined above, occurred because of the July 8, 2021 incident, the evidence presented persuades the ALJ that the alleged MOI did not aggravate, accelerate or combine with a pre-existing right knee/low back condition to give rise to Claimant's need for treatment. Rather, the evidence presented supports a conclusion that Claimant's current pain and need for treatment, including any recommended surgery is, more probably than not, related to the natural progression of his chronic pre-existing degenerative condition in the right knee and low back.

M. 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).

N. 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, Claimant's current symptoms may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment or the incident occurring July 8, 2021. *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 here, the ALJ is not convinced that Claimant's right knee pain is a consequence of the July 8, 2021 incident. Even if Claimant had established that the July 8, 2021 incident aggravated his pre-existing degenerative medial meniscus tear, the evidence presented supports a conclusion that the surgery recommended by Dr. Simpson is neither reasonable nor necessary. Here, the ALJ credits the opinions of Dr. O'Brien to find and conclude that Claimant may have suffered a mild right knee strain that was self-limiting and self-healing. Moreover, the evidence presented, supports a conclusion that Claimant's low back pain is probably related to and emanating from the natural progression of his pre-existing degenerative disc disease rather than any acute injury alleged to have arisen out of the July 8, 2021 incident. There simply is a dearth of forensic evidence to connect Claimant's current symptoms and right knee/low-back pathology to the incident occurring on July 8, 2021. Accordingly, Claimant has failed to establish the requisite causal connection between his alleged July 8, 2021 injuries and his work activities that day. Because Claimant has failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed. Consequently, his remaining claim for additional medical benefits need not be addressed.

ORDER

It is therefore ordered that:

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

DATED: July 28, 2022

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

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

mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she sustained a compensable industrial injury on July 16, 2021.

- Whether Claimant proved by a preponderance of evidence that she is entitled to medical benefits resulting from a compensable injury sustained July 16, 2021.

- Whether Claimant proved by a preponderance of evidence that she is entitled to temporary disability benefits resulting from a compensable injury sustained July 16, 2021, and whether those benefits are subject to reduction based on applicable law.

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

FINDINGS OF FACT

1. Claimant worked for Employer from January 2020 to July 2021 as an inventory supervisor. Claimant's job duties included preparing stores for inventory, tagging merchandise, preparing reports and managing employees.

2. Claimant sustained a work injury on July 16, 2021 while taking inventory. Claimant testified that a stack of boxes collapsed onto her back while she was kneeling down scanning boxes. Claimant testified that she did not know how many boxes fell on her nor the weight of the boxes, but that they felt "heavy." The boxes were made of cardboard and contained merchandise. Claimant testified she felt soreness, throbbing, and pressure in her back after being struck by the boxes. Claimant subsequently reported the incident to her District Manager, EJ[Redacted], and sought treatment the following day.

3. Claimant sought treatment at North Suburban Medical Center on July 18, 2021 with complaints of back pain after several boxes fell onto her back while at work. Physical exam revealed no external evidence of trauma. Muscle spasm to the trapezius muscle as well as paraspinal tenderness to palpation of the thoracic and lumbar spine were noted. X-rays of the lumbar and thoracic spines revealed no acute abnormalities. Claimant was prescribed medication and instructed to follow up with her primary care physician.

4. Claimant subsequently sought treatment with authorized provider Concentra on July 21, 2021. Lacie Esser, PA-C noted that Claimant reported multiple boxes weighing between 5-50 pounds each fell on her back at work. At hearing, Claimant denied that she specified the weight of the boxes to PA Esser. On examination, PA Esser noted tenderness to the thoracic spine with limited range of motion, tenderness in the lumbar spine with limited range of motion, and that Claimant was unable to stand fully erect.

Bilateral straight leg raise was negative and there were no significant radiologic findings. PA Esser assessed Claimant with a back contusion, prescribed medication and referred Claimant for physical therapy. Claimant was placed on work restrictions.

5. Claimant underwent MRIs of the lumbar and thoracic spine on August 13, 2021. The lumbar spine MRI revealed mild diffuse disc bulging and mild bilateral facet arthropathy at L3-4, L4-5 and L5-S1. The radiologist's impression was mild degenerative changes without central canal stenosis or significant neural foraminal narrowing. The thoracic spine MRI was unremarkable.

6. On August 16, 2021 Claimant saw Brittany Lain, NP at Concentra with complaints of 10/10 pain in her thoracic and low back. Claimant also reported right arm numbness and tingling, which NP Lain noted was of relatively new onset. She noted that the MRI results were unremarkable. NP Lain referred Claimant for an orthopedic evaluation.

7. On August 25, 2021 Claimant presented to Nicholas K. Olsen, M.D. for an orthopedic evaluation. Claimant reported the same mechanism of injury to Dr. Olsen as she did to her other providers. On examination, Dr. Olsen noted Claimant was unable to heel or toe walk due to increased pain, but that she was able to complete 10 repetitive heel raises. He further noted increased lumbar lordosis, decreased range of motion, and that facet loading was markedly positive on the right and left. Sitting and supine straight leg raise was negative. He noted that Claimant's August 13, 2021 lumbar MRI demonstrated mild diffuse disc bulge with mild facet arthrosis. Dr. Olsen gave an assessment of persistent thoracolumbar sprain and strain and mild facet arthrosis at L3-4, L4-5 and L5-S1. He recommended Claimant undergo bilateral L4-5, L5-S1 facet injections.

8. Claimant continued to follow-up with PA Esser, who on August 27, 2021 and September 10, 2021 noted severe global tenderness to light touch of the thoracic spine and lumbar spine and that Claimant refused range of motion for both. Straight leg raise was negative bilaterally.

9. On November 3, 2021, Claimant saw Wendy Carle, M.D. at Concentra. Claimant reported numbness radiating from her buttocks down into her thighs and legs down to her ankles, sometimes going into her toes. Claimant reported this occurred all of the time with her right lower extremity and also into her left lower extremity about one-third of the time. On physical exam, Dr. Carle noted global severe tenderness to light touch to the thoracic spine and global severe tenderness to palpation to the lumbosacral spine. Claimant refused range of motion. Straight leg raise was negative bilaterally. Dr. Carle assessed Claimant with a back contusion, myofascial pain syndrome of the lumbar and thoracic spine, acute adjustment order with depressed mood, and sleep disturbance. She noted that the trial facet injections performed by Dr. Olsen did not help, and that Dr. Olsen was recommending a trial of SI joint injections. Dr. Carle noted she thought the trial of SI joint injections might help Claimant's back pain and ambulation and intermittent left extremity symptoms. She further noted she believed Claimant has diffuse myofascial syndrome

lower thoracic to lower lumbar/upper sacrum, with hypersensitivity of skin, as well as bilateral SI joint pain and possible dysfunction.

10. On November 17, 2021, Claimant returned to PA Esser reporting severe pain in her back and an inability to move, sit, or stand straight. PA Esser noted that Claimant did not want to do physical therapy, and that Claimant felt massage therapy would be too painful. Claimant reported that nothing Concentra had done thus far had helped.

11. On December 15, 2021 PA Esser explained to Claimant that physical therapy can cause increased discomfort in the beginning, but that it takes more than two visits to improve. PA Esser noted that Claimant became upset with her, again stating Concentra was doing nothing for her. On physical examination, PA Esser noted tenderness throughout all levels of the lumbar spine, that Claimant pulled away to light palpation, and limited lumbar range of motion.

12. On December 17, 2021, Claimant presented to Mackenzie Kigin, D.O. at Clinica Campesina for evaluation of water therapy. Claimant reported 10/10 pain that caused leg numbness. On examination, Dr. Kigin noted lumbar midline and paraspinal tenderness with full range of motion. Neurological exam was normal. Dr. Kigin gave an assessment of lumbar back pain with radiculopathy affecting lower extremity. She referred Claimant for water therapy.

13. On January 17, 2022, Lawrence Lesnak, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Claimant reported that several boxes stacked approximately 6-feet high fell and struck her directly on her lower back region. Claimant complained of constant diffuse lower lumbar/superior buttock pain. Dr. Lesnak reviewed Claimant's medical records and physically examined Claimant. He noted Claimant exhibited numerous pain behaviors and nonphysiologic findings on his examination. He opined that Claimant's subjective complaints were without any reproducible objective findings. He noted that there were no reproducible objective findings on Claimant's initial examination, including no external evidence of trauma to the back, and no abnormalities on x-ray. Dr. Lesnak further noted that Claimant's thoracic MRI revealed no abnormalities and the lumbar MRI revealed mild facet arthropathy in Claimant's mid to lower lumbar spine, which was normal considering Claimant's age and body habitus. Dr. Lesnak opined that the injections performed by Dr. Olsen were nondiagnostic and nontherapeutic. He noted that Dr. Olsen's initial evaluation did not note any reproducible objective findings or even diagnoses involving either of her SI joints. Dr. Lesnak explained that the reported mechanism of injury was not one that would cause or aggravate preexisting SI joint pathology. He opined that, although there was a work incident, it did not result in any work injury. He further opined that Claimant is not a candidate for additional treatment, including the bilateral SI joint injections recommended by Dr. Olsen. Dr. Lesnak remarked that, based on a psychosocial screening test he completed, Claimant reported high levels of somatic complaints.

