ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his neck beginning in May 2021 and ongoing (including a cervical spine fusion recommended by Dr. Brian Witwer) is reasonable, necessary, and related to the admitted January 21, 2020 work injury.

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

Whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant is responsible for the termination of his employment with the employer, thus ending his entitlement to TTD benefits.

FINDINGS OF FACT

1. The claimant worked for the employer as staff security at a community corrections "work release" facility in Rifle, Colorado. The claimant was paid $23.78 per hour and he worked on a full-time basis. The claimant's job duties included overseeing the delivery of food to the facility.

2. On January 21, 2020, the claimant suffered an injury[1] while on duty. Specifically, the claimant was overseeing the delivery of inmate meals. While food carts were being unloaded, one cart began to roll back off the delivery truck. The claimant reached out to grab the cart so that it would not fall three feet to the ground. As he did so, the claimant immediately felt a "snap" and pain in the right side of his neck. Subsequently, the claimant reported the incident to the employer and was provided with medical treatment for his neck.

Medical Treatment Prior to January 21, 2020

3. The claimant was involved in a motor vehicle accident (MVA) in 2007. Due to the injuries he suffered as a result of that MVA, the claimant underwent a cervical spine fusion that same year. That fusion was at the C6 and C7 levels The claimant testified that between the 2007 spine fusion and the injury in January 2021, he did not suffer any neck related symptoms.

[1] The issue of compensability was initially endorsed for the current hearing. At the hearing, the respondents stipulated that the claimant suffered an injury to his neck on January 21, 2020.

4. In the years following his fusion surgery, the claimant underwent treatment for chronic neck pain. Part of this treatment was the use of prescription narcotics.

Medical Treatment After January 21, 2020

5. On January 24, 2020, the claimant was seen in the emergency department at Grand River Medical Center. At that time, the claimant was seen by Chelsea Lawrenz, PA-C. The claimant reported dull and persistent pain, with extreme neck stiffness. PA Lawrenz recorded that the claimant "denies any distal numbness that is worse than his baseline from his prior vertebral injuries". On exam the claimant had limited range of motion in his neck, particularly to the right. The claimant was diagnosed with a cervical muscular strain. The claimant was prescribed cyclobenzaprine. In addition, the claimant was placed under work restrictions of no lifting, carrying, pushing, or pulling over five pounds; and no reaching overhead or away from the body.

6. Grand River Medical is the claimant's authorized treating provider (ATP) for this claim. On February 4, 2020, the claimant was seen at Grand River Clinic by Mark Quinn, PA-C. On exam, PA Quinn noted that the claimant's neck was tender with significant spasms on the right side. PA Quinn also noted that magnetic resonance imaging (MRI) of the claimant's cervical spine showed disc herniations at multiple levels. PA Quinn listed the claimant's diagnoses as cervical discogenic pain syndrome, cervical disc displacement, and cervical radiculopathy. PA Quinn prescribed methocarbamol in lieu of the previously prescribed cyclobenzaprine. PA Quinn also prescribed a five day course of prednisone "bursts". In addition, PA Quinn released the claimant to return to work with work restrictions of no lifting, pushing, pulling, or carrying over five pounds.

7. On February 6, 2020, the claimant was seen by his primary care provider, Natasha Ellwood, PA-C with Mountain Family Health. At that time, the claimant reported pain in his neck and shoulders following an injury at work. The claimant also reported that his chronic back pain was stable with the use of 10 milligrams of hydrocodone on a daily basis. However, due to his neck pain, he took "a couple extra pills".

8. On February 20, 2020, the claimant returned to PA Quinn. At that time, the claimant reported that the prednisone had relieved his radiating pain symptoms. PA Quinn referred the claimant to physical therapy and continued the temporary work restrictions.

9. Thereafter, the claimant attended a few physical therapy visits. However, between the appointment with PA Quinn on February 20, 2020, and July 26, 2021, he claimant did not attend any other medical appointments related to his work injury.

10. During that same period of time (February 2020 to July 2021) the claimant was seen multiple times at Grand River Medical Center. On June 13, 2020, the claimant was seen by PA Norwood, who noted a normal neck exam. Thereafter, the Grand River Medical Center medical records have no mention of neck pain or symptoms related to the work injury. However, these records do demonstrate the claimant's ongoing use of narcotics to address his chronic neck and back pain. Although the claimant's narcotic

prescription was increased following his work injury, by June 2021, his prescription/usage had returned to the claimant's baseline.

11. On July 26, 2021, the claimant was seen by PA Quinn. At that time, the claimant reported a sudden increase in his neck symptoms approximately two months prior. In addition, the claimant reported the new symptom of radiating pain down his left arm. PA Quinn noted a diagnosis of cervical radiculopathy and referred the claimant for a cervical spine MRI.

12. On August 24, 2021, the claimant underwent a cervical spine MRI. The MRI showed no issues related to the prior C6-C7 fusion, little change from the February 2, 2020 MRI, and a "slight increase" in anterolisthesis of the C5 over C6.

13. Subsequently, the claimant was referred to Dr. Giora Hahn for injections. On November 19, 2021, the claimant underwent bilateral facet injections at C4-C5 and C5-C6.

14. Following these injections, the claimant experienced numbness on the right side of his face. The claimant sought emergent care regarding this facial numbness. Thereafter, Dr. Hahn declined to administer additional injections.

15. On February 8, 2022, the claimant attended an independent medical examination (IME) with Dr. Douglas Scott. In connection with the IME, Dr. reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Scott noted that there was a gap in the medical records between March 26, 2020 and July 26, 2021. Dr. Scott opined that on January 21, 2020, the claimant probably suffered a strain of a neck muscle. In addition, Dr. Scott noted that the claimant's neck pain was addressed by prednisone burst, physical therapy, and medication. Dr. Scott opined that the claimant reached his baseline when he did not return to PA Quinn or physical therapy in March 2020. Dr. Scott opined that the onset of neck pain in May 2021 was the result of a new injury, and not causally related to the claimant's January 2020 work injury.

16. The claimant was ultimately referred for a surgical consultation. On February 23, 2022, the claimant was seen by Dr. Brian Witwer. At that time, Dr. Witwer identified the claimant's diagnoses as cervical spondylosis and radiculopathy. In addition, Dr. Witwer identified severe adjacent level disease at C5-C6 (above the prior C6-C7 fusion). Dr. Witwer recommended extending the fusion to the C5-C6 level. The respondents have denied authorization for this surgical request.

17. After receiving additional medical records, on March 27, 2022, Dr. Scott issued an addendum to his IME report. Specifically, Dr. Scott was provided with medical records during the period of March 26, 2020 and July 26, 2021. In his March 2022 IME addendum Dr. Scott noted that the claimant did not report neck related symptoms to his providers at Mountain Family Health during that time. At an appointment on June 30, 2020 at Mountain Family Health, the claimant had a normal neck exam. Then on July 1, 2021, the claimant reported to Dr. Percy that he was doing well, with no report of neck

issues. In the March 27, 2022 IME addendum, Dr. Scott opined that on January 21, 2020, the claimant suffered a temporary aggravation to his chronic neck condition, and that exacerbation was resolved by June 13, 2020. Dr. Scott further opined that the claimant's neck symptoms that he began to report in July 2021 are likely due to the natural progression of the pre-existing degenerative condition of his cervical spine. Dr. Scott reiterated his opinion that the claimant's 2021 neck symptoms are not causally related to the January 2020 work injury.

18. Dr. Scott's testimony was consistent with his written reports. Dr. Scott explained that following a spinal fusion, the levels above and below the fusion can become stressed, resulting in additional symptoms. Dr. Scott referred to this as progressive segmental dysfunction. In the claimant's case, the claimant's C5-C6 level (the level above his prior fusion) is likely the level with the most stress. Dr. Scott testified that trauma is not required to cause stress at the level above the fusion. It is Dr. Scott's opinion that the claimant's development of new symptoms in July 2021 is the result of the normal progression of progressive segmental dysfunction, and not his work injury.

19. The claimant continued working full-time between his injury in January 2020 and December 1, 2021, when his employment was terminated. The claimant asserts that following the injury he was unable to work overtime hours, resulting in lost wages. The ALJ is not persuaded by this argument. The ALJ finds that the claimant suffered no wage loss as a result of his work injury.

Employment Terminated

20. On June 19, 2021, the claimant was driving on I-70 when he was pulled over by law enforcement for speeding. During the traffic stop it was discovered that the claimant's drivers license was "under restraint" due to an unpaid traffic ticket. The claimant testified that the incident "escalated" and he was arrested and taken into custody.

21. While in police custody, the claimant agreed to undergo a blood test. The test results showed that the claimant had THC[2] and Percocet in his system. As a result, the claimant was charged with driving while ability impaired (DWAI). The claimant was released from custody the following day.

22. On Monday, June 20, 2021, the claimant was able to prove that he had paid the traffic ticket. However, the claimant was still required to go to court regarding the DWAI.

23. In approximately November 2021, the claimant pled guilty to the DWAI charge. On December 1, 2021, the claimant's employment was terminated. The claimant testified that he was terminated because he failed to report the traffic stop and related arrest to the employer within 72 hours. It is the claimant's understanding that the employer has a 72 hour "rule" or "code" that requires an employee to report any contact

[2] Tetrahydrocannabinol.

with law enforcement within that time frame. It is the claimant's understanding that his violation of that rule, resulted in the termination of his employment. The claimant testified that he was not aware of this 72 hour rule. The ALJ does not find the claimant's testimony on this issue to be credible or persuasive.

24. The ALJ credits the medical records and the opinions of Dr. Scott. The ALJ specifically credits Dr. Scott's opinion that the claimant's development of new symptoms in 2021 is the result of the normal progression of progressive segmental dysfunction, and not the work injury. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that neck symptoms that he began to report in July 2021 are causally related to the January 21, 2020 work injury.

25. The ALJ also finds that the respondents have successfully demonstrated that it is more likely than not that the claimant was responsible for the termination of his employment. The claimant knew, or reasonably should have known, that being cited for a DWAI was something to be reported to the employer. The ALJ further finds that the claimant knew, or reasonably should have known, that pleading guilty to a DWAI could result in the termination of his employment. The claimant exercised some degree and control over his decision to not disclose his arrest and charges to the employer. Therefore, the ALJ finds that the claimant was responsible for his termination of employment.

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. 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).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his current neck symptoms and related medical treatment (including the surgical recommendation) are causally related to the January 21, 2020 work injury. As found, the medical records and the opinions of Dr. Scott are credible and persuasive.

6. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

7. As found, the claimant did not suffer a wage loss following his work injury. The claimant continued working full-time until his employment was terminated on December 1, 2021. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

8. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault"

applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

9. As found, the respondents have successfully demonstrated by a preponderance of the evidence, that the claimant is responsible for the termination of his employment.

ORDER

It is therefore ordered:

1. The claimant's request for additional medical treatment of his neck is denied and dismissed.

2. The claimant's request for a cervical spine fusion, as recommended by Dr. Witwer, is denied and dismissed.

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

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

Dated June 1, 2022.

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

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

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

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on November 17, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary, authorized medical benefits to cure and relieve the effects of that alleged injury that are related to the alleged work injury of November 17, 2021.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits as a consequence of the alleged work related injury.

IV. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause or is responsible for his termination.

V. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to penalties for alleged violation of W.C.R.P. Rule 8-2(A)(1) , for failure to provide a designated provider list with four medical providers as required by statute and rule, and if so if Claimant may select Dr. Brian Beatty, a level II accredited provider.

PROCEDURAL ISSUES AND STIPULATIONS

Claimant filed an Application for Hearing on December 28, 2021 on issues that include compensability, medical benefits that are authorized, reasonably necessary and related to the November 17, 2021 work related injury, average weekly wage and temporary disability benefits. Claimant also listed multiple penalties for failure to designate a list of providers and failure to timely provide a copy of the claim file.

Respondents filed a Response on and Amended Response to AFH dated January 27, 2022 with issues stating Claimant failed to specify the grounds for any penalties with specificity as required by statute, reserving the right to cure as well as statute of limitations. The responses indicated that one of the defenses included that Respondents were alleging Claimant may have been under the influence of drugs or alcohol.

Respondents agreed that they no longer were alleging any involvement with alcohol or drugs following investigation of the claim and that these allegations were simply to preserve their right to this defense if any investigation showed any such involvement.

Claimant stipulated that he was withdrawing, with prejudice, the issue of penalties for failure to provide a copy of the claim file. This stipulation is approved and this ALJ enters this stipulation as part of the order in this matter.

Respondents stipulated that the issue of independent contractor and the defense of intoxication were withdrawn, with prejudice. This stipulation is approved and this ALJ enters this stipulation as part of the order in this matter.

FINDINGS OF FACT

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

1. Claimant is primarily a Spanish speaking, 22 year old, laborer that worked in construction for Employer. His hours were varied. He build wood homes, and generally performed heavy lifting duties. Claimant attended secondary school in Guatemala.

2. Claimant worked for Employer for several months. Claimant earned $26.00 per hour.

3. Claimant alleged he was injured in the course and scope of his employment on November 17, 2021. He testified he was carrying wood that was approximately 20 foot long by twelve inches wide and two inches thick, which weighed approximately 75 lbs. Claimant was carrying the wood overhead when it shifted and pulled him backwards, causing him to fall onto some wood that was on the ground. Claimant alleged that he landed on his right side, injuring his lumbar spine.

4. On the day of the accident, Claimant advised his supervisor of the fall but was not provided with a designated provider lists. Claimant completed his work shift. The following day, Claimant again advised his supervisor of the incident. His supervisor sent him home, advised him to use some cream but failed to provide a designated provider list.

5. On Friday, November 19, 2021 Claimant sent his supervisor a text advising that he needed to see a medical provider because of the pain in his low back at the waist. He also asked whether Employer had workers' compensation insurance. Again, Employer failed to provide a designated provider list. However, he did request that Claimant go to the job site to pick up his check. Claimant did not return to work for Employer.

6. Claimant did not carry health insurance and testified that he could not afford medical care.

7. Claimant filed a Workers' Claim for Compensation on December 1, 2021 describing the mechanism of accident. Respondents filed a First Report of Injury on December 28, 2021 stating that Employer was notified of the incident on November 17, 2021. Claimant filed an Application for Hearing on December 28, 2021 on issues of compensability, medical benefits, average weekly wage and temporary disability benefits.

8. Claimant returned to heavy duty work in construction/framing on January 3, 2022 without seeking medical care or urgent care services and had no medical restrictions at that time.

9. On January 11, 2022 Respondents filed a Notice of Contest stating that they had no documentation supporting a compensable injury.

10. Claimant was first seen by Mountain View Pain Center on February 4, 2022 with complaints of lumbar spine and hip pain. This was a full month after Claimant returned to regular work in heavy construction and framing.

11. Dr. John Raschbacher evaluated Claimant for an IME on March 18, 2022 at Respondent's request. Claimant primarily reported low back pain. Dr. Raschbacher performed a physical exam, which was unremarkable. Claimant had mild tenderness which was consistent with complaints of low back pain or with someone with no back pain. Dr. Raschbacher found no objective findings on physical exam.

12. Dr. Raschbacher testified by deposition on May 6, 2022. He stated that simply because an incident occurred at work, that does not mean that Claimant suffered an injury, that looking at Claimant's alleged injury where he did not seek treatment for several months after the incident, including urgent care or an emergency department, and resuming the same type of work in January, would suggest that Claimant did not actually have an injury or that it was resolved by that time. Further, Dr. Raschbacher opined that Claimant's return to work performing essentially the same job functions indicated that Claimant is was able to have normal function. This ALJ infers by this opinion that by January 3, 2022 Claimant had normal functions, even if there was an incident.

13. Dr. Raschbacher explained that he would expect someone who had, or thought they had, serious symptomatology to seek some medical care. Dr. Raschbacher also opined that if someone had a concern about having an injury and was going to resume the same type of functions, that person would have sought care and obtained a physical exam. Dr. Raschbacher's opinion is persuasive.

14. As found, Dr. Raschbacher's opinions and findings are more persuasive that Claimant's subjective complaints and testimony.

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). The question of whether Claimant has met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ*. City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v.*

Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *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.*

A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Employer. As found, Claimant returned to full duty work as a construction laborer and framer on January 3, 2022 without seeking any medical attention, even from an emergency service provider or urgent care facility. Claimant first sought medical evaluation on February 4, 2022. As found, Dr. Raschbacher credibly testified that, on exam on March 18, 2022 Claimant had no objective signs of injury. This is finding and opinion is persuasive to this ALJ. Claimant's testimony was not persuasive in this matter. Claimant's claim is not compensable. Therefore, the remaining issues are moot.

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ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for a work injury of November 17, 2021 is *denied* and *dismissed*.

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

DATED this 1st day of June, 2022.

Digital Signature

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 19, 2020 until terminated by statute.

2. Whether Respondent has proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as an overnight stocker. His normal hours were from 10:00 p.m. to approximately 6:00 a.m.

2. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. Claimant initially sought medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot.

3. On September 14, 2020 Claimant received medical treatment through Authorized Treating Physician (ATP) Concentra Medical Centers. He was evaluated by Glenn D. Petersen, PA. Claimant reported the left foot injury while working as an overnight stocker. He noted that he continued to work following the injury while utilizing a foot boot and knee scooter. The report documented that Claimant had been in the foot boot, using the knee scooter and non-weight-bearing on the left lower extremity for four weeks. PA Petersen diagnosed Claimant with a non-displaced fifth proximal fracture and referred him to a foot specialist. PA Petersen assigned work restrictions of sedentary work only, with the left leg elevated, and continued use of the foot boot and knee scooter. Nevertheless, Claimant was permitted to work his entire shift and authorized to return to modified duty on September 15, 2020. Claimant's next scheduled appointment with Concentra was September 28, 2020.

4. On approximately September 19, 2020 Claimant attempted to return to work for his regular shift beginning at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot.

5. Approximately three-quarters of the way through his shift on September 19, 2020 Claimant told his supervisor that he was in too much pain to complete his shift and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He remarked that he subsequently left messages for his supervisor stating that he was unable to perform his job because of pain. Claimant commented that Employer never offered him a seated position consistent with his work restrictions. He subsequently received a letter from Employer terminating his employment. Claimant specified that he was terminated because he was no longer working scheduled shifts.

6. On September 22, 2020 Claimant returned to Concentra for a walk-in, non-scheduled visit. He was evaluated by Kathryn G. Bird, DO. As noted in the Concentra record, "[p]atient comes in for a walk-in visit today to see if he could get restrictions advanced." Claimant reported that he continued to work modified duty and was awaiting the referral to the foot specialist. He reported a 4/10 pain level in his left foot. Dr. Bird restricted Claimant to seated duty only and wearing his foot boot while awake. He was permitted to work his entire shift.

7. On October 6, 2020 Claimant returned to Dr. Bird at Concentra for a follow-up appointment. He remarked that he had not yet visited Michael Zyzda, DPM, but was scheduled for the following day. Claimant also reported no longer working for Employer because no light duty was available. He noted 2/10 pain in the left foot. X-rays revealed a two millimeter gap of the first metatarsal fracture line. Claimant's restrictions remained seated duty only and wearing his boot. He was permitted to work his entire shift.

8. On October 7, 2020 Claimant visited Dr. Zyzda at Concentra for an examination. Claimant reported the mechanism of injury and remarked that the VA had placed him in the foot boot with the use of a knee scooter. He remarked that he utilized the cast boot and scooter for the first four weeks and that over the last two weeks he felt great. Dr. Zyzda recommended smoking cessation and weight-bearing on the heel, but to avoid full weight utilization. Dr. Zyzda did not alter Claimant's work restrictions.

9. Claimant testified that, following his work shifts, he would babysit and take care of his granddaughter during the day. He commented that he never spoke with any claims adjuster throughout the duration of the claim. Nevertheless, Claimant recognized the name of the claims adjuster as SD[Redacted]. He denied ever telling Ms. SD[Redacted] that he could no longer work for Employer because his post-accident work shifts during the day conflicted with his babysitting duties.

10. On October 20, 2020 Claimant returned to Dr. Bird for an evaluation. Claimant reported "[n]ot working – let go." Dr. Bird noted that Dr. Zyzda had recommended use of a bone stimulator. Claimant reported 2/10 pain in the left foot. His work restrictions remained unchanged.

11. On January 21, 2021 Claimant returned to Dr. Bird for a telemedicine evaluation. The record specifies that "[h]e was scheduled for a demand visit today" but due to a fever and sore throat the visit was done telephonically. Claimant reported

continuing left foot pain. Dr. Bird remarked that Claimant had not been evaluated by either herself or Dr. Zyzda since October. Dr. Bird did not make any changes to Claimant's work restrictions.

12. On January 28, 2021 Claimant returned to Dr. Bird for an examination. Claimant reported continuing left foot symptoms. He recalled that a few weeks earlier "he was chasing his dog and his foot twisted sideways, he felt a pop and had worse pain on the lateral side of his foot." Dr. Bird commented that Claimant had not returned to Dr. Zyzda even though he had a scheduled appointment. She also remarked that Claimant was no longer wearing or utilizing the foot boot. Claimant reported 4/10 pain in the left foot. Dr. Bird continued to restrict Claimant to seated duty.

13. On March 29, 2021 Claimant again visited Dr. Bird for an evaluation. He reported 8/10 left foot pain but that his condition had not changed. Dr. Bird commented that Insurer had denied Dr. Zyzda's February 10, 2021 surgical request. She remarked that he had not reached Maximum Medical improvement (MMI). Dr. Bird again did not change Claimant's work restrictions.

14. On May 10, 2021 Claimant returned to Dr. Bird for an examination. Claimant reported that his left foot symptoms had increased and he was experiencing edema in his left lower leg. After conducting a physical examination, Dr. Bird determined that Claimant had reached MMI. She advised Claimant that he could advance his activities as tolerated. Dr. Bird assigned a 5% left lower extremity permanent impairment rating that converted to a 2% whole person impairment.

15. On September 2, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Sharon Walker, M.D. Dr. Walker reviewed Claimant's medical records and conducted a physical examination. She concluded that Claimant had not reached MMI. Dr. Walker reasoned that Claimant was only placed at MMI because requested treatment had not been authorized. She explained that Claimant was a surgical candidate and warranted evaluation for Chronic Regional Pain Syndrome (CRPS). Dr. Walker recommended temporary work restrictions of no crawling, kneeling, squatting or climbing. She also noted no lifting, pushing, pulling or carrying in excess of 15 pounds and using a foot boot as needed.

16. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. He initially obtained medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot. Claimant then worked for several weeks utilizing the foot boot and knee scooter. On September 14, 2020 Claimant began receiving treatment through ATP Concentra. He received work restrictions of sedentary work only, with the left leg elevated and continued use of the foot boot and knee scooter. Claimant was permitted to work his entire shift and authorized to return to modified duty work on September 15, 2020.

17. Claimant has not worked for Employer since approximately September 19, 2020 because of continuing pain and left foot symptoms. He was subsequently terminated from employment. The record reflects that Drs. Bird and Zyzda have not changed Claimant's work restrictions and he has been limited to seated duty only. Claimant has thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The August 21, 2020 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

18. Respondent has failed to prove that it is more probably true than not that Claimant was responsible for his termination by abandoning his employment and is thus precluded from receiving TTD benefits. Initially, Claimant's work restrictions remained largely unchanged from when he began seeking treatment with ATP Concentra throughout the duration of the claim. Claimant was limited to seated or sedentary activities, with required use of the knee scooter starting on September 14, 2020. He was authorized to work his entire shift. However, the record reveals that Employer was unable to accommodate Claimant's work restrictions and his assigned duties caused significant pain.

19. On approximately September 19, 2020 Claimant attempted to return to work on his regular shift at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot. About three-quarters of the way through his shift Claimant told his supervisor that he was in too much pain to complete his job and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He subsequently received a letter from Employer terminating his employment.

20. Although Claimant ceased reporting to work after about September 19, 2020 the record reveals that he was unaware that he would be terminated from employment. Claimant remarked that he left messages for his supervisor after September 19, 2020 stating that he was unable to perform his job because of his pain. He commented that Employer never offered him a seated position consistent with his work restrictions. Claimant thus did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Respondent has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period October 19, 2020 until terminated by statute.

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. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability,” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the

employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAO, July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

6. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute. On August 21, 2020 Claimant suffered an admitted left foot fracture while stepping over a pallet. He initially obtained medical treatment through the VA Medical Center. Imaging revealed a non-displaced fracture of the fifth metatarsal. He was non-weight-bearing and received a scooter and boot. Claimant then worked for several weeks utilizing the foot boot and knee scooter. On September 14, 2020 Claimant began receiving treatment through ATP Concentra. He received work restrictions of sedentary work only, with the left leg elevated and continued use of the foot boot and knee scooter. Claimant was permitted to work his entire shift and authorized to return to modified duty work on September 15, 2020.

7. As found, Claimant has not worked for Employer since approximately September 19, 2020 because of continuing pain and left foot symptoms. He was subsequently terminated from employment. The record reflects that Drs. Bird and Zyzda have not changed Claimant's work restrictions and he has been limited to seated duty only. Claimant has thus suffered medical incapacity based on the loss of bodily function and an impairment of wage earning capacity because of his inability to resume prior work. The August 21, 2020 accident impaired his ability to effectively and properly perform his regular employment. The record thus reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI. Accordingly,

Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

8. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant was responsible for his termination by abandoning his employment and is thus precluded from receiving TTD benefits. Initially, Claimant's work restrictions remained largely unchanged from when he began seeking treatment with ATP Concentra throughout the duration of the claim. Claimant was limited to seated or sedentary activities, with required use of the knee scooter starting on September 14, 2020. He was authorized to work his entire shift. However, the record reveals that Employer was unable to accommodate Claimant's work restrictions and his assigned duties caused significant pain.

9. As found, on approximately September 19, 2020 Claimant attempted to return to work on his regular shift at 10:00 p.m. He brought his knee scooter and wore his boot. Claimant explained that his supervisor directed him to proceed through certain aisles in the store and ensure items on the grocery shelves were facing forward for customers. Claimant further noted he was required to perform the work with his injured leg on the knee scooter and his non-injured leg on the ground. Although he was working on the middle shelves, he was required to get up and down from the knee scooter and could not keep his knee on the device. The activity caused intense pain in his left foot. About three-quarters of the way through his shift Claimant told his supervisor that he was in too much pain to complete his job and left Employer's facility. Claimant noted he was scheduled to work the following day, but did not return because he could not perform the job. He subsequently received a letter from Employer terminating his employment.

10. As found, although Claimant ceased reporting to work after about September 19, 2020 the record reveals that he was unaware that he would be terminated from employment. Claimant remarked that he left messages for his supervisor after September 19, 2020 stating that he was unable to perform his job because of his pain. He commented that Employer never offered him a seated position consistent with his work restrictions. Claimant thus did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Respondent has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period October 19, 2020 until terminated by statute.

ORDER

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

1. Claimant is entitled to receive TTD benefits for the period October 19, 2020 until terminated by statute.

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*.

DATED: June 1, 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. 5-145-713-003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to additional Permanent Partial Disability (PPD) benefits.

FINDINGS OF FACT

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

1. Claimant was previously employed by Employer as a janitor.
2. On July 16, 2020, Claimant suffered an injury to his right leg. Claimant's right leg was struck by a metal sign. The metal sign was sitting on top of a grocery cart and hit the lateral side of his right lower leg
3. Claimant passed away on or about December 9, 2021.
4. Before passing away, Claimant treated with Concentra Medical Center under the care of Kathryn Bird, D.O. Claimant began treatment on July 27, 2020. (CHE 4, pp. 18-21). At this evaluation, it was noted that Claimant was 5 feet 6 inches, weighed 208 pounds, with a BMI of 33. Claimant reported wearing jeans at the time of incident, where an ecchymotic lesion resulted at the point of impact. Upon examination, no drainage existed, and Claimant was diagnosed with cellulitis.
5. Claimant subsequently underwent four surgeries to address the resulting wound and cellulitis. On August 14, 2020, Claimant was operated on by Dr. Craig Lehrman for surgical debridement of the right lower extremity. (RHE F, p. 22). On September 15, 2020, Claimant was operated on by Dr. Lily Daniali who performed a skin graft of Claimant's right lower extremity wound. (*Id*.) On October 2, 2020, Dr. Daniali performed a surgical preparation of the wound with application of vacuum assisted closure. (*Id*.)
6. On March 3, 2021, Dr. Bird placed Claimant at maximum medical improvement (MMI). When she placed Claimant at MMI, she noted the skin on Claimant's right lower extremity had:
    - Significant, 1/8 of an inch, pitting edema below the knee.
    - Healed skin trauma over the distal leg.
    - A large scar that is depressed on the anterolateral distal right lower leg.
    - Shiny skin from being taught,
    - Healed wound with confluent skin and "only a [single] crusted area 3 mm in diameter."

RHE F, 23.

7. Dr. Bird issued a 10% lower extremity impairment for hematoma residual impairment, similar to a peripheral vascular disease under Table 52, Class 2, p. 79, of the AMA Guides. (RHE F, pp. 20-25).

8. On March 11, 2021, Respondent filed a Final Admission of Liability admitting to temporary total disability (TTD) benefits from August 11, 2020, through November 29, 2020, totaling $5,183.88, and permanent partial disability (PPD) benefits for the 10% scheduled lower extremity rating in the amount of $7,011.89. (CHE 2). These benefits have been paid in full.

9. On June 29, 2021, Claimant at his request, attended a DIME with Robert Mack, M.D. (RHE G). At the time of the DIME, Dr. Mack concluded that Claimant is not at MMI due to pitting edema of the right edema of the right leg and foot, persistent pain, and "*recurring skin lesions"* in the skin graft area of the right leg and need for additional treatment (emphasis added). Thus, at the time of the DIME, Claimant had additional skin lesions. Dr. Mack described the lesions as:

   - Three ½ inch circular scabbed-over lesions. Two were anteromedial and one was posterior. But no drainage was noted from any of the lesions.

   RHE G, pp. 35-36.

10. Dr. Mack also determined Claimant was not at MMI because he was "concerned with the amount of edema and skin lesions noted in the area of the skin grafted wound." RHE G, pp. 36.

11. Dr. Mack concluded that there was the potential for recurring infection next to a preexisting right total knee replacement. Dr. Mack also recommended that ongoing monitoring by a wound specialist and that the leg needed additional evaluation for circulation purposes. Although Claimant was not at MMI, Dr. Mack issued a provisional lower extremity impairment rating of 35% based on Table 52 Impairment to Lower Extremity due to Peripheral Vascular Disease, under class 2. Dr. Mack also indicated in his report that "[i]t should be noted as an orthopedic surgeon, I'm not experienced performing Impairment ratings of skin and soft tissue wounds such as this."

    RHE G, p. 36.

12. Therefore, at the time of the DIME with Dr. Mack, the ALJ finds that Claimant's skin condition was worse than at the time he was originally placed at MMI by Dr. Bird and provided a 10% impairment rating.

13. The ALJ further finds that the worsening of Claimant's skin condition at the time of the DIME, in which Claimant was found to not at MMI, resulted in Dr. Mack providing a higher provisional impairment rating of 35%. Therefore, the ALJ finds that the impairment rating provided by Dr. Mack is not an accurate assessment of Claimant's resulting impairment from his work-related condition. In other words, providing an impairment rating at a time when Claimant's skin condition is worse, and which might improve with additional treatment, makes it very difficult to

determine the extent of Claimant's impairment from his work-related condition based on Dr. Mack's assessment. Because Claimant's skin condition had gotten worse, and Dr. Mack concluded Claimant should return to Dr. Daniali to assess Claimant's edema and the recurring lesions, the provisional impairment rating provided by Dr. Mack is not found to be persuasive as it relates to Claimant's ultimate impairment from his work-related injury. As a result, the ALJ finds Dr. Bird's assessment of Claimant's impairment is found to be more credible and persuasive as to Claimant's permanent impairment due to his work-related injury.

14. On January 25, 2022, an Application for Hearing was filed endorsing solely the issue of PPD benefits.

15. On February 24, 2022, Respondent filed its Response to Application for Hearing also endorsing PPD benefits and overpayment or credits applied to any PPD award due to previous payment of indemnity benefits. Respondent also endorsed that Claimant was deceased.

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 has proven by a preponderance of the evidence that he is entitled to additional Permanent Partial Disability (PPD) benefits.

Pursuant to C.R.S. § 8-42-116(b), "[w]here the injury proximately caused permanent partial disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived. (emphasis added).

The term "unaccrued" is not defined in the statute. In *Nilsen v. Legacy Trucking, Inc.*, (ICAO – 2009 WL 1947270), it was determined that PPD benefits had accrued for purposes of the statute since respondents had admitted to said benefits. On October 23, 2007, claimant died for reasons unrelated to his industrial injury. However, the following day, respondents had filed a Final Admission of Liability admitting to the disputed PPD benefits. ICAO reasoned that even though the claimant had passed away one day prior, entitlement to PPD benefits had accrued given the opined impairment rating and most importantly, respondents' admission to those benefits before learning of the death.

MMI status is not dispositive of determining whether PPD benefits have been accrued. In *Singleton v. Kenya Corporation*, 961 P.2d 571 (Colo. App. 1998), the Court of Appeals determined that PPD benefit may have accrued before placement at MMI "upon proof that an industrial injury caused the deceased employee to suffer a permanent disability." As such the court reasoned that "the statute does not foreclose such posthumous proof when the employee dies of unrelated causes before reaching MMI."

Claimant's widow is seeking additional PPD benefits beyond which has already paid and accrued. Claimant's widow is seeking the scheduled lower extremity impairment issued by the DIME, Dr. Mack, at 35%.

The parties agree that PPD benefits for 10% lower extremity impairment has been paid in accordance with the Final Admission of Liability. The parties agree also that no additional PPD benefits have been paid beyond the admitted 10% lower extremity. At issue is whether an additional 25% of lower extremity impairment benefits have accrued.

First, given Claimant was not at MMI at the time of the DIME and the time of his death, combined with the recommendation of additional medical care, it cannot be found that additional PPD benefits have accrued. Dr. Mack concluded that MMI had not been reached. While MMI is unnecessary to have accrued PPD benefits at death, the fact that Dr. Mack was recommending additional medical care is persuasive that that additional PPD benefits had not accrued. Dr. Mack was concerned of needing additional treatment for ongoing edema, the potential for ongoing infections, and the need for ongoing monitoring additional evaluations to address the recurrent wound lesions and circulation

concerns. As a result, Claimant's medical status per the opinions of Dr. Mack was not stable for determination of permanent partial disability status and his opinion is not found to be persuasive as it relates to Claimant's permanent impairment from his injury.

Second, this case is different from the case in *Singleton*, where no previous PPD benefit had been admitted and paid. Instead, here Respondent has already admitted and paid for PPD benefits in the amount of $7,011.89 based on an opinion that Claimant had reached MMI and was provided an impairment rating. Thus, Respondent has already compensated Claimant for PPD benefits and provided PPD benefits under the statute based on Dr. Bird's rating.

Third, given that additional treatment was being recommended by Dr. Mack, it is speculative that the advisory rating issued by the DIME should be paid under the claim. Due to Claimant's unfortunate death, it is unknown if Claimant's placement at MMI would have residual impairment of an additional 25%. It is unknown if the additional treatment would have kept Claimant's residual impairment the same as found and opined by Dr. Mack. It also is unknown if the additional treatment would have improved Claimant's condition and residual impairment. Accordingly, it is thus speculative to require payment of additional PPD benefits given the unknown nature of the future impairment had death not transpired. In other words, it is only speculative to conclude that additional PPD benefits and increased impairment exists at the time of death.

Fourth, the additional impairment issued by Dr. Mack is not reliable. Dr. Mack admits in his own report that he is not qualified to assess skin and wound impairments. Consequently, Dr. Mack's own admission makes it even more problematic to conclude that additional impairment and PPD benefits have accrued at the time of death.

Fifth, the ALJ credits Dr. Bird's opinion regarding the extent of Claimant's permanent impairment. The ALJ credits Dr. Bird's opinion because she assessed Claimant's condition at a point when Claimant was at MMI and did not have the extensive pitting edema, did not have the additional lesions, and did not need additional treatment which might improve Claimant's condition and resulting permanent impairment.

As a result, Claimant has been compensated for PPD benefits as a result of the wound injury he suffered on July 16, 2020. Based on the totality of evidence and the circumstances of this case, the Claimant's widow has failed to establish by a preponderance of the evidence that additional PPD benefits have accrued at the time of Claimant's death and that additional PPD benefits are payable based on the 35% provisional impairment rating provided by Dr. Mack. Therefore, Claimant's widow's request for additional PPD benefits is denied.

ORDER

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

1. The request for additional PPD benefits based on Dr. Mack's 35% scheduled impairment rating 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: June 2, 2022

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-125-703-002

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the lumbar spine surgery recommended by Dr. Douglas Orndorff is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her March 13, 2019 work injury?

FINDINGS OF FACT

1. Claimant is employed with Employer as a certified nursing assistant ("CNA"). Claimant job duties included performing healthcare services in Employer's assisted living facilities and in the homes of patients and individuals. Claimant testified she was a "float team" member, and would work either in homes or in facilities as needed depending on other employees' schedules.

2. Claimant sustained an admitted injury to her lower back on March 13, 2019 when she was attempting to help lift an obese patient to a toliet. Claimant testified the felt a pop and felt what she described as a warm water balloon down the small of her back.

3. Claimant reported the injury to Employer and was referred to Peak Professionals for medical treatment. Claimant was initially evaluated by Physicians' Assistant ("PA") Dockins on March 15, 2019. PA Dockins works with Dr. Adams with Peak Professionals. PA Docking noted Claimant complained of acute right-sided low back pain with right-sided sciatica. Claimant provided a consistent accident history to PA Dockins of trying to help a patient use the restroom when she sustained the back injury. PA Dockins diagnosed Claimant with a right low back strain, sciatica with radiculopathy and provided Claimant with work restrictions and medications, including Percocet. PA Dockins referred Claimant for a magnetic resonance image ("MRI") of the lumbar spine due to decreased reflexes and a positive straight leg test on the right on physical examination.

4. The MRI was performed on April 3, 2019 showed a disc protrusion at L1-L2 and disc bulges at L4-L5 and L5-S1. .

5. Claimant was evaluated by PA Dockins on May 18, 2019. PA Dockins noted Claimant had increasing pain since she had to drive from Eckert from Ridgway for work. PA Dockins noted that Claimant needed to stand every 15 minutes due to her disc bulge and the driving had delayed Claimant's healing and caused Claimant to regress some. PA Dockins noted Claimant was having worsening radicular pain down both

thighs and needed opioid painkillers at night. PA Dockins referred Claimant to Dr. Faragher for consideration of an epidural steroid injection. ("ESI").

6. Claimant returned to PA Dockins on May 23, 2019. PA Dockins noted Claimant continued to have radicular pain down both thighs. PA Dockins recommended Claimant continue using Diclofenac, cyclobenzaprine, and Percocet as medications for her symptoms. PA Dockins noted Claimant needed to take standing breaks on her commute, and recommended she stop every 15 minutes for a standing break.

7. On June 13, 2019, PA Dockins noted Claimant had continued worsening pain from her lumbar disc bulges, including radicular symptoms now occurring in the left leg. PA Dockins discussed referring Claimant to St. Mary's Hospital Neurosurgery.

8. Claimant was evaluated by Dr. Faragher for consultation on August 13, 2019. Dr. Faragher noted decreased sensation in a right L5 pattern. Dr. Faragher diagnosed Claimant with low back pain, right-sided sciatica, multiple disc bulges, right L5-S1 foraminal stenosis, and possible right sacroiliac ("SI") joint pain and dysfunction. Dr. Faragher recommended conservative treatment, including a home exercise program, physical therapy, a TENS unit, and lumbar traction, as well as medications and potential L5-S1 epidural joint injections.

9. Claimant subsequently underwent a right-sided lumbar interlaminar L5-S1 ESI on September 5, 2019 under the auspices of Dr. Faragher. On September 26, 2019, the Dr. Faragher noted Claimant did not get any benefit from the injection. Dr. Faragher opined that Claimant may be having pain associated with the SI joint and, therefore, recommended a right-sided SI joint injection. Dr. Faragher noted Claimant had been diliegent with her home exercise program which included walking most days of the week. Dr. Faragher recommended Claimant continue her walking program and home exercise program and recommended physical therapy with a focus on lower extremity stretches, core strengthening, and spinal stabilization exercises.

10. Claimant underwent the right SI joint injection on October 21, 2019 under the auspices of Dr. Faragher. Claimant reported to Dr. Faragher on November 20, 2019 that she had no improvement with the SI joint injection. Dr. Faragher noted Claimant may have facet syndrome, and recommended bilateral L4-S1 lumbar facet injections.

11. Claimant underwent the L4-S1 bilateral facet injections on January 16, 2020 under the auspices of Dr. Faragher. Claimant reported 50% improvement after the injections when she returned to Dr. Faragher on February 4, 2020. Dr. Faragher recommended Claimant undergo a new lumbar MRI.

12. Claimant underwent the MRI on May 15, 2020. The MRI showed slightly increased disc protrusion at L1-2, and significantly processed L5-S1 degenerative facet changes with more distention of the right-sided facet with new fluid and distention of the left-sided facet. Levels L2-L5 showed moderate degenerative changes.

13. Claimant returned to Dr. Faragher on May 20, 2020. Dr. Faragher noted Claimant's MRI results, and Claimant's ongoing radicular symptoms. Dr. Faragher recommended bilateral SI joint injections with fluoroscopy. The bilateral SI joint injections were eventually performed on July 9, 2020.

14. Claimant returned to Dr. Faragher on August 11, 2020. Dr. Faragher noted Claimant would like to go forward with a right L5-S1 interlaminar epidural injection after the last bilateral SI joint injection did not help as much as intended.

15. Dr. Adams subsequently referred Claimant to Spine Colorado, a neurosurgery clinic. Claimant was evaluated by PA Byers on August 25, 2020. PA Byers diagnosed Claimant with low back pain and right greater than left radiculopathy into the lower extremities, to the dorsal side of the right foot. PA Byers noted decreased sensation on the lateral leg and dorsum of the foot. PA Byers noted that some of Claimant's symptoms were consistent with nerve compression at the L5-S1 level. PA Byers recommended an electromyelogram ("EMG") to further evaluate Claimant's radicular symptoms.

16. Claimant underwent EMG testing on October 14, 2020 with Spine Colorado. The EMG testing did not show evidence of a lumbar radiculopathy, a peripheral neuropathy or a compressive neuropathy. The EMG report noted Claimant's report of radicular symptoms and decreased sensation on the lateral right leg and dorsum of the right foot on examination. The report recommended Claimant be referred to Dr. Orndorff for surgical consultation.

17. Claimant returned to Spine Colorado on December 2, 2020 where Claimant was examined by physician access supervisor ("PASUP") Hamlin. PASUP. Hamlin noted Claimant had spondylolisthesis and significant facet arthropathy at L5-S1. PASUP Hamlin noted that Claimant continued to show decreased sensation on the right leg and foot on examination. PASUP Hamlin diagnosed Claimant with anterolisthesis and herniated nucleus pulposus at L5, bilateral S1 joint dysfunction, and facet arthropathy at L5-S1.

18. Claimant consulted with Dr. Orndorff at Spine Colorado on January 20, 2021. Dr. Orndorff noted Claimant had low back pain with bilateral leg pain, right worse than left with numbness in the right toes. Dr. Orndorff noted Claimant had undergone conservative treatment including physical therapy, anti-inflammatory medications, traction, narcotics, muscle relaxers, gabapentin, meloxicam, and injections. On examination, Dr. Orndorff noted tenderness in various parts of the spine and in the SI joint, pain with flexion and extension, decreased sensation on the right leg and right foot, diminished reflex in the right patella, and positive results on SI joint compression tests.

19. Dr. Orndorff reviewed extension X-rays, which demonstrated an L5-S1 hypermobile spondylolisthesis with 4.2 mm of translation with severe facet arthropathy. Dr. Orndorff reviewed Claimant's MRI scan and noted it showed a broad-based disc

bulge at L5-S1 and severe facet arthropathy and anterolisthesis of L5 on S1 that measured 3.2 mm. Dr. Orndorff opined Claimant had exhausted all forms of conservative options and recommended an anterior approach, LF-S1 laminectomy and posterior fusion surgery.

20. Respondents obtained an independent medical examination ("IME") with Dr. Reiss on March 17, 2021. Dr. Reiss noted Claimant reported she had low back pain that was between 5-7 out of 10, along with pain down the right leg and into the right toes. Dr. Reiss noted Claimant was engaging in a home exercise program. Dr. Reiss opined Claimant had not yet completed appropriate conservative care and indicated that Claimant's pain generator had not yet been necessarily identified. Dr. Reiss recommended Claimant pursue additional conservative care including core strengthening and aerobic conditioning aided by a physical therapy program.

21. After reviewing additional imaging studies, Dr. Reiss authored a second report on May 20, 2021. Dr. Reiss noted that there was no nerve compression and therefore there was no indication for any form of decompression. Dr. Reiss opined that no surgery is indicated at this time.

22. Dr. Orndorff produced another report on October 26, 2021 in which he opined that based on Claimant's complaints of pain and radiating symptoms, he felt the L5-S1 Gill laminectomy, L5-S1 posterior interbody fusion and autograft bone was reasonable treatment that was directly addressing the pathology and symptoms that were a result of Claimant's lifting injury.

23. On January 10, 2022, Dr. Adams noted Claimant was set to begin physical therapy as recommended by Dr. Reiss, but she was delayed due to contracting COVID-19. Dr. Adams noted Claimant's medication regimen was helping her symptoms, but not solving the symptoms Dr. Adams noted Claimant would continue with her home exercise program and re-initiate physical therapy.

24. Dr. Reiss testified at hearing consistent with his IME reports. Dr. Reiss testified that Claimant's spondylolisthesis could be a surgical lesion if it caused nerve compression or instability. Dr. Reiss opined, however, that Claimant's spondylolisthesis did not cause any nerve compression or instability. Dr. Reiss further opined that Claimant's spondylolisthesis and degenerative facet joints were preexisting conditions, but noted that these conditions were not symptomatic prior to the work injury. Dr. Reiss testified that if Claimant's spondylolisthesis was unstable, surgery may be an option for Claimant. Dr. Reiss testified, however, that there was insufficient evidence that the spondylolisthesis was unstable.

25. Claimant testified at hearing that she had engaged in frequent exercise at home since 2019 using a therapy ball, rubber bands, and hand weights along with core strengthening on her own at home. Claimant testified that since re-initiating physical therapy, she had been doing extra exercises at home focusing on the pelvic area. Claimant testified that she was delayed in beginning her most recent physical therapy

due to there being a waiting list and had only engaged in six sessions. Claimant testified that she had shooting pain down the small of her back to her tailbone. Claimant testified her pain radiates to the right hip and down the outside of the right leg, wrapping around the calf, and then to the first two toes on her right foot. She testified that she had occasional shooting pain in the left leg from the hip to the knee. Claimant testified these symptoms limit her ability to sit, stand, walk, sleep, drive, and perform activities of daily living and personal care activities. Claimant testified that her condition had worsened in the year since the surgery had been recommended by Dr. Orndorff.

26. Claimant testified that she would like to have surgery in order to resolve her symptoms and be able to return to work. Claimant testified that surgery was a last option, but felt as though she had exhausted all other options in the three years since the injury and wanted to improve her function. Claimant testified that she wanted to undergo the surgery.

27. The ALJ finds Claimant's testimony to be credible and persuasive.

28. The ALJ credits the opinions and medical records of Dr. Orndorff and Dr. Faragher over the contrary medical opinions of Dr. Reiss and finds Claimant has proven it is more likely than not that the proposed lumbar spine surgery is reasonable medical treatment necessary to cure and relieve Claimant's condition resulting from the industrial injury.

29. The ALJ recognizes the contrary opinions expressed by Dr. Reiss in his report and testimony, but finds the opinions expressed in Dr. Orndorff's records along with Claimant's testimony to be more credible and persuasive with regard to the issue of whether the proposed medical procedure would be reasonable medical treatment necessary to cure and relieve the Claimant from the effects of her industrial 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., 2018. 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).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

4. 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).

5. As found, the ALJ finds the testimony of Claimant with regard to her injury and treatment along with the reports from Dr. Orndorff and Dr. Faragher and finds that Claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Orndorff, an anterior approach, L5-S1 laminectomy and posterior fusion, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her work injury of March 13, 2019.

6. Respondents' are therefore liable for the costs of the medical treatment recommended by Dr. Orndorff pursuant to the Colorado Medical Fee Schedule.

ORDER

It is therefore ordered that:

1. Respondents' shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the surgery recommended by Dr. Orndorff.

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

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

DATED: June 2, 2022

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-238-001

ISSUES

1. Whether Claimant timely objected to Respondents' November 10, 2021 Final Admission of Liability, and timely applied for a Division Independent Medical Examination.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of her employment with Employer on November 26, 2019. (Ex. A). Employer filed a First Report of Injury on December 4, 2019. (Ex. D).

2. On January 7, 2020, [Third Party Administrator (TPA) for Insurer redacted], sent Claimant a letter identifying itself as Insurer's representative for Claimant's claim. (Ex. E). Respondents then filed a Notice of Contest on February 10, 2020. (Ex. G).

3. On August 26, 2021, Claimant's counsel, JP[Redacted], Esq., filed an entry of appearance with the Division of Workers' Compensation and served it on [TPA Redacted] and Employer. (Ex. 12).

4. On November 1, 2021, Claimant, through Mr. JP[Redacted], filed an Application for Hearing with the Office of Administrative Courts and served it on [TPA Redacted] and Employer. (Ex. 10).

5. On November 10, 2021, Respondents filed a Final Admission of Liability (FAL) related to Claimant's November 26, 2019 injury, admitting for medical treatment, and denying that Claimant sustained any permanent partial disability. Respondents mailed the FAL to Claimant at her address of record, Employer, and Respondents' counsel, JI[Redacted], Esq. Respondents neither listed Claimant's counsel, Mr. JP[Redacted], on the certificate of mailing for the FAL nor mailed him the FAL at that time. (Ex. A).

6. The parties stipulated that Claimant timely received the FAL after Respondents mailed it on November 10, 2021.

7. On November 15, 2021, Respondents' counsel, Mr. JI[Redacted] filed an Entry of Appearance with the Office of Administrative Courts and served it on Claimant's counsel, Mr. JP[Redacted]. (Ex. 8).

8. On December 15, 2021, Claimant filed a Hearing Confirmation with the OAC for the April 8, 2022 hearing in this matter and served it on Respondents' counsel, Mr. JI[Redacted]. (Ex. 8).

9. The parties stipulated that Mr. JP[Redacted] did not receive the FAL from Respondents until December 16, 2021. The following day, December 17, 2021, Mr.

JP[Redacted] filed Claimant's Objection to Final Admission ("Objection"), and a Notice and Proposal and Application for Division Independent Medical Examination ("DIME Application"). Claimant's counsel served both the Objection and the DIME Application on Respondents and Mr. JI[Redacted]. (Exs. 3 & 5).

10. Claimant did not file her Objection and DIME Application within 30 days of the date Respondents filed the FAL. But Claimant did file both documents within 30 days of Claimant's counsel receipt of the FAL.

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 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 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 Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

TIMELINESS OF CLAIMANT'S OBJECTION AND DIME APPLICATION

The material facts of the case are not in dispute. Respondents filed the FAL on November 10, 2021, and mailed a copy to Claimant but not to Claimant's counsel.

Claimant's counsel did not receive the FAL until 36 days later, on December 16, 2021. The following day, Claimant filed the DIME Application and Objection. Respondents contend that because Claimant received the FAL, and failed to file an objection or request a DIME within thirty days, her claim automatically closed. Claimant contends Respondents' failure to provide a copy of the FAL to her counsel tolled the period for response until Claimant's counsel received the FAL. For the reasons set forth below, the ALJ concludes that Claimant's Objection and DIME Application were timely filed.

Under the Act, when an insurer files an FAL the claimant must either object to the FAL and file an application for hearing, or request the selection of a DIME physician within thirty days. § 8-43-203(2)(b)(II)(A), C.R.S. The failure to file either an objection or a DIME application within thirty days results in the closure of all issues admitted in the FAL. *Id*. When a party is represented by counsel, W.C.R.P. Rule 1-4(A), requires that "[w]henever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and the attorney(s) of record, if any." Even in the absence of a specific rule or statute requiring service on counsel of record, procedural due process requires that both the party and counsel receive actual notice of critical determinations, such as an FAL. *Hall v. Home Furniture Co.*, 724 P.2d 94, 96 (Colo. App. 1986). Where counsel is not properly served and does not have actual notice of an FAL, the time limit imposed by § 8-43-203 (2)(b)(II)(A), C.R.S., does not begin to run until counsel receives notice. *Id*. The ALJ finds the Court of Appeal's decision in *Hall* to be dispositive. Contrary to Respondents' contention, *Hall* is not factually distinguishable from the present case.

In *Hall*, a worker's compensation insurer filed a special admission of liability and mailed a copy to the claimant but did not mail or otherwise serve it on claimant's then attorney of record. 724 P.2d at 95. The claimant took no further action on his claim until he filed a petition to reopen almost six years later. *Id*. Claimant's petition to reopen was originally granted, and later reversed by the Industrial Commission that concluded the petition to reopen was untimely. Claimant appealed, arguing the insurer's failure to provide a copy of the special admission to his attorney tolled the time limit for filing a petition to reopen. *Id*. The Court of Appeals agreed with the claimant and reversed the Commission's decision, finding "[c]laimant's due process rights were violated by claimant's attorney not being furnished with a copy of the admission of liability." *Id.,* at 96. "Under these circumstances, time limitations do not commence to run until claimant's attorney first received notification…that the admission of liability had been filed." *Id*.

The *Hall* court's decision relied on and is consistent with the Colorado Supreme Court's decision in *Mountain States Tel. & Tel. Co. v. Dept. of Labor, 520 P.2d 586 (Colo. 1974).* The *Mountain States* court held that procedural due process requires notice be given to a party's attorney of record even where no statute requires such notice. "This basic requirement flows from the attorney-client relationship by which the management, discretion and control of all procedural matters connected with the litigation is invested in the attorney. By virtue of such delegation of authority, the client is bound by the actions of his attorney." *Id*. at 589. Thus, "[i]f the attorney through no fault of his own is denied notice of the critical determination in the case, and by reason thereof fails to take procedural steps necessary to preserve his client's rights, fundamental unfairness results.

Procedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests." *Id*.

The evidence establishes that Mr. JP[Redacted] was counsel of record as of August 26, 2021, and had notified Respondents of his representation by virtue of the entry of appearance, and filing the November 1, 2021 application for hearing. Respondents did not initially provide Mr. JP[Redacted] the November 10, 2021 FAL, but provided it on December 16, 2021. Consequently, under both *Hall* and *Mountain States*, the time period for Claimant to contest the FAL or request a DIME did not commence until December 16, 2021. Claimant requested a DIME and filed her Objection on December 17, 2021, within 30 days of Mr. JP[Redacted]'s receipt of the FAL. Claimant has therefore established by a preponderance of the evidence that her Objection and DIME Application were filed within the thirty-day time limit of § 8-43-203(2)(b)(II)(A), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's December 17, 2021 DIME Application and Objection to the November 10, 2021 FAL were filed within the time limit imposed by § 8-43-203(2)(b)(II)(A), C.R.S.

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: June 2, 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 5-188-971-001

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§ 8-42-105(4) and 8-142-103(1)(g), C.R.S., and thus his entitlement to temporary total disability (TTD) benefits should be terminated effective January 20, 2022.

2. Whether Respondents have established by a preponderance of the evidence that all TTD benefits paid after January 20, 2022 are an overpayment as contemplated by § 8-40-201 (15.5), C.R.S.

FINDINGS OF FACT

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

1. Claimant initially worked as a dockworker for Employer. In January 2021, Claimant began the training program to become a truck driver. In March 2021, he received his Commercial Driver's License and became an over-the-road truck driver for Employer. (Tr. 13:25-14:8).

2. On November 13, 2021, Claimant suffered a compensable industrial injury when he missed a foothold while exiting his truck and fell backward onto the pavement. (Ex. A).

3. Respondents filed a General Admission of Liability (GAL) on December 14, 2021, and began paying TTD benefits to Claimant as of November 13, 2021, at the weekly rate of $635.17. (Ex. B).

4. On January 12, 2022, Claimant notified Employer that he was cleared to return to work with modified restrictions. (Ex. L). As of January 17, 2022, Claimant's modified restrictions included: 20 lbs. maximum lifting; 10 lbs. repetitive lifting; 20 lbs. carrying, pushing, and pulling. Claimant was to use caution with ladders and stairs, but he was cleared for commercial driving. (Ex. M).

5. TH[Redacted], Director of Safety for Employer, testified that Employer has established drug testing policies, in compliance with the Federal Motor Carrier Safety Administration (FMCSA) and Federal Motor Carrier Safety Rules (FMCSR). One such policy is that if an employee is separated from employment longer than 30 days, the employee must undergo a drug test as a prerequisite to returning to work. (Tr. 14:15-16:3).

6. Claimant had been on medical leave for more than 30 days, so as a condition of returning to work, Claimant was required to undergo drug testing.

7. Mr. TH[Redacted] and AE[Redacted], Safety Manager for Employer, are trained and certified to administer drug tests per FMCSR. (Tr. 18:13-19:5 and 37:15-38:10). Either Mr. TH[Redacted] or Mr. AE[Redacted] administered the drug tests to employees for Employer. (Tr. 18: 8-12).

8. Claimant reported to Employer for modified duty on January 17, 2022, and underwent a urine drug screen (UDS) at Employer's location. Ms. AE[Redacted] administered Claimant's UDS test. Ms. AE[Redacted] had administered two UDS tests earlier that day before she administered Claimant's test. (Tr. 39:15-23).

9. Ms. AE[Redacted] testified as to the process she was trained to utilize when administering drug tests. Ms. AE[Redacted] credibly testified that she followed that same process with Claimant on January 17, 2022. (Tr. 38:14-39:11).

10. Ms. AE[Redacted] instructed Claimant to leave the specimen cup on the back of the toilet, and to not flush the toilet. When Ms. AE[Redacted] retrieved Claimant's sample from the back of the toilet, she immediately noticed the sample did not feel warm enough on her palm. (Tr. 41:4-14).

11. The specimen cups have a temperature strip already in place when they are delivered to Employer. Ms. AE[Redacted] testified that Claimant's UDS sample did not register on the temperature strip. The temperature strip registers at 90 degrees or higher. (Tr. 41:15-42:10).

12. Ms. AE[Redacted] told Claimant that his urine sample was not registering on the temperature strip, so he needed to provide another sample within three hours under observation, or she would have to count it as a refusal, if he failed to do so. (Tr. 42:11-43:24). Ms. AE[Redacted] testified that per FMCSA requirements and the Employer's policy, Claimant was not allowed to leave and come back later, or another day to retest. (Tr. 53:4-20).

13. Claimant testified that after he left the specimen on the toilet and came out of the restroom, Ms. AE[Redacted] spent five to ten minutes talking to him about on-line classes he needed to complete before she retrieved the specimen. (Tr. 61:12-62-2). Ms. AE[Redacted] testified that this was not accurate. She testified that it takes her seconds to collect the specimen from the back of the toilet. Further, she testified that there is a requirement, per her training and certification, that there is four-minute window from the time the sample is given and when it is tested. Ms. AE[Redacted] credibly testified that there was no delay in collecting Claimant's UDS sample as he asserted. (Tr. 74:3-22). The ALJ finds Ms. AE[Redacted]'s testimony to be more credible than Claimant's testimony, and finds that there was no delay in the collection of Claimant's UDS specimen.

14. Claimant testified that Ms. AE[Redacted] told him he could not leave. He further testified that he went outside to smoke a cigarette after she told him this. According to

Claimant, Ms. AE[Redacted] followed him outside and said that he could not leave her eyesight, so he followed her back inside to her office. (Tr. 62:16-63:16).

15. Claimant requested to speak with MB[Redacted], President of Operations. Ms. AE[Redacted] attempted to call Mr. MB[Redacted], but Claimant said, "I'm not doing it, I'm out," and he left and drove away. Ms. AE[Redacted] testified that she told Claimant not to leave, and that if he left she would have to count that as a refusal to take the test. (Tr. 44:2-20).

16. Ms. AE[Redacted] credibly testified that she followed Claimant as he left the building, and again told him if he left she would have to count that as a refusal to test. She told him repeatedly not to leave. Claimant got in his car and drove off. (Tr. 44:16-46:2).

17. Claimant testified that Ms. AE[Redacted] told him he could not leave, but he left nonetheless. Claimant testified that he only lived a few blocks away and told Ms. AE[Redacted] to call him when she was ready to administer the test again. He further testified that he had no idea he could be fired for leaving. (Tr. 62:16-63:21). The ALJ does not find this testimony credible. It is uncontroverted that Ms. AE[Redacted] told Claimant he could not leave. Claimant, however, chose to disregard Ms. AE[Redacted]'s admonition.

18. Ms. AE[Redacted] completed a Federal Drug Testing Custody and Control Form indicating, "[d] id not mark on the temp strip – Refused retest – left the building." After the first out-of-temperature test, but before he left Employer's office, Claimant signed the form. (Ex. K).

19. Ms. AE[Redacted] informed Mr. TH[Redacted] as to what had occurred with Claimant's out-of-temperature testing and his refusal to do another test. (Tr. 53:21-54:4).

20. It is undisputed that Claimant did not provide a second UDS sample on January 17, 2022. Mr. TH[Redacted] testified that Claimant's refusal to submit to a second test constituted a violation of Employer's drug testing policies and was grounds for immediate termination. Employer terminated Claimant's employment as of January 17, 2022. (Tr. 25:2-22).

21. Mr. TH[Redacted] testified that had Claimant not been terminated, Employer would have accommodated Claimant's modified duty restrictions on a full-time, full wage basis until such time Claimant was medically released to full duty. (Tr. 26:23-27:11).

22. Pursuant to the Employee Handbook, "[n]o driver shall refuse to take a required test." The Employee Handbook further provides, "[a]ny violation of this policy will result in discipline up to and including termination under Denney Transport independent authority, as provided for by the DOT." (Ex. J).

23. Claimant signed confirmation of his receipt of the Employee Handbook, and his understanding that his employment with Employer "is at-will." Claimant additionally signed the New Employee Orientation Checklist, wherein he confirmed he had "READ EMPLOYEE HANDBOOK." (*Id.*).

24. Claimant's drug test was reported as out of compliance due to his refusal to submit a second sample after the first sample was out of temperature. Mr. TH[Redacted] testified that a refusal to test is classified the same as a positive drug test result. (Tr. 22:18-25).

25. Claimant's actions in refusing to submit to a second drug test after the first out-of-temperature test, and then leaving the premises after explicitly being informed he could not do so, reflect a willful and knowing violation of Employer's drug policy.

26. The ALJ finds that Claimant was responsible for the termination of his employment with employer. The ALJ further finds that Claimant's TTD benefits should be terminated.

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).

Temporary Total Disability Benefits/Termination for Cause

To prove entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that claimant left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *Colo. Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). In order to obtain TTD benefits, §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. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restrictions 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 Elec.,* 971 P.2d 641, 649 (Colo. 1999).

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.

Under §§8-42-105(4) and 8-42-103(1)(g), C.R.S. ("the termination statutes"), a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

As found, Claimant acknowledged receipt of all Employer's Handbooks and written policies regarding Employer's drug testing policies. Employer's policies clearly state that

"[n]o driver shall refuse to take a required test," and "[a]ny violation of this policy will result in discipline up to and including termination." (Findings of Fact ¶ 23). Claimant's first UDS specimen did not measure on the temperature strip, so per FMCSA and Employer policies, Claimant was required to provide a second UDS, this time observed, within three hours of his first test, or it would be counted as a refusal to test. (*Id.* at ¶ 12). Ms. AE[Redacted] credibly testified that she told Claimant, after his first UDS test, that he could not leave the premises. (*Id.*). Claimant confirmed in his testimony that Ms. AE[Redacted] told him he could not leave the premises, and despite this direction, he left the premises, got in his car and drove away. (*Id.* at ¶ 14). Claimant contends he was unaware that by leaving the Employer's premises, he would be subject to termination. (*Id.* at ¶ 17). The ALJ does find not Claimant credible. The ALJ credits the testimony of Ms. AE[Redacted] that she repeatedly informed Claimant he should not leave the premises until he submitted a second sample or she would have to indicate a failure to retest. (*Id.* at ¶ 16).

Claimant willfully and knowingly violated Employer's drug testing policies which, in turn, directly resulted in his termination. (*Id.* at ¶ 25). The ALJ credits the testimony of Mr. TH[Redacted], as supported by the Employer's Handbook, that Employer was ready, willing, and able to accommodate Claimant's modified duty restrictions until he was released to full duty. (*Id.* at ¶ 21). As such, Claimant's wage loss after January 17, 2022 is directly attributable to his termination for cause and not to his industrial injury. (*Id.* at ¶ 26).

Overpayment of TTD Benefits

The Act defines an overpayment as money received by a claimant that:

1) Is the result of fraud;
2) Is the result of an error due only to miscalculation, omission, or clerical error asserted in a new admission of liability filed within 30 days of the erroneous admission of liability;
3) Is paid in error or inadvertently in excess of an admission or order that exists at the time the benefits are paid to a claimant; or
4) Results in duplicate benefits because of offsets that reduce death or disability benefits.

§8-40-201(15.5)(a), C.R.S.[1] Respondents must prove their entitlement to an overpayment by a preponderance of the evidence. *Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002).

As found, Claimant's entitlement to TTD benefits terminated as of January 17, 2022 due to Claimant's termination for cause. Respondents argue that Claimant, received money he "was not entitled to receive" and this constitutes an "overpayment." Respondents, however, rely upon the prior statutory definition of "overpayment." As set forth in the Act, the current version of the statute is effective as of January 1, 2022.

[1] The definition is effective January 1, 2022.

Consequently, Respondents have not proven that TTD benefits paid to Claimant after January 17, 2022 are an overpayment pursuant to §8-40-201(15.5)(a), C.R.S. The TTD benefits paid to Claimant from January 17, 2022 to date were not paid in error, nor were they the result of fraud. Thus, the TTD benefits that Claimant received from January 17, 2022 forward are not an overpayment, and Respondents are not entitled to recover this money.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant's entitlement to TTD benefits terminated as of January 17, 2022 due to Claimant's termination for cause.

2. Respondents have failed to prove by a preponderance of the evidence that they are entitled to claim an overpayment of all TTD benefits paid on or after January 17, 2022.

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: June 6, 2022

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

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Brian J. Beatty, D.O. that Claimant's left hip condition is causally related to her December 17, 2018 motor vehicle accident (MVA).

2. Whether Claimant has demonstrated by a preponderance of the evidence that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA.

STIPULATION

The parties agreed that Claimant is not currently at Maximum Medical Improvement (MMI) based on active treatment for her right lower extremity. Accordingly, the issue of permanent impairment as it relates to the left hip is not ripe for adjudication and is reserved for future determination.

FINDINGS OF FACT

1. Claimant is a 70 year-old female who suffered admitted industrial injuries on December 17, 2018 during a MVA. She was immediately transported to a hospital following the accident. Claimant was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture. She ultimately underwent right ankle surgery.

2. Claimant has a significant history of pelvic and SI joint injuries related to a 2016 non-work related fall off a ladder in which she shattered her pelvis. She was out of work for almost one year because of the injury. Specifically, on October 12, 2016 Claimant underwent an open reduction and internal fixation symphysis (ORIF), closed reduction percutaneous iliosacral screw fixation and right sacral fracture. A second ORIF surgery was performed on January 12, 2017 due to pelvic nonunion with hardware failure and Claimant underwent an external fixation to the anterior pelvis. Despite the injuries, Claimant eventually made a full recovery and was released to work full duty.

3. On January 28, 2019 Claimant began medical care with Authorized Treating Physician (ATP) Cathy Smith, M.D. for her December 17, 2018 MVA. Dr. Smith took a detailed history of the mechanism of injury and noted that Claimant had undergone surgery. Claimant was then discharged to Fairacres Manor on January 24, 2019 for continued rehabilitative care. A physical examination revealed no pain with direct palpation or manipulation of the lower back, SI joints, buttocks or bilaterally at the hips. Claimant had equal bilateral hip range of motion. Her work-related diagnoses included

fracture of the right calcaneus and right tibia, fracture of the mid-sternum, abdominal hematoma and chest wall hematoma.

4. On May 29, 2019 Claimant returned to Dr. Smith at UC Health. Since becoming more active, Claimant noticed increased lower back pain that she attributed to her gait because of walking in a bent forward position. A physical examination revealed an extremely antalgic gait while walking without the use of a cane. Dr. Smith addressed proper cane usage with Claimant. They discussed that the onset of lower back pain in all medical probability was due to Claimant's significant gait disturbance. Dr. Smith thus recommended therapy for Claimant's lumbar discomfort while also receiving treatment for right ankle stiffness and pain.

5. On August 7, 2019 Claimant reported to Dr. Smith a sudden escalation in lower back discomfort that began four to five days earlier. Claimant was unsure what caused the increased pain, but noted that she had a physical therapy appointment the day before the pain escalated. Claimant reported no pain with direct palpation or manipulation bilaterally at the hips.

6. On September 3, 2019 Claimant returned to Dr. Smith at UC Health for an examination. Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." Dr. Smith remarked that range of motion in the lumbar spine was extremely tender. Moreover, Claimant reported pain with palpation "in the posterior lateral left hip" and pain with external rotation of the left hip.

7. On September 13, 2019 Claimant underwent a CT scan of the abdomen and pelvis. The impression included chronic healed fractures of the pubic rami and lower sacrum with internal fixation hardware across the superior pubic rami and right SI joint as well as bilateral SI joint osteoarthritis. A lumbar CT scan revealed extensive degenerative changes throughout the thoracic and lumbar spine. There was no evidence of any acute trauma or failure of Claimant's hardware.

8. Dr. Smith determined that the escalation of Claimant's symptoms was likely multifactorial in nature. She attributed the increase to a change in exercises and physical therapy combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Gregory Reichhardt, M.D. for a physiatric consultation.

9. On September 18, 2019 Claimant visited Dr. Reichhardt and reported significant pain over the left SI and gluteal area while doing prone hip extensions in physical therapy. Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower

leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. After discussion, Dr. Reichhardt administered trochanteric bursa and trigger point injections.

10. By September 27, 2019 Claimant reported that she was doing 40% to 50% better following the trochanteric bursa and trigger point injections. However, because she continued to report SI gluteal area pain, Dr. Reichhardt recommended a hip MRI arthrogram.

11. Claimant subsequently underwent repeat trochanteric bursa and trigger point injections over time and generally obtained relief of her symptoms. She also received an SI joint injection and experienced pain relief.

12. On October 17, 2019 Claimant underwent a left hip MRI arthrogram. The impressions were: (a) limited arthrogram images of the left hip due to extensive metal susceptibility artifact from prior acetabulum fixation; (b) left greater than right trochanteric bursitis; (c) asymmetric atrophy of the left gluteus medius and gluteus minimus muscles when compared to the right side, likely sequela of a prior muscle injury or denervation change; and (d) degenerative disc disease of the lower lumbar spine.

13. Claimant returned to Dr. Reichhardt on October 18, 2019. He commented that the hip MRI confirmed Claimant had hip bursitis along with other pain generators. Dr. Reichhardt noted that it was difficult to determine whether Claimant had intra-articular hip involvement or SI involvement, but her examination was more prominent for the SI area.

14. Claimant subsequently underwent a left SI joint injection on January 3, 2020. On February 17, 2020 Claimant received a trochanteric bursa injection and trigger point injections to the gluteal area.

15. On October 21, 2020 Dr. Reichhardt placed Claimant at Maximum Medical Improvement (MMI). He diagnosed Claimant with a work-related MVA resulting in a sternal fracture, right calcaneal fracture and abdominal hematoma, status post ORIF for calcaneal fracture and lower back/left hip/SI area pain that included a "possible component of trochanteric bursitis, myofascial pain and possible non-work related L4 lumbar radiculopathy. With regard to the left hip, Dr. Reichhardt assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits. He recommended maintenance treatment for the left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years.