14. Claimant returned to Dr. Carle for a follow-up evaluation on January 18, 2022. She reported bilateral blower back pain, with radiating pain down her thighs mostly on the

anterior area, but also new pain in the upper thoracic area after her IME the previous day. Claimant reported that the doctor had her lying supine on the examination table, stating that this is already very painful for her, then that the doctor performed passive external rotation of each hip with her knees in a flexed position. Claimant stated that when she sat up after that part of the examination she felt pain in her bilateral upper/mid thoracic area. Dr. Carle noted that Claimant's ongoing pain in the lumbar and thoracic areas seemed to be myofascial, but that she did have SI joint tenderness on bilateral examination.

15. Claimant testified at hearing that she ceased participating in physical therapy at Concentra because she felt it agitated her symptoms and increased her pain. Claimant testified that, as a result, she has undergone pool therapy outside of the workers' compensation system. Claimant testified that her current symptoms include constant pain and pressure in the low back. She testified that she is unable to stand flat on both feet, she is unable to lay down flat on her stomach, or back, and must lay on her side, and she feels as though she must lean to either side while seated. She testified that these posture changes seem to concentrate the pain, and primarily affect her lower back. Claimant testified she did not experience similar symptoms leading up to the work injury. Claimant described having 10 out of 10 pain throughout her treatment, and testified that she understood 10 out of 10 pain as pain that she could not tolerate without medication. She further testified that no one told her that this scale was to be used objectively, nor was she given examples of the different levels of pain.

16. Dr. Lesnak testified by pre-hearing and post-hearing deposition on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Regarding Claimant's reported mechanism of injury, Dr. Lesnak opined that if a 50-pound box had struck Claimant on her back, then there would have been a soft tissue contusion, bruising, or evidence of trauma to the soft tissues. Dr. Lesnak testified that if a 5-pound box struck Claimant's back it would be very unlikely to cause any sort of injury. Dr. Lesnak testified that when Claimant presented to North Suburban Medical Center on July 17, 2021 there was no evidence of any external trauma or injury to Claimant's back and that Claimant merely had subjective complaints. He further testified that there was no objective evidence of an injury at Claimant's July 26, 2021 evaluation with PA Esser. Dr. Lesnak testified that Claimant had no reproducible objective findings on examination, merely tenderness, which is a subjective complaint.

17. Dr. Lesnak opined that, based on his review of medical records, there was no documented evidence of any specific signs of injury or trauma that would in any way be related to the reported July 16, 2021 incident. Dr. Lesnak testified that he performed a physical examination of Claimant during his IME, during which Claimant complained of diffuse pain. He testified that just touching Claimant's skin, as in brushing her skin in her low back region caused her to moan and groan, which he explained is a non-physiologic finding. Dr. Lesnak opined that his physical examination of Claimant indicated no evidence that Claimant sustained any injury and, in fact, he found no diagnosis that would correlate with her pain complaints on examination. Dr. Lesnak testified that muscle spasm, as described by Claimant during her July 18, 2021, emergency room appointment, are subjective, not objective, complaints.

18. Dr. Lesnak opined that there is no causal connection between the need for medical care and Claimant's reported incident, and that she is not a candidate for any SI joint injections as recommended by Dr. Olsen. Resp. Ex. A: 012. 3-7. Dr. Lesnak testified that SI joint issues arise from instances such as pregnancy, a car accident, and injury, or a fall. Dr. Lesnak testified that a striking incident, a direct blow to the back does not cause an SI joint injury, that it does not cause pathology in the SI joint, and that it is physically impossible. Dr. Lesnak testified that SI joint pain is neither exacerbated by posture, nor is it caused by posture. Dr. Lesnak testified that there is no objective evidence in the medical records or indicated during his physical examination that would indicate Claimant requires any sort of functional work restrictions from the date of her incident onward.

19. Dr. Olsen testified at hearing on behalf of Claimant as a Level II accredited expert in physical medicine and rehabilitation. Dr. Olsen testified that he initially recommended lumbar facet joint injections for Claimant due to the location of Claimant's pain and her MRI results. He testified that the lumbar facet joint injections were nondiagnostic, but that Claimant reported some relief from the steroidal medication that was injected, which caused him to suspect that there may be another source of inflammation. Dr. Olsen then focused his treatment on the SI joint. He testified that he performed provocative maneuvers of SI joint on examination, which were positive, and that Claimant reported pain with direct palpation of the joints. He opined that the SI joint is the most likely source of Claimant's pain, which he stated is consistent with Claimant's reports and mechanism of injury. Dr. Olsen explained that he did not perform SI examination at his initial evaluation of Claimant because at the time the MRI showed pain consistent with facet joint arthropathy.

20. Dr. Olsen testified that Claimant never displayed any Waddell signs at any of his examinations. Dr. Olsen disagreed with Dr. Lesnak's opinion that there are no objective symptoms upon which to recommend treatment, and that a SI joint injection should not be used for diagnostic purposes. He testified that such treatment is reasonably necessary, and a common tool to assess and evaluate the source of a patient's pain. Dr. Olsen testified that determining a positive finding of SI joint pain is difficult to assess with provocative maneuvers alone, and that one of the best diagnostic tools is to perform the SI joint injection. He testified that he believes the SI joint injection will resolve Claimant's pain complaints and that it is reasonably necessary to perform the SI injection as related to Claimant's work injury.

21. Dr. Lesnak testified at a post-hearing deposition after reviewing Dr. Olsen's testimony. Dr. Olsen reiterated that the lumbar facet injections were non-diagnostic and nontherapeutic, and testified that Claimant's reports of some relief after the facet injections did not make sense. He testified consistent with his IME report and prior testimony, reiterating his opinion that the mechanism of injury would not cause SI joint issues and the medical records do not indicate an injury was sustained.

22. Subsequent to the work injury, Claimant worked modified duty for Employer performing a desk job until November 2021. Claimant last worked for Employer during

the pay period ending October 28, 2021. She ceased working for Employer because Employer was no longer able to accommodate her restrictions. Claimant subsequently began employment with a different employer at an assisted living home in approximately late January 2022. Claimant testified she has been working within her restrictions performing medical filing.

23. Claimant's hours and earnings varied by week. Claimant earned $16.50 per hour until receiving a pay raise to $17.77 per hour as of the pay period ending 6/3/2021. Claimant wage records indicate she earned the following gross wages from pay period ending 4/1/2021 through 7/15/2021:

Pay Period Ending	Gross Wages
4/1/21	$966.42
4/8/21	$1,202.11
4/15/21	$1,063.29
4/22/21	$1,274.67
4/29/21	$1,497.74
5/6/21	$576.09
5/13/21	$932.15
5/20/21	$1,496.01
5/27/21	$1,109.89
6/3/21	$612.38
6/10/21	$1,665.95
6/17/21	$1,339.52
6/24/21	$1,147.72
7/1/21	$724.57
7/8/21	$560.44
7/15/21	$964.00

24. As Claimant received a pay raise approximately seven weeks prior to her industrial injury, the ALJ deems it fair to consider Claimant's gross wages for the 9 weeks leading up to her pay raise, divided by her hourly rate at the time, and then multiply this unit by her wage increase. Using this method, Claimant's gross wages from pay period ending 4/1/2021 through 05/27/2021 were $9,055.08. Dividing this number by her hourly rate of $16.50, gives a total of 548.79 units. Multiplying this number by her increased wage of $17.77, results in a total of $9,752.00 Adding this together with the gross wages earned of $7,014.58, for the pay period ending 6/3/2021 through 07/15/2021, equals $16,766.58. Dividing this number by the number of weeks represented by the period ending of 4/1/2021 through 07/15/2021 (16 weeks), equals an AWW of $1,047.91. The ALJ finds that this AWW is a fair approximation of Claimant's wage loss and diminished earning capacity.

25. The wage records reflect that after Claimant was placed on modified duty with Employer as a result of the work injury, she worked fewer hours in certain weeks and thus earned less than her AWW.

26. For the weeks ending July 24, 2021 – September 4, 2021, Claimant received unemployment benefits at a weekly rate of $904.00 per week. For the weeks ending September 11, 2021 – January 1, 2022, Claimant received unemployment benefits at a weekly rate of $604.00 per week. For the week ending January 8, 2021, Claimant received an unemployment payment amount of $293.00.