16. On March 25, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Brian J. Beatty, D.O. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal

fracture and left hip greater trochanteric bursitis. He agreed that Claimant reached MMI on October 21, 2020. With regard to the left hip, Dr. Beatty assigned a 33% extremity impairment rating that converted to a 13% whole person rating due to range of motion deficits. Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

17. Respondents filed an Application for Hearing to challenge Dr. Beatty's DIME determination. Specifically, Respondents asserted that Claimant had not sustained a ratable left hip condition related to her work injury.

18. On January 4, 2022 John Raschbacher, M.D. performed an independent medical examination of Claimant and testified at the hearing in this matter. Dr. Raschbacher reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant sustained a sternum fracture, abdominal wall hematoma, right fibula fracture and a comminuted right calcaneus fracture as a result of her December 17, 2018 MVA. Claimant reported that she developed left bursa symptoms due to limping so badly that she had pain in her hip and left buttock during physical therapy in August 2019. However, Dr. Raschbacher reasoned that Claimant's left hip condition and symptomatology was not related to her MVA and inconsistent with the mechanism of injury.

19. Dr. Raschbacher remarked that left hip trochanteric bursitis is located outside of and lateral to the hip joint. He explained that the bursa is well outside the hip joint and bursitis is inflammation of the bursa. Even if related to the injury, bursitis would not produce a permanent impairment. Further, bursitis is a fairly common problem that can become symptomatic without trauma and is frequently idiopathic. Here, imaging revealed that bursitis was present in both hips. Dr. Raschbacher testified that it was unusual that bursitis was present radiologically on both sides, but only symptomatic on one side. He noted that bursitis typically involves point tenderness, not dysfunction at the hip joint causing loss of motion.

20. Assuming Claimant suffers symptomatic bursitis, Dr. Raschbacher reasoned that it would not likely produce permanent impairment or limitations of hip motion. Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for the left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Dr. Raschbacher also noted it was unlikely that a physical therapist would recommend exercises that cause hip bursitis, and hip joint motion does not cause trochanteric bursitis.

21. Dr. Raschbacher testified that there were no medical records reflecting that Claimant sustained an acute hip or lower back injury as a result of her December 17, 2018 MVA. He noted that the left hip MRI clearly showed old muscle changes from the 2016 ladder injury. Further, trochanteric bursitis is not usually caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common

and typically patients have no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

22. Dr. Raschbacher also disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior pathology on the MRI related to the 2016 fall, and trigger point injections are not used to treat trochanteric bursitis.

23. On May 5, 2022 the parties conducted the post-hearing evidentiary deposition of ATP Dr. Reichhardt. Dr. Reichhardt disagreed with Dr. Raschbacher's causation assessment. He reasoned that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

24. Dr. Reichhardt explained that, based on his physical examinations, Claimant had very prominent tenderness over the trochanteric bursa. Even though she had generalized tenderness over other areas including the SI joint and some of the muscles around the hip girdle region, she was particularly tender over the bursa. After performing various examinations and injections, Dr. Reichhardt was able to obtain a better understanding of Claimant's probable pain generators. Notably, he ruled out labral tears based on the hip MRI.

25. Dr. Reichhardt detailed that, although Claimant obtained some improvement after SI joint injections, she continued to experience symptoms over the lateral aspect of the hip. He thus wanted to repeat the trochanteric bursa injection. Dr. Reichhardt explained that Claimant's source of pain was emanating from the bursa and caused reactive changes in the muscles around the hip joint under the hip girdle.

26. Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that, when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)*

(AMA Guides) Claimant warranted an impairment rating for the left hip based on range of motion limitations. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

27. Dr. Reichhardt recommended maintenance treatment for the left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He suggested treatment to the hip for a four-year period because injections either lose their benefit or people do not require them for functioning even if they still have symptoms. He summarized that Claimant's symptoms from the trochanteric bursa are affecting the myofascial girdle of the left hip. Moreover, because the altered gait could be contributing to Claimant's myofascial pain, Dr. Reichhardt recommended additional trigger point injections. Dr. Reichhardt thus reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA.

28. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that Claimant's left hip condition is causally related to her December 17, 2018 MVA. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Beatty's causation determination was incorrect. Initially, Claimant suffered admitted industrial injuries on December 17, 2018 during a MVA. She was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture.

29. Claimant received treatment for her injuries from ATP Dr. Smith. In a September 3, 2019 visit with Dr. Smith Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." After a CT scan of the abdomen and pelvis, Dr. Smith attributed the increase in pain to a change in physical therapy exercises combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Dr. Reichhardt for a physiatric consultation.

30. On September 18, 2019 Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. He then administered trochanteric bursa and trigger point injections. On October 17, 2019 Claimant underwent a left hip MRI arthrogram that revealed left greater than right trochanteric bursitis. After additional diagnostic testing and injections, Dr. Reichhardt determined that Claimant reached MMI on October 21, 2020 and assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits.

31. On March 25, 2021 Claimant underwent a DIME with Dr. Beatty. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal fracture and left hip greater trochanteric bursitis. Dr. Beatty agreed that Claimant reached MMI on October 21, 2020 and assigned a 33% extremity impairment rating for Claimant's left hip that converted to a 13% whole person rating due to range of motion deficits.

32. After conducting an independent medical examination, Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for Claimant's left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of left hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Furthermore, trochanteric bursitis is not frequently caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common and typically patients present no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

33. Dr. Beatty did not engage in a detailed causation analysis connecting Claimant's left hip condition to her MVA. However, the persuasive opinion of Dr. Reichhardt supports Dr. Beatty's DIME determination that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

34. Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that, when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides,* Claimant warranted an impairment rating for the left hip because of

range of motion deficits. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

35. Based on the medical records and persuasive opinion of Dr. Reichhardt, Dr. Beatty correctly assigned an impairment rating for Claimant's left hip condition. The contrary determination of Dr. Raschbacher is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Beatty's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

36. Claimant has demonstrated that it is more probably true than not that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA. Dr. Reichhardt determined that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

37. ATP Dr. Reichhardt recommended maintenance treatment for Claimant's left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He summarized that Claimant's symptoms from the trochanteric bursa affect the myofascial girdle of her left hip. Moreover, because the altered gait could be contributing to Claimant's myofascial pain, Dr. Reichhardt reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA. Similarly, DIME Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

38. In contrast, Dr. Raschbacher disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior MRI pathology related to the 2016 fall and trigger point injections are not used to treat trochanteric bursitis. Despite Dr. Raschbacher's determination, the medical records and persuasive opinion of ATP Dr. Reichhardt reflect that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to Claimant's December 17, 2018 MVA. Accordingly, Claimant is entitled to receive two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

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).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

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. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (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. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether

the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Beatty that Claimant's left hip condition is causally related to her December 17, 2018 MVA. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Beatty's causation determination was incorrect. Initially, Claimant suffered admitted industrial injuries on December 17, 2018 during a MVA. She was diagnosed with an abdominal wall hematoma, sternal fracture, distal fibula fracture on the right and a complex right calcaneal fracture.

9. As found, Claimant received treatment for her injuries from ATP Dr. Smith. In a September 3, 2019 visit with Dr. Smith Claimant noted significant difficulty walking due to back pain and radiation of the pain into her left groin, anterior thigh and lateral calf. Dr. Smith noted that Claimant's pain increased after attempting some physical therapy exercises where she was lying on her stomach and extending her left leg. Physical examination was positive for a "significant increase in triggers noted at the L5-S1 facet area and the upper SI joint." After a CT scan of the abdomen and pelvis, Dr. Smith attributed the increase in pain to a change in physical therapy exercises combined with different activities at home and an attempt to return to work that required prolonged sitting. Dr. Smith thus referred Claimant to ATP Dr. Reichhardt for a physiatric consultation.

10. As found, on September 18, 2019 Dr. Reichhardt noted the onset of left hip, groin, SI, and left leg pain while Claimant was undergoing physical therapy. He specified that within about a week of doing prone hip extensions, Claimant began experiencing significant pain over the left SI and gluteal area, the anterior aspect of the left thigh and the lateral aspect of the lower leg. Dr. Reichhardt diagnosed possible SI joint involvement, possible trochanteric bursitis and myofascial pain, possible internal hip derangement and possible lumbar radiculopathy. He then administered trochanteric bursa and trigger point injections. On October 17, 2019 Claimant underwent a left hip MRI arthrogram that revealed left greater than right trochanteric bursitis. After additional diagnostic testing and injections, Dr. Reichhardt determined that Claimant reached MMI on October 21, 2020

and assigned a 14% lower extremity impairment rating that converted to a 6% whole person rating based on range of motion deficits.

11. As found, on March 25, 2021 Claimant underwent a DIME with Dr. Beatty. Dr. Beatty reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported that she developed hip pain while doing "exercises" and then started to undergo therapy on her hip. Dr. Beatty's clinical examination revealed tenderness to palpation over the greater trochanteric on the left hip and limited range of motion. He diagnosed right calcaneal fracture and left hip greater trochanteric bursitis. Dr. Beatty agreed that Claimant reached MMI on October 21, 2020 and assigned a 33% extremity impairment rating for Claimant's left hip that converted to a 13% whole person rating due to range of motion deficits.

12. As found, after conducting an independent medical examination, Dr. Raschbacher reasoned that Dr. Beatty erroneously assigned an impairment rating for Claimant's left hip because the condition was not related to the initial mechanism of injury. There was no clear causal connection between the MVA and the development of left hip symptoms. Dr. Raschbacher also noted that Dr. Beatty did not perform any causation analysis with regard to Claimant's left hip bursitis. He testified that a MVA typically involves strains, sprains and broken bones, but is not usually associated with bursitis. Furthermore, trochanteric bursitis is not frequently caused by an acute traumatic event, altered gait or other specific incident. Instead, the condition is common and typically patients present no specific reason for the condition. Finally, while Dr. Raschbacher agreed that Claimant's symptoms of tenderness could be related to bursitis, range of motion limitations and pain in the hip joint with motion are not consistent with bursitis. Specifically, the bursa is not located within the hip joint and should not affect hip motion even when the condition is symptomatic and has not been injected.

13. As found, Dr. Beatty did not engage in a detailed causation analysis connecting Claimant's left hip condition to her MVA. However, the persuasive opinion of Dr. Reichhardt supports Dr. Beatty's DIME determination that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. He summarized that, while performing rehabilitation exercises for her right ankle injury and subsequent surgery, Claimant was extending her hip while lying prone and had an increase in symptoms. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

14. As found, Dr. Reichhardt noted that, while trochanteric bursitis and myofascial pain do not always produce impairment, Claimant clearly exhibited limited hip range of motion during exams over time and not merely on her date of MMI. Claimant had consistent range of motion and functional limitations in her left hip. Dr. Reichhardt explained that range of motion is affected because the muscles and tendons including the tensor fasciae latae and the iliotibial band cross the bursa. He thus commented that,

when the hip joint is moved, the iliotibial band will move across the bursa and cause pain or irritation. The left trochanteric bursa was thus the primary pain generator and the MVA caused or substantially contributed to Claimant's condition. Dr. Reichhardt reasoned that, based on the *AMA Guides,* Claimant warranted an impairment rating for the left hip because of range of motion deficits. He thus concluded that DIME Dr. Beatty properly assigned an impairment rating for Claimant's left hip.

15. As found, based on the medical records and persuasive opinion of Dr. Reichhardt, Dr. Beatty correctly assigned an impairment rating for Claimant's left hip condition. The contrary determination of Dr. Raschbacher is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Beatty's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

Medical Benefits

16. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular 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).

17. As found, Claimant has demonstrated by a preponderance of the evidence that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to her December 17, 2018 MVA. Dr. Reichhardt determined that Claimant developed hip pain as a result of her MVA. Specifically, she experienced muscle tightness because a gait deviation caused irritation of the bursa. Dr. Reichhardt also remarked that Claimant's symptoms developed while performing hip extension exercises that likely placed excessive stress on the bursa. Based on Claimant's overall clinical course, her responses to injections and physical examination, Dr. Reichhardt concluded that the trochanteric bursa was her primary pain generator.

18. As found, ATP Dr. Reichhardt recommended maintenance treatment for Claimant's left hip in the form of two trochanteric bursa injections per year and up to four sets of trigger point injections per year on an as-needed basis over the next four years. He summarized that Claimant's symptoms from the trochanteric bursa affect the myofascial girdle of her left hip. Moreover, because the altered gait could be contributing

to Claimant's myofascial pain, Dr. Reichhardt reasoned that the need for the injections is causally related to Claimant's December 17, 2018 MVA. Similarly, DIME Dr. Beatty recommended two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

19. As found, in contrast, Dr. Raschbacher disputed that trigger point injections were causally related to any injuries sustained in the MVA. He noted that Claimant has prior MRI pathology related to the 2016 fall and trigger point injections are not used to treat trochanteric bursitis. Despite Dr. Raschbacher's determination, the medical records and persuasive opinion of ATP Dr. Reichhardt reflect that additional medical benefits, including left hip trigger point injections and left hip bursa injections, are reasonable, necessary and causally related to Claimant's December 17, 2018 MVA. Accordingly, Claimant is entitled to receive two trochanteric bursa injections annually and up to four sets of trigger point injections annually, as needed, for four years.

ORDER

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

1. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Beatty's determination that Claimant's left hip condition is causally related to her December 17, 2018 MVA is incorrect.

2. Claimant is entitled to receive reasonable and necessary additional medical benefits, including left hip trigger point injections and left hip bursa injections, for her December 17, 2018 MVA.

3. The issue of permanent impairment as it relates to Claimant's left hip is not ripe for adjudication and is reserved for future determination.

4. Any other 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: June 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

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: **[Redacted]** Claimant, v. **[Redacted]** Employer, and **[Redacted],** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-091-771-005**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge ("ALJ"), Richard M. Lamphere on March 2, 2022 and April 25, 2022. The March 2, 2022 hearing was convened in Courtroom 1 of the Office of Administrative Courts (OAC) in Colorado Springs and was digitally recorded between 1:00 and 2:40 p.m. The April 25, 2022 hearing was conducted via video teleconference and digitally recorded on the Google Meets platform between 9:00 and 9:36 a.m.

Claimant was present for both hearings and testified on her behalf. She is proceeding *pro se*, i.e. without counsel. Respondents were represented at both hearings by [Redacted], Esq. In addition to Claimant's testimony, the parties took the evidentiary deposition of Dr. Wallace Larson on April 5, 2022. The written transcript of Dr. Larson's deposition testimony has been lodged with the OAC and is admitted into evidence. The ALJ has also received and listened to the audio recording of Dr. Larson's April 5, 2022 deposition. The audio recording of Dr. Larson's deposition is also admitted into evidence. In addition to the aforemtnioned testimony, the ALJ admitted the following exhibits into evidence: Claimant's Hearing Exhibits 1-7 and Respondents' Hearing Exhibits A-E. Finally, the ALJ takes administrative notice of the contents of files identified as W.C. No. 5-091-771-004 and W.C. 5-091-771-004 maintained by the OAC.

The parties presented, closing arguments at the April 25, 2022 hearing. Because Claimant raised concerns regarding the accuracy of the written transcript of Dr. Larson's deposition testimony, the ALJ ordered any video of Dr. Larson's deposition be produced to Claimant and the OAC within ten days of the April 25, 2022 hearing. As part of his order, the undersigned gave Claimant ten days after receipt of the video of Dr. Larson's deposition to submit supplemental argument to the ALJ. Respondents were given five days after receipt of Claimant's supplemental argument to file a written response. After fifteen days from the production of the video, the ALJ indicated that the case would be

at issue and ready for an order.[1] The ALJ was subsequently notified that while Dr. Larson's deposition was conducted by Zoom Teleconference, no video was captured and preserved. Nonetheless, audio of Dr. Larson's deposition was available and sent to Claimant, Respondent's counsel and the ALJ for review.

On May 2, 2022, Claimant filed, what the ALJ considers, a Motion to Add an Issue for Hearing. In her motion, Claimant alleges that there were "Discrepancies" between the audio of Dr. Larson's deposition and the written transcript prepared by Mile High Court Reporting & Video. On May 11, 2022, Claimant submitted additional documentation to the OAC for consideration by the ALJ. This documentation included a May 3, 2022 statement from DJ[Redacted] outlining her personal perceptions concerning the testimony of Dr. Larson. On May 13, 2022, Respondent's counsel filed a motion to strike Ms. DJ[Redacted]' statement on relevancy and hearsay grounds. By order dated May 17, 2022, the undersigned struck Ms.DJ[Redacted]'s statement. In the May 17, 2022 Order, the ALJ advised the parties that the issue of the alleged inconsistencies between the written transcript and the audio recording of Dr. Larson's deposition would be addressed, along with the other issues before the ALJ, in a full order containing specific findings of fact and conclusions of law. Neither party submitted supplemental argument based upon the May 17, 2022 order. Consequently, the matter is ready for an order.

In this order, [Redacted] will be referred to as "Claimant." [Redacted] will be referred to as "Employer" and [Redacted] will be referred to as "Insurer." Employer and Insurer may be referred to collectively as Respondents. All others shall be referred to by name.

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2018); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her claim should be reopened based on an alleged worsening of condition related to her October 12, 2018 industrial injury.

II. If Claimant established that she is entitled to a reopening of her claim, whether she also established, by a preponderance of the evidence, that she is entitled to additional medical treatment, temporary total disability (TTD) benefits and a disfigurement award.

FINDINGS OF FACT

[1] See the April 26, 2022 order of ALJ Lamphere.

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

Claimant's October 12, 2018 Industrial Injury and Treatment for the Same

1. Employer operates as a long term care facility housing residents who require various levels of help with activities of daily living (ADL) and management of chronic health conditions.

2. Claimant worked for Employer as the night shift nursing supervisor. She is a registered nurse (RN). In the early morning hours of October 12, 2018, Claimant was summons to a patient room by the nursing staff to assist in moving a resident to her bed for the night.

3. Claimant testified that the resident in question weighed 425 pounds and that when she arrived to the patient's room she found her dangling precariously from a Hoyer lift. Concerned that the resident was slipping out of the sling, Claimant ordered the staff to lower the patient to the floor so the sling could be repositioned and the resident safely lifted to her bed. According to Claimant, she placed pillows and blankets on the floor and cradled the patients head and neck from a kneeling position while the staff eased the resident to the floor. As Claimant stood back up, she experienced pulling and pain in her neck, shoulders and upper back. She completed an incident report and returned to work. Claimant tendered the incident report to her supervisor when she reported to work around 5:00 a.m. and went home after her shift, hoping that her pain would subside.

4. Once home, Claimant retired to bed but awoke around 2:00 p.m. with severe pain in her shoulders, upper back and lower back. She called her supervisor informing her she was going to take the evening off and went to the emergency department at Penrose Hospital where she was assessed with a strain of the left trapezius muscle.

5. Liability for Claimant's injuries was admitted and she began a course of conservative care[2], including physical therapy (PT) on October 21, 2018.

6. On November 26, 2018, Claimant returned to the emergency room at Penrose Hospital where she reported that she had been attending PT as part of her treatment plan for her work injury. Upon presentation to the ER, Claimant advised that her physical therapist had "felt something" concerning in her low back and that additional PT would be held until Claimant underwent an MRI. (Respondents' Exhibit (RE) C, p. 73). Claimant reported that she asked her authorized treating provider (ATP) under her workers' compensation claim for an MRI but none was ordered. (Id.). Claimant was in pain and tearful. (Id.). Accordingly, she was admitted to the hospital for observation and completion of an MRI of the thoracic and lumbar spine. (Id.). Imaging of the thoracic spine revealed "mild thoracic dextroscoliosis" and "mild

[2] Under the direction of Dr. Charles Patrick Higgins.

degenerative disc and facet joint changes but "[n]o significant spinal canal or neural foraminal compromise in the thoracic spine. (Id.) The C6-7 level of the cervical spine was also partially visible on the thoracic MRI and demonstrated "more advanced degenerative disc disease" along with a disc bulge or herniation was "partially demonstrated." (Id.). No MRI of the cervical spine appears to have been completed during Claimant's November 26, 2018 hospital admission.

7. On November 28, 2018, Claimant returned to Dr. Higgins for reevaluation. Claimant reported "ongoing and worsening pain in her neck that radiates down through her shoulders." Dr. Higgins erroneously documented that Claimant had an MRI of the cervical spine, which demonstrated a disc herniation at the C6-7 level. (RE C, p. 73). Claimant requested a neurosurgical referral and Dr. Higgins acquiesced to the same. (Id.).

8. On December 5th and 26th, 2018, Dr. Higgins again recommended that Claimant undergo both an orthopedic and neurology evaluation for her persistent symptoms and reported MRI findings. (RE C, p. 74).

9. Claimant sought additional care through the emergency room at Penrose Hospital on January 16, 2019. She reported that she was waiting for a workup with a spinal surgeon and was returning to the ER for continued pain. Spinal examination was entirely normal and non-tender to palpation. (Id.). Claimant requested a "steroid" injection, which was administered. She was also provided with valium and tramadol for use at home and discharged.

10. On February 4, 2019, Dr. Eric Ridings completed an Independent Medical Examination (IME) of Claimant at the request of Respondents. After completing a physical examination directed to the cervical spine, Dr. Ridings opined:

> My current impression is that the patient does not have a work-related cervical diagnosis, in that I do not see any examination evidence of abnormality that I would relate to the cervical spine. She does have at least a disc bulge at C6-7 seen on the thoracic MRI scan, but disc bulges are often asymptomatic as I suspect this one is at least currently, given the lack of findings or complaints in the cervical spine today.

(RE B, p. 67).

11. While Dr. Ridings did not believe Claimant had a work-related cervical diagnosis, he did conclude that Claimant had suffered a left greater than right shoulder strain that had become chronic causing myofascial pain and tightness. Nonetheless, Claimant's history of bilateral upper extremity paresthesia combined with the "poorly-visualized cervical disc abnormality on the thoracic MRI prompted Dr. Ridings to recommend that Claimant actually obtain a cervical MRI. (RE B, p. 67). He noted specifically that Claimant "did not have examination findings consistent with rotator cuff

injury or any other intra-articular pathology of either shoulder." (Id. at p. 66). Dr. Ridings completed an additional records review on March 26, 2019. (RE B, p. 56-59). Dr. Ridings concluded that the additional records contained "little" information and failed to change any of the opinions expressed in his February 4, 2019 IME report.

12. Claimant was referred to Dr. Kenneth Finn to assume/direct the care related to her October 12, 2018 industrial injury. (Re A, p. 18). Dr. Finn evaluated Claimant on April 11, 2019. (Id.). He noted mild positive impingement signs concerning the left shoulder along with decreased cervical range of motion. (Id.). He recommended MRI of the neck, additional PT and consideration of an MR/arthrogram of the left shoulder. (Id.).

13. On April 21, 2019, Claimant experienced an episode of syncope while grocery shopping. She was taken to the emergency room where an MRI of the cervical spine was performed. (RE A, p. 19). The MRI reportedly demonstrated a C4-5 right paracentral disc extrusion without significant cord compression or nerve root impingement. (Id.).

14. Claimant returned to Dr. Finn on May 3, 2019 in follow-up. (RE A, p. 19). Dr. Finn performed an electrodiagnostic study of the left upper extremity that he interpreted as falling within normal limits. (Id.). Because the left upper extremity was more affected than the right, testing of the right arm was deferred. (Id.). Dr. Finn noted that the recent cervical spine MRI demonstrated "multilevel spondylosis and disc extrusions which may be contributing to her symptoms . . ." (Id.). Consequently, he recommended a cervical epidural steroid injection (ESI).

15. Claimant underwent an IME with Dr. Lawrence Lesnak on May 24, 2019. (RE C). Following his medical records review and physical examination, Dr. Lesnak opined that Claimant might possibly have sustained a "mild soft tissue strain/sprain injury to her left suprascapular/scapular/upper trapezius musculature as a result of the 10/12/2018 reported occupational incident." (RE C, p. 79). He felt that Claimant's "expanding symptomatology" raised the specter for an underlying anxiety/personality disorder based on his conclusion that Claimant had no reproducible objective findings to support any of her ongoing complaints. (Id.). According to Dr. Lesnak, if Claimant had suffered a sprain/stain injury to her left suprascapular/scapular/upper trapezius musculature, this injury would have completed resolved within several weeks/months. (Id.). Consequently, he opined that Claimant had "no current diagnoses . . . that would correlate with her current subjective complaints that would be related in any way to the occupational incident of 10/12/2018." (Id.).

16. Claimant's symptoms continued unabated throughout the balance of 2019 and into 2020. She continued to treat with Dr. Finn and additional diagnostic testing to include repeat electrodiagnositc studies and an MR arthrogram of the left shoulder were performed. The potential for multiple sclerosis was raised and neurology consults were completed.

17. On May 27, 2020, Claimant was evaluated by Dr. Wallace Larson in an IME setting at Respondents request. (RE D). Dr. Larson was asked to provide opinions regarding Claimant's current diagnosis and what, if any, diagnosis were causally related to the October 12, 2018 work incident involving lowering the heavy resident in question to the floor. After taking a history, completing a records review and physical examination, Dr. Larson opined as follows:

> The patient does not have any objectively identified diagnosis or injury related to her reported incident at work 10/12/2018. Whether the claimed injury occurred from supporting the patient's head while she was in a kneeling position, or, as reported to me, as she was arising from a kneeling position, it is highly unlikely she sustained any injury at all. Her symptoms are not consistent with any anatomic injury. Clearly, arising from a kneeling position would not have caused injury that she describes as involving nearly her entire body.
>
> * * *
>
> Radiographic and MRI findings are clearly those of a pre-existing [condition]. There is no reasonable indication those conditions were aggravated by her occupational exposure.

(RE D, p. 100).

18. The ALJ finds the opinions of Drs. Ridings, Lesnak and Larson regarding the relatedness of Claimant's persistent shoulder and neck symptoms to the October 12, 2018 work incident involving the lowering a heavy resident to the floor are strikingly similar to one another.

19. On October 29, 2020, Claimant sought a neurosurgical evaluation with Dr. Paul Boone. (Claimant's Exhibit (CE) 2; see also RE A, p. 40). Dr. Boone noted that Claimant reported experiencing constant back pain with sensory disturbance and subjective weakness in her lower extremities. (Id. at p. 41). She also complained of intermittent neck pain and constant pain involving her upper extremities bilaterally which began after the October 12, 2018 work incident. (Id.). Dr. Boone reviewed the images of a cervical MRI obtained September 13, 2020. According to Dr. Boone, Claimant's September 13, 2020 cervical MRI demonstrated the "presence of mild diffuse spondylitic changes as manifested by the presence of some signal change within all cervical disc space segments." (RE A, p. 44). He also noted the presence of a disc bulge/osteophyte complex at C6-7, which resulted in "moderate right and moderate to severe left bilateral foraminal stenosis." (Id.). No other focal areas of significant cervical disc herniation or cervical spinal stenosis were identified on radiographic imaging. (Id.). Dr. Boone opined that Claimant's symptoms and associated findings on imaging did not warrant neurosurgical intervention. (RE A, p. 45). Instead, Claimant

was encouraged to pursue additional injection therapies and an evaluation by a pain management specialist to address her ongoing symptoms. (Id.).

20. On November 25, 2020, Claimant underwent an evaluation by Dr. David Weinstein with respect to her complaints of bilateral shoulder pain. During this encounter, Claimant reported, "diffuse pain throughout the shoulder girdles and arms." (RE A, p. 46). She reported having EMGs and suggested that she had carpal tunnel syndrome. (Id.). Following a comprehensive physical examination, Dr. Weinstein opined that Claimant's imaging (MRI scans) did not demonstrate any high-grade full or partial thickness rotator cuff or labral tears and that her persistent symptoms were consistent with "severe myofascial inflammation." (Id. at p. 49). He recommended additional physical therapy and suggested that Claimant was approaching MMI. (Id.).

21. Claimant was placed at maximum medical improvement (MMI) on November 25, 2020, by Dr. Thomas Higginbotham as part of a Division Independent Medical Examination (DIME) performed January 5, 2021. (RE A). In his DIME report dated January 10, 2021 and amended February 2nd and 4th, 2021, Dr. Higginbotham assessed Claimant with a strain injury involving the neck and shoulders along with "moderate cervical spondylosis without radiculopathy" and "bilateral shoulder impingement syndrome." (Id. at p. 32). Dr. Higginbotham assigned a 25% combined whole person impairment rating and indicated that surgery had not been "recommended for [Claimant's] neck or shoulders. (Id. at pp. 33-35). He noted further that additional injection therapy was not likely to improve her condition. He recommended a self-directed care program consisting of breathing techniques stretching, automassage, postural righting maneuvers, improved nutrition and a general strengthening and aerobic exercise program. (Id. at p. 35). Finally, Dr. Higginbotham recommended that Claimant avoid any further litigation associated with the workers' compensation system. (Id.).

22. Claimant testified that she experienced a worsening of her neck/upper extremity symptoms on February 1, 2021.

23. Respondents filed a Final Admission of Liability (FAL) on February 26, 2021 admitting to Dr. Higginbotham's assigned impairment rating. (RE A, p. 1) The FAL did not admit liability for maintenance care after MMI.

24. Claimant through her then attorney, [Redacted], Esq. filed an objection to Respondent's February 26, 2021 FAL. As part of her objection to the February 26, 2021 FAL, Claimant also filed an Application for Hearing (W.C. No. 5-091-711-004) endorsing Permanent Partial Disability and Overcoming the DIME opinions of Dr. Higginbotham as to impairment. The March 17, 2021 Application for Hearing did not endorse ongoing maintenance care as an issue for determination at hearing.

25. On March 11, 2021, Claimant returned to Dr. Boone for follow-up regarding her persistent neck pain. (CE 3). During this encounter, Claimant reported experiencing constant neck pain, which was exacerbated by head movement. (Id.).

With the exception of left greater than right upper extremity radicular type pain, Dr. Boone's diagnostic impression remained unchanged. (Id.). Non-operative and operative treatment options were discussed and after consultation, Claimant elected to proceed with surgical intervention directed to the C6-7 osteophyte complex causing severe bilateral foraminal stenosis. (Id.). Accordingly, Claimant was scheduled for C6-7 total disc replacement surgery. (Id.).

26. Although she did not include the C6-7 operative note in her exhibit packet, Claimant testified that she underwent a total disc replacement surgery for severe spinal stenosis. A follow-up IME report authored by Dr. Larson on April 29, 2021 indicates that Claimant presented with a well-healed left anterior cervical incision and reported that she underwent cervical disc replacement surgery on April 7, 2021. (RE D, p. 102).

27. In his April 29, 2021 IME report, Dr. Larson documents that Claimant was "uniquely" uncooperative with the IME by refusing to provide any meaningful history or allow any meaningful examination. (RE D, p. 108). He reiterated his opinion that Claimant had "no occupationally related diagnosis. (Id.). He opined further that Claimant need for a C6-7 disc replacement surgery was not related to her claimed October 12, 2018 industrial injury.

28. On June 4, 2021, Dr. Larson issued a brief report outlining a medical record authored by Dr. Richard Meinig following an April 20, 20921 visit with Claimant. (RE B, p. 101). Dr. Larson's June 4, 2021 report indicates simply that Claimant was evaluated by Dr. Meinig for bilateral shoulder impingement and that a left subacromial shoulder injection with Kenalog was administered. (Id.). The report also indicates that a recent MRI arthrogram demonstrated "some tendinosis changes and some type II acromion changes but no evidence of full-thickness cuff tearing." (Id.). Dr. Larson's summery of the content of Dr. Meinig's April 20, 2021 report is devoid of any mention concerning the need for shoulder surgery.

29. Claimant did not supply a copy of the April 20, 2021 report of Dr. Meinig or any other report opining that Claimant needs shoulder surgery and that the need for this surgery is causally related to Claimant's October 12, 2018 industrial injury.

30. On July 19, 2021, Claimant filed an Unopposed Motion with Withdraw her March 17, 2021 Application for Hearing with a request that she be permitted to file a successor application within 30 days of the order granting her motion. Claimant acknowledged that should she not refile an Application for Hearing within 30 days, her claim would close subject to the reopening provisions of the Workers Compensation Act. Claimant's motion was granted by order of ALJ William Edie on July 21, 2021. Claimant's counsel then moved to withdraw from the claim and the claim was closed by the Office of Administrative Courts.

31. As Claimant did not file an Application for Hearing within the 30 days prescribed by the July 19, 2021 Motion and the July 21, 2021 Order of ALJ Edie, the claim closed subject to reopening.

32. On November 16, 2021, Claimant filed an Application for Hearing endorsing among other issues, petition to reopen. This Application was designated as W.C. No. 5-091-711-005. Attached to her Application was a type written statement from Claimant indicating that she underwent spinal surgery as a consequence of her October 12, 2018 industrial injury and that she had been diagnosed with bilateral damage caused by her work injury which was worsening for which surgical intervention had been recommended.

Dr. Larson's April 5, 2022 Deposition Testimony

33. As noted, Dr. Larson testified by deposition on April 5, 2022. Claimant contends that the written transcript of Dr. Larson's deposition testimony is incomplete as the court reporter omitted material testimony from the record. In order to assess the accuracy of the written transcript, the ALJ ordered that the video tape of Dr. Larson's deposition be produced and forwarded to the Claimant and the ALJ for review. As referenced above, no video of the deposition was captured. Nonetheless, an audio recording of Dr. Larson's deposition had been preserved and the same was forwarded to Claimant and the ALJ for review.

34. The ALJ has listened carefully to the audio recording of Dr. Larson's deposition testimony. After thorough review of the audio recording, the ALJ is not convinced that any significant omissions in Dr. Larson's testimony were made by the court reporter. Rather, review of the audio recording reveals that on a couple of occasions a small error was made when transcribing the audio to text when preparing the written transcript of Dr. Larson's testimony. For example, during the audio recording Respondents counsel asked Dr. Larson whether there was "any objective medical evidence that these symptoms which Ms. Fieldgrove testified to had their onset on February 1 of 2021 *were due to* a natural progression and worsening of the work-related incident and its sequelae." (Audio Recording of Dr. Larson's April 5, 2022 deposition, Time Stamp, 8:49–9:09). This question was transcribed incorrectly as: "Is there any objective medical evidence that these symptoms which Ms. Fieldgrove testified to had their onset on February 1 of 2021 *would lead to* a natural progression and worsening of the work-related incident and its sequelae?" (Deposition Transcript of Dr. Larson, p. 8, lines 9-13)(emphasis added). While small errors in the transcription appear to have occurred during Dr. Larson's deposition, the ALJ finds Claimant's contention that wholesale omissions occurred in reducing Dr. Larson's testimony to written text unfounded.

35. Dr. Larson testified that Claimant's October 12, 2018 work incident did not cause or substantially and permanently aggravate Claimant's C6-7 spinal stenosis. (Deposition Transcript of Dr. Larson, hereinafter Depo. Trans., p. 7, ll. 18-25). He testified that spinal stenosis most commonly arises from the progression of the aging process which overtime results in bone spur formation, which causes impingement, and narrowing of the spinal contents around the neck, including the spinal nerves. (Depo. Trans., p. 10, ll. 8-12). According to Dr. Larson, Claimant's C6-7 spinal stenosis was

most probably caused by the natural age-related changes in her neck. (Id. at p. 10, ll. 20-23). He opined further that Claimant's need for surgical intervention at C6-7, as performed by Dr. Boone on April 7, 2021, was not related to worsening, as a natural progression of Claimant's work-related incident, but rather due to progression of the age-related changes in her neck. (Depo. Trans., p. 8, ll. 20-25 and pp. 9-10).

36. In support of his opinions, Dr. Larson testified that the evidence presented supported a conclusion that Claimant did not suffer an acute injury to the neck on October 12, 2018. (Depo. Trans., p. 11, ll. 1-7). Indeed, he suggested that the presence of "spondylitic changes" and the reference to an osteophyte complex and retrolisthesis in the medical record supports a conclusion that Claimant's spinal stenosis and need for surgery were caused by progressive age-related related degenerative forces rather than the incident of October 12, 2018. (Depo. Trans. Pp. 11-13).

37. Claimant challenged the opinions of Dr. Larson on the basis that he did not have her MRI report or the March 11 or April 7, 2021 reports of Dr. Boone at the time he completed his April 29, 2021 IME. Claimant's questions to Dr. Larson imply her belief that his opinions should be rejected because he was insufficiently educated as to the condition of her neck or the surgery performed. The ALJ is not persuaded. Dr. Larson testified that subsequent to his April 29, 2021 IME, he had an opportunity to review Dr. Boone's March 11, 2021 report. (Depo. Trans. P. 38, ll. 3-7). According to Dr. Larson, there was nothing in Dr. Boone's March 11, 2021 report that indicated that the Claimant's neck condition was occupationally related or related to trauma. (Id. at p. 39, ll. 3-8). Indeed, everything in the March 11, 2021 report of Dr. Boone supported his conclusion that the condition of Claimant's neck was "consistent" with degenerative change in the cervical spine and the recommendation for disc replacement surgery was to treat those degenerative changes. (Id.).

38. The totality of the evidence presented persuades the ALJ that Claimant has failed to establish that her bilateral shoulder condition has worsened since the October 12, 2018 work incident. Although Claimant asserted in her Application for Hearing and Petition to Reopen that the condition of her shoulders was worsening and she had received a recommendation for surgery, she failed to present evidence of the same. Indeed, the evidence presented supports a finding that since the October 12, 2018 work incident, Claimant has and continues to suffer from bilateral shoulder pain and paresthesia, which Dr. Weinstein concluded was consistent with "severe myofascial inflammation" and could not be treated surgically.[3] Based upon the evidence presented, it appears that the Claimant last treated for her shoulders on April 20, 2021, when she was seen by Dr. Meinig.[4] Similar to the opinions of Dr. Finn and Higginbotham, Dr. Meinig concluded that Claimant's primary diagnosis was impingement of both shoulders. Thus, it does not appear that Claimant's working diagnosis has changed by April 20, 2021. The ALJ is aware that Dr. Meinig's report was summarized by Dr. Larson. Nonetheless, that summery does not indicate that Claimant needs surgery and Claimant failed to present corroborating evidence that her

[3] See Dr. Weinstein's November 25, 2020 report, RE A, p. 49.
[4] See RE D, p. 101.

diagnosis, had changed, her symptoms were worse or that shoulder surgery was reasonable, necessary and related to the October 12, 2018 work incident.

39. Based upon the evidence presented, Claimant has failed to present sufficient evidence of a worsening shoulder condition that would warrant removing her from MMI and reopening the case for additional medical benefits. Rather, the evidence presented persuades the ALJ that Claimant's current subjective complaints of worsening shoulder pain are unreliable and that her current pain and paresthesia likely represent symptoms similar to those she was experiencing when he was placed at MMI.

40. Concerning her cervical spine complaints, the ALJ credits the opinions of Drs. Ridings, Lesnak and Larson to find that Claimant has failed to establish a causal connection between her C6-7 spinal stenosis and her need for disc replacement surgery to the October 12, 2018 work incident in question. While Claimant's belief that the October 12, 2018 incident lead to her neck symptoms and need for spinal surgery is sincere, the objective medical evidence, i.e. the MRI[5] and the deposition testimony of Dr. Larson support a finding that Claimant's C6-7 spinal stenosis was probably caused by the natural progression of age-related degenerative disc disease and the development of an osteophyte complex at this spinal level. The ALJ is convinced that the Claimant's degenerative disc disease and osteophyte complex caused associated stenosis at C6-7 by narrowing the tunnel for and pressing upon the spinal nerves exiting the facet joints which subsequently gave rise to Claimant's neck pain and subsequent need for surgery.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *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. 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 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.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the

[5] As commented upon by Dr. Boone on October 29, 2020 and March 11, 2021.

record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. 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. As found above, Claimant's subjective reports of worsening shoulder pain and need for shoulder surgery are not supported by the evidence presented. Moreover, the evidence presented fails to support Claimant's contention that there is a causal connection between her neck pain and her need for surgery to the October 12, 2021 work incident. While the ALJ is convinced that Claimant's reports of neck pain were/are credible and that her disc replacement surgery was reasonable and necessary, the medical evidence persuades the ALJ that the need for such treatment was not causally related to the October 12, 2018 incident involving the lowing of a heavy resident to the floor as Claimant described.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from progressive age-related degenerative disc and spine disease, the natural progression of which probably resulted in her neck symptoms and need for treatment, including surgery at C-6-7.

Claimant's Request to Reopen Her Claim Based on a Change Condition

E. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). In seeking to reopen a claim, the claimant shoulders the burden of proving his/her 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).

F. The question of whether a claimant has proven a change in condition of the original physical or mental condition, which can be causally connected to the original compensable injury, is one of fact for determination by the ALJ. *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); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). In this case, Claimant contends that the evidence supports a conclusion that she has proven that her shoulder condition, an injury traceable to the original compensable injury has worsened since being placed at MMI by Dr. Higginbotham. As found, the ALJ is not convinced. Here, Claimant failed to present persuasive evidence that her shoulder symptoms have worsened with the passage of time or that she needs surgery to address that worsening. Rather, the credible evidence presented supports a conclusion that Claimant's principal diagnosis has not changed and she continues to experience symptoms similar to those she had when she was placed at MMI. As presented, the evidence supports a conclusion that Claimant likely suffers from persistent severe myofascial inflammation of the shoulders girdles, which is not amenable to surgery. Because Claimant has failed to present sufficient evidence of a worsening condition and because an authorized provider has not indicated that she requires additional treatment for her shoulders[6], Claimant's request to reopen her claim based upon a change in the condition of her shoulders must be denied and dismissed.

G. Claimant also contends that she is entitled to reopen her case based upon a change in the condition of her neck, which worsening ultimately caused her to undergo a C6-7 disc replacement and fusion procedure with Dr. Boone on April 7, 2021. Respondents contend that Claimant's neck pathology and her need for spinal surgery are unrelated to the October 12, 2018 incident wherein Claimant assisted in lowing a heavy resident to the floor. Indeed, Respondents contend that Claimant's persistent cervical symptoms and need for spinal surgery related to the natural progression of an underlying preexisting degenerative condition at C6-7. On this point, the ALJ agrees with Respondents. Here, the evidence presented supports a conclusion that Claimant failed to establish the requisite causal connection between her cervical condition and her need for surgery to the October 12, 2018 work incident in question.

H. 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

[6] The ALJ is without authority to order an authorized treating physician to provide a particular form of treatment, which has been recommended only by a physician unauthorized to treat. *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAO May 4, 1995); *see also Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO May 15, 2018).

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). As found, the ALJ credits the opinions of Dr. Larson to conclude that Claimant's C6-7 spinal stenosis and ultimately her surgery was probably caused by the natural progression of age-related degenerative disc disease and the development of an osteophyte complex at this spinal level. Moreover, the is not convinced that the described mechanism of injury (MOI), i.e. Claimant's employment related duties aggravated, accelerated or combined with this pre-existing condition to give rise to Claimant's disability or need for treatment. Rather, the evidence presented supports a conclusion that Claimant's neck pain and need for treatment, including surgery was, more probably than not, related to the natural age-related progression of her chronic pre-existing degenerative disc and spine disease.

I. 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).

J. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as asserted by Respondents, the occurrence of symptoms at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment or the incident occurring January 2, 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, the ALJ credits the opinions of Dr. Larson to find and conclude that Claimant's neck pain/dysfunction is probably related to and emanating from the natural progression of a pre-existing condition rather than the duties of her employment on October 12, 2018. While the ALJ commends Claimant's work ethic and devotion to her position, there simply is a dearth of forensic evidence to connect her current symptoms and neck pathology to the incident occurring on October 12, 2018. Accordingly, Claimant has failed to establish the requisite causal connection between her neck condition and need for surgery to her work activities on October 12, 2018. Because Claimant has failed to establish she suffered a compensable neck injury as defined by the aforementioned legal opinions, her request to re-open her claim based upon a worsening of this condition must be denied and dismissed. As Claimant has failed to carry her burden of proof to reopen her claim, the additional claims for

benefits, including her request for additional medical treatment, temporary disability benefits and disfigurement need not be addressed.

ORDER

It is therefore ordered:

1. Claimant's request to reopen her claim is denied and dismissed.

DATED: June 8, 2022

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

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

CERTIFICATE OF 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:

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

Date: June 8, 2022

/s/ Matthew Chavez
Court Clerk

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on April 8, 2021 within the course and scope of his employment with Employer.

IF CLAIM IS DEEMED COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized and reasonably necessary to cure and relieve him of the effects of the injury.

III. Whether Claimant has proven by a preponderance of the evidence what was Claimant's average weekly wage.

IV. Whether Claimant has proven by preponderance of the evidence that he is entitled to temporary disability benefits from April 9, 2021 through the present.

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a penalty for Employer's failure to have workers' compensation insurance.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on issues of compensability, medical benefits, reasonably necessary and related, average weekly wage, and other compensation, including indemnity benefits for lost wages. The Office of Administrative Courts logged the AFH on January 24, 2022.

Attached to the AFH was an Employers' First Report of Injury dated December 18, 2021 purportedly completed by David Gallivan, Manager of Legislation on behalf of Corvel Corporation and Colorado Uninsured Employer's Board. Also attached were multiple forms completed by Claimant for Corvel.

Respondent Employer did not file a Response to the Application for Hearing.

A hearing was previously scheduled before ALJ Kara R. Cayce on April 14, 2022. Upon receiving the pro se (self-represented) advisement from the ALJ, Claimant indicated he wished to proceed. Employer moved for an extension of time to retain counsel. Claimant objected to the extension as he did not wish further delays. The ALJ found good cause for the extension and issued an order granting the extension of time to commence the hearing for up to 45 days. ALJ Cayce advised in the April 14, 2022 order that the

parties proceeding pro se were responsible for being familiar with and complying with the OAC policy, applicable rules and statutes.

At the rescheduled May 24, 2022 hearing both parties again appeared pro se. This ALJ also advised the parties that they were responsible to know the OAC policy and rules of procedure as well as the Rules of Evidence, the statutory and case law authority. Both Claimant and Employer indicated that they had made attempts to obtain counsel without success and that they wished to proceed with the hearing at this time.

FINDINGS OF FACT

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

A. Claimant's testimony of alleged injury

1. At the time of the hearing Claimant was sixty years old. Claimant worked for Employer as of January 2021 as a mechanic.

2. On April 8, 2021 Claimant was assigned the task of dismantling a Nissan pathfinder. Claimant stated that was using a socket wrench, attempting to loosen the screws that attached the motor to the chassis of the vehicle. One of the screws was not coming lose. He applied a lot of force to get it to loosen up. Claimant testified that, while he was exerting all the force he could, the screw broke and the right arm over extended in a jerky movement. He stated that it caught him by surprise and the posture change caused a wrenching of the right shoulder, and pop. He immediately felt an unbearable pain in the right shoulder. Claimant was in such extreme pain that all he could do in the moment was sit down on an adjacent tire.

3. Claimant testified that multiple individuals were in the shop when the accident happened and came over quickly. Claimant had to rest for a while before he went to report the injury to the shop manager. His coworkers advised him to seek medical attention right away. The owner of the shop was in Mexico at the time, but Claimant advised him of the accident when he returned.

4. Claimant stated he made an appointment at Denver Health Medical Center and was evaluated. He was provided with some care and he returned to work but not at the same level of activity or at full capacity. He was performing easy work. His shoulder problems did not improve and, following diagnostic testing, he was advised by the providers that he required surgery for the shoulder.

5. Claimant testified that his employer continued to pay him half of his wages for a while, but that it did not fully compensate him for his loss of earnings. He continued to work light duty, being paid his full salary until his August 24, 2021 surgery date and following the surgery he was not able to return to work as his physician did not authorize his return to work. His Employer stopped payments at that time. Employer called Claimant to advise him that he would no longer continue payments until he returned to work.

6. Claimant indicated that he has not returned to normal and does not have full strength or range of motion in the injured shoulder. He was not capable of returning to work at the time of the hearing as he believed the nerves and tendons were affected. This caused him significant depression and financial stress. He was forced to sell his vehicle to meet his essential expenses. He noted that he was unable to pay rent or meet his other needs for the last several months. He is scared that he will be evicted and he and his disabled wife will have nowhere to live. He also became depressed because of this situation where he was unable to work due to the injury.

7. Claimant's weekly wage was $1,200. He was paid $600.00 per week from August 25, 2021 until October 24, 2021. His employer asked that he convey to his physician he be allowed to return to his regular job but Claimant was unwilling to do so as he continued to have right shoulder problems.

8. His surgery took place on August 25, 2021 and he continues to have problems with his right shoulder. He showed this ALJ the five arthroscopic port scars on his right shoulder. Four were small incisions scars no larger than a dime. The fifth scar was approximately two inches long close to the armpit.

B. Employer's testimony

9. Employer, (owner) stated he had no workers' compensation insurance. He stated that he noted that he had a certain responsibility to Claimant but that other of his workers were complaining that he was paying Claimant and Claimant was not working. He also stated that Claimant failed to provide any medical reports or receipts. He stated that he paid Claimant for a while but then could no longer continue to do so as he saw no sign that Claimant could return to work.

10. Owner stated that he had been travelling on the date of the alleged injury but denied that the accident could happen in the manner Claimant stated. He was not provided with any broken bolts or any evidence that the accident happened. Owner believed Claimant for a while but then determined that he no longer did. He stated that he had been running his business for 14 years without any incidents or problems like this. Owner stated that Claimant should have been able to gage the amount of force to exert to remove the screw without any accidents.

C. Medical Records

11. Claimant was seen on April 9, 2021 at the Lowry Family Health Center for Denver Health by Daniel R. Wells-Prado, M.D. The records are unclear as to the diagnosis or history in this record as multiple of the records were in Spanish. However, the records show that Claimant was administered the Moderna COVID-19 vaccine at that time intramuscularly into the left deltoid muscle. The records also show that he had a screening for colorectal cancer, prediabetes and was noted to be at risk for heart disease.

12. On April 28, 2021 Claimant was seen by Raenna P. Simcoe, M.D. regarding acute onset of pain after fall the previous day onto the right shoulder. The history of present illness states “Yesterday slipped on water and fell onto R shoulder. Felt sharp pain from front to back, feels clicking, pain now 6/10, worse with lifting overhead, tried ibuprofen but did not last long, heat also helped, has some tenderness, no numbness or tingling.” Dr. Simcoe ordered x-rays.

13. On July 7, 20221 Nurse Stacy Morsch documented that Claimant was seen for a right shoulder trauma from “a fall a couple of months ago.” It also noted that x-rays showed no fracture and was positive for degenerative changes. On exam Claimant showed weakness with empty can test. He also showed tenderness of the anterior and bicep tendon, and decreased range of motion. Nurse Morsch order a right shoulder MRI to rule out ligament injury based on physical findings.

14. Claimant was seen at the Outpatient Medical Center Radiology/MRI Department on July 20, 2021. The MRI findings as read by Dr. Scott Tomsick showed a massive rotator cuff tear involving the supraspinatus, infraspinatus and subscapularis tendons, including muscle atrophy of the supraspinatus, glenohumeral joint synovitis and biceps tendinosis.

15. Claimant was initially evaluated by Jarrod T. King, M.D., an orthopedic surgery specialist, on August 19, 2021. They obtained a history of injury at work while working on removing an engine out of a vehicle, when he sustained a right shoulder injury. His impression was that Claimant was “right-hand-dominant 59-year-old auto mechanic with an acute traumatic large rotator cuff tear with pseudoparalysis of the right shoulder.” They assessed that Claimant was “indicated for early surgical intervention to prevent severe disability associated with the severe rotator cuff tear to the patient's dominant extremity.” He stated that there was no role for conservative care and Claimant was booked for surgery for an acute rotator cuff repair. He reviewed the diagnostic testing and found that the x-rays of the right shoulder revealed impingement related anatomy and the MRI arthrogram scan demonstrated full-thickness supraspinatus and a partial infraspinatus tear, which is retracted back to the glenohumeral joint line, with no significant atrophy of the supraspinatus or infraspinatus, they suspected some damage to the subscapularis. Claimant was immediately scheduled for surgery for the following Wednesday.

16. Claimant was seen on August 25, 2021 for a traumatic rotator cuff tear as an outpatient surgery patient by Dr. King and his PA Jamie Stambaugh. On exam they found Claimant’s right shoulder had loss of range of motion and that Claimant was catastrophically weak with external rotation and supraspinatus testing.

17. The operative report showed Dr. King performing arthroscopic double row rotator cuff repair of the subscapularis, and double row repair of the supraspinatus and infraspinatus tendons, as well as open subpectoral biceps tenodisis, arthroscopic subacromial and subcoracoid decompression with acromioplasty and coracoplasty, arthroscopic extensive glenohumeral debridement, and coplaning of AC joint.

18. Immediately following the surgery, Dr. Benjamin Lippert, at the surgeon's request, administered an upper extremity block with Marcaine.

19. Following surgery, Claimant was restricted from any lifting, sent home in a sling. Claimant was instructed to return to see Dr. King two weeks post-surgery and to start physical therapy within one to two weeks. The initial physical therapy visit was scheduled for September 1, 2021 wit the Outpatient Rehabilitation Services PT. The follow up with orthopedics was scheduled for September 9, 2021 with PA Jamie Stambough of the Orthopedic Department at DHMC.

20. There is a record by PA Stambaugh on December 1, 2021 for recheck and follow up of the right shoulder.

21. As found, Claimant has failed to show by a preponderance of the evidence that he was injured in the course and scope of his employment. While Claimant testified about an event on April 8, 2021, the medical records tendered at hearing fail to show that is the case. In fact, the medical records support that he was seen on April 9, 2021 for conditions unrelated to a right shoulder injury. The records persuasively note that Claimant had a slip due to water and fell onto his right shoulder causing injury on or about April 27, 2021. This is documented by Dr. Simcoe on April 28, 2021. It was at this time when the provider ordered an x-ray. The history is also documented by Nurse Morsch on July 7, 2021. As found, the Denver Health medical records are more persuasive than Claimant's account of events and testimony in this matter. Claimant is specifically found not credible.

CONCLUSIONS OF LAW

A. Generally

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is

not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

Here, as found, Claimant has failed to prove that he was injured in the course and scope of his employment with Employer. As found, the medical records are more persuasive than Claimant's testimony in this matter. On April 9, 2021 Claimant was seen

at Denver Health and there is no indication that Claimant complained of right shoulder injury. However, on April 28, 2021 Dr. Simcoe documented that Claimant had had a fall the previous day when he slipped on water and fell on his right shoulder. This is further documented on July 7, 2021 by Nurse Morsch. The documentation in the medical records do not support a determination of compensability in this matter. Therefore, Claimant's claim for compensation is denied and dismissed. The remaining issues are moot in light of this determination.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim with regard to an alleged injury on April 8, 2021 is *denied* and *dismissed*.

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

DATED this 10th day of June, 2021.

Digital Signature

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

ISSUES

- Did Claimant prove he was Respondent's "employee" performing services under an express or implied contract of hire when he suffered injuries on July 2, 2020?
- If Claimant proved a compensable injury, the ALJ will address these additional issues:
- What is Claimant's average weekly wage?
- Is Claimant entitled to TTD benefits commencing July 2, 2020?
- Is Claimant entitled to reasonably necessary medical benefits to cure and relieve the effects of his injury?
- Is Respondent liable for penalties for failure to carry workers' compensation insurance at the time of Claimant's accident?

FINDINGS OF FACT

1. Respondent is an automotive repair shop in Manassa, Colorado. The company has been operated by [Redacted, hereinafter LH and DH respectively] as a sole proprietorship for over 40 years. Mr. LH performs all repair work, while Ms. DH primarily tends the books and other administrative tasks. The automotive repair work is performed out of a garage on a property immediately adjacent to Mr. and Ms. H's home. Respondent never had any employees other than Mr. and Ms. H prior to June 30, 2020.

2. On July 2, 2020, Claimant suffered severe injuries on Respondents' property when a trailer tongue accidentally dropped on his feet. Mr. H was backing up a pickup truck to connect the trailer and Claimant was standing next to the tongue. The trailer tongue was resting on a jack. The tongue dislodged from the jack and fell on Claimant's feet.

3. Claimant suffered multiple severe fractures from of the accident. Ms. DH drove him to the emergency department in Manassa. Claimant was airlifted to Memorial Hospital in Colorado Springs, where he was hospitalized for six days. He was discharged from the hospital on July 8, 2020.

4. Claimant had surgery on August 6, 2020 to fuse multiple joints in his left foot. Although the surgery was successful from a technical standpoint, Claimant continued to experience severe pain in his feet. He was subsequently diagnosed with complex regional pain syndrome (CRPS).

5. Claimant applied for Medicaid during his hospital stay. Medicaid has covered treatment related to the injury.

6. The medical records contain no persuasive evidence regarding whether Claimant was Respondent's employee at the time of the accident.

7. Claimant first met the LH and DH at their home on June 30 or July 1, 2022. The introduction was made by Chief Roman Marrufo of the Manassa Police Department. Chief Marrufo had brought Claimant to the H's home to inquire whether Respondent had any work available for Claimant. Chief Marrufo has known the Hs for many years because Respondent provides automotive repair services for the Town of Manassa.

8. Chief Marrufo could not recall the specific date on which he and Claimant went to the H's home.

9. Claimant testified Respondent hired him to work as a laborer and "shop hand" for $8 per hour. Claimant assumed he would be working 40 hours a week, "Monday through Friday," because he understood that to be Mr. H's work schedule. Claimant testified the initial meeting took place on "the last day of June 2020." He testified Mr. LH offered him a job and he was told to start work the next day. Claimant testified the offer and acceptance were purely verbal, and conceded there is no written documentation of an employment relationship. Claimant testified he worked for Respondent on July 1, 2020, helping to remove a transmission and other repair tasks.

10. There is no persuasive evidence Claimant ever sought or received pay for any work he allegedly performed before the July 2, 2020 accident.

11. Regarding the injury, Claimant testified he was helping Mr. LH hook up a trailer to a pickup truck when the accident occurred. Claimant was standing next to the trailer, "guiding" Mr. LH as he backed up the truck. The trailer dislodged from the jack and landed on Claimant's feet.

12. Ms. DH confirmed that Claimant and Chief Marrufo came to the house and ate lunch, although she could not recall the exact date. Claimant asked whether Respondent had any work. Claimant stated he had no experience as an automotive mechanic. Ms.DH testified that even if Respondent had offered Claimant a job, it would not have been "Monday through Friday" because the shop is closed on Friday. She recalled that Claimant had returned "the next morning and just kind of hung around out in the garage." It is unclear whether the "next day" to which she referred was the day of Claimant's injury, or the day before the injury. Ms. DH testified the trailer was parked at a different location than Claimant described in his testimony. She knew Mr. LH had backed the truck to hook up the trailer, but did not witness the accident itself. Ms. DH took Claimant to the hospital, but could not go in with him "because of COVID." Ms. DH testified she "didn't hear a whole lot about" Claimant's injuries after taking him to the hospital. Claimant later contacted Ms. DH and requested "gas money," and she gave him some cash. She disagreed that Respondent ever hired Claimant. She testified Respondent's

financial records contain no indication that Claimant was hired or paid any wages. Ms. DH confirmed Respondent had no workers' compensation insurance.

13. Mr. LH recalled meeting Claimant over lunch at his home. He agreed that Claimant asked whether Respondent had any work available. They briefly discussed Claimant's work experience, and Claimant indicated he had never done automotive repair work before. Mr. LH was unsure if or how Claimant could help, but he told Claimant to come back "tomorrow" and they could talk more about it. Mr. LH testified he told Claimant, "**if** I hired him, I could only pay $8 an hour." Mr. LH testified Claimant was injured "the day after" their initial conversation. He testified Claimant had been at the shop for less than an hour before the accident occurred. Mr. LH disputed Claimant's testimony he was working at the shop the day before the accident. He was adamant that the accident occurred "the next day" after Claimant and Chief Marrufo came to the house. Mr. LH testified he had merely discussed a possibility of employment with Claimant but never offered him a job.

14. Claimant's testimony is no more persuasive than Mr. and Ms. H's testimony.

15. Claimant failed to prove he was performing services for Respondent under a "contact of hire" at the time of his accident.

CONCLUSIONS OF LAW

It is undisputed that Claimant suffered severe injuries on July 2, 2020 when the trailer fell on his feet. However, to receive workers' compensation benefits, Claimant must prove he was an "employee" performing services under a "contract of hire" when the accident occurred. Section 8-40-202(1)(b). Even if Claimant was on Respondent's property to discuss a possible job, injuries suffered before a contract of hire comes into existence are not compensable. *E.g., Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991) (job applicant injured during a pre-employment physical was not entitled to compensation where employment was not guaranteed even if she had passed the test).

An "employee" is defined as an individual "who performs services for pay" under an express or implied "contract of hire." Sections 8-40-202(1)(b) and (2)(a). Contracts of hire are subject to the same rules as other contracts. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994). A contract of hire may be found even though not every formality attending commercial contracts has been observed as long as the fundamental elements of contract formation are present. *Id*. at 1387. Claimant must prove he was Respondents' employee by a preponderance of the evidence. *Hall v. State Compensation Insurance Fund*, 387 P.2d 899 (Colo. 1963). No particular form of evidence is required, and the existence of a contract of hire must be determined based on the totality of evidence in the particular case. *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861, 864 (Colo. App. 1996).

As found, Claimant failed to prove he was an "employee" performing services under a "contract of hire" at the time of his accident. Because there is no documentary proof that Claimant was Respondent's employee, the evidence on this point consists

solely of testimony. Chief Marrufo confirmed that Claimant had asked about work at the initial meeting, but offered no testimony regarding any agreement to hire Claimant or whether Claimant actually performed any work for Respondent. The case thus comes down to conflicting testimony of interested witnesses. Claimant appeared a credible witness. But Mr. and Ms. H appeared credible too. Claimant's testimony was no more persuasive than the testimony offered by Respondent. It is possible that Claimant was "hired" by Respondent to work in the repair shop. It is at least equally likely that Claimant and Respondent were merely exploring the possibility of an employment relationship, but no offer or acceptance had actually occurred. Based on the evidence presented, the ALJ cannot say that one scenario is more likely than the other. Claimant has the burden of proof in this matter, and this evidentiary equipoise prevents Claimant from proving a contract of hire as "more likely than not."

ORDER

It is therefore ordered that:

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

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

DATED: June 10, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-733-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that an L5-S1 laminectomy and transforaminal lumbar interbody fusion (TLIF) surgery recommended by Clint Devin M.D., is related to her admitted work injury.

FINDINGS OF FACT

1. Claimant is 49 years old, and has worked for employer for approximately five and one-half years as a dietary assistant and dietary manager. Employer operates a hospital and an assisted living facility, and Claimant's job duties have included meal preparation, general kitchen work, stocking products, and delivering meals.

2. Claimant has a history of chronic lower back issues dating to 2004 when she sustained an injury while working for a different employer. Since that time, Claimant has experienced intermittent issues with her lower back, including radicular symptoms in her right leg and foot. (Ex. C, D, E, F, and G). In May 2016, Claimant underwent a discectomy at the L5-S1 level, after which her symptoms improved. (Ex. F). In January 2018, Claimant underwent a second lumbar discectomy at the L5-S1 level for a recurrent disc herniation. (Ex. I). Claimant testified that following the 2018 surgery, she felt good and did not have any further radiating symptoms. Claimant testified that after her 2018 surgery, her back issues did not affect her ability to perform her job duties for employer.

3. On October 28, 2020, Claimant was transporting meals from the hospital to the assisted living facility. The meals were contained in two plastic totes with handles on each side of the tote. Claimant was carrying two totes in front of her torso when she slipped on an icy sidewalk. Although Claimant did not fall to the ground, her legs split apart, resulting in admitted injuries.

4. Later on October 28, 2020, Claimant saw Frank Tong, D.O., at the Middle Park Medical Center emergency department, reporting pain in her left shoulder and hip pain. Dr. Tong diagnosed Claimant with a left trapezius strain with radiculopathy, and a left hip strain. Claimant reported minimal hip pain, mild hip tenderness, and normal hip range of motion. Claimant did not report any issues with her lower back, and Dr. Tong found no lumbar spinal tenderness. (Ex. 4).

5. On November 3, 2020, Mark Wisner, D.O., at Middle Park Medical Center, saw Claimant for cervical pain, including radicular symptoms. Dr. Wisner diagnosed her with cervicalgia, cervical radiculopathy, and trapezius strain, with concerns for a possible cervical disc herniation. (Ex. 4). Claimant underwent a cervical MRI on November 31, 2020, which confirmed cervical disc issues at C5-6 and C6-7. (Ex. 10). Over the following nine months, Claimant received various evaluations and treatment for her cervical spine

symptoms, including physical therapy, massage, medications, and cervical epidural steroid injections. (Ex. 4, 5, 7, and 8).

6. Between October 28, 2020, and July 29, 2021, Claimant intermittently reported non-specific lower back pain. For example, on December 17, 2020, Claimant reported that she felt the positioning of her neck and arm bothered her lower back. (Ex. 4). Claimant also reported to physical therapy that she had chronic lower back pain that had worsened. (Ex. 5). When Claimant saw nurse anesthetist Kellie Marie Logue, CRNA, she reported "chronic low back pain" with an onset "years ago" and constant duration. (Ex. 8). Claimant's medical records do not document reports of lower back radicular symptoms, or specific treatment for lower back pain between the October 28, 2020 injury and July 29, 2021.

7. Claimant's first documented complaint of acute back pain following her work injury was on July 29, 2021, nine months after her injury. On July 29, 2021, Claimant reported to Dr. Wisner "new onset" back pain, with pain across the lower back including radiation and a rare stabbing sensation in the right buttock. On examination, Dr. Wisner noted lumbar spasms and tenderness, with decreased range of motion. Straight leg raise tests were negative on both the left and right. Dr. Wisner assessed that Claimant had a "new onset lumbar strain, likely related to compensation in movements due to neck pain and radiculopathy." (Ex. 4). Dr. Wisner offered no further explanation as to how compensation for Claimant's neck pain caused or contributed to a lumbar strain.

8. On August 2, 2021, Claimant saw Clint Devin, M.D., at Steamboat Orthopaedic & Spine Institute. Dr. Devin noted Claimant's two prior lumbar discectomies had left her with "saddle anesthesia and paresthesias in her right buttock and leg area," and these symptoms were "obviously concerning to her, but the neck is the more pressing issue at this point." Dr. Devin's record from August 2, 2021, does not note any specific examination of Claimant's lumbar spine or diagnosis related to her lumbar symptoms. (Ex. 7).

9. On August 31, 2021, Claimant underwent surgery on her cervical spine. (Ex. 7).

10. On September 30, 2021, Claimant reported to Dr. Wisner that she was experiencing post-surgical numbness in her right foot and lower back pain. Dr. Wisner indicated Claimant's right foot numbness was of uncertain etiology, stating: "question compressive neuropathy from surgical positions v spinal nerve compression from original [injury]." He ordered a lumbar x-ray to investigate Claimant's right foot numbness. (Ex. 4). The lumbar x-ray was interpreted as showing "increased moderate degenerative changes," compared to an October 9, 2017 MRI of Claimant's lumbar spine. (Ex. R).

11. On October 25, 2021, Claimant saw Dr. Devin and reported she had struggled with back pain for years, and that her back tended to be sore with activity, and could worsen with coughing or sneezing. Dr. Devin noted Claimant had symptoms consistent with nerve tension and radicular pain on the right and recommended an MRI and lumbar x-rays. (Ex. 7). The lumbar x-ray was interpreted as showing questionable static grade 1 anterolisthesis of L4 and L5 versus rotational artifact, and lower spine predominant disc

degeneration and facet arthropathy. (Ex. 10). Dr. Devin increased Claimant's previous prescription for gabapentin to address her lumbar symptoms. (Ex. 7).

12. On November 1, 2021, Claimant woke at approximately 3:00 a.m. with severe right-sided lower back pain with shooting pain down her right leg, and increased right foot numbness. Claimant was evaluated at the emergency department by Jason Stuerman, M.D., and provided medication for pain. She was advised to follow up with Dr. Wisner the following day. (Ex. 9).

13. The following day, November 2, 2021, Claimant saw Dr. Wisner, reporting pain across the right low back and down the back of her leg to her mid-posterior thigh, with new whole-foot numbness. (Claimant's foot numbness was previously limited to the outside of her foot.) Dr. Wisner indicated he suspected Claimant's condition was "related to original fall given complaint of hip pain at the time." (Ex. 4).

14. Claimant's lumbar MRI was completed on November 9, 2021, and showed a large (10 mm) right-sided disc herniation at L5-S1. (Ex. 10). Dr. Wisner then referred Claimant for s spine surgery consultation. (Ex. 4).

15. Claimant returned to Dr. Devin on November 15, 2021, for evaluation of her lumbar spine. Dr. Devin reviewed Claimant's MRI, and diagnosed Claimant with a recurrent L5-S1 lumbar disk herniation. He recommended a right L5-S1 laminectomy and TLIF (transforaminal lumbar interbody fusion) (Ex. 7).

16. Claimant continued to report right foot numbness and lower back pain in visits with Dr. Wisner on November 18, 2021, December 21, 2021, January 25, 2022, and February 25, 2022. At the December 21, 2021 visit, Dr. Wisner noted that Dr. Devin had unexpectedly passed away, and that Claimant required a new neurosurgical consultation. (Ex. 4).

17. On March 14, 2022, Claimant saw Alex Sielatycki, M.D., at Steamboat Orthopaedics. Dr. Sielatycki noted that Dr. Devin's proposed surgery was denied by workers compensation. Dr. Sielatycki noted that Claimant continued to have pain in the low back radiating down the right leg with right foot numbness and Claimant "reports the onset [of] this was the fall at work." He further noted that Claimant "had a history of discectomy prior to that number of years prior [sic], but it has not been a problem until the fall as she reports." Dr. Sielatycki diagnosed Claimant with lumbar recurrent disk herniation at L5-S1. In addressing causation, he wrote: "By her history and report of symptom onset at the time of her fall, I think it is reasonable to conclude that the fall contributed in part 50% or more to the recurrence of symptoms. I think it is also reasonable to pursue fusion as Dr. Devin had recommended right-sided approach L5-S1, facetectomy with fusion of L5-S1." (Ex. 7). Dr. Sielatycki's record from Mach 14, 2022 does not indicate that he reviewed Claimant's medical records in reaching his causation opinion. Given that Claimant's medical records do not indicate that Claimant experienced low back pain or radicular symptoms on or near October 28, 2020, the ALJ finds Dr. Sielatycki's causation opinion unpersuasive.

18. On January 11, 2022, Robert Messenbaugh, M.D., performed a record review at Respondents' request. Dr. Messenbaugh was admitted as an expert in occupational medicine and orthopedics, and testified at hearing. He opined that Claimant's lumbar disc herniation and S1 nerve root compression shown on the November 9, 2021 were not causally related to her October 28, 2020 work injury. Consequently, he opined that the recommended lumbar surgery, although reasonable and necessary, was not causally related to her work injury.

19. Dr. Messenbaugh credibly testified Claimant's L5-S1 spinal level was compromised prior to October 28, 2020, due to her prior surgeries. He further opined it would not take a significant amount of force to result in a disc herniation due to her compromised state. He credibly testified that if Claimant had sustained a lumbar disc injury on October 28, 2020, one would expect symptoms to appear at that time. However, Claimant did not report significant low back symptoms or symptoms of lumbar radiculopathy until months after the initial injury. He also opined that the negative straight leg raise tests Dr. Wisner performed on July 29, 2021 indicated that "though [Claimant] might have been experiencing some low back pain, she was not showing physical examination evidence of having lumbar nerve root compression." (Ex. T). Dr. Messenbaugh credibly testified that the symptoms attributable to an L5-S1 disc protrusion would primarily affect the L5-S1 dermatome, and would result in radicular symptoms in the Claimant's foot and lower leg, and an absent ankle reflex.

20. Claimant credibly testified that prior to October 28, 2020, she was able to perform her job functions and did not have any radicular symptoms. She testified that from January 2021 through August 2021, she was experiencing a deep ache in her lower back, and occasional tingling sensations in her right leg. No credible evidence was admitted indicating that Claimant experienced radicular symptoms related to her lower back between October 28, 2020 and July 29, 2021.