27. The ALJ finds the opinion and testimony of Dr. Olsen, as supported by the medical records, Dr. Carle's opinion, and Claimant's credible testimony, more credible and persuasive than the opinion and testimony of Dr. Lesnak.

28. Claimant proved it is more probable than not she sustained a work injury arising out of and in the course of her employment, which caused disability and the need for medical treatment.

29. Claimant proved it is more probable than not additional medical treatment, including the recommended SI injections, are causally related to her work injury and reasonably necessary to cure and relieve its effects.

30. Claimant proved it is more probable than not she is entitled to TPD benefits for the weeks between July 16, 2021 through October 28, 2021 that she sustained partial wage loss and earned less than her AWW.

31. Claimant proved it is more probable than not she missed more than three work shifts due to a disability caused by the work injury, resulting in actual wage loss and is entitled to TTD benefits from October 29, 2021 through January 22, 2021.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The

compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The preponderant evidence establishes that Claimant sustained a work injury arising out of and in the course of her work duties, resulting in disability and the need for medical treatment. Claimant is credible with respect to her reports of the work incident and has been consistent regarding her description of the incident to each physician. Claimant reported the incident to Employer not long after it occurred, and shortly thereafter sought medical treatment. Claimant credibly testified she continues to experience symptoms. Dr. Olsen, who has seen Claimant over multiple evaluations and is familiar with her presentation, is more credible and persuasive than Dr. Lesnak, who evaluated Claimant on one occasion over the course of approximately seven minutes. Contrary to Dr. Lesnak's opinion that Claimant exhibited pain behaviors and nonphysiologic findings, Dr. Olsen credibly testified Claimant did not exhibit Waddell signs on his examination.

Dr. Olsen credibly explained that there are objective findings supporting the conclusion that Claimant sustained a work injury. Dr. Olsen further credibly explained that he initially attributed Claimant's pain to the lumbar facets, but that he later confirmed, via his examination and injections, the SI joint is the likely source of Claimant's pain. Dr. Olsen is aware of the reported mechanism of injury and Claimant's presentation over the course of treatment, and continues to opine that Claimant sustained a work injury for which she requires additional care to further identify a diagnosis and treat her condition. Accordingly, Claimant met her burden to prove she sustained a compensable work injury.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As Claimant proved she sustained a compensable work injury, she is reasonably necessary and causally related medical treatment. Dr. Olsen credibly opined that SI injections are reasonably necessary for diagnostic and therapeutic purposes in Claimant's case as a result of the work injury. Dr. Olsen's opinion is supported by that of Dr. Carle, who also opined that a trial of SI joint injections might help Claimant's back pain and ambulation and intermittent left extremity symptoms. Claimant has proven it is more probable than not the recommended SI joint injections are reasonably necessary and causally related to the work injury.

Temporary Indemnity Benefits

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

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

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

Section 8-42-103(1)(f) provides that temporary disability benefits shall be reduced by the amount of unemployment benefits received by a claimant for the applicable time period.

Claimant sustained partial wage loss due to working modified duty as a result of her work injury. Accordingly, Claimant proved she is entitled to TPD benefits for the weeks between July 16, 2021 through October 28, 2021 that she earned less than her AWW. Claimant ceased working for Employer because Employer could no longer accommodate

her work restrictions, which were in place due to the work injury. Claimant sustained actual wage loss as a result. Claimant proved she is entitled to TTD benefits from October 29, 2021 through January 22, 2021. Respondents are entitled to an offset in temporary disability benefits based on Claimant's receipt of unemployment benefits from July 24, 2021 through January 8, 2022.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,047.91. This AWW takes into consideration Claimant's pay raise and the average earnings she received for several weeks prior to the work injury.

ORDER

1. Claimant proved by a preponderance of the evidence she sustained a compensable industrial injury on July 16, 2021.

2. Respondents shall authorize and pay for reasonably necessary treatment related to the industrial injury, including the SI injections recommended by Dr. Olsen.

3. Respondents shall pay Claimant TPD benefits for the weeks she earned less than her AWW from July 16, 2021 through October 28, 2021.

4. Respondents shall pay Claimant TTD benefits from October 29, 2021 through January 22, 2021.

5. Respondents are entitled to offset of temporary disability benefits from July 24, 2021 through January 8, 2022 due to Claimant's receipt of unemployment benefits.

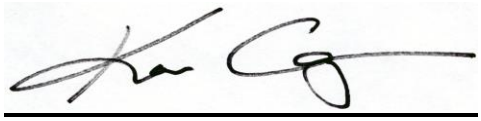
6. Claimant's AWW is $1,047.91.

7. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

8. 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: July 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable occupational disease to her right shoulder.

II. Whether Claimant proved by a preponderance of the evidence the recommended medical treatment is reasonable, necessary, and work related.

III. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary partial disability benefits from May 27, 2020, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is 56 years of age. Claimant has worked for Employer since August 2008. She began working in her current position as a bone puller in 2014. Claimant's job as a bone puller involves Claimant using her hands or a long hook to pull and transfer bones, weighing approximately four pounds, from one conveyor belt to another. Claimant testified her job involves repetitively pulling items off a fast-running conveyor belt.

2. Employer's Physical Job Demands Summary for Claimant's position indicates the position requires constant (6-8 hours) lifting, carrying, pushing and pulling of 0-10 pounds of weight or force, with an average pull force of no more than five pounds. The summary indicates the employee picks product off the line between 10-15 times within a one-minute cycle, and the approximate time between new cycles is 2-5 seconds. The position requires constant forward reaching shoulder posture, never over shoulder level.

3. On April 3, 2010, Claimant sustained a work injury to her right upper extremity for which she was placed at maximum medical improvement ("MMI") on November 19, 2010. Claimant was placed on permanent restrictions, including: a) no use of a knife in her right hand; b) limit lifting to 30 pounds occasionally, floor to shoulder height (medium labor); c) shoulder to overhead, maximum occasional lift up to 10 pounds; d) right hand solo lift and carry occasionally up to 10 pounds; e) left hand solo lift and carry up to 23 pounds; and f) push/pull force of 30-50 pounds.

4. Prior medical records document Claimant's intermittent complaints of, *inter alia*, pain in her right hand, right ring finger, right elbow, right arm, left shoulder, left elbow and left ring finger from November 2008 through February 27, 2018. Right shoulder complaints are specifically noted on September 2010 and November 7, 2014.

Additionally, Claimant wrote on a May 1, 2013 patient questionnaire that she had a previous work-related injury of her right arm, elbow and shoulder in 2009 and checked "Yes" indicating she was experiencing current problems from that injury. A pain chart completed by Claimant on September 30, 2015 reflects pain complaints in the right upper extremity from Claimant's hand to shoulder.

5. Claimant testified that her right shoulder pain began in 2014 when she began working in her current position. She testified that she would intermittently seek treatment at Employer's health services clinic for the pain and undergo some icing and physical therapy. Claimant testified that, despite this intermittent pain, she was able to continue working and performing her same job duties.

6. Claimant testified that beginning in April 2020, she began performing additional work as fewer co-workers appeared for work due to COVID-19. Claimant testified she and one other co-worker were performing the work of approximately 7-8 individuals. Claimant testified she began experiencing right shoulder, right elbow and right hand pain. Employer's plant subsequently shutdown due to COVID-19 for two weeks in April 2020, during which time Claimant did not work.

7. On April 22, 2020 Claimant saw her primary care physician, William Oligmueller, M.D. at UC Health with concerns of a possible sinus infection or exposure to COVID-19. Claimant complained of a headache radiating along the back of her neck and into her shoulders. The medical report does not contain any indication Claimant reported to Dr. Oligmueller that she felt her shoulder pain could be work-related. On examination, Dr. Oligmueller noted Claimant was positive for neck pain and headaches. No mention was made of any shoulder abnormalities. Dr. Oligmueller noted diffuse neck and shoulder girdle myalgias associated with upper respiratory infection symptoms. Claimant's COVID-19 test was negative.

8. Claimant subsequently returned to work and sought treatment for her right shoulder at Employer's health services clinic on April 29, 2020. Claimant reported having right shoulder pain that radiated up the lateral side of her neck. Claimant attributed the pain to her increased work duties. No objective findings were noted. She was referred for physical therapy.

9. Claimant returned to Employer's health services clinic on May 16, 2020 with continued right shoulder complaints. Claimant subsequently underwent evaluation and treatment with authorized treating physician ("ATP") Oscar Sanders, M.D. at UC Health.

10. On May 27, 2020, Claimant first presented to Michael Dietz, PA-C under the supervision of Dr. Sanders. She reported developing progressive pain over the last several weeks, with increasing pain in her right shoulder, biceps, trapezius area, rotator cuff area and neck. Claimant reported no significant injuries to her right shoulder, arm or neck. Dr. Sanders noted Claimant's job for the past seven years involved constant tugging and pulling on meat of different sizes with a meat hook. On examination of the right shoulder, Dr. Sanders noted decreased range of motion, tenderness, spasm and

decreased strength without swelling, effusion, or crepitus. Impingement and apprehension tests were positive. His initial assessment was a right shoulder strain with impingement. He prescribed medication, referred Claimant for physical therapy and placed her on restrictions for the right upper extremity of no lifting, carrying, pushing, pulling, pinching, gripping, reaching overhead, reaching away from body, or repetitive motion.

11. Claimant began performing light duty work on May 28, 2020, which involved pulling trim with her left hand.

12. Claimant underwent MRIs of her right shoulder and cervical spine on July 25, 2020. The right shoulder MRI revealed: 1) full-thickness tear of the supraspinatus tendon anteriorly at the insertion with mild partial-thickness articular surface tearing of the rest of the supraspinatus tendon and the anterior infraspinatus tendon fibers at the insertion; 2) mild right subscapularis tendinosis; and 3) suspicion for a tear of the superior/posterior superior labrum.

13. Claimant returned to Dr. Sanders on July 29, 2020. Dr. Sanders noted Claimant's cervical MRI demonstrated mild spondylosis with minimal foraminal stenosis and the right shoulder MRI revealed full-thickness rotator cuff tearing. He diagnosed Claimant with impingement syndrome of the right shoulder and non-traumatic incomplete tear of the right rotator cuff. Dr. Sanders referred Claimant to Joshua Snyder, M.D. for an orthopedic surgery evaluation.

14. Claimant presented to Dr. Snyder on July 31, 2020 reporting an increase in right shoulder pain on May 16, 2020. Dr. Snyder noted Claimant reported having a prior injury and dealing with intermittent shoulder pain for quite some time. Right shoulder x-rays obtained that same day revealed minor AC joint osteoarthritis. Dr. Snyder reviewed the July 25, 2020 right shoulder MRI, noting full-thickness rotator cuff tearing, early osteoarthritis and a likely labral detachment more chronic in nature. Dr. Snyder's diagnosed Claimant with right shoulder pain with evidence of full-thickness rotator cuff tearing as well as inferior glenoid wear. Dr. Snyder referred Claimant for further evaluation with Christopher Stockburger, M.D.

15. Claimant presented to Dr. Stockburger on August 12, 2020. Claimant reported having an onset of right shoulder pain on May 16, 2020 with some cervical spine issues and occipital headaches radiating to her neck and shoulder. Dr. Stockburger reviewed Claimant's cervical and right shoulder MRIs, noting the former was "relatively clear" while the latter demonstrated a full-thickness tear of the supraspinatus. He noted Claimant had significant intraarticular pain and pain with loading of the rotator cuff on examination. He opined that the rotator cuff represented the majority of Claimant's pain generators and recommended a surgical repair of the rotator cuff. He requested scheduling for the right shoulder arthroscopic rotator cuff repair with a subacromial decompression.

16. On August 19, 2020, Lawrence Lesnak, D.O. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported to Dr. Lesnak she began experiencing right shoulder and right-sided clavicle pains and headaches in February/early March 2020. Claimant reenacted her work activities for Dr. Lesnak using her left hand, demonstrating pulling pieces of meat from a conveyor belt to a nearby conveyor belt or bin. Dr. Lesnak noted Claimant demonstrated movement only at waist level. Claimant reported having chronic persistent right forearm, hand and wrist symptoms since an occupational injury in April 2010. Dr. Lesnak noted Claimant denied having any specific right shoulder symptoms or prior right shoulder injuries. Dr. Lesnak reviewed Claimant's records dating back to November 2008, as well as a physical job demands assessment and a video of employees performing Claimant's job duties. He noted the July 25, 2020 cervical MRI revealed mild to moderate degenerative changes at C3-C5 and the right shoulder MRI showed evidence of significant degenerative changes including what appeared to be a degenerative full-thickness rotator cuff tear with underlying subchondral bone marrow edema/cystic changes involving the inferior aspect of the glenoid and a chronic labral tear. Dr. Lesnak concluded that the right shoulder MRI findings were completely chronic in nature and unrelated to any acute injury or trauma-related pathology.

17. Dr. Lesnak opined that Claimant's right upper extremity complaints are not causally related to her employment. He noted Claimant has had chronic right upper extremity symptoms since at least 2010 and, although Claimant reported to him never having any shoulder or upper extremity symptomatology prior to February/March 2020, the medical records reflect diffuse right upper extremity symptoms predating February/March 2020. He concluded there is no medical evidence Claimant's right shoulder MRI pathology is related to her job duties and no medical evidence Claimant sustained an occupational disease.

18. At a follow-up evaluation with Dr. Sanders on August 21, 2020, Dr. Sanders noted Claimant reported a history of previous right neck and shoulder pain periodically during her time working for Employer. Claimant reported that she had previously successfully treated at Employer's onsite health clinic. Dr. Sanders reviewed the reports of Drs. Snyder and Stockburger. He referred Claimant for ongoing care with Dr. Stockburger and continued Claimant's work restrictions.

19. On February 16, 2021, Dr. Sanders issued a letter in response to an inquiry from Respondents' counsel. Dr. Sanders opined that Claimant had not reached MMI and required the open rotator cuff repair recommended by Dr. Snyder and Dr. Stockburger. Dr. Sanders opined that Claimant sustained, at minimum, work-related myofascial strains of the cervical/thoracic and right upper extremity. He further opined that it was also likely Claimant sustained tearing of the rotator cuff secondary to performing her routine duties over the course of eight years of employment with Employer. Dr. Sanders referred to the risk factors for shoulder tendon related pathology outlined in MTG, noting Claimant did not meet the risk factor of overheard work consisting of additive time per day of at least 30 minutes/day for a minimum of five years. However, he opined that, per his review of Claimant's job demands analysis, Claimant appeared to potentially meet

the risk factors for repetitive shoulder movement with minimal pauses using 10% or greater maximum voluntary force.

20. Dr. Lesnak offered deposition testimony on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report and continued to opine Claimant did not sustain an industrial injury or occupational disease. Dr. Lesnak explained that there is no evidence indicating the full-thickness rotator cuff tear revealed on MRI is related to Claimant's employment. Dr. Lesnak addressed Dr. Sanders' February 16, 2021 letter and agreed with Dr. Sanders that Claimant did not meet the risk factors under the MTG for overhead activities. He acknowledged that, per the MTG, there is some evidence that some of Claimant's other work activities may potentially cause an increased risk for shoulder pathology. However, Dr. Lesnak emphasized that medical literature shows that up to 75% of people over the age of 50 have significant rotator cuff tendon pathology regardless of the type of work they do, noting Claimant was 56 years old at the time of his evaluation. Dr. Lesnak testified that the most important activity that can cause shoulder pathology involve activities above shoulder height, which Claimant's job did not involve. Dr. Lesnak opined that Claimant has chronic pain, that she did not sustain an aggravation, and that the recommended shoulder surgery is not causally related to Claimant's employment. Dr. Lesnak further testified that it has yet to be clearly determined if the proposed surgery is reasonable and necessary, as all full-thickness rotator cuffs do not require repair, and it is unclear if the MRI pathology is responsible for Claimant's symptoms.

21. Claimant testified at hearing that her work duties did not include activity above shoulder level. Claimant testified she did not inform Dr. Sanders and Dr. Lesnak of the extent of her pre-existing conditions because they did not ask. When asked if the pain after May 16, 2020 was the same, worse, or better than the pain she had in 2014 and 2015, Claimant initially testified it was the same pain and same intensity. She later testified that it was more pain than she had previously experienced. Claimant testified that she does not perform any activities outside of work that would cause her symptoms. She further testified that, with her prior injuries, she was always able to return to same job; however, since her most recent injury, she has not been able to perform her same job.

22. The ALJ finds the opinions of Drs. Sanders, PA Dietz, Dr. Snyder and Dr. Stockberger, as supported by the medical records and Claimant's credible testimony, more credible and persuasive and testimony of Dr. Lesnak.

23. Claimant proved it is more probable than not she suffered an occupational disease with a date of onset of May 27, 2020, when she was placed on work restrictions.

24. Claimant proved she is entitled to reasonable necessary and causally related treatment for the occupational disease, including the recommended right shoulder surgery.

25. Claimant earned $16.15 per hour with time-and-a-half for overtime. Claimant testified she was working about 54 hours per week at the onset of her injury in May 2020. Claimant testified that after she was placed on light duty, was placed on light duty, she only worked 8 hours a day, 40 hours per week with no overtime.