CONCLUSIONS OF LAW

Generally

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

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

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

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

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

Claimant has failed to establish by a preponderance of the evidence that the need for the surgery proposed by Dr. Devin (and later Dr. Sielatycki) is causally related to Claimant's industrial injury. The proposed surgery is intended to address the lumbar disc hernia shown on Claimant's November 9, 2021 MRI and the resulting symptoms. The evidence does not establish that either the lumbar disc hernia or the associated symptoms are causally related to Claimant's October 28, 2020 work injury. The ALJ finds credible Dr. Messenbaugh's opinion that if Claimant sustained a lumbar disc injury at the

time of her October 28, 2020 injury, symptoms would have begun shortly thereafter. The symptoms attributable to an L5-S1 disc protrusion would primarily affect the L5-S1 dermatome, and would manifest as radicular symptoms in the Claimant's foot and lower leg, and an absent ankle reflex. Claimant did not report any radicular symptoms until July 29, 2021, when she reported brief stabbing sensation into the right buttocks. Dr. Wisner performed straight leg raise tests at that time, which were negative for lumbar nerve root compression, suggesting that no disc herniation was present at that time. Claimant later reported radicular symptoms consistent with a disc herniation on leg on September 30, 2021, when she reported symptoms in her foot and leg, which became severe on November 1 2021.

Although Dr. Wisner and Dr. Sielatycki opined that Claimant's lumbar symptoms were causally related to her October 28, 2020 injury, neither persuasively explained how the emergence of radicular symptoms in either July 2021 or September 2021 was caused by or related to Claimant's injury nine to eleven months earlier. Moreover, neither physician credibly opined as to how Claimant's L5-S1 disc herniation was caused by or related to her work injury, other than the fact that Claimant's symptoms emerged after the injury. Dr. Sielatycki's opinion is based on the incorrect assumption that Claimant's lower back symptoms began at the time of her fall, and is thus not persuasive.

Given Claimant's history of lumbar surgery, the significant time gap between her injury and the first report of symptoms, and the fact that no physician has credibly opined that Claimant's lumbar disc herniation was caused by or aggravated by the October 28, 2020 injury, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence a causal connection between her October 28, 2020 injury and the symptoms and anatomical pathology for which surgery is recommended.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the L5-S1 laminectomy and transforaminal lumbar interbody fusion (TLIF) surgery recommended by Dr. Devin and Dr. Sielatycki 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: June 10, 2022

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that his low back condition is causally related to his October 7, 2020 work injury.

II. Whether Claimant proved by a preponderance of the evidence that his left knee anterior horn medial meniscus tear and need for surgery for that tear are causally related to his October 7, 2020 work injury.

FINDINGS OF FACT

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

1. Claimant was 32 years old at the time of the hearing in this matter. He worked for Employer as a painter.

2. Medical history was significant for preexisting complaints of lumbar spine pain. On December 10, 2019 Claimant was seen at Clinica Family Health by Britt Severson, M.D., who documented that Claimant was seen for shooting low back pain and gluteal pain that radiated to the dermatome anteriorly. On physical exam, Dr. Severson noted normal low back ROM[1] flexion, extension, lateral bending and rotation; no paraspinal muscle TTP[2], normal strength, sensation, normal gait and no edema in LE[3] bilaterally; negative straight leg raise bilaterally with visual overview of all four extremities as normal. Dr. Severson also noted normal inspection and range of motion of the cervical and thoracic spine. On review of systems he documented negative for back pain, joint pain, joint swelling and neck pain though he noted some muscle weakness. However, Claimant was assessed with acute left sided low back pain with left sided sciatica despite the normal exam. Dr. Severson suspected only a mild strain of the low back muscles.

3. Claimant was attended by Dr. Severson on April 16, 2020 and June 1, 2020 but without mention of a lumbar spine or sciatica condition, only hypertension as well as complaints of anxiety and dizziness.

4. Claimant was working for Employer on October 7, 2020. His supervisor requested that he paint the railings of the balconies of the apartments they were working on. He was using a boom or lift in order to reach to paint them. The boom would only go down to about four feet above the ground and Claimant would jump off to the ground. On October 7, 2020 he jumped off of the boom and felt immediate onset of pain in his left

[1] Range of Motion
[2] Tender to palpation
[3] :Lower extremities

knee. Claimant resumed painting but he had to lean to the right because of the left knee pain. Claimant then called his supervisor to advise that he could no longer continue painting due to the pain. His coworkers had to help him get off the lift. After consulting with his supervisor, they took him home, where he stayed for two days. Claimant stated that his knee swelled up and that he had swelling also in the thigh and lower leg. Claimant testified he remembered having problems with the left hip and low back from the date of the injury but they were not as severe as the left knee pain.

5. On October 9, 2020 PA-C Kelli Eisenbrown of AFC Urgent Care evaluated Claimant for left leg injury after Claimant jumped off of a lift on October 7, 2020 and reported left knee pain and an odd feeling in his left knee since the injury, including pain and instability. She documented that Claimant had an abnormal left knee, tender to palpation at the superomedial joint line and overlying the medial meniscus. She ordered x-rays and medication for pain. She also referred Claimant for an MRI, due to instability of the left knee and concerns with possible ACL tear, as well as to an orthopedic specialist. She stated that the objective findings were consistent with history and mechanism of injury and was to return to clinic following the orthopedic evaluation. Claimant was limited to sedentary work and no lifting.

6. Employer filed an Employer's First Report of Injury (FROI) on October 14, 2020 noting a left knee sprain at approximately 4:00 p.m. on October 7, 2020. The FROI notes that Claimant reported the injury on the date of incident.

7. On October 19, 2020 PA-C Chelsea Rasis of Concentra documented that the sprain to the left knee was a result of Claimant jumping down from a lift boom. He stated that the left knee worsened during the remainder of the day in the medial aspect of the left knee and that he had swelling in the medial joint for the first three days, which improved with a RICE regimen.[4] PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee that was dull and associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. Claimant had abnormal range of motion of the left knee. He stated that the objective findings were consistent with history and mechanism of injury. PA Rasis instructed Claimant on gait, and the proper use of crutches while walking, sitting and navigating stairs safely. PA Rasis ordered physical therapy, an MRI and an interpreter as well as a brace for the left knee. Claimant was limited to modified work. The October 21, 2020 evaluation with PA Rasis appears to be a duplicate of the prior visit. In follow up visits he continues to mention that Claimant continues to have pain in the medial aspect of his left knee.

8. Claimant was attended by PA Rasis again on October 28, 2020. Rasis noted Claimant had a heavy poking pain that was constant in the left medial knee with tenderness over the anteromedial aspect of the left knee and over the medial collateral ligament as well as abnormal range of motion. Claimant was worse with bending of the left knee, squatting and walking. Claimant was using the brace and crutches and reported

[4] RICE stands for rest, ice, compression and elevation.

that he had swelling sometimes. Rasis documented that Employer had no light duty available so Claimant was not working.

9. On October 28, 2020 Respondents filed a General Admission of Liability admitting to medical benefits and temporary disability benefits, specifically noting that they were admitting liability for only the left knee injury.

10. An October 31, 2020 left knee MRI showed a small bone contusion of the anterior peripheral medial femoral condyle, a borderline shallow trochlear groove and edema within Hoffa's fat pad. The report was issued by Dr. Robert Leibold of Health Images. It did not document any problems with the menisci.

11. On November 18, 2020 Claimant continued to complain of pain in the medial aspect of the left knee. The symptoms of moderate pain occur constantly. Autumn Schwed, D.O. documented instability, stiffness, tenderness and painful walking with exacerbating factors of kneeling, squatting and walking. Dr. Schwed stated that the objective findings were consistent with history and mechanism of injury. Claimant continued with follow-up appointments at Concentra with multiple providers that documented the pain in the medial aspect of the left knee with anterior and lateral pain.

12. On January 6, 2021, Dr. Theodore Villavicencio took over as Claimant's primary treating physician at Concentra (the ATP), and he has remained in that role.

13. On February 1, 2021 Claimant started seeing Stephanie Best, P.T. She documented Claimant with pain in the left knee with medial side pain that feels swollen, and grabbing when trying to put weight through the leg, up/down stairs, squatting and kneeling. She stated that Claimant had mild limitation in hip rotation, was able to achieve full depth squat with notable effort and had multiple areas of myofascial trigger points present throughout the quadriceps, gastric and hamstring. She laid out a treatment plan for the following four weeks.

14. On February 9, 2021 Ms. Best noted that Claimant's lower extremity pain resolved with the prior trigger point dry needling and only had the familiar medial knee pain remaining.

15. Michael Hewitt, M.D. attended Claimant on February 15 2021 and found mild medial joint line tenderness of the left knee. He reviewed the MRI findings with Claimant and recommended and injected lidocaine into the anterolateral knee to decreased inflammation.

16. On February 16, 2021 Ms. Best stated that Claimant's pain had resolved with the injection the prior day though had some returning pain with squats but applied ice pack at the end of the PT session. Claimant continued to attend PT for strengthening and TDN with pain most notable along the medial aspect of the left knee. By March 25, 2021 Claimant reported he was riding a bike and treadmill to improve endurance and by April 12, 2021 he was able to try intermittent jogging with some soreness but doing well. However, by April 27, 2021 Claimant returned to work and started having leg pain again.

17. On April 16, 2021 Claimant was reporting some popping on his left knee to Dr. Villavicencio, who continued to document the pain in the medial aspect of the left knee with anterior and lateral pain with tenderness diffusely over the anterolateral aspect and

diffusely over the anteromedial aspect. Dr. Villavicencio also continued to state that objective findings were consistent with history and work-related mechanism of injury, providing Claimant work restriction.

18. On April 30, 2021 Claimant complained to Dr. Villavicencio that he had some stabbing pains that started in the left foot, going up to lower back that comes and goes. This is the first time that Dr. Villavicencio provided a diagnosis of lumbar spine strain and made a referral to physical therapy to start treating Claimant's lumbar spine. There is no apparent causation analysis or even examination of the spine in this document nor is there any mention of objective findings other than joint pain generally.

19. On May 4, 2021 Claimant complained to Ms. Best that he had occasional back pain since the injury but that the knee symptoms had been more prominent. He reported that the pain started in his foot up to his left low back and into his hip and buttocks, along the left side of his ribcage area, especially when using the foam roller. Claimant reported pain between the shoulder blades on May 10, 2021 that had been present for the last couple of days, as well as pain in the foot and calf while walking.

20. On May 14, 2021 Claimant reported that he had tried to carry a bucket at work, that was about 50 lbs., and had left sided back pain.

21. Claimant described feeling overall better on May 17, 2021, the pain in the back and leg was minimal, his knee was still sore and he was getting "sore" between the shoulder blades and spine, but not pain. However, following body weight squatting Claimant reported pain that initially felt like cramping in the left flank area, intensified to feel "like my nerve" was "angry" and shooting pain from the foot up into the left buttock, up the back and into the shoulder blade.

22. On May 18, 2021 Dr. Villavicencio noted that Claimant had a setback the prior day in physical therapy, noting leg and back complaints but also noted that Claimant was worse in the left medial aspect of the left knee with anterior and lateral pain in the left knee, noting that Claimant was in moderate distress. He specifically noted that the chief complaint was that "[T]he patient presents today with follow up LT knee pain/ discomfort, tightness medially after PT." Dr. Villavicencio ordered an MRI of the lumbar spine, referred Claimant to a physiatrist for evaluation of the lumbar spine and provided a "[W]ork status-modified -not able to return today due to increased pain."

23. On May 18, 2021 Dr Albert Hattem performed a medical records review and responded to Insurer's inquiry whether further physical therapy was justified as medically reasonable and necessary. He responded in the negative as he considered the knee injury to be minor and that Claimant had made sufficient gains to be able to proceed with a self-directed exercise program. Dr. Hattem also opined that Claimant's lumbar spine condition was not related to the claim.

24. On May 25, 2021, Claimant was evaluated by Dr. Chan anyway, who noted that Claimant was able to ambulate around the room without difficulty, but he displayed very visible pain symptoms and complaints on examination. Dr. Chan indicated Claimant was neurologically intact, and the majority of his issues with regard to his lumbar spine were likely due to an underlying deconditioning. Dr. Chan's assessment was that Claimant's lumbar, thoracic and cervical issues were diffuse myofascial complaints, most

consistent with a myelogenic complaint, and not related to his claim. Dr. Chan opined that further work-up was indicated, but it should be pursued outside of the workers' compensation system.

25. On the morning of June 9, 2021, Claimant returned to Dr. Villavicencio, reporting positional vertigo, and increased cervical pain with bilateral upper extremity paresthesias. Dr. Villavicencio reviewed Dr. Chan's opinion with Claimant concerning his spinal issues. He noted that Claimant understood he was to go to Denver Health to rule out other causes of his vertigo, bilateral upper extremity issues, cervical issues, and lumbar issues.

26. On the same day, Claimant went to Denver Health for an evaluation of his vertigo and other issues, but before he entered the facility the Denver Health staff found him on the sidewalk outside, suspecting Claimant had a syncopal episode. He was then treated at Denver Health ED for syncope, increased neck pain, and bilateral upper extremity paresthesias.

27. Claimant returned to Dr. Villavicencio on June 17, 2021. Claimant continued to complain of left knee pain. On exam Dr. Villavicencio noted that Claimant continued to have a similar exam as on previous exams including tenderness diffusely over the anterolateral aspect of the left knee and diffusely over the anteromedial aspect with minimal decrease from last visit including limited end range abnormal range of motion. Dr. Villavicencio referred him for a left knee MRI.

28. Claimant returned to Dr. Hewitt on June 21, 2021. Claimant reported that he had good benefit from the cortisone injection but the symptoms restarted while participating in therapy on May 17, 2021. On exam there was mild medial joint line tenderness. Following discussion of care options, Dr. Hewitt recommended a new MRI to confirm healing of the bone bruise.

29. The MRI on June 30, 2021, read by Dr. Frank Crnkovich, noted a probable anterior horn medial meniscus tear toward the midline. The lateral meniscus was intact. He also noted that the bony contusion had resolved.

30. On July 19, 2021 Claimant was again seen by Dr. Hewitt to review the MRI findings of minimal knee effusion, resolved medial femoral condyle bone bruise, and fraying of the anterior horn of the medial meniscus with a medial plica.[5] Claimant had persistent medial-sided knee pain and Dr. Hewitt recommended proceeding with arthroscopy of the left knee.

31. On July 29, 2021 Dr. Hattem issued another medical record review report opining that any further left knee complaints were not related to the work injury and that there was no documentation of increased left knee problems in physical therapy on May 17, 2021 that would justify approving the recommended arthroscopy.

32. On August 16, 2021, Dr. Villavicencio responded to a letter from Insurer requesting updated opinions on causation and MMI. Dr. Villavicencio indicated Claimant's low back condition was "due to compensating for gait", but claimant's low back condition should be at MMI. Dr. Villavicencio related Claimant's left knee meniscal tear to squatting

[5] Thin, intraarticular fold of the joint lining, or synovial tissue, over the medial aspect of the knee.

during therapy on May 17th, and he further indicated Claimant was not at MMI for his knee, as he needed surgery.

33. On September 23, 2021, Claimant received medical care for his low back at Denver Health. Claimant was complaining of multiple issues including his left upper back, shoulder, chest, and occasional numbness in his forearms and lower extremities. On October 1, 2021, a lumbar MRI obtained at Denver Health was read as showing a L4-5 left foraminal disc protrusion and annular tear impinging on the exiting left L4 nerve root, and moderate left neural foraminal narrowing secondary to the protrusion. On October 19, 2021, Claimant's Denver Health provider reviewed the lumbar MRI, and diagnosed the lumbar condition as chronic bilateral low back pain with left sided sciatica.

34. On December 7, 2021, Claimant was seen for an IME by Dr. F. Mark Paz at Respondents' request. Dr. Paz took a history from Claimant, reviewed Claimant's available medical records, examined Claimant, and then opined that Claimant's work related injury was a left knee femoral condyle contusion with bone bruise, and that Claimant's other issues (cervical, thoracic, lumbar spine, upper and lower extremity paresthesias) were not related to this claim.

35. On April 8, 2022, Stephanie Best, P.T., testified concerning Claimant's allegation that his low back condition and left knee anterior horn medical meniscus tear were causally related to squatting exercises he performed that occurred during physical therapy she provided. Ms. Best testified that it is not uncommon for physical therapy patients to experience soreness in areas other than those being treated, and that soreness does not equate to injury. She stated that she would not be surprised if a patient with a prior history of left sided low back pain with left-sided sciatica experienced soreness in those areas following a therapy session. During the course of the therapy she provided from February 1, 2021 through May 17, 2021, Claimant often complained of issues that would go beyond his left knee and she was aware that at times Claimant complained of pain traveling from his left foot up his leg, through his hip and buttock, up his low back and into his upper back and shoulder blade areas, which she associated to the common after effects of therapy. She opined that she did not believe that Claimant sustained a new injury to his low back, mid-back or neck as a direct result of therapy she provided.

36. Dr. Paz testified as an expert in general medicine, occupational medicine, and as a Level II physician. He indicated that after issuing his report, he was provided with Claimant's prior medical records from Clinica Family Health, additional records from Denver Health, and he reviewed Ms. Best's deposition testimony. He was also present during the hearing for claimant's testimony. Dr. Paz indicated that based upon his review, Claimant did not sustain a low back injury as part of this claim, whether during the initial injury, during therapy using a foam roller prior to May 17th, or during the May 17th therapy session. He also disagreed with Dr. Villavicencio's opinion Claimant's low back condition was related to compensating for gait, noting that claimant was able to return to walking, and to work, and records document a non-antalgic gait.

37. As found, Claimant has failed to prove that the lumbar spine (or any other spine condition) injury was related to the October 7, 2020 workplace injury or in any way related to the May 17, 2021 physical therapy exercises he performed. Dr. Chan, Dr.

Hattem and Dr. Paz are persuasive in this matter that Claimant was suffering from deconditioning.

38. As found Claimant has proven by a preponderance of the evidence that he sustained a work-related injury to the medial aspect of his left knee. Claimant was complaining of joint line tenderness and pain to the medial aspect of his left knee from the first visit with PA Eisenbrown on October 9, 2020. PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. On November 18, 2020 Claimant continued to complain of pain in the medial aspect of the left knee. Dr. Schwed documented instability, stiffness, tenderness and painful walking with exacerbating factors of kneeling, squatting and walking. Claimant continued with follow-up appointments at Concentra with multiple providers that documented the pain in the medial aspect of the left knee, including Dr. Villavicencio on February 10, 2021 and April 16, 2021. However, after the May 17, 2021 physical therapy visit, on May 18, 2021 Dr. Villavicencio noted that Claimant had a setback the prior day in physical therapy, complaining of worsened symptoms in the left medial aspect of the left knee with anterior and lateral pain in the left knee, noting that Claimant was in moderate distress. Dr. Villavicencio and Dr. Hewitt are persuasive in the matter of a worsening of the medial aspect of Claimant's left knee and the consequent medial meniscus injury. Claimant has proven that the surgery recommended by Dr. Hewitt is reasonable, necessary and related to the October 7, 2020 workplace injury.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (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. Medical Benefits

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

All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this October 7, 2020 work related injury to his left knee. This was actually admitted to by Respondents in their General Admission of Liability dated October 28, 2020 and is not in dispute. However, the question remains whether Claimant injured his lumbar spine and if the medial meniscus arthroscopy is related to the October 7, 2020 admitted work related injury.

C. Causation of alleged lumbar spine injury

Claimant had two different theories with regard to his lumbar spine, thoracic spine and cervical spine complaints. First, that he had low back pain from the inception of the October 7, 2020 work injury but did not complain of them because his left knee complaints were so overwhelming. The medical records first documented lumbar spine pain on April 30, 2021, over six months following his original injury date. This is not persuasive. The second theory was that he aggravated both his left knee and his lumbar spine, thoracic spine and cervical spine, with attendant radicular symptoms into his upper and lower extremities, on May 17, 2021 during physical therapy.

Claimant had to prove by a preponderance of the evidence that the lumbar spine condition he was alleging as part of the work related claim was caused in the course and scope of his employment. Under the quasi-course of employment doctrine, injuries sustained during treatment of the industrial injury have been held compensable as a consequence of the industrial injury*. Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo.App. 1993). The doctrine is not restricted to injuries arising out of "authorized" treatment. *Schrieber v. Brown & Root, Inc*., 888 P.2d 274, 278(Colo.App. 1993). For instance, in *Excel Corp.,* the Colorado Court of Appeals held that injuries sustained while leaving a physical therapy session for treatment of the industrial injury were compensable. The Court reasoned that this is so because the employer is required to provide medical treatment, and the claimant is required to submit to medical treatment. Additionally, a claimant is obligated to cooperate with reasonable medical treatment designed to cure and relieve the effects of the industrial injury. See §8-43-404(3), C.R.S. In *Miller v. Progressive Driver Services, Inc.,* W.C. No. 4-318-241 (April 22, 1998), aff'd 98CA0902 (Nov. 27, 1998)(NSOP), the panel explained that "[a]s pointed out by Professor Larson, this includes treatment in the form of exercise. 1 Larson, Workers' Compensation Law § 13.22 & § 13.22(d)." Accordingly, the failure to compensate a claimant for the natural and proximate results of his rehabilitation efforts which are consistent with the "prescribed" treatment for the industrial injury could undermine a claimant's prompt and complete recovery. The question of whether a particular injury falls within the quasi-course of employment doctrine is essentially one of fact for determination by the ALJ. See *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997).

However, the lumbar spine was neither caused nor aggravated during physical therapy on May 17, 2021 while under the care of therapist Best. Medical records showed that Claimant had back pain approximately six months after the inception of the work injury on October 7, 2020 and as early as April 30, 2021, around the time when he complained of back pain to Dr. Villavicencio and his physical therapist. Claimant failed to show that the lumbar spine condition was aggravated or caused during physical therapy in the quasi course of employment.

D. Causation of alleged left knee condition and authorization for surgery

As found, PA Rasis of Concentra documented that the injury to the left knee was a result of Claimant jumping down from a lift boom on October 7, 2020. He stated that the left knee worsened during the remainder of the day in the medial aspect of the left knee and that he had swelling in the medial joint for the first three days, which improved with a RICE regimen. PA Rasis noted that the symptoms occurred constantly in the medial aspect of the left knee that was dull and was associated with instability, stiffness, tenderness and painful walking. On exam he noted that the left knee was swollen, with tenderness diffusely over the anteromedial aspect of the left knee and over the medial collateral ligament. As found, the problems with pain in the medial aspect of Claimant's left knee occurred from the very inception of the claim and the fact that the initial MRI did not show the fraying of the medial meniscus is not persuasive that there was no injury to the left medial meniscus.

As found, the persuasive medical evidence is that Claimant continued to have medial meniscus pain that continued from the date of the injury through the day in which Claimant had a worsening of his condition during physical therapy on May 17, 2021. As found, Claimant was performing squats that day, put pressure on the left meniscus and caused further injury and symptoms in the left medial meniscus. This is supported by the persuasive report of May 18, 2021 where Dr. Villavicencio documented the worsened left knee complaints in the medial aspect of the left knee, when he recommended an MRI of the left knee. Claimant followed up with Dr. Hewitt, the orthopedic specialist, who also recommended the MRI of the left knee. The MRI of June 30, 2021 radiologist suspected a medial meniscus tear and this was confirmed by Dr. Hewitt, who recommended the surgical repair. As found, Dr. Hewitt and Dr. Villavicencio are more persuasive in this matter, over the contrary opinions of other examining or evaluating medical providers. As found, Claimant has shown that it is more likely than not that the left knee medial meniscus tear was as a consequence of the aggravation sustained in the quasi course of employment, while receiving medical care related to the workplace injury of October 7, 2020. As found, Claimant has shown that the surgery proposed by Dr. Hewitt to treat the left medial meniscal tear was proximately caused by the injury arising out of and in the course of the employment. As found, Claimant has further shown that the surgery is authorized, reasonably necessary and related to the admitted workplace injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for authorization of treatment of the lumbar spine or other conditions is denied and dismissed as the lumbar spine or any other spine conditions are not proximately caused by the October 7, 2020 work related injury.

2. Respondents shall pay for the reasonable, necessary and related medical treatment for the left meniscal tear injury of October 7, 2020 including the authorized treatment proposed by both Dr. Villavicencio and Dr. Hewitt.

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 13th day of June, 2021.

Digital Signature

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

ISSUES

I. Deceased Claimant's average weekly wage.

II. Identification of any dependents.

III. If Older and Younger Minor Children are dependents pursuant to Sec. 8-42-501, et.al., what is the allocation of dependent benefits among the dependents.

IV. Are there any offsets.

PRELIMINARY MATTERS

None of the Claimants were represented by counsel. A *pro se* advisement was given before the commencement of testimony and parties agreed they wished to proceed as self-represented through their respective guardians and the Estate Representative.

FINDINGS OF FACT

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

1. Employer is a concrete contractor, contractor, excavator, demotion and trucking business. On September 23, 2021 Deceased Claimant was involved in a fatal accident while unloading a skid loader off a trailer. Claimant's coworker was in the skid steer moving the bucket upwards when he lost control of the bucket mechanism and Claimant was crushed by the bucket/plow, which fell on him while he was unchaining the skid steer. Deceased Claimant was working for Employer at the time of the accident.

2. Deceased Claimant suffered blunt force injuries to his chest, pelvis, and right lower leg. An autopsy report from John Carver, MD at the Jefferson County Coroner's Office identifies the cause of death as crush injuries of the right upper chest and pelvis. Deceased Claimant was 29 years old at the time of his death. His date of birth was February 28, 1992.

3. On September 28, 2021, the Division of Workers' Compensation sent a letter addressed to The Estate of Jonathan Martinez in an effort to ascertain whether the decedent left dependents who may be entitled to workers' compensation benefits. Copies

of Dependent's Notice & Claim for Compensation blank forms were enclosed. The letter was sent to 11471 Paris Court, Henderson, CO 80640.

4. Respondents filed a Fatal Case – General Admission of Liability on December 14, 2021 admitting to compensability due the work related accident. Respondents stated that dependent benefits were still to be determined.

5. A representative of the Division of Workers' Compensation and the claims representative from the Insurer communicated by email regarding the status of possible dependent benefits. For example, on December 28, 2021 the claims representative provided the following update to DOWC: "Hi William, The status of the dependent benefits is still pending. We are still awaiting the completed dependent claim forms from the respective parties, along with other ID documentation. I was in contact with the family representative recently and they were close to getting us the necessary paperwork. At least at last report. Please let me know if you need anything else."

6. In a subsequent email on January 10, 2021, the claims representative provided the following additional update: "Hi William, Of course, the main issue that based on information gathered thus far we believe the decedent had two minor children from different mothers and was not legally married to either. Under C.R.S. 8-41-505: 'A minor child of a deceased putative father is entitled to compensation when it is proved to the satisfaction of the director that the father, during his lifetime, has acknowledged the child as his and has regularly contributed to his or her support or maintenance for a reasonable period of time prior to his death.' Neither of the minor children or their respective mothers are currently represented, so we have been attempting to gather information as best we can from decedent's mother – whom he was living with on the date of the fatal accident. We need further information to confirm the decedent was actually contributing to the illegitimate children's support and maintenance – which is the missing link so far. I hope that helps but please let me know if you need any further information."

7. Decedent's mother testified at the time of the hearing as a representative of the Deceased Claimant's Estate. Deceased Claimant lived with her and her husband for the last several years, prior to his passing. Deceased Claimant was not married at the time of the accident. The Deceased would frequently leave the home for stretches at a time and would sometimes be visiting his Oldest Minor Child. Sometimes the Oldest Minor would visit him at his mothers' home and stay overnight. She was unaware of when and how often the Deceased Claimant would visit his children.

8. Deceased Claimant's mother's husband had hired Deceased Claimant to work for Employer in 2020, originally. He had been working for Employer at the time of the accident. Her husband was a minor partner in the Employer's business. She testified that her husband's cousin was the majority owner and the cousin was the one to provide her with the wage information, which she included on the Dependent's Notice and Claim for Compensation filed by each of the mothers of the two minor children in the amount of $580.00 per week. She prepared the initial claims, met with both of the mothers of the minor children to have them sign the claim forms before a notary public.

9. Deceased's mother stated that he was earning $17.00 per hour and worked approximately 34 hours a week based on what she knew of his coming and going from

the home and her consultation with the majority owner of Employer. Deceased's mother was asked about these wage records, including gaps in the wage history – such as a 4 month gap between mid-January 2021 and late May 2021. She explained that the business involves both excavation and cement work. The company was busier in the summer months. In addition to the seasonal nature of the work, she indicated that her son also had some significant personal difficulties in life including depression. Wage records showed the net earnings and multiple time periods that were blank or unreported on the Employee Quick Report, which was provided by Employer.

10. Deceased Claimant was unmarried at the time of his death.

11. Deceased Claimant was survived by two acknowledge children.

12. The Oldest Minor Child was born on March 17, 2010 and was twelve years and two months old at the time of the hearing. The birth certificate of the Oldest Minor Child showed that the father's name was that of the Deceased Claimant. Deceased Claimant's mother stated that he was 18 years old when the Oldest Minor Child was born. She confirmed that the Deceased was never married to the Oldest Minor Child's mother. She explained that the Child's mother does have four other children, but that only the Oldest Minor Child was Claimant's biological child. The Child would come to their house fairly often to spend time with Claimant and her grandparents.

13. The Oldest Minor Child was being paid for child support through the Colorado Family Support Registry and the Complete Disbursement Record showed payments made. However, the mother testified that the Deceased also contributed by paying for back to school supplies and clothing or other necessities that the Oldest Minor Child required and assisted her mother when necessary with additional funds occasionally.

14. The Youngest Minor Child was born on July 7, 2017 and was four years and 10 months old at the time of the hearing. The birth certificate of the Youngest Minor Child showed that the father's name was the Deceased Claimant. Deceased Claimant's mother testified that Claimant and the Youngest Minor Child's mother were never married, that the Deceased spent very limited time with the Younger Child and that she, herself, had not seen the Younger Child since she was a baby. When asked if Decedent paid child support for the Younger Minor Child, she explained that there was no formal child support order like with the Older Minor Child. However, if the Child's mother contacted the Decedent and said she could use help with something then Decedent would try to provide some funds.

15. Deceased's mother clarified for this ALJ that she was not alleging to have been financially dependent on her son at the time of his death.

16. Respondents filed an Application for Hearing on February 14, 2022 on the issues of AWW and Death Benefits. The Remarks section of the Application reflects: "Decedent was involved in a fatal accident on 9/23/21 within the course and scope of his employment. A GAL (Fatal Claim) was filed on 12/17/21. GAL noted that medical benefits and funeral expenses had been paid but that 'Dependent benefits are still to be determined.' Respondents believe that there may be two dependents. Decedent was not married, but did have two minor children" They further stated that "Respondents are

applying for hearing to obtain an order identifying any dependents and the status of those dependents (whole or partial); and allocation/apportionment of benefits among any dependents. AWW; Offsets (if applicable)…"

17. Decedent's mother was asked about the Dependent's Notice and Claim for Compensation forms filed on behalf of both minor children. When the claims representative from Pinnacol reached out to her and explained that he was trying to identify any potential dependents, Decedent's mother helped complete those forms with information regarding the two minor children and in assisting the children's mothers to sign each of the forms for their respective children.

18. The Youngest Minor Child's mother testified by phone at hearing. She stated that she had a child with Claimant in 2017 and confirmed that she and Claimant were never married. They did not live together. They did not file joint income tax returns together. The Youngest Child's mother indicated that there was no child support order or arrangement. She testified that Claimant did pay $100.00 on occasion and for other expenses such as for preschool supplies. She testified that she had primary custody of the Youngest Minor Child and that she is the one that supported her daughter. When asked how often she would talk with Claimant, she explained that it was very sporadic. There were times that they would talk for a couple of months and then Claimant would go "MIA" and she would hear nothing. She stated that she only recalled taking the Youngest Minor Child to her grandparents' house in Henderson to visit, where Claimant was also living, 1 or 2 times in 2018 or 2019 when she was a baby.

19. The Youngest Minor Child's mother confirmed that she had been provided with a set of the hearing exhibits from Respondents prior to hearing. She was asked about documents captioned "Parenting Plan" and "an Allocation of Parental Responsibilities" Order. The Youngest Minor Child's mother confirmed that she had provided those documents to Respondents' counsel. She explained that these documents were issued in 2018, when the Youngest Minor Child was only 1 year old. These documents represented her proposal at the time with respect to custody time and division of parental responsibilities. She explained, however, that Clamant did not end up showing up for any of the court dates so the judge ended up awarding her primary custody. The Youngest Minor Child's mother testified that she and Claimant did not ever end up actually sharing custody or dividing parental responsibilities as originally suggested in the documents.

20. The Youngest Minor Child's mother testified that the Youngest Minor Child had not yet received any benefits from the Social Security Administration since Claimant's death, such as social security survivor benefits. She explained that, since she did not have a copy of Claimant's death certificate, she had not been able to pursue anything with the Social Security Administration. However, it was her intention to apply for benefits for the Youngest Minor Child.

21. The Youngest Minor Child's mother confirmed for the ALJ that she does have a bank account and was the Youngest Minor Child's guardian.

22. The Oldest Minor Child's mother also testified at hearing confirming that she had had a child with Claimant in 2010, that they had never married and had never lived together. They did not file joint income tax returns together. She stated that there was a child support order in place, and that when Claimant was working then child support would

be paid to the Family Support Registry. She explained that she had provided the document, which is a disbursement record from the Family Support Registry with Child Support Services. The Oldest Minor Child's mother confirmed that this document reflected child support payments that Claimant had made for the Oldest Minor Child from 2017 through 2021. She testified that if he was working, he would generally pay around $200 per month. In addition to the child support payments, she confirmed he would also make other financial contributions such as helping pay for school supplies. She acknowledged that the Oldest Minor Child did refer to Claimant as her "dad." Decedent would sometimes visit the Oldest Minor Child at their house and that the Oldest Minor Child would also go to visit Claimant and her grandparents in their own home in Henderson.

23. The Oldest Minor Child's mother testified that she had not received benefits from the Social Security Administration, such as social security survivor benefits, on her daughter's behalf since Claimant's death. She said that this is something that she is still trying to figure out, and confirmed for the ALJ that it is her intention to apply for such benefits.

24. The Oldest Minor Child's mother confirmed for the ALJ that she does have a bank account and that she was the Oldest Minor Child's guardian.

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.

A. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning

capacity. *Ebersbach v.United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

There is, admittedly, limited documentation upon which to calculate an AWW. The Employer's First Report indicates that Claimant was paid $17.00 an hour and this was also supported by the testimony of Decedent's mother, the Estate Representative. Her husband and his cousin operate Employer's business. She testified that she included an AWW figure of $580.00 on the two Dependents' Notices & Claim for Compensation. She indicated that this was based upon information that she received directly from the cousin. She did testify that the company's work with excavation and cement was somewhat seasonal. Claimant had lapses in his wage records due in part to the seasonal work, and in part due to some personal difficulties that Claimant had experienced over the years. Based on the totality of the evidence, the fair approximation of Decedent's average weekly wage, as found, is $580.00.

B. Dependents for Purposes of Death Benefits

Respondents seek a determination of any dependents in this matter. Pursuant to Sec. 8-41-501(1), C.R.S. the following persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence):

(a) Widow or widower, un less it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support…

(b) Minor children of the deceased under the age of eighteen years of age, including posthumous or legally adopted children;

(c) Minor children of the deceased who are eighteen years or over and under the age of twenty-one years if it is shown that:

(I) At the time of the decedent's death they were actually dependent upon the deceased for support; and

(II) Either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited school. The period of the presumed dependency shall continue until they attain the age of twenty-one years or until they cease to be engaged in courses of study as full-time students at an accredited school, whichever occurs first."

In this case, Claimant was not legally married to either of the mothers of his two biological children. Claimant did not live with either of the children's mothers either, at the time of his death, nor is there any evidence that either of the mothers were alleging to have been common law spouses of Claimant. Further, neither took Claimant's last name nor did they file joint income tax returns with the Decedent.

Despite the lack of a marital relationship, Claimant's biological minor children may still potentially be deemed dependents for purposes of entitlement to death benefits. Section 8-41-505 provides: "***A minor child of a deceased putative father is entitled to compensation when it is provided to the satisfaction of the director that the father, during his lifetime, has acknowledged the child as his and had regularly contributed to his or her support and maintenance for a reasonable period of time prior to his death***."

Under the facts of this case, there are birth certificates supporting that Claimant was the biological father of the Older and Younger Minor Children. The question that then needs to be addressed is whether Claimant acknowledged the minor children as his **and** regularly contributed to his or her support for a reasonable period of time prior to his death.

The evidence and testimony supports that a child support order was in place for the Older Minor Child, and that child support payments were made to the Family Support Registry from 2017-2021. Claimant also contributed financially for school supplies for the Older Minor Child.

While the evidence for the Younger Minor Child is not as clear since there was no formal child support order in place, the Younger Minor Child's mother testified that Clamant would contribute $100 on occasion and that Claimant would help with her school supplies-such as for preschool. Further, she did file documents with the court with the intention of sharing custody with the Decedent but, since he failed to show to the proceedings, the judge awarded her custody, though not because he was not the father, as demonstrated by the Birth Certificate, as Decedent clearly was. This was acknowledged by Decedent's mother, who testified that both daughters were Decedent's biological daughters.

In response to queries by this ALJ, both of the Minor's mothers indicated that they hold accounts and are their daughters' guardians.

The Decedent's mother testified that she was not dependent on the Decedent and denied seeking any such dependent benefits.

As found, from the totality of the evidence, both the Older Minor Child and the Younger Minor Child are entitled to claim death benefits in this matter as dependent minor children of the deceased pursuant to Sec. 8-41-505(b), C.R.S. As found, there are no other dependents in this case.

C. Allocation

Respondents suggest that, if there was a determination that both minor children, qualify for benefits under § 8-41-505, the most equitable outcome would be an equal

50/50 allocation between the two minor children. This ALJ agrees with this assessment. Neither of the minor Children made any request for a division that was any different in this case. Therefore, as found, the equitable allocation of the dependent benefits is fifty percent (50%) to the Oldest Minor Child and fifty percent (50%) to the Youngest Minor Child.

Upon the Oldest Minor Child reaching the age of majority benefits shall continue only if the Oldest Minor Child shows that she continues schooling with an accredited school and only to the age of twenty-one. At the time the Oldest Minor Child's benefits terminate, the Youngest Minor Child shall be allocated one hundred percent (100%) of the death benefits until the Youngest Minor Child reaches the age of majority or shows she continues to be entitled to dependent benefits pursuant to Sec. 8-41-505(c)(II), C.R.S.

D. Offsets

Section 8-42-114, C.R.S. lays out what death benefits dependents may receive and states designates what reductions may be asserted against those death benefits as follows:

> 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.

In this matter, it is clear that, based on the testimony of both minor children's mothers, neither of the dependents have received social security death benefits at this point in time. At least the Youngest Minor Child's mother stated that she could not apply for benefits as they did not have the death certificate. In response to queries by this ALJ, both of the Minor's mothers indicated that they do intend to pursue the possibility of social security survivor benefits for their respective minor daughters. Should either or both minor dependents obtain social security dependent death benefits, their guardian shall provide the information to Respondents and Respondents shall be entitled to take an offset pursuant to statute. As found, at this time, no offset is appropriate.

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ORDER

IT IS THEREFORE ORDERED:

1. Decedent's average weekly wage is $580.00 and dependent benefits shall be paid out at the maximum rate of $386.66 per week.

2. The Oldest Minor Child is entitled to 50% of the dependent death benefits in the amount of $193.33 per week until terminated by law.

3. The Youngest Minor Child is entitled to 50% of the dependent death benefits in the amount of $193.33 per week until terminated by law.

4. Respondents shall pay benefits as stated above, including interest at the rate of eight percent (8%) on all benefits that were not paid when due.

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

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

DATED this 16th day of June, 2022.

Digital Signature

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

PROCEDURAL BACKGROUND

W.C. No. 5-143-435 involves an admitted injury claim with Employer and its insurance carrier at the time, Pinnacol Assurance ("the Pinnacol injury"). Employer subsequently changed workers' compensation carriers to Zurich American Insurance. W.C. No. 5-164-953 involves a contested claim filed with Employer during Zurich's policy period ("the Zurich injury"). The claims were consolidated for hearing in an order dated September 14, 2021.

ISSUES

- Did Claimant prove the Pinnacol claim should be reopened effective February 17, 2021 based on a change of condition?
- In the alternative, did Claimant suffer a new compensable injury on February 17, 2021 during Zurich's policy period?
- Did Claimant prove entitlement to medical benefits and TTD benefits commencing February 18, 2021?
- The parties to the Zurich claim stipulated to an AWW of $1,854.52.
- The parties to the Zurich claim stipulated that Dr. Emily Burns is the ATP, if the claim is compensable.

FINDINGS OF FACT

1. Claimant works for Employer as a Shop and Field Technician, repairing heavy equipment such as excavators, bulldozers, haul trucks, skid loaders, and crusher machines. The job requires long shifts with frequent heavy lifting, prolonged standing and walking, squatting, climbing, and crawling while working on and around equipment.

2. Claimant suffered an admitted injury to his left knee on July 6, 2020 when he jumped from the exit ladder of a bulldozer approximately four feet off the ground.

3. Claimant had had problems with his left knee since approximately 2011. He underwent arthroscopic surgery in September 2018 consisting of debridement, removal of loose bodies, and chondroplasties in the medial, femoral, and patellar compartments. Claimant recovered from the surgery and sought no treatment for his left knee from March 2019 until the July 2020 work accident. Claimant started working for Employer in February 2020, and performed the heavy work without difficulty or limitation. He also regularly participated in fitness activities such as running and weightlifting.

4. After the July 6, 2020 work accident, Employer referred Claimant to the UCHealth Occupational Medicine Clinic for authorized treatment. Claimant saw PA-C Zoe Call at his initial appointment on July 8, 2020. He disclosed the prior knee surgery but could not recall if the current injury felt similar to the prior injury. Ms. Call diagnosed a knee sprain, suprapatellar effusion, and osteoarthritis. She referred Claimant to Dr. Jordan Schaeffer, an orthopedic surgeon.

5. A left knee MRI on July 15, 2020 showed a medial meniscus tear and multi-compartmental degenerative changes.

6. On August 4, 2020, Dr. Schaeffer performed a left knee arthroscopy with partial medial meniscectomy, chondroplasty, and removal of loose bodies.

7. Dr. Kathryn Murray took over as Claimant's primary ATP on September 9, 2020. Claimant was still having significant swelling in his knee, and was using a crutch to assist with ambulation. He was awaiting clearance from Dr. Schaeffer to start therapy.

8. On September 17, 2020, Dr. Schaeffer noted Claimant's mechanical symptoms had improved but he was still having pain and swelling, "likely secondary to underlying degenerative changes." Dr. Schaeffer hoped to avoid a total knee arthroplasty, given Claimant's young age. He administered a cortisone injection and aspirated the knee.

9. Claimant's knee slowly improved over the next two months, but he continued to have some symptoms, particularly with activity. On November 23, 2020, Dr. Murray documented his knee would swell "if he is doing a lot of standing or walking." The physical therapist had recommended gradually increasing his walking rather than trying to progress too quickly. Claimant was worried about tolerating the physical demands of his regular work. Objectively, the examination findings were improved, with "minimal" swelling and discomfort with palpation along the medial joint line. Dr. Murray thought Claimant was approaching MMI, pending his next appointment with Dr. Schaeffer.

10. Claimant followed up with Dr. Schaeffer on December 16, 2020. Dr. Schaeffer noted, "surgery was done for acute medial meniscal tear in the setting of advanced medial and patellofemoral compartmental chondromalacia. He has had a slow recovery, but at this time he feels he is doing well with no recurrent swelling and controlled pain." Claimant felt ready to return to work. Physical examination showed no abnormalities other than reduced range of motion. Dr. Schaeffer opined Claimant was "doing well" and had reached MMI. He released Claimant to work without restrictions. Given his significant degenerative changes, Dr. Schaeffer opined Claimant might require a total knee arthroplasty in the future. He recommended follow-up as needed depending on the progression of knee pain as Claimant returned to normal work duties and activity.

11. Claimant saw Dr. Emily Burns for an MMI and impairment evaluation on January 7, 2021. She noted he was only performing seated tasks at work because Employer had not let him return to full duty. He still had some pain when walking up stairs, but was improving. The knee was not locking, catching, or giving out. He was back at the

gym doing his normal activities except for less lifting with the lower extremities. He was working up to his pre-injury 30-minute sessions on the stair mill. Claimant was wearing a knee brace occasionally but only for heavier activities "such as at the gym," and using ibuprofen on a "very occasional" basis. On examination, the knee was mildly tender to palpation along the medial joint line but otherwise nontender. There was no instability and meniscal testing was negative. Dr. Burns observed Claimant's gait to be "essentially normal." Dr. Burns assigned a 26% lower extremity rating based on the meniscal diagnosis and range of motion deficits. She released Claimant to full duty work. She opined no specific maintenance care was needed, although recommended Claimant be allowed to follow-up with orthopedics for any recurrent symptoms over the next year.

12. Claimant credibly testified that the surgery performed by Dr. Schaeffer was helpful and his knee was "good" when he was placed at MMI. He was getting around fine at home, going up and down the stairs multiple times per day, helping to care for his children, using a treadmill and elliptical machine, and exercising on his home gym.

13. Claimant returned to full duty work in the "shop" on the first workday after his impairment evaluation.

14. The work in the shop is physically demanding, although not as strenuous as working in the field, particularly regarding walking long distances on uneven terrain and climbing stairs.

15. [Adjuster redacted, hereinafter Ms. G] is a senior claim representative at Pinnacol who handled Claimant's claim. On January 14, 2021, Ms. G emailed and spoke with Claimant regarding her intent to file a Final Admission of Liability (FAL). Ms. G also advised Claimant of his right to contest the FAL, and encouraged him to advise Employer if he had further problems with his knee.

16. Pinnacol filed an FAL on January 15, 2021 admitting for Dr. Burns' rating. The FAL also admitted for medical benefits after MMI.

17. Claimant applied for a full lump sum on January 17, 2021. The Division issued an Order on January 20 approving the lump sum.

18. Claimant spoke with Ms. G by phone on January 20. He explained his knee felt sore after by the end of his shift and wondered, "what I should do? Should I go see a doctor?" Claimant understood soreness was normal after several months of sedentary activity and assumed it would resolve, but wanted to "make sure I was covering all the bases . . . and being straightforward about what was going on." Ms. G offered to schedule a maintenance care visit but Claimant wanted to wait "a week or so" and see how his knee progressed.

19. Claimant improved steadily over the next several weeks. The improvement was "especially" notable at work, but also at home. He was performing his physical therapy exercises daily, jogging on a treadmill, walking fast, and "doing it faster, longer."

20. By mid-February 2021, Claimant felt he had improved enough that he could return to the field. He was eager to resume the overtime that routinely comes with being out in the field, and felt "ready to rock."

21. Claimant was assigned to work at the mine in Cripple Creek on February 17, 2021. The facility is very large, which required extensive walking and climbing stairs while carrying heavy items. Claimant's primary task that day was to work on a large material press, which required him to crawl through a labyrinth of pipes and tubing to get inside the machine. At one point, his leg slipped and he felt a sharp, significant pain in his knee. A supervisor on site noticed him limping shortly thereafter and Claimant stated he had "tweaked" his knee. Claimant he limped for the remainder of the day while performing his duties, and the limping was noticeable enough that coworkers offered to help him with his work.

22. After his shift, Claimant texted his supervisor to report that his knee was "messed up" and he could not work the next day. The text messages were not introduced into evidence and Claimant could not recall exactly what he said. However, he agreed he mentioned "climbing up and down stairs all day" but did not describe specific incident climbing through the pipes.

23. When Claimant arrived home that evening, he removed his heavy work clothes and observed his knee was significantly swollen. He credibly testified, "there was fluid in places there wasn't before." He elevated and iced his knee that evening and took ibuprofen.

24. Claimant called Ms. G the next day. Claimant told Ms. G his knee pain increased after working 13 hours in the mine the day before going up and down the stairs. Claimant mentioned no specific incident, although Ms. G conceded she did not ask him if there was a specific event. Ms. G reminded Claimant he would probably need a total knee replacement in the future and advised that Pinnacol would probably not cover that under his claim. Nevertheless, Ms. Gills authorized Claimant to see Dr. Burns about his worsened symptoms.

25. Claimant saw Dr. Burns on February 25, 2021. Dr. Burns had a detailed discussion with Claimant regarding the condition of his knee since her last evaluation and the trigger for his increased symptoms. Dr. Burns documented,

> [H]e went back to work after he was closed and placed at MMI after his last visit here. He was feeling stronger—he was crawling, climbing, lifting, hopping without any pain at all but just soreness at the end of the day consistent with remaining re-strengthening. Last Thursday (2/18/2021) he went to the mine in Cripple Creek for his job duties that day—duties that they included lots of stairs, carrying buckets of bolts weighing 80-90 lbs, climbing in and out of machine. He had a specific incident while climbing out of material press – it is a little above his waist height with pipes and safety lines and he pulled his left leg up and over some of the pipes with his leg out behind him and he did have to push off of one of the pipes with his

> left leg and he felt immediate pain where the bubble of swelling was before and it got more swollen. After that later in the day he couldn't put full weight on the knee anymore. He has continued to have more swelling since then. He feels like he is "kind of" having more locking and catching especially with going down stairs when it actually feels a little unstable. He reports medial pain when he puts weight on it. He has iced and elevated, no work – it has improved a little but still significantly painful when he steps on.
>
> The day this injury happened, it then took him 3 hours to drive home – riding in a service truck and when he climbed out it was really stiff. When he got home it was more swollen. He had compression sleeves on at the time and when he took that off it was swollen on both the medial spot and lateral. He has been using his knee brace and that is not helping a whole lot.
>
> Before this event, he had almost no swelling and felt strong again and fully confident in the knee, no functional limitations over the past month. He was going to the gym and doing his normal athletic routine.

Inspection of the knee showed a focal area of swelling proximal to the medial joint line, and a smaller pocket of swelling over the lateral knee. The knee was significantly tender to palpation over the medial meniscus and the swollen area proximal to the medial meniscus. Claimant could "barely" get to full extension and had about 90° of flexion. His gait was "extremely antalgic" and he was using a cane. Dr. Burns opined,

> It does sound like he has had full functional recovery with maintaining that over about a month after being placed at MMI and then had the specific event. However, his pain and swelling and symptoms are very similar to what he had before. . . . At this point, I am inclined to consider this part of his previous injury unless we discover with an MRI later that a new significant injury has occurred.

26. Dr. Burns restricted Claimant to sedentary work only with the ability to elevate his knee "as needed." She referred him back to Dr. Schaeffer for reevaluation.

27. Ms. G credibly testified she initially did not think Claimant sustained a new injury based on their conversation of February 18, 2021. But she subsequently received Dr. Burns' report dated February 25, 2021, with the detailed description of the accident on February 17, 2021. The report changed Ms. G' opinion regarding the cause of Claimant's ongoing symptoms. Had Employer had still been a Pinnacol policyholder, she would have instructed Employer to file a new claim.

28. Claimant saw PA-C Jayme Eatough for an unscheduled appointment on March 1, 2021. Ms. Eatough noted that "since injury he has been icing and resting." Claimant had gone to work that morning, but simply going up and down stairs, driving his truck, and walking across the parking lot had severely aggravated his pain. He tried to elevate his leg while sitting in the chair at work "but it wouldn't stop throbbing." He could only stay at work a few hours before he left and came in for evaluation. A physical

examination confirmed swelling and “very limited” range of motion. Ms. Eatough observed an antalgic gait and recommended crutches if weight bearing was too painful. She amended Claimant’s restrictions to include “needs to be able to elevate knee with support above his heart at all times” and “use crutches at all times.”

29. Employer could not accommodate Claimant’s restrictions. Other than the aborted work attempt on March 1, 2021, he been off work since February 18, 2021.

30. On March 16, 2021, Zurich filed a notice of contest in W.C. No. 5-164-953.

31. A left knee MRI on March 18, 2021 showed moderate joint effusion, normal postoperative appearance of the prior partial meniscectomy, and high-grade cartilage loss with reactive marrow edema.

32. On March 19, 2021, Dr. Burns reviewed the new MRI and opined Claimant’s “symptoms are stemming from his underlying osteoarthritis within effusion that would suggest irritation.” She further opined, “he does not have a mechanism with this injury to cause significant new cartilage damage.” She stated she would “circle back on causality” after the orthopedic evaluation.

33. On April 16, 2021, Claimant was evaluated by Michael Sciortino, an orthopedic PA-C, who opined Claimant’s symptoms were due to “advanced degenerative changes within his medial femoral compartment.” Claimant and Mr. Sciortino discussed the possibility of a TKA, but Claimant opted against pursuing a TKA. Mr. Sciortino gave Claimant a corticosteroid injection.

34. Dr. Mark Failinger performed an IME for Pinnacol on September 2, 2021. Claimant told Dr. Failinger “he sustained a left knee injury in February 2021” while “pulling and pushing with the left leg off a pipe, [when] he felt pain in the left knee.” Claimant described limping after that accident and reporting the injury to a manager before the end of his shift. Claimant described texting his supervisor that same evening to express concern about his ability to work the following day. Upon returning home, he observed swelling, lumps, and bulges of fluid, which his spouse commented looked like “hamburger.” He also reported difficulty sleeping after the accident despite ice, elevation, and ibuprofen.

35. Dr. Failinger opined Claimant remains at MMI for the Pinnacol injury. Dr. Failinger did not think the Pinnacol injury accelerated the underlying degenerative joint disease, "although it might have caused further tearing of a preexisting meniscus tear.” Dr. Failinger opined the pathology caused by the Pinnacol injury was treated reasonably and Claimant was appropriately put at MMI in January 2021. He noted Claimant had no difficulties before the specific accident in February 2021, which created new symptoms. Dr. Failinger attributed Claimant’s recent increase in symptoms to the Zurich injury. For the new injury, Dr. Failinger recommended rest, a cortisone injection, and possibly viscosupplementation injections. He opined another arthroscopy is unlikely to improve Claimant’s symptoms. He believes a TKA or osteotomy will eventually be needed,

although “it would be difficult for an orthopedic surgeon to recommend a [TKA] at this time given his young age.”

36. On September 16, 2021, Dr. Burns responded to an inquiry from Zurich’s counsel regarding the cause of Claimant’s recurrent symptoms. Dr. Burns confirmed Claimant had no restrictions after being put at MMI. She noted he reported some soreness over the few weeks after returning to work, “but denied actual pain including with his work carrying bolts up and down stairs and crawling prior to the day he started experiencing significant symptoms again.” She indicated he “reported to [her] that it was the crawling that seem[ed] to trigger his recurrence of symptoms,” and had described his current symptoms as being “more severe than in the past.” Dr. Burns did not think the 2021 MRI showed any “significant change,” although she would “certainly defer to orthopedics for confirmation of this statement from the images.” She commented that causation “could certainly be argued either way,” but she was “inclined to connect” the recurrence to “his previous injury rather than attribute it to a new injury.”

37. Claimant saw Dr. Burns again on October 13, 2021, who opined that he should remain on sedentary work restrictions.

38. Dr. Failinger testified at hearing consistent with his report. Dr. Failinger opined any pathology caused by the Pinnacol injury was “cleaned up” during the 2020 surgery, and Claimant was appropriately placed at MMI for the Pinnacol injury. He saw no evidence to suggest Claimant’s recurrent symptoms are related to that injury. Dr. Failinger opined Claimant suffered a new knee injury in February 2021, when he “torqued” or twisted it while pushing off a pipe with his leg. Dr. Failinger testified that such a torqueing mechanism heightens the risk of a cartilage injury and Claimant’s description of the accident is consistent with a new injury. He explained that that Claimant’s post-accident dysfunction, swelling, symptoms, and new effusion (as demonstrated by the 2021 MRI) are also suggestive of a new injury: “[T]he reason we get swelling in arthritic situations like this is that cartilage gets knocked off . . . the body says, ‘I can’t have fragments in here,’ . . . In the fluid that’s made after these events, there are . . . enzymes that will break down to dissolve and disintegrate the floating cartilage, so that’s why we have swelling . . . In an arthritic knee when there’s cartilage that’s falling off . . . if it’s a . . . slow rate of falling off it doesn’t happen, but a sudden knocking off of cartilage will create this debris and then the knee swells . . .” Dr. Failinger testified there is a 99.9% chance that articular cartilage damage caused the new effusion. He considered Claimant a reliable historian and opined one would have to “completely discount” Claimant’s statements and testimony to conclude the Zurich injury was not responsible for the current symptoms.

39. Dr. Failinger’s opinions are credible and persuasive.

40. Claimant’s testimony was credible, including his description of the incident while climbing in the material press.

41. Claimant failed to prove entitlement to additional medical or indemnity benefits under the Pinnacol claim.

42. Claimant and Pinnacol collectively proved Claimant suffered a new injury at work on February 17, 2021. The new injury directly and proximately caused the worsening of Claimants' condition, leading to increased disability and a need for medical treatment.

43. Claimant proved he was disabled and suffered an injury-related wage loss from February 18, 2021 through February 28, 2021, and from March 2, 2021 ongoing.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen[1] any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is 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). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Pre-existing disability from a prior industrial injury does not preclude recovery of workers' compensation benefits for a second compensable injury to the same body part. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986).

A claimant suffers a compensable injury if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove a compensable aggravation. A purely symptomatic aggravation is sufficient for an award of benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment or causes a disability, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). However, the mere fact that a claimant experiences symptoms during or after work activities does not necessarily establish a compensable injury. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Where, as here, the pre-existing condition results from a prior industrial injury, the ALJ must determine whether the recurrent pain is "a logical and recurrent consequence

[1]The indemnity portion of the Pinnacol claim is closed, and additional TTD benefits can only be awarded if the claim is reopened. The medical portion of the claim remains open pursuant to the January 15, 2021 FAL. Therefore, reopening is not a prerequisite to an award of additional medical benefits. Nevertheless, Claimant still must prove a causal nexus between the requested treatment and the original injury.

of the original injury," or a compensable "aggravation" giving rise to a new claim. *F.R. Orr Construction, supra,* at 968.

As found, Claimant and Pinnacol collectively proved Claimant suffered a new compensable injury to his left knee on February 17, 2021. The new injury proximately caused additional disability, a wage loss, and a need for medical treatment. Claimant's knee substantially worsened on February 17, 2021, as evidenced by his credible testimony and the contemporaneous medical records. The aggravation was caused by climbing and crawling in the material press. Before the new accident, Claimant was active, caring for his children at home, exercising, and successfully performing physically demanding work. After the accident, he could not bend the knee, had significantly more pain, and had a new "giant bubble" of fluid in the knee. Dr. Burns' documented new clinical findings on February 25, including multiple areas of swelling, range of motion loss, and an "extremely antalgic" gait. Dr. Failinger's causation analysis is credible and persuasive that Claimant's worsened condition on and after February 17, 2021 represents a new injury rather than a continuation of the Pinnacol injury.

Admittedly, Claimant's failure to mention a specific incident in his text message to his supervisor or his conversation with Ms. G conflicts with his later descriptions to Dr. Burns, Dr. Failinger, and at hearing. But the balance of persuasive evidence convinces the ALJ that Claimant's account of the incident with the material press is truthful. The probative value of the text message is diminished because it was not offered into evidence. Regardless, Claimant's primary intent was probably to advise his supervisor he aggravated the knee and would not be able to work the next day, rather than trying to provided a detailed description of the day's events. Similarly, when Claimant spoke with Ms. G, his main concerns were to let her know his knee was worse and inquire about seeing a doctor. Although Claimant volunteered no information about the incident with the material press, Ms. G did not ask him about any incident either. Dr. Failinger persuasively explained why the detailed discussion with Dr. Burns on February 25 is the most reliable source of information regarding the precipitating event. Claimant most likely gave Dr. Burns additional details because she specifically asked about it, and because he wanted her to understand what precipitated the sudden worsening of his condition to decide the best course of treatment. Moreover, reporting a new injury to Dr. Burns ran counter to Claimant's compensation-related self-interest by complicating his ability to obtain further benefits from his already-established Pinnacol claim. The ALJ is not persuaded by the argument Claimant fabricated the specific incident.

B. TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Once commenced, TTD benefits continue until the occurrence of one of the events listed in § 8-42-105(3)(a)-(d). One enumerated terminating event is a return to regular or modified employment. Claimant was off work because of the injury from February 18 through February 28, 2021. His entitlement to TTD terminated on March 1, 2021 when he returned to modified duty. He then left work again because of the injury, and commenced a new period of disability on March 2, 2021. As of the hearing date, Claimant had not been placed at MMI, released to full duty work, or returned to work.

The parties stipulated to an AWW of $1,854.52. Two-thirds of the stipulated AWW exceeds the maximum compensation rate of $1,074.22 applicable to Claimant's date of injury. Accordingly, all TTD benefits are payable at the rate of $1,074.22.

C. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant proved evaluations and treatment recommended by Dr. Burns are reasonably necessary and causally related to the February 17, 2021 accident covered under the Zurich claim.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen W.C. No. 5-143-435 for additional temporary disability benefits is denied and dismissed.

2. Claimant's request for medical benefits in W.C. No. 5-143-435 is denied and dismissed.

3. Claimant's claim in W.C. No. 5-164-953 for a February 17, 2021 injury is compensable.

4. Zurich shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

5. Claimant's AWW is $1,854.52.

6. Zurich shall pay Claimant TTD benefits at the maximum weekly rate of $1,074.22, from February 18, 2021 through February 28, 2021, and from March 2, 2021 until terminated by law.

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

8. All issues not decided herein are reserved for future determination.

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

DATED: January 19, 2022

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to additional permanent partial disability (PPD) benefits.

FINDINGS OF FACT

1. On October 14, 2019, the claimant suffered an injury to his right shoulder while working for the employer. On October 25, 2019, the respondents filed a General Admission of Liability (GAL) regarding the October 14, 2019 work injury.

2. During this claim, the claimant has treated with providers a Roaring Fork Family practice.

3. On January 20, 2020, a magnetic resonance image (MRI) of the claimant's right shoulder showed, *inter alia*, a moderately sided acromial spur, mild infraspinatus tendinosis, a bursal tear of the mid distal fibers, an articular tear of the distal anterior fibers, moderate acromioclavicular joint osteoarthritis, and mild atrophy of the teres minor muscle.

4. On June 1, 2020, the claimant was seen by Dr. Ferdinand Liotta for a surgical consultation. Dr. Liotta noted that the claimant was a candidate for shoulder surgery. Thereafter, surgery was scheduled for July 7, 2020.

5. The claimant has Type 2 diabetes. On July 3, 2020, the claimant was seen by Ivy Chalmers, PA-C for a pre-operative appointment. On that date, it was noted that the claimant's hemoglobin A1c level was at 12.8. As a result, the recommended rotator cuff repair surgery was not performed. Dr. Liotta communicated to PA Chalmers that he will not perform the surgery until the claimant's A1c level is less than 8.

6. The claimant's primary care physician is Dr. Christopher Tonozzi. The medical records entered into evidence demonstrate that Dr. Tonozzi attempted to work with the claimant to lower his A1c levels. On July 20, 2020, the claimant's A1c level was 13.9. On December 8, 2020, it was 10.8. On January 19, 2021, the A1c level was 10.9. On March 31, 2021, it was at 9.3. On July 27, 2021, the claimant's A1c level was at 12.5.

7. These same medical records demonstrate that the claimant was not compliant with Dr. Tonozzi's instructions regarding insulin use. For example, on March 31, 2021, Dr. Tonozzi instructed the claimant to increase his insulin to 80 units in the morning and 50 units in the evening. However, on July 27, 2021, the claimant informed Dr. Tonozzi that he had not increased his insulin, and continued at 60 units in the morning, and 45 units in the evening. The claimant also reported that he "had heard lots

of insulin might do damage, so he actually decreased. Hoped tea he was taking would help." As noted above, the claimant's A1c level was 12.5 on that date.

8. On April 4, 2021, the claimant was seen by Dr. Andrew Gisleson. On that date, Dr. Gisleson noted that the claimant's diabetes was poorly controlled and he could not undergo surgery. Dr. Gisleson recommended that the claimant be placed at maximum medical improvement (MMI).

9. On June 14, 2021, Dr. David Lorah determined that the claimant reached MMI as of April 6, 2021. Dr. Lorah noted that although the claimant is a potential surgical candidate, he cannot undergo surgery until he is able to lower his hemoglobin A1c levels. Specifically, Dr. Lorah noted that the claimant's A1c would need to be less than 7 prior to undergoing surgery. Dr. Lorah rated the claimant's permanent impairment for his right upper extremity as nine percent (which converts to five percent whole person).

10. On September 10, 2021, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Lorah's June 14, 2021 report.

11. Following the FAL, the claimant requested a Division sponsored independent medical examination (DIME). On November 16, 2021, the claimant attended a DIME with Dr. Frank Polanco. In connection with the DIME, Dr. Polanco reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Polanco identified the claimant's diagnoses as a right shoulder strain, tendinosis with biceps tearing, and "subacute on chronic" quadrilateral space syndrome. Dr. Polanco opined that the claimant was not at MMI and needed additional treatment including physical therapy and surgery.

12. During his deposition testimony, Dr. Polanco stated that the claimant has adhesive capsulitis (also called "frozen shoulder"). Dr. Polanco recommends the claimant undergo manipulation under anesthesia. It is Dr. Polanco's opinion that this procedure would improve the claimant's function.

13. On January 26, 2022, the claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his report, Dr. Primack opined that the claimant was at MMI. Dr. Primack noted that the claimant has adhesive capsulitis, secondary to diabetes. In addition, Dr. Primack opined that the treatment recommendation by Dr. Polanco would not address the claimant's condition. Dr. Primack assessed permanent impairment of 11 percent for the claimant's right upper extremity (which converts to whole person impairment of seven percent).

14. Dr. Primack's deposition testimony was consistent with his report. Dr. Primack explained that due to the claimant's diabetes, he has developed a diabetic shoulder. Specifically, the tendons and soft tissue in the claimant's shoulder have

thickened and created adhesions. Therefore, manipulation under anesthesia (as recommended by Dr. Polanco) would not work to improve the claimant's shoulder function. In fact, that procedure would likely worsen the rotator cuff tear.

15. The claimant testified that he would like to undergo the treatment recommended by Dr. Polanco. The claimant also testified that he has tried to reduce his blood sugar levels.

16. In the April 27, 2022 Findings of Fact, Conclusions of Law, and Order, the ALJ credited the medical records and the opinions of Drs. Gisleson, Lorah, Liotta, and Primack over the contrary opinions of Dr. Polanco. The ALJ found that the respondents had overcome the opinions of the DIME physician. The ALJ also found that the claimant was at MMI.

17. At the hearing, the claimant argued that if the ALJ found that the respondents had overcome the DIME physician's opinion on MMI, then the ALJ should order the claimant to return to the DIME physician for an impairment rating. The respondents argued that if the ALJ found that the respondents had overcome the DIME physician's opinion on MMI, then the issue of PPD benefits would become ripe for an order based on the evidence presented at the hearing. The ALJ has considered these arguments and finds that she has jurisdiction to determine the issue of PPD benefits, and that issue is ripe of an order at this time.

18. In this matter, there are two impairment ratings assessed for the claimant's right upper extremity Dr. Lorah's assessment of 9 percent and Dr. Primack's assessment 11 percent. The DIME physician, Dr. Polanco did not assess an impairment rating at the DIME. The ALJ credited Dr. Primack's opinions on the issue of MMI. The ALJ likewise credits Dr. Primack's assessment of an 11 percent impairment rating for the claimant's right upper extremity. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that he is entitled to an impairment rating of 11 percent for his right upper extremity.

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. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

5. As found, the impairment rating assessed by Dr. Primack is credible and persuasive. As found, the claimant is entitled to an impairment rating of 11 percent for his right upper extremity.

ORDER

It is therefore ordered the claimant is entitled to an impairment rating of 11 percent for his right upper extremity.

Dated this 21st day of June 2022.

Cassandra M. Sidanycz
Administrative Law Judge

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

OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

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

ISSUES

- Whether Respondents have overcome the opinions expressed by Dr. Mayer in her Division-Sponsored Independent Medical Examination ("DIME") report by clear and convincing evidence that the Claimant is not at maximum medical improvement ("MMI")?

- Has Claimant established by a preponderance of the evidence that the additional medical treatment recommended by Dr. Mayer is reasonable treatment necessary to cure and relieve Claimant from the effects of the industrial injury?

- If Respondents have overcome the DIME physician's opinion regarding MMI by clear and convincing evidence, what is Claimant's proper permanent impairment rating?

- Has Claimant proven by a preponderance of the evidence that she is entitled to additional temporary partial disability ("TPD") benefits for the period of June 1, 2020 through ongoing?

- Have Respondents proven by a preponderance of the evidence that Claimant was overpaid temporary disability benefits for which they are entitled to an offset against permanent partial disability ("PPD") benefits?

FINDINGS OF FACT

1. Claimant was employed by Employer as an Activity Assistant. Claimant contracted COVID-19 while employed with Employer in April 2020. Claimant reported to the emergency room on April 13, 2020 and was diagnosed with acute hypoxemic respiratory failure and was admitted to the hospital and put on oxygen.

2. Respondents filed a General Admission of Liability on October 8, 2020 admitting for temporary total disability ("TTD") benefits from April 5, 2020 through May 31, 2020 and temporary partial disability ("TPD") from June 1, 2020 through ongoing. Respondents admitted to an AWW of $717.58.

3. Following her release from the hospital, Claimant was referred to family nurse practitioner ("FNP") Caitlin Lawshe for medical treatment. FNP Lawshe evaluated Claimant on April 24, 2020. FNP Lawshe noted Claimant complained of low energy levels and low oxygen levels that required supplemental oxygen. Claimant returned to FNP Lawshe on May 11, 2020 and noted that she had tried to wean down the supplemental oxygen, but her saturation levels dropped below 90%. Claimant reported

being able to walk to her mailbox and do light duties around the house a 1-2L of oxygen.

4. FNP Lawshe eventually allowed Claimant to return to work up to four hours per day after her May 26, 2020 examination. FNP Lawshe noted Claimant required 2L of oxygen with activity and recommended Claimant get an O2 backpack to go to work with.

5. FNP Lawshe subsequently referred Claimant to Dr. Knutson, a pulmonologist, for medical treatment. Dr. Knutson initially examined Claimant on July 13, 2020. Dr. Knutson noted Claimant had been a smoker for 30 years. Dr. Knutson diagnosed Claimant with significant exertional hypoxemia. Dr. Knutson referred Claimant for a computed tomography ("CT") angiogram of the chest.

6. The CT angiogram of the chest was performed on July 16, 2020. The CT angiogram showed no definite pulmonary embolus, but it was noted that the evaluation of some of the pulmonary arterial branches was limited by suboptimal contrast bolus timing and some motion artifact. Atherosclerotic changes of the aorta and scattered atelectasis was also noted along with interlobular septal thickening and emphysematous changes.

7. Claimant underwent an echocardiogram on August 7, 2020 that revealed no significant abnormalities.

8. Claimant continued to treat with Dr. Knutson. Dr. Knutson noted on September 14, 2020 that Claimant was continuing to need supplemental oxygen at 2.5L with activity and up to 3L while at work.

9. Claimant returned to Dr. Knutson on March 22, 2021. Dr. Knutson noted Claimant reported using more oxygen recently, with 3L being needed while at work. Dr. Knutson noted Claimant likely has COPD and mild post COVID fibrosis which would explain her increased need for supplemental oxygen. Dr. Knutson recommended Claimant continue with pulmonary rehab and recommended no change in her work restrictions.

10. Claimant underwent a repeat chest CT scan on April 12, 2021. The CT scan showed no interval change in mild emphysema and mild interlobular septal thickening and chronic subpleural ground-glass changes in the lung base. Calcification in the tail of the pancreas were noted to probably reflect chronic pancreatitis.

11. Claimant was next evaluated by Dr. Knutson on April 26, 2021. Dr. Knutson noted Claimant had some benefit with her pulmonary rehab with treadmill activity at 3-4 L per minute of supplemental oxygen. Dr. Knutson opined that Claimant has reached maximum medical improvement from a standpoint of her pulmonary status. Dr. Knutson opined that Claimant would greatly benefit from a portable oxygen concentrator in order to maintain her mobility, activity tolerance, and conditioning as well

as her ability to work, albeit in shorter shirts. Dr. Knutson noted that Claimant's exercise oxygen needs would be chronic.