26. Claimant's wage records reflect Claimant earned the following wages, including regular pay and overtime pay, for the specified pay periods in 2020:

Pay Period End (2020)	Regular Pay	Overtime Pay	Total Wages
5-Jan	$446.87	$56.46	$503.33
12-Jan	$646.00	$110.24	$756.24
19-Jan	$646.00	$106.13	$752.13
26-Jan	$387.00	$58.87	$445.87
2-Feb	$646.00	$37.55	$683.55
9-Feb	$516.80	$58.15	$574.95
16-Feb	$646.00	$218.07	$864.07
23-Feb	$387.60	$14.52	$402.12
1-Mar	$646.00	$23.23	$669.23
8-Mar	$646.00	$24.23	$670.23
15-Mar	$646.00	$236.73	$882.73
22-Mar	$646.00	$24.23	$670.23
29-Mar	$646.00	$115.09	$761.09
5-Apr	$646.00	$121.15	$767.15
12-Apr	$646.00	$121.50	$767.50
3-May	$528.11	$0.00	$528.11
10-May	$603.69	$194.88	$798.57
17-May	$617.25	$173.64	$790.89
24-May	$629.85	$0.00	$629.85
31-May	$504.36	$204.59	$708.95
7-Jun	$629.85	$191.42	$821.27
14-Jun	$516.80	$9.69	$526.49
21-Jun	$621.45	$9.69	$631.14
28-Jun	$646.00	$9.69	$655.69
5-Jul	$646.00	$12.12	$658.12
12-Jul	$629.85	$9.69	$639.54
19-Jul	$633.56	$7.27	$640.83
26-Jul	$702.54	$9.45	$711.99
2-Aug	$695.16	$13.50	$708.66
9-Aug	$432.00	$8.10	$440.10
16-Aug	$576.00	$18.36	$594.36

30-Aug	$702.54	$21.60	$724.14
6-Sep	$720.00	$27.00	$747.00

27. The pay records reveal that Claimant continued to work at least some overtime subsequent to May 2020 while on modified duty. However, the records also indicate the amount of overtime Claimant worked decreased due to being placed on modified duty in May 2020. Claimant is entitled to temporary partial disability benefits for the time period in which she earned less than her AWW subsequent to May 27, 2020 as a result of the occupational disease.

28. For the pay periods listed above ending January 5, 2020 through May 24, 2020 Claimant earned a total of $12,187.99 in earnings, resulting in an AWW of $682.66. The ALJ finds this AWW a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the

claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

When evaluating the issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

W.C.R.P. Rule 17, Exhibit 5, which sets forth the Medical Treatment Guidelines for cumulative trauma conditions with regard to the upper extremity, does not specifically address cumulative trauma conditions of the shoulder. W.C.R.P. Rule 17, Exhibit 4, sets forth the Medical Treatment Guidelines for shoulder injuries.

Rule 17, Exhibit 4(C)(2) discusses principles of causation of occupational shoulder diagnoses, noting some evidence exists for the following causative risk factors for shoulder tendon related pathology: (1) overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of five years; (2) work that requires shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; (3) work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no two second pauses for 80% of the work cycle; and (4) jobs requiring daily heavy lifting (20kg or greater) at least 10 times per day over the years.

As found, Claimant proved it is more probable than not she sustained a compensable occupational disease with a date of onset of May 16, 2020. The medical records indicate Claimant does have a history of prior right shoulder/upper extremity injuries and symptoms. She credibly testified that she intermittently sought treatment at Employer's health services clinic for the pain, would undergo some conservative treatment, and was able to continue performing her same job duties. Claimant's symptoms subsequently became more severe in April 2020 and May 2020 after being required to meet increased production needs in the absence of co-workers. Claimant was then placed on restrictions preventing her from performing her regular job duties. Here, the nature of Claimant's work required hazards that caused, intensified, or aggravated Claimant's right shoulder condition. There is no evidence that such hazards and similar repetitive right shoulder/upper extremity movements existed in Claimant's everyday life.

Dr. Sanders described the work Claimant was performing as of May 2020 as repetitive shoulder movement with minimal pauses using 10% or greater of maximum voluntary force. He reviewed Claimant's job description and concluded she possibly met

the risk factors contained in the MTG except for overhead lifting. Dr. Sanders opined that Claimant's condition and need for treatment, including surgery, is a result of her work activities. Dr. Lesnak acknowledged that, per the MTG, there is some evidence that some of Claimant's other work activities may potentially cause an increased risk for shoulder pathology. Based on the totality of the evidence, the preponderant evidence establishes that Claimant sustained a compensable occupational disease to her right shoulder.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As Claimant proved she sustained a compensable occupational disease, Claimant is entitled to reasonable, necessary and related treatment to cure and relieve the effects of the occupational disease. Claimant has received medical treatment from her ATP, Dr. Sanders, who then referred claimant to Dr. Snyder. Dr. Snyder indicated Claimant needs surgery based on the MRI results. Dr. Stockberger believed that the surgery would likely alleviate Claimant's symptoms and pain from the shoulder. Dr. Sanders credibly opined that that the need for surgery most likely developed over the eight years that Claimant had been performing her job for Employer. The preponderant evidence establishes that the right shoulder treatment, including the recommended surgery, is reasonable, necessary and causally related.

Temporary Partial Disability

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

Claimant suffered partial wage loss as a result of the work injury. Accordingly, Claimant is entitled to TPD benefits for the weeks in which she earned less than her AWW subsequent to May 27, 2020 and ongoing.

Average Weekly Wage

As found a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $682.66, which takes into account Claimant's wages for several weeks prior to the onset of the occupational disease.

ORDER

1. Claimant proved she sustained a compensable occupational disease to her right shoulder.

2. Respondents shall authorize and pay for reasonably necessary treatment related to the occupational disease, including the surgery recommended by Dr. Stockberger.

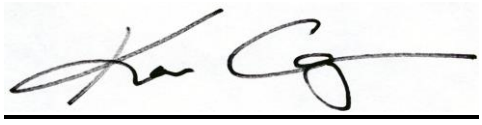
3. Respondents shall pay Claimant TPD benefits beginning May 27, 2020 and ongoing, until terminated by operation of law.

4. Claimant's AWW is $682.66.

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

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

DATED: July 29, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have established by a preponderance of the evidence that continuing medical maintenance treatment in the form of prescriptions as recommended by Authorized Treating Physician (ATP) Benjamin Savage, M.D. is no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant worked for Employer as an airplane mechanic. On November 26, 2001 he was inspecting landing gear when he hit his head on a landing gear door. Claimant immediately experienced pain but was able to complete his shift. Over time however, Claimant began to experience severe headaches that were treated with medications.

2. On February 27, 2002 Claimant visited J. Glen House, M.D. for an evaluation. Dr. House recounted that on August 19, 1999 Claimant had suffered a prior serious head injury to his left frontal lobe. The injury involved a subdural hematoma and left hemiparesis. Dr. House reported that Claimant specifically suffered three skull fractures from falling off of a ladder at home. On physical examination for the November 26, 2001 work injury, Dr. House noted tenderness in the frontalis muscle and "desensitization over the VI cranial nerve supplying the frontal region." He diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization." Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

3. On May 22, 2006 Claimant visited Thomas Van Sistine, M.D. for an examination. At that time, Claimant was taking Effexor, Lunesta, Lyrica, Naproxen, Fentanyl, and Lidoderm for his continued symptoms. Dr. Van Sistine noted that the medications helped, but once they wore off, Claimant experienced stabbing and throbbing pain on the left side of his forehead, "which radiates across the head, then has burning discomfort with numbness in the left torso/mid back." He diagnosed Claimant with Chronic Regional Pain Syndrome (CRPS), neuropathic head pain and left hemidysestheia/parathesisas that were caused by the November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches.

4. On April 13, 2006 Claimant visited L. Barton Goldman, M.D. for an independent medical examination. Claimant reported headaches, left arm pain, left leg pain, and pain on the left side of his upper body. Dr. Goldman concluded Claimant suffered a blunt trauma injury on November 26, 2001 that resulted in several diagnoses including post-traumatic headaches and CRPS. He recommended treatment in the form of regular medication monitoring.

5. On April 13, 2006 Claimant reached Maximum Medical Improvement (MMI) with a 25% whole person impairment rating. In the June 13, 2008 Final Admission of Liability (FAL) Respondents acknowledged that Claimant was entitled to receive Permanent Total Disability benefits (PTD) and medical maintenance benefits for his November 26, 2001 work injury. In the FAL Respondents specifically noted "[c]arrier admits for reasonable, necessary and related medical benefits after MMI."