12. FNP Lawshe examined Claimant on June 2, 2021. FNP Lawshe noted Claimant reported having good days and bad days with oxygen requirements of 3L with rest and 4L with activity. Claimant reported she was working from 10:00 – 2:00 three days a week and 10:00 – 4:30 two days per week and would leave work exhausted. FNP Lawshe placed Claimant at MMI as of June 2, 2021 and continued her work restrictions for her current schedule. FNP Lawshe recommended an additional 24 weeks of pulmonary rehab along with the use of inhalers as maintenance medical treatment.

13. Claimant was referred to Dr. Adragna for the impairment rating by FNP Lawshe. Dr. Adragna performed testing on Claimant in association with her impairment rating and provided Claimant with an impairment rating of 25% whole person, placing Claimant in Class II Of Table 8, Classes of Respiratory Impairment, of the AMA Guides 3rd Edition, Revised.

14. Claimant underwent a Division-sponsored Independent Medical Examination ("DIME") with Dr. Mayer on October 13, 2021. Dr. Mayer reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with the DIME. Dr. Mayer noted Claimant reported not being on supplemental oxygen or medications prior to contracting COVID-19. Dr. Mayer noted Claimant's was discharged from pulmonary rehab on June 23, 2021, despite the recommendation from FNP Lawshe that she continue with the rehab for another 24 weeks as of June 2, 2021.

15. Dr. Mayer summarized Claimant's medical records in her DIME report, including the diagnostic testing performed by the physicians providing Claimant medical care. Dr. Mayer noted it was her medical opinion that Claimant's oxygen requirements for 6-minute walk have not been established. Dr. Mayer further noted that she was concerned that Claimant's supplemental oxygen requirements are out of proportion to her pulmonary physiology, which suggested there may be an additional cause of her hypoxemia that may be amenable to treatment reasonably expected to improve her condition. Therefore, Dr. Mayer opined that Claimant was not at MMI for her work injury.

16. Dr. Mayer opined that Claimant should undergo additional testing to determine if there was treatment that would reasonably be expected to improve Claimant's condition and functional status, and if identified and treated, decrease her oxygen requirements and allow her to resume more of her former work activities. Dr. Mayer recommended a V/Q scan of perfusion scan to evaluate possible chronic thromboembolic disease. Dr. Mayer also recommended an echocardiogram with agitated saline to evaluate possible pulmonary hypertension and right to left shunt. Lastly, Dr. Mayer recommended an oxygen desaturation test with arterial line, to establish 6-minut walking oxygen requirements and possible component of obesity

hypoventilation. Dr. Mayer recommended the oxygen desaturation test as soon as possible.

17. Dr. Mayer further opined that Claimant qualified for an impairment rating under Class IV of Table 8, Classes of Respiratory Impairment, of the AMA Guides 3rd Edition, Revised, and provided Claimant with an impairment rating of 65% whole person.

18. Respondents filed an Application for Hearing on November 22, 2021 to contest the finding of not at MMI by Dr. Mayer.

19. Respondents referred Claimant for an Independent Medical Examination ("IME") with Dr. Bernton on January 11, 2022. Dr. Bernton reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with the IME. Dr. Bernton diagnosed Claimant with persistent hypoxemia and noted Claimant would require ongoing oxygen following her COVID-19 infection. Dr. Bernton opined in his report that he agreed with Dr. Knutson that Claimant was at MMI.

20. Dr. Bernton opined that the fact that there are diagnostic evaluations which can be performed and could potentially determine that other conditions maintenance treatment may be required does not alter the fact that Claimant is at MMI at this point in time.

21. Dr. Bernton noted that he agreed with Dr. Mayer that performing a repeat echocardiogram would be appropriate as it has been over a year from Claimant's prior echocardiogram. Dr. Bernton noted that a finding of the presence of pulmonary hypertension is, unfortunately, not unlikely given Claimant's deasutration off of oxygen in the presence of pulmonary fibrosis. Dr. Bernton opined that if pulmonary hypertension were present, that might alter treatment but that would not the fact that Claimant is at MMI.

22. Dr. Bernton further opined in his report that a V/Q scan would be appropriate, but again opined that this could be done as maintenance care. Dr. Bernton opined that a congenital right-to left shunt was a low probability and would not be an issue unless Claimant did have pulmonary hypertension, which had not yet been established. Dr. Bernton further opined that there was little evidence for the presence of obesity hypoventilation. Dr. Bernton opined that testing exercise with an arterial line was not a necessary test.

23. Dr. Bernton agreed with Dr. Mayer that Claimant's prognosis was unfortunately for continued decline in pulmonary function due, at a minimum, to aging and possibly to progression of the past-COVID pulmonary fibrosis. Dr. Bernton noted other treatments may be required based upon the Claimant's condition in the future. Dr. Bernton further opined that Claimant's proper PPD rating was the 25% whole person rating provided by Dr. Adragna.

24. Dr. Bernton testified at hearing consistent with his IME report. Dr. Bernton testified that Claimant had been clinically stable for quite some time when she was placed at MMI. Dr. Bernton testified that while he agreed that additional testing may be reasonable, the recommended additional testing could be considered maintenance treatment.

25. Respondents referred Claimant for an additional IME with Dr. Schwartz on February 18, 2022. Dr. Schwartz reviewed Claimant's medical records, obtained a medical history and performed a physical examination with testing in association with his IME. Dr. Schwartz issued a report on March 2, 2022 and diagnosed Claimant with work related post-COVID pulmonary fibrosis, and non-work related COPD/emphysema lung conditions along with another non-work related, non-pulmonary condition, morbid obesity, that may contribute to her hypoxemia but more certainly contributes to her shortness of breath with exertion.

26. Dr. Schwartz opined in his report that the recommended V/Q scan was reasonable to evaluate Claimant for a pulmonary emboli. Dr. Schwartz opined that if this evaluation is performed and negative, an echocardiogram would be unnecessary as the previous echocardiogram in August 2020 showed no heart abnormality of any etiology.

27. Dr. Schwartz opined in his report that Claimant likely had COPD/ emphysema prior to her COVID pneumonia that was secondary to her 30 years of daily exposure to the toxic effects of cigarette smoke. Dr. Schwartz opined that Claimant's long-term need for inhaled bronchodilators is treatment for her pre-exiting COPD and patients with post-COVID pulmonary fibrosis do not have COVID-induced COPD for which they would benefits from chronic bronchodilator therapy. Dr. Schwartz opined in his report that Claimant likely developed COVID pneumonia in April 2020 secondarty to a workplace exposure, which left Claimant with longstanding, no-smoking-related pulmonary abnormalities, possibly fibrosis, and an impairment of oxygenation for which Claimant now requires, and likely will continue to require, long-term need for supplemental oxygen.

28. Dr. Schwartz opined that based on Claimant's stability over the past year and there being no treatment available to treat her post-COVID pulmonary condition other than maintenance therapy with supplemental oxygen, Dr. Schwartz concurred with the opinion that Claimant was at MMI.

29. Dr. Schwartz testified consistent with his report at hearing. Dr. Schwartz opined in his testimony that Claimant was at MMI as of April 26, 2021. Dr. Schwartz testified that Claimant may have other conditions that could affect her respiratory condition. Dr. Schwartz testified that the COVID-pneumonia was not actively being treated. Dr. Schwartz opined that Claimant having blood clots was unlikely, but the V/Q scan would be appropriate for determination of long term clots in Claimant's legs.

30. Dr. Knutson testified by deposition in this matter. Dr. Knutson testified that she had reviewed the DIME report from Dr. Mayer. Dr. Knutson testified she did not believe any addition testing was necessary. Dr. Knutson testified the chest CT angiogram was performed in July, 2020 and "was adequate to exclude the so-called diagnosis of chronic thromboembolic disease." Dr. Knutson testified that the ventilation perfusion scan (V/Q scan) does not generally contribute any additional information, so she felt that test would not be useful.

31. With regard to the echocardiogram, Dr. Knutson testified that this would be a test for a pre-existing problem which was not reflected based on Claimant's history, and would only be suggested when there is presence of pulmonary hypertension, which Dr. Knutson felt was not warranted.

32. The ALJ notes that Dr. Knutson's opinion that no further diagnostic treatment is necessary in this case is contradicted by Dr. Mayer, Dr. Schwartz and Dr. Bernton who all testified that at least some additional testing would be reasonable in this case. The opinions did not agree as to whether this testing would be considered maintenance care or was pre-MMI care, but they did agree that at least some of the testing was reasonable.

33. Dr. Mayer testified by deposition in this matter. Dr. Mayer testified that one of the most notable things about Claimant's condition that remains unresolved is how much oxygen she needs when she walks. Dr. Mayer noted that the CT scan report was relatively mild and less that what she would expect Claimant to have with the severe degree of problems with oxygenation.

34. Dr. Mayer testified that one of the problems with COVID infections is that it can predispose people to developing chronic thromboembolic disease. Dr. Mayer noted that the physicians in this case had very appropriately performed a CT angiogram of the chest to look for acute pulmonary embolism, which was negative, although there was some limitation in seeing some of the outer branches, but to not identify a major clot. Dr. Mayer explained that her concern was not that a blood clot had been missed, but that hypercoagulability, the tendency to clot, would remain an ongoing problem in the long COVID syndrome.

35. Dr. Mayer testified that Claimant's condition included having her oxygen going too low during the day and/or night. Dr. Mayer testified that this can lead to pulmonary hypertension. Dr. Mayer noted that according the physical therapy reports, when they were trying to have Claimant do pulmonary rehabilitation, and especially on the treadmill, Claimant's oxygen kept going low, even though the activities they were having her do were consistent with activities of daily living. Dr. Mayer testified she was concerned with the fact that if Claimant were spending a fair amount of time moving around at an oxygen saturation below 88 percent, it would increase her risk for pulmonary hypertension. Dr. Mayer opined that a repeat echocardiogram could evaluate for right ventricular systolic pressure, which shows an elevated pressure in the right ventricle, which is an estimate of the pressuring in the pulmonary arteries, i.e.

pulmonary hypertension. Dr. Mayer testified that the physical therapy records document that Claimant's oxygen saturation had not been adequate when doing things like walking at a relatively slow pace on the treadmill.

36. Dr. Mayer testified that the existence of a right-to-left shunt was unlikely, but as an alternative explanation for why Claimant's oxygen is dropping when they exercise is a right-to-left shunt. Dr. Mayer explained in her testimony that the basis for her recommendations was the fact that Claimant's degree of oxygenation problems she has is out of proportion both to the mildly reduced diffusing capacity and the relatively mild fibrosis in the lung. Dr. Mayer explained that the reason she suggested this test is that if Claimant was getting an echocardiogram, the right-to-left shunt is a very simple addition to add the agitated saline and would allow for a more complete exam.

37. With regard to the six-minute walk test, Dr. Mayer testified the test would be to determine how much oxygen Claimant would need to maintain adequate oxygen saturation during activity. Dr. Mayer explained that this would help determine how much oxygen Claimant would need to maintain adequate oxygen saturation and have an adequate level of oxygen for her to safely do her activities of daily living.

38. The ALJ finds the DIME report and testimony of Dr. Mayer to be credible and persuasive with regard to Claimant's current medical condition and recommendations for further testing and treatment.

39. Claimant testified at hearing in this matter. Claimant testified she would like to undergo the testing recommended by Dr. Mayer. Claimant testified she continues to try to work for Employer, but her shifts have had to be shorter. Claimant testified that while she used to work 40 hours per week, she is now working 22-24 hours per week. Claimant testified she started back at work in June 2020 working four hours per day. Claimant testified she is not earning the same amount of money now than she was before she contracted COVID. Claimant testified that since she returned to work in June 2020 she has received TPD every two weeks in the amount of $25.

40. The ALJ finds the testimony of Claimant to be credible and persuasive.

41. With regard to the issue of MMI, the ALJ finds that Respondents have failed to overcome the DIME physician's opinion that Claimant is not at MMI by clear and convincing evidence. The ALJ credits the opinions expressed by Dr. Mayer in her report and testimony and finds that the evidence establishes that additional testing is appropriate to determine if there is an additional condition, such as chronic thromboembolic disease or pulmonary hypertension, which could be improved with additional treatment.

42. Notably, if Claimant is found to have blood clots, or pulmonary hypertension, additional treatment could be necessary to treat those conditions. The ALJ notes that the opinions expressed by Dr. Bernton and Dr. Schwartz indicate that the testing is reasonable, but their opinion is that it should be considered maintenance

treatment as opposed to medical treatment designed to cure and relieve the Claimant from the effects of the industrial injury. The ALJ finds that this represents a difference of medical opinion regarding the issue of MMI and does not overcome the opinion of Dr. Mayer by clear and convincing evidence.

43. In this case, the ALJ credits the opinion expressed by Dr. Mayer that the additional testing, including the V/Q scan, the echocardiogram and exercise test are reasonable medical treatment necessary prior to Claimant being placed at MMI and finds that Respondents have failed to establish that the opinion of Dr. Mayer regarding MMI has been overcome by clear and convincing evidence.

44. Based on the finding that Respondents have not overcome the DIME opinion on MMI by clear and convincing evidence, the ALJ need not make a finding on permanent impairment as this issue is not yet ripe.

45. With regard to the issue of temporary partial disability ("TPD") benefits, the ALJ finds Claimant's testimony that she received only $25 every two weeks from Insurer to be credible and persuasive. This testimony is consistent with the indemnity logs from Insurer that were entered into evidence at hearing.

46. Additionally, Claimant's wage records that were entered into evidence at hearing in this matter. The wage records demonstrate that Claimant was only capable of working part time after she returned to work on or about June 10, 2020. Claimant was provided with temporary disability benefits from Insurer in the amount of $1,708.50 for the period of April 5 through April 29, 2020. Claimant was then provided with temporary disability benefits in the amount of $956.76 every two weeks for the period of April 30, 2020 through September 30, 2020. After Claimant was placed at MMI, Respondents provided Claimant with indemnity benefits in the amount of $25 every two weeks, despite the fact that no admission of liability had been filed reducing the amount of temporary disability benefits paid to Claimant until the October 8, 2020 general admission of liability which admitted for TTD benefits for the period of April 5, 2020 through May 31, 2020 at a rate of $478.38 per week. The GAL noted the full amount of TTD benefits amounted to $3,895.38.

47. According to the indemnity logs entered into evidence by Respondents, Claimant was paid $25 every two weeks for the period of October 1, 2020 through February 28, 2022 for a total of $9500.00 (the indemnity logs show two payments on March 14 and March 28, but the ALJ is only calculating TPD benefits through March 1, 2022 only go that far). The indemnity logs further establish that temporary disability benefits in the amount of $12,232.86 were paid for the period of April 5, 2020 through September 30, 2020.

48. The ALJ notes that Claimant's testimony with regard to her receipt of TPD benefits is consistent with the Claim Indemnity Payment Log from Insurer entered into evidence by both parties at hearing. Insofar as the testimony may be considered inconsistent with the indemnity log entered into evidence at hearing, the ALJ credits the

indemnity log and wage records entered into evidence at hearing. The ALJ notes that Claimant's wage records entered into evidence at hearing demonstrate that Claimant's earnings after she returned to work were consistently several hundreds of dollars less per week than her admitted average weekly wage and were not rectified by the bi-weekly $25 payments from Respondents.

49. However, the indemnity logs indicate that Claimant was paid temporary disability benefits in the amount of $956.76 every two weeks up through September 30, 2020. Claimant's disability benefits were then reduced to $25 per week through the date of hearing.

50. Section 8-42-106, C.R.S. provides that in cases of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. The ALJ credits Claimant's testimony that she was unable to continue to work full time as a result of her work injury and had to reduce her hours to be credible and persuasive. The ALJ finds that this testimony is consistent with the medical records entered into evidence in this case.

51. Claimant set forth in exhibit 15 documentation showing the amount of temporary disability benefits owed to Claimant and the amounts of temporary disability benefits paid to Claimant. According to exhibit 15, Claimant was entitled to temporary partial disability benefits in the amount $19,007.69 for the period of May 28, 2020 through the date of hearing. This is in addition to the $3,895.38 in TTD benefits Claimant was entitled to for the period of April 5, 2020 through May 31, 2020, for a total of $22,903.07. The indemnity logs establish that through the date of the hearing, Claimant was paid $13,182.86 which establishes an underpayment of $9,720.21 through March 1, 2022 ($22,903.07 - $13,182.86 = $9,720.21).

52. The ALJ credits exhibit 15 and finds that Claimant has established by a preponderance of the evidence that she is entitled to additional temporary disability benefits in the amount of $9,720.21 for the period of June 1, 2020 through March 1, 2022. Based on the finding that Claimant is entitled to ongoing TPD benefits, the ALJ finds that Respondents have failed to establish that there was an overpayment of temporary disability benefits in this case. Respondents request for an Order finding an overpayment of benefits is therefore denied.

53. Respondents shall pay Claimant TPD benefits for the period of June 1, 2020 and continuing until terminated by law based on the stipulated average weekly wage ("AWW") of $717.58. As found, Claimant's calculation of underpaid TPD benefits in the amount of $9,720.21 through March 1, 2022 is found to be credible and persuasive.

54. Respondents shall also pay statutory interest on the unpaid amount of temporary benefits.

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., 2018. 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).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

4. 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 probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

5. 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.

6. As found, the ALJ finds the testimony of Dr. Mayer more credible and persuasive than the conflicting testimony of Dr. Knutson, Dr. Bernton and Dr. Schwartz. As found, Dr. Bernton and Dr. Schwartz both opined that the testing recommended by

Dr. Mayer was reasonable, but maintained that this was maintenance treatment. As found, the opinions by Dr. Bernton and Dr. Schwartz represent a difference of opinion regarding the nature of the treatment and do not rise to the level of clear and convincing evidence that Claimant is not at MMI.

7. The ALJ recognizes the opinions of Dr. Bernton and Dr. Schwartz that while some of the additional testing is reasonable, it would be more appropriately categorized as maintenance medical treatment. However, diagnostic procedures constitute a compensable medical benefit that must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. *Jacobson v. American Industrial Service/Steiner Corp.*, W.C. No. 4-487-349 (ICAO, April 24, 2007). In this regard, the ALJ credits the opinions expressed by Dr. Mayer to be more credible and persuasive than the contrary opinions expressed by Dr. Bernton and Dr. Schwartz.

8. Respondents' are therefore liable for the costs of the medical treatment recommended by Dr. Mayer pursuant to the Colorado Medical Fee Schedule.

9. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to an award of temporary partial disability benefits for the period of May 31, 2020 through ongoing. As found, Claimant's testimony that she was unable to continue to work full time as a result of her work injury is found to be credible.

11. As found, the ALJ credits the indemnity logs entered into evidence along with Claimant's exhibit 15 and finds that Claimant was underpaid temporary disability benefits in the amount of $9,702.21 through March 1, 2022. As found, Claimant is entitled to ongoing TPD benefits until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents' shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury including the testing recommended by Dr. Mayer.

2. Respondents shall pay Claimant TPD benefits in the amount of $9,720.21 for TPD benefits through March 1, 2022.

3. Respondents shall pay ongoing TPD benefits to Claimant until terminated by law or statute.

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

DATED: June 21, 2022

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-039-027-003

ISSUES

The issues set for determination included:

- Is Respondent precluded from litigating the issue of causation concerning Claimant's low back injury based upon the prior Order issued by ALJ Peter Cannici?

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

PROCEDURAL STATUS

The undersigned ALJ issued a Summary Order on December 27, 2021, which was mailed on December 27, 2021. Respondents requested a full Order on January 5, 2022. This Order follows.

FINDINGS OF FACT

1. There was no evidence in the record that prior to February 2017, Claimant suffered an injury to his lumbar spine or required treatment for that area of the body.

2 On February 2, 2017, Claimant was injured when he slipped and fell on black ice while in the course and scope of his employment. Claimant injured his low back and right hip as a result of the fall. Claimant was transported by ambulance to the Emergency Department of Good Samaritan Hospital.

3. Claimant was hospitalized at Good Samaritan Hospital where x-rays showed he had a comminuted intertrochanteric and subtrochanteric fractures of the right hip with displacement and varus angulation.

4. On February 3, 2017, Claimant underwent surgery for the intertrochanteric and subtrochanteric fractures, which was performed by George Chaus, M.D. The surgery included open reduction internal fixation of the fractures with an intramedullary implant. Dr. Chaus noted the characterized the fracture was "significantly more difficult for fixation and reduction than a standard intertrochanteric or subtrochanteric hip fracture with significant deforming forces requiring an open reduction, cerclage cable wiring and advanced trauma techniques.

5. Claimant was hospitalized at Good Samaritan through February 6, 2017. Claimant was evaluated by ATP Dean Prok, M.D. at SCL Broomfield on March 10, 2017.

Claimant, who was using a wheelchair and cane, reported right upper/lateral leg pain. Dr. Prok diagnosed Claimant with right hip pain, right knee pain and acute intractable tension-type headaches.

6. Claimant was at a skilled nursing facility (Advanced Health Care) for approximately one month before he returned home.

7. The medical records admitted at hearing showed Claimant continued to use a wheelchair and a cane. On March 17, 2017, Claimant returned to Dr. Chaus. Claimant described weight bearing status as "toe touch weight bearing". Claimant did not report lumbar pain. Dr. Chaus also evaluated Claimant on April 18, 2017, who noted he was still using a wheelchair. Dr. Chaus said Claimant was to transition to weight bearing.

8. On April 11, 2017, Claimant returned to light duty work with Employer. He had restrictions of no lifting or carrying more than two (2) pounds, and no walking, crawling, kneeling, squatting, climbing, or driving. Claimant was directed to use the wheelchair for movement a maximum of 2-4 minutes per hour. X-rays taken on April 28, 2017 documented the fact that the hip fracture was healing well.

9. On May 19, 2017 Claimant returned to Dr. Prok for an examination. Claimant did not report any lower back pain. He utilized a walker instead of a wheelchair. Claimant advised Dr. Prok that he would be leaving soon for a one month-long vacation in the Philippians. Dr. Prok referred Claimant to Nicholas K. Olsen, D.O. for an examination.

10. On June 29, 2017 Claimant was evaluated by Dr. Olsen. Claimant mentioned the recent trip to the Philippines with his family. While in the water he was able to walk with a normal gait and significantly reduced pain. Claimant noted a marked increase of pain with a single-legged stance on the right lower extremity, difficulty walking upstairs and relief when sitting in a recliner or propping his leg up with pillows in bed. Dr. Olsen noted mild forward flexed posture and moderate range of motion deficits in both flexion and extension. He prescribed land-based physical therapy and pool therapy because of Claimant's good experience with water walking while in the Philippines.

11. Over the next four months, Claimant received treatment including physical therapy ("PT") and his treatment was overseen by Dr. Prok. Claimant's initial visit at CACC Physical Therapy was on July 10, 2017. He advised the therapist that his greatest difficulty was with walking; that dressing himself was a challenge, especially putting on his right sock and shoe; that sitting and driving for long periods aggravated his pain; and that he utilized a chair lift at home. The initial PT exam revealed deficits in strength, flexibility, and walking tolerance, which limitations restricted his ability to perform usual work and activities of daily living (ADL-s). Claimant received PT at CACC until August 31, 2017.

12. On August 24, 2017 Claimant visited Dr. Olsen for an examination. Claimant was using a straight cane mostly at work but less at home. He reported anterior

right groin pain when weight-bearing as well as pain in his right knee and hip. Claimant did not mention pain in his lumbar spine or SI joint. Dr. Olsen noted "neutral mechanics" in the lumbar spine and full range of motion ("ROM").

13. Dr. Prok saw Claim at regular intervals from September 22, 2017 through March 5, 2018. Claimant reported right knee pain and Dr. Prok included "acute pain of right knee" in his diagnoses. These records reflected Claimant's continued use of a cane.

14. On February 5, 2018 Dr. Olsen added, "acute deep vein thrombosis (DVT) of the distal vein of right lower extremity" to his diagnoses. He noted that Claimant's personal physician was managing the DVT with blood thinners.

15. Dr. Prok concluded Claimant reached MMI on March 5, 2018. At that time, Claimant was reporting right hip, right knee and right thigh pain. Claimant was using a cane to ambulate. Dr. Prok assigned Claimant a 21% lower extremity impairment and 20% for the implant arthroplasty, pursuant to Table 45 of the *AMA Guides*.

16. Respondent filed a Final Admission of Liability ("FAL") on March 22, 2018, admitting to Dr. Prok's impairment rating.

17. On September 7, 2018 Claimant underwent a DIME that was conducted by David Yamamoto, M.D. Claimant reported pain in the right hip, right leg, right knee and low back. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination, Dr. Yamamoto diagnosed Claimant with the following: (1) right hip intertrochanteric fracture/subtrochanteric fracture with extension to the proximal right femur requiring an intramedullary implant; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) DVT following the right hip fracture, lengthy immobilization and inactivity post-injury.

18. Dr. Yamamoto stated Claimant's continuing antalgic gait was secondary to his work injury, which resulted in persistent lower back pain and dysfunction that had not been formally treated. This conclusion regarding causation was persuasive to the ALJ. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond to treatment, Dr. Yamamoto suggested he be referred to a physiatrist for further evaluation and treatment.

19. After a hearing was conducted on February 7, 2019, ALJ Cannici issued Findings of Fact, Conclusions of Law and Order, dated March 19, 2019, which was mailed March 20, 2019.[1] More particularly, on the causation question, ALJ Cannici found: "[B]ased upon the medical evidence in the record, the ALJ determined Claimant suffered an injury to his lumbar spine as a result of his February 2, 2017 work injury". Judge Cannici found Respondent did not meet its burden of proof to overcome Dr. Yamamoto's opinion on MMI:

[1] This Order was admitted into evidence as part of Exhibit KK, pp. 350-360.

"Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports".[2]

20. The ALJ determined the issues adjudicated at the February 7, 2019 hearing were different than those at the instant hearing. In particular, the first hearing involved the issue of MMI, while the latter concerned the question of Claimant's permanent medical impairment.

21. Respondent filed a General Admission of Liability ("GAL") on May 3, 2019, referencing Dr. Yamamoto's determination that Claimant was not at MMI, as well as ALJ Cannici's Order.

22. Claimant returned to Dr. Prok on May 24, 2019. It was noted he was working with permanent restrictions and used a cane for support. He reported low back pain above the hip, along with aching/burning in that area, as well as the right hip area. On examination, Dr. Prok noted Claimant reported pain in the hip, lower leg and knee areas diffusely. Pain was also present in the right low back, with tenderness to palpation in the right lumbosacral and thoracic region and SI area. Dr. Prok referred Claimant to Scott Primack, D.O. and for PT.

23. Claimant underwent seven treatment sessions at CACC Physical Therapy beginning on June 21, 2019, with modalities including deep tissue massage and neuromuscular treatments. The massage therapist who assessed Claimant found he had hypertonicity or tension in his quadratus lumborum, glutes, and lumbar paraspinals at each of the seven (7) visits. By the end of therapy on August 16, 2019, Claimant's left and right quadratus lumborum muscles were still hypertonic. The ALJ noted these treatments were in connection with low back pain and the physical therapist's findings of hypertonicity.

24. On July 12, 2019, Claimant was evaluated by Dr. Prok. His pain complaints were similar to the previous evaluation, including right low back, gluteal and hip pain. On examination, Dr. Prok noted mild decreased ROM at the hip, with minimal soreness in the knee and hip area. Right and left low back pain was present on movement at end range.

[2] Exhibit KK, p 356.

Dr. Prok's assessment was: S/P ORIF fracture; acute pain of right knee; pain and swelling of left lower leg; fall; closed fracture of the right hip with routine healing; chronic right-sided low back pain without sciatica; acute DVT of the distal vein of right lower extremity.

25. On July 19, 2019, Claimant was evaluated by Dr. Primack. He reported a 20% improvement in connection with his lumbar spine, with increased pain with sitting and improvement with walking. Dr. Primack noted on examination that Claimant had a Trendelenburg gait pattern without the cane, which was an issue of hip mechanics as compared to spine mechanics. The Trendelenburg gait pattern was still present with the cane, but less so. Dropping of the right pelvis was present, which was consistent with a gluteus medius level weakness. Lumbar flexion was 40°, extension was 20°, with some discomfort with extension noted. (The ALJ found these measurements showed restrictions in ROM). Right and left lateral side bending or within normal limits.

26. Dr. Primack's diagnoses were: pelvis and hip intertrochanteric and subtrochanteric hip fracture, which resulted in an intra-medullary implant, with a significant breaking the right proximal femur; Claimant had extensive PT and was followed by Dr. Prok, with no report of back pain. Claimant was referred to Dr. Olsen, who managed Claimant's recovery, with neutral mechanics were demonstrated at follow-up appointments; MMI by Dr. Prok on March 5, 2018; DIME on September 7, 2018; subjective symptoms as described. Dr. Primack did not foresee any permanent residual impairment at the level of the lumbar spine, but ordered a lumbar MRI.

27. Claimant underwent a lumbar MRI on July 26, 2019. The films were read by Eduardo Seda, M.D. Dr. Seda's impression was: L1-2 left paracentral extruded free disc fragment, with moderate dural sac narrowing and mild crowding of the cauda equina; degenerative disc joint changes at the other level without dural sac or root sleeve deformity. The ALJ found the MRI provided evidence of objective conditions within Claimant's lumbar spine.

28. Claimant returned to Dr. Primack on August 16, 2019, at which time the MRI was reviewed. On examination, Claimant had 18° of hip extension, 28° abduction, adduction was 20°, internal rotation was 26° and external rotation was 44°. Dr. Primack concluded Claimant was at MMI. He opined there was no specific work-related lumbar spine injury, but lumbar spondylosis was present. Dr. Primack concluded Claimant had a 16% impairment of the lower extremity.

29. On October 4, 2019, Dr. Prok placed Claimant at MMI and noted an impairment rating was previously assigned. Dr. Prok's diagnoses were: closed fracture of right hip with routine healing; chronic right-sided low back pain without sciatica; right hip pain; acute pain of right knee; S/P ORIF fracture; fall subsequent encounter. Dr. Prok stated Claimant had permanent restrictions of no running and use of cane, as needed. The record did not contain ROM testing worksheets for Claimant's hip or lumbar spine performed by Dr. Prok.

30. On November 15, 2019, Claimant returned to Dr. Yamamoto for the follow-up DIME. At that time, Claimant reported right hip, right lower back and right leg pain. Dr. Yamamoto noted decreased ROM in all planes and the left iliac crest was slightly lower than the right. Dr. Yamamoto observed that after the first DIME, the lower back was then marked on all the subsequent pain diagrams and the lower back pain was noted in the physical therapy that was done after the first DIME report.

31. Tenderness was found over the right paraspinal musculature. Decreased ROM of the right hip was found with the following measurements: flexion 90°, extension 20° degrees, abduction 40°, abduction 40°, internal rotation 24°, external rotation 36°. Dr. Yamamoto's diagnoses were: right hip inter-trochanteric fracture, sub trochanteric fracture with extension at right proximal right femur requiring an intramedullary implant; healthy gait requiring frequent use of cane; mechanical low back pain secondary to the antalgic gait; history of DVT following the right hip fracture, causation unclear.

32. Dr. Yamamoto concluded Claimant had a permanent medical impairment for the lumbar spine of 15%, which included 5% from Table 53, IIB of the *AMA Guides*, with 10% assigned for loss of ROM. For the right hip, he was assigned an ROM impairment of 14%, which converted to a 6% whole person impairment. Dr. Yamamoto included worksheets for the impairment rating and reviewed the reports of Dr. Olsen and Dr. Primack. Dr. Yamamoto disagreed that Claimant's low back was not related to the work injury and specifically commented on Dr. Cebrian's conclusions, as follows:

> "He (Dr. Cebrian) opined that through a large portion of the medical care, there was not documentation of any lumbar spine complaints. (*Comment: Mr. Heine states that he did mention the lower back pain on several occasions but it was not documented. The low back pain was not documented at all until after I performed the Division IME and when he returned to treatment the lower back pain was then documented and addressed.)*
>
> "He (Dr. Cebrian) opined on page 22 of his report that the lumbar spine complaints were not causally related to the claim. He noted that I indicated that Mr. Heine used a cane 80% of the time because of his gait abnormality. He stated that the purpose of a cane was to redistribute the weight from the lower leg that is weaker (or) painful and to improve stability by increasing the base of support and by utilizing a cane it takes additional for(ce) (off of) the spine and should lessen any muscular related soreness secondary to a gait abnormality. (*Comment: I certainly am aware of this but Dr. Cebrian also did not take into account the fact that the ongoing use (of) the cane clearly showed that his gait was not stable this would strongly indicate that he was having difficulty with pelvic stability which could in my opinion clearly was the cause of ongoing significant mechanical low back pain.)*
>
> "He (Dr. Cebrian) also stated that even if Mr. Heine had some lumbar muscular soreness as a result of the gait abnormality, the muscular soreness did not rise

to the level of permanent impairment. (*Comment: If this was muscular soreness, I would not expect it to persist for a period of over 2 years.)*[3]

Dr. Yamamoto articulated his rationale for including the lumbar spine as follows:

"With all due respect, I am not in agreement with the findings from Dr. Cebrian. Dr. Cebrian that the hip injury should be a scheduled impairment even though he noted that Mr. Heine required the use of a cane and that a Trendelenburg gait was documented clearly by Dr. Primack. This is clear evidence that the impairment extends above the right hip joint. Dr. Primack also noted back pain even though he did not a pine that this was readable and thought it was more muscular. I would argue that this is more than a muscular problem and rises to the level of a spine impairment. It is clear that the lumbar dysfunction is a chronic condition and is expected to improve. In regard to the DVT, I find it more than a coincidence that this happened on the same side that he had the severe hip fracture. There was a long period of time between the fracture and the DVT and it appeared that this was at least eight months although Mr. Heine reported that it was six months when I first saw him. He does have increased risk because of his age and obesity as Dr. Cebrian pointed out but in my opinion, this is more than coincidence. However, I did not have some of the records from Dr. Olsen, when I did the initial DIME. I will concede that there is not convincing evidence regarding the work relatedness of the DVT although I certainly am of the opinion that the right femur injury played a significant role. I have elected not to rate the DVT. I am strongly of the opinion that the mechanical low back pain is a result of the ongoing altered gait and again have included the lower back as part of the impairment. It is noted that there was a small herniated disc in a one-two which I believe to be an incidental finding".[4]

33. The ALJ credited Dr. Yamamoto's opinion and found it more persuasive than those offered by Dr. Cebrian and Dr. Primack.

34. There was no evidence in the record that Dr. Yamamoto's rating was invalid. The ALJ found that Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment was supported by the medical evidence in the record.

35. On March 20, 2020, Carlos Cebrian, M.D. conducted a follow-up evaluation of Claimant, at the request of Respondent.[5] At that time, Claimant's complaints included:

[3] Ex. II, pp. 323-325.

[4] Ex. II, pp. 327-328.

[5] Dr. Cebrian's prior evaluation was November 29, 2018. In that report, he stated Claimant was at MMI. The ALJ noted Dr. Cebrian's subsequent report reiterated other opinions from the prior report, including his disagreement with Dr. Yamamoto concerning Claimant's date of MMI and whether his low back condition was causally related to the work injury.

limping while walking; swelling, right leg; pain, right hip; pain, lower back. On examination, Claimant's lumbar spine had no spasms, trigger points or atrophy. Straight leg raise was to 60°, with a negative FABER and Patrick signs. ROM with dual inclinometers was: 62° in flexion, 25° in extension, 25° in right lateral flexion and 25° and left lateral flexion. Dr. Cebrian's diagnosis that were claim-related included: right hip fracture, with surgery performed by Dr. Chaus.

36. Dr. Cebrian concluded Claimant's lumbar spine complaints were not causally related to the February 2, 2017 injury, reasoning that there was no documentation of lumbar spine complaints for an extended period of time after the injury. Dr. Cebrian also opined that Claimant's lower extremity DVT was not causally related to the February 2, 2017 injury. He disagreed with Dr. Yamamoto and opined Claimant had a medical impairment rating of his right hip totaling 18% lower extremity impairment, which converted to a 7% whole person impairment.