6. On January 31, 2007 Claimant visited John S. Hughes, M.D. for an independent medical examination. Dr. Hughes determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the optimal way to manage Claimant's symptoms.

7. On June 9, 2012 Claimant visited Gerald J. Bannasch, M.D. for an evaluation. At the time, Claimant was taking Keppra, Celebrex, Baclofen, Lunesta, and Lyrica. Dr. Bannasch conducted an EEG study in which he noted abnormal findings "most indicative of a focal cerebral dysfunction over the left frontal region of the brain which is potentially epileptogenic."

8. Scott Hompland, D.O. completed an evaluation of Claimant and authored a report dated October 24, 2014. Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland remarked that Claimant's findings were "consistent with the clinical findings of a central pain syndrome." He further stated that the MRI exhibited "evidence of significant central nervous system abnormalities." Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Finally, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury.

9. On March 1, 2018 Claimant visited Susan G. Hibbs, M.D. for an evaluation. Dr. Hibbs noted that Claimant suffered from CRPS as a result of his November 26, 2001 industrial injury. She commented that Claimant continued good tolerance of Baclofen, Lyrica, and Tramadol.

10. On November 13, 2018 Dr. Hibbs authored a letter stating that she was a neurologist treating Claimant for CRPS. Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head emanating from his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results." She further commented that Claimant required the preceding medications to control the effects of his 2001 work injury.

11. On April 9, 2019 Dr. Hibbs noted that Claimant continued to benefit from Baclofen, Lyrica, Tramadol, and Keppra (for seizure prevention). After Claimant reported tremors, Dr. Hibbs also prescribed Primidone. On May 22, 2019 Dr. Hibbs stated that Claimant's tremors were "due to CRPS which is due to an injury sustained in [a] work related accident on November 26, 2001."

12. In 2020 Claimant began receiving treatment from ATP Benjamin G. Savage, D.O. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy.

13. At the hearing in this matter Claimant stated that, if he does not take medications, he experiences intolerable pain. Claimant also remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues. Claimant also remarked that he did not begin taking any medications until after his 2001 work injury.

14. On August 26, 2021 Lawrence A. Lesnak conducted a records review of Claimant's claim. After considering extensive medical records, Dr. Lesnak noted that Claimant sustained a traumatic brain injury in August 1999 that "resulted in apparently left hemiparesis." In contrast, as a result of Claimant's November 26, 2001 industrial injury he was diagnosed with a left-sided scalp contusion. Dr. Lesnak noted that a March 2, 2005 MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Moreover, Claimant's diagnoses of left median neuropathy at the wrist and left ulnar motor neuropathy at the elbow were also unrelated to the work injury claim of November 26, 2001. Furthermore, Claimant's diagnoses of mild cardiomegaly, prior urosepsis, lumbar degenerative disc disease, lumbar spondylosis and sleep apnea were also unrelated to the November 26, 2001 accident. Finally, Dr. Lesnak reasoned that, although Claimant has been diagnosed with "essential tremors," there have been no reproducible objective findings for other diagnoses including posttraumatic epilepsy or CRPS. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

15. On December 13, 2021 Respondents filed an Application for Hearing in the present matter. Respondents specifically contested the reasonableness and necessity of continuing medical benefits for Claimant's November 26, 2001 industrial injury.

16. Respondents have failed to establish that it is more probably true than not that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage are no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Initially, on November 26, 2001 Claimant

struck his head on a landing gear door at work and was diagnosed with severe headaches. On February 27, 2002 Dr. House acknowledged that Claimant had suffered a prior serious head injury to his left frontal lobe on August 19, 1999 at home. Nevertheless, he diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization" as a result of the November 26, 2001 work incident. Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

17. The record is replete with opinions from multiple medical providers that Claimant's 2001 work injury caused CRPS, seizures, tremors and severe cognitive dysfunction. Moreover, providers have agreed that the optimal way to manage Claimant's medical maintenance treatment is through medications. Notably, on May 22, 2006 Dr. Van Sistine diagnosed Claimant with CRPS, neuropathic head pain and left hemidysestheia/parathesisas as a result of his November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches. Furthermore, on January 31, 2007 Dr. Hughes persuasively determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the best way to manage Claimant's symptoms. Finally, in a November 13, 2018 letter Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head that was caused by his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results."

18. In 2020 Claimant began receiving treatment from ATP Dr. Savage. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy. Claimant's credible testimony was consistent with Dr. Savage's treatment. Claimant remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues.

19. In contrast, in a report dated October 24, 2014, Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Furthermore, Dr. Lesnak attributed Claimant's current symptoms to his traumatic brain injury in August 1999 based on his review of a March 2, 2005 MRI. Specifically, the MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Dr. Lesnak also reasoned that Claimant's other diagnoses were unrelated to the November 26, 2001 work incident. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

20. Despite the opinions of Drs. Hompland and Lesnak, the record reveals that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage is causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Furthermore, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury. Moreover, Dr. Lesnak's opinion is contrary to multiple medical providers who have treated Claimant for many years. Although Claimant's providers were aware of his 1999 head injury, they nevertheless determined that he developed symptoms subsequent to the November 26, 2001 work event. Finally, Claimant's credible testimony reveals that he had recovered from the 1999 incident and did not suffer left lower extremity CRPS, essential tremors and post-traumatic epilepsy until after the November 26, 2001 work accident. ATP Dr. Savage thus prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions. Respondents have thus failed to demonstrate that the preceding treatment is no longer causally related, reasonable and necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

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. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when the respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when the respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, the respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012). Here, Respondents filed a FAL acknowledging liability for continuing medical maintenance benefits and now seek to terminate all of Claimant's maintenance treatment. They thus bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition.

5. As found, Respondents have failed to establish by a preponderance of the evidence that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage are no longer causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Initially, on November 26, 2001 Claimant struck his head on a landing gear door at work and was diagnosed with severe headaches. On February 27, 2002 Dr. House acknowledged that Claimant had suffered a prior serious head injury to his left frontal lobe on August 19, 1999 at home. Nevertheless, he diagnosed Claimant with blunt trauma to the "left frontal region with continued tenderness over the frontalis muscle and VI cranial nerve sensitization" as a result of the November 26, 2001 work incident. Dr. House commented that Claimant benefitted from treatment with Neurontin, Lidocaine patches and Ultram.

6. As found, the record is replete with opinions from multiple medical providers that Claimant's 2001 work injury caused CRPS, seizures, tremors and severe cognitive dysfunction. Moreover, providers have agreed that the optimal way to manage Claimant's medical maintenance treatment is through medications. Notably, on May 22, 2006 Dr. Van Sistine diagnosed Claimant with CRPS, neuropathic head pain and left

hemidysestheia/parathesisas as a result of his November 26, 2001 work injury. Dr. Van Sistine prescribed Lyrica, Effexor, and Lidoderm patches. Furthermore, on January 31, 2007 Dr. Hughes persuasively determined that the November 26, 2001 work injury caused damage to Claimant's left supraorbital nerve resulting in CRPS-II. Dr. Hughes also concluded that medical maintenance treatment was the best way to manage Claimant's symptoms. Finally, in a November 13, 2018 letter Dr. Hibbs specified that Claimant had CRPS with continued pain and dysfunction on the left side of his head that was caused by his November 26, 2001 work injury. She stated that Claimant had seen "multiple providers who agree with [this] diagnosis." Dr. Hibbs noted that Claimant was taking Keppra, Lidoderm patches, Pregabalin, and Tramadol with "excellent therapeutic results."

7. As found, in 2020 Claimant began receiving treatment from ATP Dr. Savage. In his most recent record dated November 24, 2021, Dr. Savage prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions of left lower extremity CRPS, essential tremors and post-traumatic epilepsy. Claimant's credible testimony was consistent with Dr. Savage's treatment. Claimant remarked that he suffers continued tremors, seizures and cognitive dysfunction. He specified that he did not experience any of the preceding symptoms prior to his November 26, 2001 work injury. Although Claimant acknowledged that he suffered a 1999 head injury, he healed and returned to work without any issues.

8. As found, in contrast, in a report dated October 24, 2014, Dr. Hompland reasoned that Claimant's diagnosis of CRPS was not substantiated with any thermography and bone scans were questionable. Moreover, the neurological examinations by Dr. Hibbs regarding left-sided weakness and hyperesthesia did not validate CRPS. Furthermore, Dr. Lesnak attributed Claimant's current symptoms to his traumatic brain injury in August 1999 based on his review of a March 2, 2005 MRI. Specifically, the MRI revealed left frontal lobe encephalomalacia that "clearly appear[ed] to be related to his traumatic brain injury that occurred in 08/1999 and completely unrelated to a left-sided scalp contusion that reportedly occurred on 11/26/2001." Dr. Lesnak also reasoned that Claimant's other diagnoses were unrelated to the November 26, 2001 work incident. He thus concluded that none of Claimant's current medical care is related to the November 26, 2001 work incident.

9. As found, despite the opinions of Drs. Hompland and Lesnak, the record reveals that continuing medical maintenance treatment in the form of prescriptions as recommended by ATP Dr. Savage is causally related, reasonable and necessary to relieve the effects of Claimant's November 26, 2001 industrial injury or prevent further deterioration of his condition. Although Dr. Hompland disagreed with Claimant's CRPS diagnosis, he recognized that Claimant sustained a significant head injury on November 26, 2001. Dr. Hompland concluded that Claimant suffers from a "neuropathic pain disorder with resulting myoclonic activity and this is deemed workers' compensation related." Furthermore, he acknowledged that Lexapro, Lyrica, Liorseal, Ultram, Keppra and Lidoderm patches were reasonable, necessary, and related medical care for Claimant's November 26, 2001 injury. Moreover, Dr. Lesnak's opinion is contrary to multiple medical providers who have treated Claimant for many years. Although Claimant's providers were aware of his 1999 head injury, they nevertheless determined

that he developed symptoms subsequent to the November 26, 2001 work event. Finally, Claimant's credible testimony reveals that he had recovered from the 1999 incident and did not suffer left lower extremity CRPS, essential tremors and post-traumatic epilepsy until after the November 26, 2001 work accident. ATP Dr. Savage thus prescribed Baclofen, Lexapro, Keppra, Lyrica, Prmidone, and Tramadol for Claimant's work-related conditions. Respondents have thus failed to demonstrate that the preceding treatment is no longer causally related, reasonable and necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. Accordingly, Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

ORDER

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

1. Respondents are financially responsible for all medical maintenance care recommended by Dr. Savage for treatment of Claimant's November 26, 2001 work injury.

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, 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*](https://oac.colorado.gov/resources/oac-forms).

DATED: July 29, 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. 5-149-193-001

ISSUES

The issues set for determination included:

- Is Claimant entitled to *Grover* medical benefits?

FINDINGS OF FACT

1. Claimant worked for Employer as an operations manager in charge of the plant.

2. There was no evidence in the record that prior to September 20, 2016, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

3. Claimant suffered an admitted industrial injury on September 20, 2016. Claimant testified he was stepping on a forklift and felt a twinge in his low back. The pain increased to the point where he could not get up.

4. Claimant was evaluated that same day by ATP Jonathan Bloch, D.O. at Concentra. At that time, Claimant reported he could not stand or walk due to intolerable pain in his low back, which radiated to the waist line and to both sides. On examination, Dr. Bloch noted a loss of normal lordosis and tenderness in the lumbar spine. Bilateral muscle spasms were present.

5. Dr. Bloch's assessment was: lumbar strain and sacroiliac sprain. Claimant was prescribed Celebrex, tizanidine and referred to physical therapy ("PT").

6. On October 11, 2016, Claimant was evaluated by with John Sacha M.D. at Concentra. Claimant's symptoms were localized to the low back, with radiation into the right anterior thigh with numbness and tingling. On examination, Dr. Sacha noted Claimant had paraspinal spasm, as well as flattening of the lumbar lordosis and lumbar shift.

7. Dr. Sacha's impression was: lumbosacral radiculopathy consistent with an L4 radiculopathy. Dr. Sacha noted an MRI was requested but had been denied, but was required. Claimant's prescription for Celebrex and to tizanidine were discontinued and Dr. Sacha renewed the prescription for tramadol, as well as dispensing Lyrica for neuropathic pain and Robaxin.[1]

[1] Elsewhere in the record, Robaxin and Methocarbamol were noted to be the same medication. See Exhibit 6, p. 171. [Dr. Cava's report.]

8. Claimant returned to Dr. Sacha on November 2, 2016. Dr. Sacha noted Claimant's MRI showed evidence of this protrusion at the L4–5 level and right-sided foraminal narrowing. Mild degenerative disc disease and facet spondylosis was noted at the other levels. Dr. Sacha's impression was: lumbar radiculopathy; opioid use, uncomplicated. Dr. Sacha stated his plan was maintenance of medication and provision of an epidural steroid block.

9. On December 8, 2016, Claimant underwent a bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation, which were administered by Dr. Sacha.
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10. Claimant returned to Dr. Sacha on January 10, 2017, at which time continued low back symptoms were noted. Dr. Sacha's diagnoses were the same as the prior evaluation and he ordered a EMG nerve conduction study. Claimant was evaluated by Dr. Sacha on March 8, 2017 and he was having right leg numbness and tingling. The EMG showed evidence of acute L5 and S1 radiculopathy. Dr. Sacha noted Claimant had a diagnostic response and symptom relief with the bilateral L5 transforaminal epidural injection.

11. On March 31, 2017, Claimant underwent repeat bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation. Claimant also received an interlaminar C7-T1 epidural. The injections were administered by Dr. Sacha.

12. Claimant testified Dr. Sacha prescribed medications, including Methocarbamol and Tramadol.

13. Claimant was evaluated on September 9, 2017 by Jennifer Latey, PA at US Healthworks in Saugus, California. By way of history, it was noted Claimant had injured his back a year ago in Colorado and was managed medically with Methocarbamol and Lyrica. Claimant moved to California, ran out of medication and suffered an exacerbation of his pain. On examination, Claimant had a normal gait, with no loss of lumbosacral lordosis. Spasms and tenderness were noted at the thoracolumbar spine and paravertebral musculature.

14. PA Latey's diagnoses were: lumbar disc disease; strain, lumbosacral, chronic or old. Claimant's Methocarbamol and Lyrica prescriptions were refilled. The report was cosigned by Larry Barnhart, M.D. (supervising physician).

15. A follow-up evaluation on December 2, 2017 with PA Latey documented Claimant continued to have lumbar symptoms. Claimant's prescriptions for Methocarbamol, Lyrica and meloxicam were filled. The report was also cosigned by Dr. Barnhart.

16. On March 11, 2019, Claimant was evaluated by Amanda Cava, M.D. at Concentra. It was noted Claimant had moved to California in April 2017 and moved back to Colorado in December 2018. Claimant complained of pain in the center of the lower lumbar area, usually rating adding across the left low back to the left buttock down to the left posterior knee. On examination, tenderness was present in the lumbar spine (L4, L5 and S1) and (spinal region. He had limited range of motion ("ROM"). Dr. Cava's assessment was lumbar strain; lumbar disc disease with radiculopathy. Dr. Cava prescribed Methocarbamol and referred Claimant back to Dr. Sacha.

17. Claimant was reevaluated by Dr. Sacha on March 27, 2019. Dr. Sacha documented Claimant's prior treatment and noted he had been evaluated by three different practitioners, received medications, PT, chiropractic and an additional epidural in the intervening period of time (two years). At that time, Claimant reported constant pain localized to low back and bilateral legs, with numbness and tingling in both feet. On examination, Claimant had lumbar paraspinal spasm, long with pain on straight leg raise and neural tension testing bilaterally. Claimant had pain with extension and external rotation localized to the back only.

18. Dr. Sacha's impression was lumbosacral radiculopathy; opioid use, uncomplicated. Dr. Sacha was to attend the EMG test and depending on the findings, noted Claimant might be approaching MMI, with case closure and maintenance care. Dr. Sacha prescribed Lyrica and renewed his Robaxin (methocarbamol). The ALJ credited Dr. Sacha's opinion with regard to Claimant's need for maintenance care.

19. In the follow-up evaluation on May 13, 2019, Dr. Sacha ordered a left L5 and S1 transforaminal epidural injection/spinal nerve block to be diagnostic and therapeutic. On July 25, 2019, Claimant underwent a bilateral L5 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation and a bilateral S1 transforaminal epidural injection/spinal nerve root block with fluoroscopic guidance and conscious sedation, which were administered by Dr. Sacha.

20. On February 21, 2020, B. Andrew Castro, M.D. performed an independent medical evaluation ("IME"). Claimant had been discharged from PT and the most recent injections were not effective. Dr. Castro opined that surgical intervention was not the best option for Claimant and his prognosis was good.

21. Dr. Castro performed a follow up IME on March 13, 2020, at which time Dr. Castro noted Claimant responded to the first epidural injection, with the second injections providing little to no relief. On examination, Claimant had very little ROM with regards to extension and lateral bending. Straight leg raise was mildly positive, with a pulling sensation.

22. Dr. Castro described the examination as "somewhat" nonphysiologic, but noted the initial MRI showed disc bulging at L4-L5 and L5-S1. The L4-L5 herniation seemed to be worse initially with a left-sided disc bulge/protrusion projecting into a congenitally narrow canal. Dr. Castro noted the repeat MRI showed that the right–sided

disc bulge was improved. The EMG showed L5 and S1 radiculopathy on the right side. The ALJ found that the MRI-s and the EMG showed objective evidence of pathology in Claimant's lumbar spine.

23. Dr. Castro assigned a 5% whole person impairment rating under Table 53 of the *AMA Guides* to Claimant's lumbar spine. He opined Claimant could not be rated for loss of ROM.

24. Dr. Castro reiterated surgical intervention would not benefit or functionally improve Mr. Clark. Dr. Castro concluded Claimant qualified for a 5% whole person impairment due to the disc herniation at L4-L5. Dr. Castro recommended Methocarbamol, as needed for maintenance treatment. The ALJ credited Dr. Castro's opinion with regard to Claimant's need for maintenance care.

25. On May 8, 2020, Claimant was evaluated by Randall Dryer, M.D. in Austin Texas. Dr. Dryer's notes stated Claimant suffered an injury on September 20, 2016 and he received three epidural steroid injections which gave him limited relief. Claimant was noted to have been on Robaxin, Lyrica and received PT. At the time of evaluation, Claimant rated his pain as 5/10. On examination, Claimant was unable to bend normally. Straight leg raising was negative bilaterally, with tenderness to palpation over the lumbar spine midline and paraspinal musculature noted. Dr. Dryer's assessment was: lumbar radiculopathy; low back pain. Claimant was set up for an L4-5 ESI.

26. In a follow-up appointment with Dr. Dryer on August 24, 2020, an additional course of PT was ordered. Claimant was prescribed Tramadol and, Skelaxin and a Medrol pak. The ALJ concluded Dr. Dryer ordered PT and prescribed medications because of Claimant's need for treatment.

27. On September 22, 2020, Claimant was evaluated by John Obermiller, M.D., who performed an impairment rating examination. The examination was performed in Austin Texas. On examination, Claimant's lumbar spine was tender to the touch and mild spasm was noted. There were no positive Waddell's signs. Dr. Obermiller concluded Claimant sustained a permanent medical impairment as a result of his work injury. Dr. Obermiller assigned 7% for a Table 53 disorder under the *AMA Guides*, with 7% assigned for ROM loss. Dr. Obermiller did not make recommendations regarding maintenance treatment, but noted Claimant was taking a muscle relaxer and recently underwent MDP.

28. A report from Anly Joseph, M.D. (Texas) dated November 6, 2020 was admitted into evidence.[2] (Dr. Joseph had issued another WCM 164 sometime in March 2020 reiterating the same opinions, but it was not dated.) It was not clear that Dr. Joseph evaluated Claimant, as the Date of Exam part of the WCM 164 form was blank. Dr. Joseph concluded Claimant was able to return to full duty and reached MMI on March 2, 2020. Dr. Joseph adopted Dr. Obermiller's 14% medical impairment and stated Claimant did not require maintenance treatment. The ALJ noted Dr. Joseph did not comment about

[2] Exhibit-D, pp. 20-21. It was not clear from the report whether Dr. Joseph had a full set of Claimant's treatment records.

Claimant's prescription for Methocarbamol (Robaxin) over the course of his treatment. The ALJ gave more weight to the opinions of Drs. Sacha and Castro than those of Dr. Joseph.

29. On December 3, 2020, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for the 14% medical impairment rating issued by Dr. Obermiller. The FAL denied liability for Grover medical benefits.

30. On January 11, 2021, an amended GAL was filed on behalf of Respondents, which admitted for maintenance medical benefits.

31. Claimant was evaluated by Alicia Feldman, M.D. on December 11, 2021, who performed an IME at the request of Respondents. At that time, Claimant had a mildly antalgic gait and exhibited multiple pain behaviors throughout the examination, including frequent changes of position. No significant tenderness to palpation was noted over the lumbar spine. Claimant's ROM measurements of the lumbar spine included true lumbar flexion at 5°, lumbar extension 0°, maximum straight leg raise on the right of 15°, maximum straight leg raise on left and 15°, maximum lumbar right lateral flexion of 10°, maximum lumbar a left lateral flexion of 5°. The ALJ noted these measurements showed restrictions in Claimant's lumbar ROM.

32. Dr. Feldman stated Claimant had somebody inconsistent migratory pain complaints since the injury of September 20, 2016. At times the pain was bilateral and now it was predominantly on the left side. Dr. Feldman opined Claimant's current complaints were related to the September 20, 2016 injury, as he had acute onset of low back pain that day and she was not aware of any pre-existing low back pain or intervening events. Dr. Feldman also said Claimant did not appear to be a surgical candidate and Dr. Feldman agreed he was at MMI. Dr. Feldman (utilizing Dr. Obermiller's ROM measurements) concluded Claimant sustained a 7% medical impairment rating per Table 53 of the *AMA Guides*, with an additional 7% attributable to loss of ROM.

33. With regard to medications, Dr. Feldman stated Claimant had taken tramadol and Methocarbamol, as well as an anti-inflammatory (Celebrex) and a neuropathic pain medication (Lyrica). Dr. Feldman said Claimant had titrated down off all of his medications and was not taking any medications. Dr. Feldman opined Claimant did not require medical maintenance.

34. Dr. Feldman's assumption regarding Claimant's medications appeared to be in error.

35. Claimant testified that he did not recall telling Dr. Feldman that he had weaned off all of his medications. He stated that he has consistently taken Methocarbamol since 2016 and this medication helped reduce his symptoms.

36. On January 13, 2022, an FAL was filed on behalf of Respondents, based upon Dr. Feldman's report. The FAL admitted for the 14% medical impairment rating. Liability for medical maintenance was denied.

37. Claimant testified that he continues to have pain and the Methocarbamol helped his symptoms. Claimant was credible witness.

38. Claimant met his burden of proof and established he needs maintenance medical treatment to maintain MMI and/or prevent deterioration.

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

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

Grover Medical Benefits

§ 8-42-101(1), C.R.S. requires Employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness

or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When Respondents challenge Claimant's request for specific medical treatment Claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012).

Once Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether Claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999). Respondents argued Claimant did not show he was entitled to Grover medical benefits. Claimant asserted that his testimony and Dr. Castro's recommendation established that the prescription for Methocarbamol was reasonable medical maintenance care. In addition, Claimant averred that Tramadol and Medrol provided relief for emergency situations related to his lower back. Respondents disputed Claimant required maintenance treatment. Respondents relied on the opinions of Dr. Joseph who opined Claimant did not require maintenance medical treatment on September 18, 2020 and November 6, 2020, as well as Dr. Feldman.

The ALJ concluded Claimant met his burden to show he was entitled to Grover medical benefits. (Finding of Fact 38). As determined in Findings of Fact 2–7, Claimant sustained an admitted industrial injury on September 20, 2016. Claimant required treatment that same day, which was provided by Dr. Bloch, an ATP at Concentra. *Id.* Claimant was diagnosed with lumbar radiculopathy and treated by Dr. Sacha, also an ATP. *Id.* Dr. Sacha administered a series of injections to Claimant's lumbar spine. (Findings of Fact 9, 11, 19). Dr. Sacha also prescribed Methocarbamol. (Findings of Fact 7, 12, 18). Other physicians prescribed this medication, including ATP Dr. Cava and an

IME physician Dr. Castro; both of whom prescribed it for Claimant's low back symptoms. (Findings of Fact 16, 24).

In addition, Claimant received a prescription for this medication after he moved to California. (Findings of Fact 14-15). Claimant also was prescribed Tramadol, Skelaxin and a Medrol pak when he relocated to Texas. (Findings of Fact 26). The ALJ found Claimant to be credible when he testified that the medication helped his symptoms. (Findings of Fact 37). His testimony that he took medications (including Methocarbomal) after leaving Colorado was corroborated by the medical records from Texas and California.

Based upon the totality of medical evidence in the record, as well as Claimant's testimony, the ALJ concluded Claimant required maintenance medical treatment. In this regard, the ALJ credited Claimant's ATP-s (Dr. Sacha and Dr. Cava), along with IME physician (Dr. Castro) regarding Claimant's need for the medications. (Findings of Fact 16, 18, 24). The physicians who evaluated Claimant in Texas and California also recommended prescriptions, which was persuasive to the ALJ. These physicians were in the best position to assess Claimant need for continuing treatment. Accordingly, Respondents will be ordered to provide maintenance treatment, pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

ORDER

It is therefore ordered:

1. Claimant met his burden and established he was entitled to maintenance medical benefits.

2. Respondents shall pay for *Grover* medical benefits, including physician evaluation(s), Methocarbomal and other prescriptions. Payment shall be made Colorado Workers' Compensation Medical Fee Schedule.

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: July 29, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

End of 2022 July Redacted Orders