37. Dr. Cebrian testified at hearing and said his examination of Claimant revealed that when using a cane, Claimant's gait normalized. (The ALJ noted this differed from the opinion offered by Dr. Primack). Without the cane, Claimant had a Trendelenburg gait, which Dr. Cebrian explained occurred due to hip dysfunction, with one hip dropping lower than the other. When using a cane, Claimant's hips stabilized and this was why his impairment was limited to the hip. Dr. Cebrian testified that Claimant did not sustain an injury to the lumbar spine and had no permanent impairment to that area of his body.

38. The ALJ found Respondent failed to overcome the opinions of DIME physician, Dr. Yamamoto. The opinions expressed by Dr. Cebrian differed from Dr. Yamamoto, but did not establish an error.

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 Eng'g, 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).

Issue preclusion

Claimant argued that the doctrine of issue preclusion barred Respondent from contesting the issue of causation or relatedness, as this issue was previously litigated. Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien,* 990 P.2d 78, 84-85 (Colo. 1999). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id*. Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). All elements of issue preclusion were not met in the case at bench.

As found, there were not identical issues litigated at the February 7, 2019 and August 20, 2020 hearings, as the former hearing involved the question of MMI and the latter, medical impairment. (Finding of Fact 20). Even though the issue of causation was an intrinsic part of both hearings, the ultimate issues were different. Therefore, the doctrine of issue preclusion does not apply in the case at bar.

Overcoming the DIME

In resolving this issue concerning Claimant's impairment, the ALJ noted the question of whether Respondent overcame Dr. Yamamoto'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 this case, Respondent disputed whether Claimant was entitled to a permanent medical impairment for his lumbar spine and contended the scheduled hip rating (14%) should be converted to the whole person impairment (6%) as an impairment not on the schedule. Respondents cited the opinions of Dr. Cebrian and Dr. Primack to support their argument. Claimant argued that insufficient evidence was introduced to overcome Dr. Yamamoto's opinions and that the clear and convincing evidentiary standard was not met.

There was no dispute about the underlying facts in the case. As determined in Findings of Fact 2-9, Claimant was injured at work on February 2, 2017 when he slipped and fell on icy concrete surface while checking fire extinguishers. He sustained comminuted intertrochanteric and subtrochanteric fractures of the right hip, with displacement and varus angulation. Claimant underwent surgery on February 3, 2017 and underwent an open reduction internal fixation procedure, with an intra-medullary implant performed by Dr. Chaus. Dr. Chaus noted Claimant had a significant break in the right proximal femur. *Id.*

Claimant was released from Good Samaritan Hospital and spent approximately one month in a skilled nursing facility. (Findings of Fact 5-6). Claimant was using a wheelchair and cane, as reflected in the medical records admitted at hearing. *Id.* When Claimant returned to light duty on April 11, 2017, he was using a wheelchair and then also using a walker. The evidence in the record reflected that Claimant continued to use the cane throughout this period of time. (Findings of Fact 9-13). As found, the medical records reflected Claimant did not report low back pain in the period of time after his surgery, but reported hip and groin pain. *Id.* Claimant's ATP Dr. Prok determined Claimant reached MMI on March 5, 2018. (Finding of Fact 15).

In the first DOWC-sponsored IME, Dr. Yamamoto concluded Claimant was not an MMI. (Finding of Fact 17). Claimant reported low back pain and Dr. Yamamoto opined that as a result of the work injury and resulting altered gait, Claimant had low back symptoms. (Finding of Fact 18). The ALJ credited this opinion. A hearing was held on the question of whether Claimant was at MMI and ALJ Cannici concluded Respondent had not overcome Dr. Yamamoto's conclusions by clear and convincing evidence. (Finding of Fact 19).

As determined in Findings of Fact 22-23, Claimant was evaluated by Dr. Prok and received additional treatment, including PT to address low back complaints. As found, in the subsequent evaluations by Dr. Prok and Dr. Primack, Claimant reported low back pain in pain diagrams following the first DIME and low back pain was included in the assessment by those physicians. *Id.* Dr. Prok then placed him at MMI on October 4, 2019. (Finding of Fact 29).

In the case at bar, the ALJ determined Respondent did not meet its burden of proof. The ALJ's rationale was twofold; first, there was no evidence that Dr. Yamamoto's conclusions were more probably erroneous or that his findings at the time of the DIME were in error. The ALJ found that Dr. Yamamoto's ROM measurements were valid at the time he performed the evaluation and the evidence submitted Respondent did not refute this fact. (Finding of Fact 34). In this regard, Dr. Yamamoto's conclusion that Claimant had a permanent medical impairment in his lumbar spine was supported by the fact that the records showed he had pain and qualified for such an impairment under the *AMA Guides*. (Findings of Fact 33-34).

In addition, Dr. Yamamoto concluded Claimant's mechanical back pain was related to his altered gait. (Findings of Fact 18, 32). As part of his reports for both evaluations, Dr. Yamamoto provided a detailed explanation as to the basis of this opinion. *Id.* In the second DIME report, Dr. Yamamoto specifically addressed the conclusions of Dr. Cebrian and expressed his disagreement. (Finding of Fact 32). Dr. Yamamoto explained his reasoning with regard to the etiology of Claimant's low back pain. *Id.* The ALJ found Dr. Yamamoto's opinion to be persuasive. (Finding of Fact 33).

Second, the evidence adduced by Respondents to contravene Dr. Yamamoto's opinion simply constituted a difference of opinion. Dr. Cebrian disagreed that Claimant had a medical impairment to his lumbar spine, however, the ALJ found Dr. Cebrian did not refute that Claimant's low back condition was causally related to the work injury or that Dr. Yamamoto's rating was valid. (Findings of Fact 36-38). The ALJ determined this did not constitute sufficient evidence to meet the clear and convincing evidentiary standard and Respondent is required to pay PPD benefits based upon Dr. Yamamoto's rating.

ORDER

It is therefore ordered:

1. Respondent did not meet its burden to overcome the DIME physician's findings with regard to Claimant's medical impairment rating by clear and convincing evidence.

2. Claimant sustained a 20% whole person impairment of his lumbar spine and a 14% scheduled impairment of his right hip as a result of his industrial injury.

3. Respondent shall pay PPD benefits based upon Dr. Yamamoto's medical impairment rating. Respondent is entitled to a credit for PPD benefits previously paid.

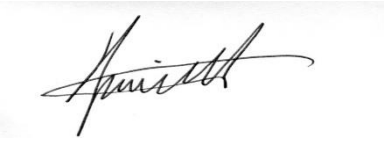
4. Respondent shall pay 8% statutory interest on all benefits not paid when due.

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

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow 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: June 21, 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. 4-915-969-006

ISSUES

- Whether Claimant may proceed to hearing on her Application for Hearing when she refuses to allow the court to record the hearing via Google Meets?

FINDINGS OF FACT

1. Claimant filed an Application for Expedited Hearing on January 25, 2022 seeking a hearing on prior authorization for medical benefits. The matter was set for hearing on April 21, 2022 at 8:30 a.m. to proceed to hearing via Google Meets or in person in Glenwood Springs, Colorado. All parties appeared at the April 21, 2022 hearing via Google Meets.

2. Respondent submitted hearing exhibits to the court in advance of the April 21, 2022 hearing. The hearing exhibits were received by the court on April 12, 2022.

3. Prior to going on the record for the April 21, 2022 hearing, the ALJ inquired from Claimant whether she had received Respondent's hearing exhibits. Claimant maintained that she had not received the exhibits. Respondent confirmed that the hearing exhibits had been sent to Claimant's P.O. Box which was noted on the January 25, 2022 Application for Hearing to be Claimant's address. Respondent also noted that the hearing exhibits had been emailed to Claimant the morning of April 21, 2022. Claimant advised that she had not checked her P.O. Box since the previous Friday (April 15) and did not want to proceed to hearing without having an opportunity to have time to review Respondent's hearing exhibits.

4. The ALJ inquired at the April 21, 2022 hearing if Claimant would like an extension of time to commence the hearing and inquired as to how long Claimant would need in order to review the exhibits for the extension of time. The ALJ granted the request for the extension of time and the parties agreed to recommence the hearing on April 28, 2022 at 1:00 p.m. Discussion was had as to how the new hearing would proceed, specifically whether the parties were to use the same Google Meets link, and the ALJ advised the parties that a new Google Meets link would be sent by the court for the April 28, 2022 hearing.

5. No evidence was accepted into the record at the April 21, 2022 hearing and the only discussions involved whether Claimant had a chance to review the Respondent's exhibits that had been sent to her and whether she wished to have additional time prior to review the exhibits before going on the record and taking any evidence in the case. Additional discussion was had off the record as to whether

Respondent was required to provide the hearing exhibits to Claimant three business days prior to the hearing and if the hearing exhibits would not be allowed into evidence if the exhibits were not exchanged. The ALJ explained to Claimant that there was no statutory rule that required the exchange of exhibits three business days prior to hearing and that particular rule was used by the OAC office in Grand Junction to ensure that the court and all parties had the exhibits in advance of the hearing.

6. The court did not issue a new Notice of Hearing for the April 28, 2022 hearing as the hearing was continued at the prior hearing to a date agreed up by all parties. The court clerk did issue a new Google Meets link to the parties for the April 28, 2022 hearing to be used by the parties.

7. Shortly before the April 28, 2022 hearing, Claimant emailed the clerk of the Court and indicated that she wanted to show up at the hearing in person. The clerk advised Claimant that she could appear in person, but the hearing was to be held in the Grand Junction Office of Administrative Courts and not the Glenwood Springs location.

8. Prior to the April 28, 2022 hearing, Claimant filed two written motions with the OAC. The first motion sought a protective order pursuant to C.R.C.P. 26(c) and the second motion requested an extension of time for the hearing which indicated that Claimant wished to attend the hearing in person and wanted the hearing to be in Glenwood Springs.

9. The April 28, 2022 hearing was recorded via Google Meets and using the recording equipment in the courtroom in Grand Junction. At the outset of the hearing, the ALJ dealt with the outstanding motions from Claimant and allowed Respondent to verbally advise as to their position on both motions. Counsel for Respondent noted that Respondent objected to both motions.

10. With regard to the Motion for Protective Order pursuant to Colorado Rules of Civil Procedure ("CRCP) 26(c), Respondent's counsel advised the ALJ that no discovery was outstanding in this case. Claimant argued at the hearing that a protective order was necessary in this case in order to protect Claimant from the dissemination of her medical records to the public.

11. The ALJ orally denied the Motion for Protective Order at the hearing and noted that he would put reduce the denial of the Order to a written Order prior to the next hearing. The ALJ noted that CRCP 26(c) deals with a protective order that limits discovery. As no discovery was outstanding in this case, there was no basis for a protective order limiting discovery.

12. With regard to Claimant's request for a continuance in order to proceed to hearing in person in Glenwood Springs, the ALJ eventually granted this motion over Respondent's objection, and the parties were able to eventually agree to proceed to hearing in Glenwood Springs on June 9, 2022 at 10:30 a.m. Counsel for Respondent noted that he had another hearing set later in the afternoon on June 9, 2022 and

requested that he be allowed to appear virtually at the hearing in Glenwood Springs. The ALJ agreed to this request by Respondent.

13. An Order granting Claimant's Motion for Extension of Time and Request for In Person Hearing and Denying Claimant's Motion for Protective Order was issued on April 29, 2022. The April 29, 2022 written order set forth the ALJ's reasoning for granting the motion for extension of time and denying the request for protective order and is contained in the file, so it will not be rehashed in this Order. The Order noted that Respondent would be allowed to appear at the June 9, 2022 hearing virtually if they decided to do so, which was consistent with the discussion on the record at the April 28, 2022 hearing.

14. A new Notice of Hearing for the June 9, 2022 hearing was issued on April 29, 2022. The paralegal for Respondent's counsel confirmed on the same day that Respondent's counsel would be attending the hearing via Google Meets.

15. Respondent also filed a request for a copy of the April 28, 2022 Google Meets recording on April 29, 2022. Claimant objected to the Google Meets recording being disseminated and noted in her April 29, 2022 email that she did not consent to the recording and did not want the Respondent to have a video copy of the recording that they could spread around to the public.

16. On May 25, 2022, Claimant filed a Motion to Suppress Claimant's Medical Information and Records, Recall and Destroy the Unauthorized "Google Meets" Video Recordings of Hearings and for Change of Administrative Law Judge. Claimant argued in her Motion that the initial hearing was set for April 21, 2022 and provided the parties with the option of appearing either via Google Meets on in person, but did not state that the hearing would be recorded using Google Meets.

17. Claimant stated in paragraph 4 of her motion "Pursuant to the court's rules, hearing exhibits were required to be delivered at least 3 business days in advance of the hearing for video conference hearings. Respondent's hearing exhibits were not delivered in time. According to the Vail post office, they were sent via Certified Mail and did not arrive at the post office until sometime on April 18, 2022. Claimant did not receive notice of the mailing until several days after the April 28, 2022 hearing because she was out of town." Claimant stated in Paragraph 6 of her motion, "Because of the untimely delivery of the hearing exhibits, the court continued the Hearing to April 28, 2022. The court did not issue a Notice of Hearing for the hearing. The court did not state during the April 21, 2022 hearing that the reset hearing would only be via Google Meets...."

18. The ALJ would note that these statements made by Claimant in her motion are, at best, a misstatement of the procedural matters in this case. The April 21, 2022 hearing was not continued based on Respondents' untimely exchange of exhibits. In fact, by Claimant's own admission, the exhibits were timely exchanged as the post office delivered the exhibits via certified mail on April 18, 2022, three business days

prior to the April 21, 2022 hearing. Moreover, when the parties inquired whether they should use the same link for the April 21, 2022 hearing, the ALJ advised the parties that a new link would be sent to the parties. Claimant at no point prior to the eve of the April 28, 2022 hearing expressed a desire to appear in person. When Claimant did indicate that she wanted to attend the hearing in person, Claimant was provided with the appropriate information regarding attending the hearing in person in Grand Junction. It was Claimant who then objected to having to travel to Grand Junction for the hearing, even though that option was provided to Claimant prior to the hearing.

19. With regard to the Google Meets recording, Claimant argued in her motion that nothing in the rules provides for recording via Google Meets or any video recording of proceedings. Claimant therefore requested relief in the form of having any Google Meets recordings be destroyed and not provided to any of the parties.

20. Claimant also requested that the ALJ recuse himself from the case based on the argument that the ALJ decided the Motion for Protective Order against Claimant without requiring Respondent to respond to the motion. Claimant also argued the ALJ blamed Claimant for the first continuance of the hearing even though Respondent failed to provide hearings exhibits in a timely fashion, did not provide a Notice of Hearing for the April 28, 2022, did not record the procedural hearing on April 21, 2022 and recorded Claimant in an unauthorized manner at the April 28, 2022 hearing via Google Meets. Claimant argued that these actions showed bias and prejudice against Claimant and violated Claimant's substantive and procedural due process and privacy.

21. Respondent filed an objection to Claimant's motion on May 31, 2022. Respondent noted in the objection to Claimant's request that the Google Meets recording be destroyed that the OAC Rules and Polices use various terms to describe the recordings and the Workers' Compensation Act notes that the hearing be "electronically recorded". The objection further noted that the OAC Rules contemplate the use of video format in discussing having witnesses testify video videoconference.

22. Respondent further noted that the OAC issued emergency rules permitting video hearings on July 31, 2020 in response to the COVID-19 pandemic. In this notice, the OAC advised that all hearings would be conducted by telephone of video conference and advised that the OAC would utilize Google Hangouts for the recording of the telephone and video conference hearings. Respondent argued in their objection that Claimant's argument that the OAC's utilization of Google Meets is unlawful and prejudicial was not supported by law or fact, nor did it deny Claimant due process with regard to her right to proceed to hearing.

23. Notably, the July 31, 2022 notice involving the use of Google Meets in light of the COVID-19 pandemic, signed by Director and Chief Administrative Law Judge Matthew Azer, states in pertinent part:

> In light of the COVID-19 pandemic state of emergency and the existing Executive Orders from the Governor, as well as local municipalities, all at

the Office of Administrative Courts (Denver, Colorado Springs and Grand Junction) **shall be conducted by telephone or video conference** for the near future.

The OAC will consider allowing in person hearings but only in limited circumstances in late October 2020.

The OAC utilizes Google Hangouts[1] for the recording of the telephone and video conference hearings. Parties will received a Google Hangout calendar invite on the afternoon prior to the scheduled hearing, with the telephone conference number, as well as a pin number to join the scheduled hearing. Parties are responsible for telephoning that telephone number at the time and date of the hearing. The parties should also have available the telephone numbers of any witnesses participating in the hearing. The ALJ will conference in the witnesses to the Google Hangout hearing. The parties shall ensure that all witnesses have copies of any exhibits that will be referenced during the telephonic hearing. (emphasis in original)

24. With regard to Claimant's request for disqualification of the ALJ, Respondent properly noted that CRCP 97 provides that "any party may for such disqualification and a motion by a party shall be supported by affidavit." Respondent noted that this rules has been interpreted to require a verified affidavit setting forth factual allegations which, if true, would show bias or the appearance of bias and prejudice. Respondent further argued that lack of a verified affidavit is sufficient basis to deny a motion for recusal. *See Austin v. City and County of Denver*, 462 P.2d 600 (1980). Respondent argued that Claimant's failure to provide a verified affidavit in support of her motion should result in the denial of her motion.

25. Respondent further argued that mere opinions or conclusions that the judge is biased are insufficient for a judge to be recused from a case. Respondents also noted that adverse rulings alone do not support a conclusion of bias.

26. ALJ Sidanycz issued an Order on June 1, 2022 summarily denying Claimant's Motion to Suppress Claimant's Medical Information and Records, Recall and Destroy the Unauthorized Google Meets Video Recordings of Hearings and for Change of Administrative Law Judge.

27. Claimant then filed a "Forthwith Request for Clarification of Court's Order Dated June 1, 2022" on June 2, 2022. Because this motion was filed within 10 days of the June 9, 2022 hearing, and Respondent has 10 days to respond to the motion, Claimant was advised by the OAC clerk that this motion would be taken up at the June 9, 2022 hearing.

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[1] The ALJ will use the terms Google Hangouts and Google Meets interchangeably in this Order as these reference the same technology utilized that the OAC to conduct hearings since at least July 31, 2020.

28. On June 3, 2022 Claimant filed "Claimant's Objection to Court's Order re: Delivery of Confidential Exhibits to Respondent in Advance". In this motion, Claimant maintained that because Respondent opposed her request for an order suppressing her confidential information from the public record, and the Court denied the motion, she could not provide advance copies of the hearing exhibits before the hearing. Claimant also argued in the motion that "Respondent should also be required to appear at the hearing in advance." At the conclusion of this motion, in bold type, Claimant stated, **"Finally, I object to and do not consent to any recording of the hearing or proceedings by any means other than the courtroom's official audio recording system."** (emphasis in original).

29. At the June 9, 2022 hearing, Claimant appeared in person in Glenwood Springs, Colorado along with the ALJ. Respondent's counsel appeared via Google Meets. The courtroom audio recording was started and the ALJ indicated to the parties that he would address Claimant's objection to recording the proceedings via Google Meets before starting the Google Meets recording.

30. Claimant noted that she could not hear or see Respondent's counsel on the video screen of the tablet at the bench. Claimant indicated that without being able to see Respondent's counsel, she would be unaware if Respondent's counsel were making faces or attempted non-verbal ex-parte communication with the ALJ.

31. Claimant had with her at counsel table a tablet and the ALJ invited Claimant to join the Google Meets hearing in order to be able to see Respondent's counsel. Claimant indicated that she was unable to join the WiFi network without providing additional information. The ALJ then turned up the volume on the tablet at the bench and turned the screen so it pointed away from the judge and towards Claimant.

32. The ALJ advised Claimant that Respondent was not required to appear live at the hearing based on our prior discussion at the April 28, 2022 hearing where the parties were attempting to find an agreeable date and Respondent's counsel had indicated that they had an afternoon hearing, but could appear in the morning if they were allowed to appear virtually. The ALJ reminded Claimant that the start time for the June 9, 2022 hearing had been set for 10:30 a.m. pursuant to her request that the hearing not start at 8:30 a.m. the ALJ further noted that the hearing confirmation for the June 9, 2022 hearing set forth that the matter was to proceed via Google Meets. Claimant maintained her objection to recording the hearing via Google Meets.

33. Upon inquiry from Claimant, the ALJ advised Claimant that the official recording for the hearing would be the Google Meets recording. The ALJ advised Claimant that the hearing had been noticed as a Google Meets hearing and Respondent had made arrangements to proceed to hearing virtually which was specifically allowed by the ALJ at the April 28, 2022 hearing in an effort to get this matter to hearing on a date and time agreeable to all parties.

34. Claimant continued to object to the Court proceeding with the hearing

being recorded via Google Meets. Claimant maintained that having a video of her at hearing was improper without her consent. The ALJ then offered to turn off the camera on the tablet which would effectively preclude any video of the Claimant at the hearing from appearing on the recording. Claimant would still not agree to this as a reasonable accommodation to allow for the court to record the proceedings via Google Meets.

35. The ALJ noted that if Claimant did not agree to have the matter recorded electronically in a manner in which the court had determined the hearing should be recorded, the ALJ would have no choice but to dismiss her application for hearing. Nonetheless, Claimant would not agree to allow the court to record the matter via Google Meets.

36. Claimant appeared to argue that the use of Google Meets to record the hearing, even with the camera turned off, violated her right to privacy and she should not be forced to proceed to hearing in this manner. Claimant offered no legal or factual basis for the claim that the recording of the hearing via Google Meets violated her right to privacy, and offered no rational explanation as to how her right to privacy would be infringed by having an electronic recording of the hearing take place via Google Meets.

37. The ALJ finds and determines that Claimant's objection to proceeding to hearing and having the matter recorded in the manner best determined by the ALJ, Claimant puts the court in a precarious position. Either the ALJ records the hearing over Claimant's objection to being recorded or the court must acquiesce to Claimant's demands for how the hearings should proceed. The court finds that such action is improper on the part of Claimant.

38. Claimant was issued multiple warnings by the ALJ at the June 9, 2022 hearing that if she did not consent to the recording, the ALJ would be forced to strike her application for hearing. The other option would be to have the ALJ record the Claimant without her consent in an administrative hearing in which she is seeking a benefit, or allow Claimant to dictate the terms of the recording of the hearing and the presentation of evidence. The court offered multiple accommodations to Claimant including having her join the Google Meets through her electronic device, turning the ALJ's tablet to face Claimant and/or turning off the camera so Claimant would not be recorded. Claimant summarily rejected having the matter recorded through Google Meets even with all of the accommodations offered to her and provided no reasonable basis for her continued objection to having the hearing recorded via Google Meets other than she did not want it to occur in that way because it violated her right to privacy. The ALJ finds that the Claimant's refusal to consent to the recording of the hearing via Google Meets is unreasonable under the circumstances of this case.

39. Notably, Claimant bears the burden of proof with regard to the issues endorsed on her Application for Hearing (medical benefits). Based on Claimant's refusal to allow the court to electronically record the hybrid hearing using Google Meets as set forth in the Hearing Notice for the April 21, 2022 and June 9, 2022 hearing, Claimant effectively blocked the court from initiating the hearing and taking evidence on

the matter. Because Claimant has the burden of proof on these issues, Claimant has failed, by her own actions in frustrating the process of getting the case to hearing, to present any evidence that she is entitled to medical benefits in this case. No evidence was entered at hearing and no testimony was taken. Therefore, Claimant has failed to meet her burden of proof to establish the right to any benefit under the Colorado Workers' Compensation Act.

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., 2018. 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).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

4. Section 8-43-207(1) states in pertinent part:

> Hearings shall be held to determine any controversy concerning any issue arising under articles 40 to 47 of this title. In connection with hearings, the director and administrative law judges are empowered to:
>
> (h) Control the course of the hearing and the conduct of persons in the hearing room.

5. Section 8-43-213(1), C.R.S., provides: "All testimony and argument of all hearings held pursuant to Section 8-43-207 concerning any issue arising under article

40 to 47 of this title shall either be taken verbatim by a hearing reporter or shall be electronically recorded by the division."

6. In response to the COVID-19, the Office of Administrative Courts set forth Google Hangouts to allow for the recording of hearings held before the OAC. This was memorialized in a July 31, 2020 statement from Director and Chief Administrative Law Judge Matthew Azer. The July 31, 2020 statement specifically addresses that the video conference hearings will be recorded via Google Hangouts.

7. As found, in this case, the matter was noticed up for a Google Meets hearing on April 21, 2022. All parties appeared at the hearing via Google Meets. As found, the ALJ granted Claimant's request for a continuance at the hearing on April 21, 2022 in order to allow Claimant additional time to review the exhibits Respondents intended to present at hearing. As found, the parties agreed to reconvene the case for hearing on April 28, 2022 at 1:00 p.m. As found, the court advised the parties that a new Google Meets link would be sent to the parties for the April 28, 2022 hearing.

8. As found, prior to the April 28, 2022 hearing, Claimant advised the court that she would like to appear in person at the April 28, 2022 hearing. As found, Claimant was advised that if she wished to appear live, she would need to appear at the OAC office in Grand Junction, Colorado. As found, Claimant then filed a written motion for a protective order and a motion for an extension of time and request for an in person hearing.

9. At the April 28, 2022 hearing, the ALJ denied Claimant's motion for protective order under CRCP 26(c) as no discovery was outstanding. Over Respondent's objection, the ALJ granted Claimant's motion for a continuance and request for an in person hearing and set the case for hearing on June 9, 2022 at 10:30 a.m. in Glenwood Springs, Colorado. The ALJ further allowed Respondents to appear virtually at the June 9, 2022 hearing.

10. Claimant subsequently objected to any video recordings of the hearings in this case via Google Meets. Claimant argued that allowing the matter to be recorded using Google Meets violated her right to privacy. However, Claimant offered no legal or factual basis for this contention that electronically recording the proceedings via Google Meets violated her right to privacy.

11. Claimant's actions in this case in refusing to allow for an electronic recording of the hearing through Google Meets serves to frustrate the court's attempts to get the matter to hearing in an attempt to allow for the presentation of evidence.

12. As found, Claimant bears the burden of proof in this case by a preponderance of the evidence. Claimant's actions in this case in refusing to consent to the recording of the proceedings via Google Meets precludes the ALJ from taking evidence in this case and Claimant is unable to meet her burden of proof without

submitting evidence. Therefore, Claimant's request for benefits must be denied and dismissed.

13. As found, based on Claimant's refusal to consent to having the hearing in this matter recorded in the manner in which the court had determined was the most appropriate means of recording, specifically using the recording function through Google Meets which was being utilized by Respondent's to appear at the hearing, Claimant has frustrated the court's attempts to have this matter proceed to hearing. The ALJ finds that the appropriate remedy in this case based on Claimant's actions is that Claimant's Application for Hearing should be dismissed.

ORDER

It is therefore ordered that:

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

DATED: June 22, 2022

Keith E. Mottram

_____

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

ISSUES

- Did Claimant prove she suffered a compensable injury on July 5, 2021?
- Is Claimant entitled to TTD benefits from July 19, 2021 through September 7, 2021?
- Is Claimant entitled to ongoing TTD benefits commencing January 3, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment on January 3, 2022, thereby precluding an award of TTD?
- The parties stipulated to an average weekly wage (AWW) of $282.79, with a corresponding weekly TTD rate of $188.53.
- If the claim is compensable, the parties stipulated that treatment provided by Concentra, Dr. Kenneth Finn, and UCHealth Urgent Care was reasonably necessary and authorized. Respondents also agreed to pay for the July 21, 2021 office visit to Peak Vista Community Health Center.
- If the claim is compensable, the parties stipulated to a general award of TPD benefits from September 8, 2021 through January 3, 2021. The parties agreed to reserve the exact amount of TPD owed to Claimant.

FINDINGS OF FACT

1. Claimant worked for Employer as a kitchen crewmember. Claimant had previously worked for Employer in the mid-2010s. She left for other employment but stayed in regular contact with her former manager, Jorge G[Redacted]. She was re-hired in November 2020.

2. When she was re-hired in 2020, Claimant made clear that she could only work Monday through Thursday because of child-care obligations. Claimant's husband shares custody of three young children with his ex-wife. The children stay with Claimant and her husband on Friday, Saturday, and Sunday. Claimant also has full custody of three children from a previous marriage. As a result, she cares for six children on Friday, Saturday, and Sunday. The children's ages range from 18 months to 13 years. Employer acknowledged Claimant's family obligations and only scheduled her to work on Monday through Thursday.

3. On July 5, 2021, Claimant noticed a pungent odor coming from one of the refrigerators. On further investigation, she discovered three boxes of spoiled chicken. Claimant contacted her supervisor, [Redacted, hereinafter Mr. G], and they agreed the bad chicken should be discarded.

4. Each box of chicken weighed approximately 40-50 pounds.

5. Claimant carried all three boxes (one at a time) approximately 50 feet to a rear door that exits to the alley. She then carried two boxes outside to the dumpster. She lifted the boxes above her shoulder and threw them into the dumpster. After lifting the second box into the dumpster, Claimant experienced pain in her low back.

6. Claimant did not report the injury to anyone that day, because she initially "didn't think it was something bad . . . I thought I was just tired [from] working a lot of hours." Claimant finished her shift and went home. She showered and took Tylenol for the pain.

7. Claimant testified that a few days after the accident, she told the shift leader, "[Redacted, hereinafter J," (sp?) that her back had been hurting "ever since I threw the chicken away." She also told co-workers [Redacted, hereinafter Ms. N] and "[Redacted, hereinafter Ms. S]" about her back pain. Ms. N[Redacted] confirmed that Claimant told her about the injury the day after the accident. Claimant also mentioned her back pain to Ms. N[Redacted] at other times over approximately the next 10 days. Neither J[Redacted] nor S[Redacted] were called as witnesses to dispute Claimant's testimony.

8. Claimant continued to work her regular shifts for ten day after the accident. Her back pain became progressively worse, particularly with lifting and bending at work. She did not report the injury to Employer or seek treatment because she hoped her back would get better on its own.

9. On Friday, July 16, 2021, Claimant's back pain become worse and "wouldn't go away." She struggled to participate in routine family activities over the weekend, and primarily rested. Claimant credibly testified she performed no activities outside of work during that time that could have caused a back injury.

10. Claimant sought treatment on July 19, 2021, at the urging of her parents. She texted her supervisor, Mr. G[Redacted], at 6:30 A.M. to advise that she could not make it into work and would have someone bring him a doctor's note later that day.

11. Claimant was seen at the UCHealth Urgent Care clinic on July 19. She complained of low back pain "x 2 weeks and recently worsening." The triage EMT documented, "she lifted a heavy box at work and has had progressive back pain since." Claimant told the treating ER provider that, "prior to onset of sxs she was throwing away a big thing of chicken at work and as she did she felt a bit of a twinge of pain but nothing unbearable. Pain became more constant afterward and was steady until 2 days ago when it began to significantly worsen." The pain was in her low back and radiated down both legs. She was having difficulty sitting, bending, and walking. Physical examination showed significant muscle spasm over the lumbar paraspinals and decreased lumbar range of motion. Claimant was diagnosed with acute low back pain and "sciatica." She was given a Toradol injection and prescriptions for a muscle relaxer and prednisone. The provider gave Claimant note stating could return to work on July 22 "as long as her symptoms have improved."

12. Claimant texted Mr. G[Redacted] later that evening that she could not come to work for several days. She said she would send him a copy of the off-work note as soon as she could.

13. Claimant saw her PCP at Peak Vista Community Health Centers on July 21, 2021. Claimant reported "low back pain starting x 2 weeks ago after throwing a heavy object into a trash can at work. States pain initially was not that bad, but has progressively worsened with time." The provider encouraged Claimant "to notify [her] supervisor of this injury at work."

14. Claimant texted Mr. G[Redacted] while she was at the Peak Vista clinic and asked if someone could report the injury "to the insurance to see if they can take care of this since it happened at work." Mr. G[Redacted] stated he would speak to his supervisor. Mr. G[Redacted] later texted Claimant that he needed "the date of when you carried the box of chicken outside." Claimant replied that the injury occurred on July 5 "when the chicken went bad." She said she was working with Margarita and Sarahi at the time.

15. Claimant and Mr. G[Redacted] exchanged text messages over the next several days regarding Claimant's injury and the procedures she needed to follow.

16. On July 29, 2021, Claimant texted the following to Mr. G[Redacted]:

> I am sorry. I just can't move because of my back. I went to the hospital and they told me I could not move for at least 3 days and could be more. It is because the day the chicken went bad, I went to go dump it at the dumpster and I got hurt. I didn't think it was that bad but with time it did start hurting more and more. This week it did get worsened since Friday, I was not able to move for nothing. I knew that I should have reported it, but I didn't think it was something serious. I do apologize.

17. Claimant saw Dr. Daniel Peterson at Concentra, Employer's designated provider, on August 2, 2021. She stated she "strained her low back on 7/5 throwing boxes of chicken wings that had gone bad into a dumpster. She felt mild pain that day and worked for 2 more weeks." Examination showed tenderness to palpation muscle spasms around the lumbar spine. Dr. Peterson diagnosed a lumbosacral strain and opined that Claimant's objective findings were consistent with the history and a work-related injury. Dr. Peterson prescribed muscle relaxers, ibuprofen, and referred Claimant to physical therapy. He imposed work restrictions including lifting no over 10 pounds and alternate sitting, standing, and walking. The work restrictions were incompatible with Claimant's regular job.

18. Employer sent Claimant a written modified job offer on September 2, 2021. The planned schedule was Monday through Thursday, from 5 P.M. to 10 P.M. Claimant accepted the job offer and returned to work on September 8, 2021.

19. Claimant underwent a lumbar MRI on November 4, 2021. It showed a right-sided disc herniation at L5-S1.

20. Claimant received conservative treatment through November 30, 2021. She stopped receiving treatment because Insurer had notified Concentra that the claim was denied and no additional treatment would be covered. Claimant's condition had partially improved but not fully recovered when she stopped treatment.

21. Claimant's description of the accident and the progression of her low back problems is credible and persuasive. Claimant's testimony is supported by the history of injury documented by multiple medical providers.

22. Claimant proved she suffered a compensable back injury on July 5, 2021.

23. Claimant proved she was disabled from her regular work and suffered an injury-related wage loss from July 19, 2021 through September 7, 2021.

24. Claimant worked modified duty from September 8, 2021 through January 2, 2022. She was terminated on January 3, 2022, and has not worked since that date.

25. Employer asserts Claimant was terminated for excessive "no call no shows" and unexcused call offs.

26. Employer's attendance policy requires all employees to provide "reasonable advance notice" of any absences, which is defined as three hours before the scheduled start of a shift. Employees are allowed only five "call-offs" in a rolling 12-month period. Absences exceeding that limit may result in disciplinary action "up to and including termination."

27. Employer identified the following days of missed work as the basis for the termination: "11/22/2021, 11/24/2021, 12/9/2021, 12/17/2021, 12/24/2021, 12/27/2021, 12/28/2021, 12/29/2021, and 12/31/2021."

28. Claimant was absent on November 22 and November 24 with approved PTO. The leave was verbally approved by Mr. G[Redacted] and approved in writing by the VP of operations on November 19, 2021.

29. Claimant missed work on December 9, 2021 because of illness. She notified Mr. G[Redacted] in the morning (more than three hours before the start of her shift) that she was vomiting and had a fever. Mr. G[Redacted] immediately replied "OK." She texted Mr. G[Redacted] again in the afternoon that she was feeling worse and still vomiting. Mr. G[Redacted] replied, "Okay, stay safe."

30. Also on December 9, unknown members of management completed a "Time Off Request Form" stating that Claimant missed work that day because of "No Day Care." Claimant later refused to sign the form because it was inaccurate.

31. In mid-December 2020, Employer changed Claimant's work schedule to include Fridays without discussing it with her. On December 13, 2021, Claimant noticed that she had been put on the schedule for Friday, December 17. Claimant was confused

because it had always been understood that she could not work on Fridays. Claimant had the following text exchange with Mr. G[Redacted] regarding the schedule:

> Claimant: Sir, I have a question. That schedule, did you schedule it just in case I come in or did they tell you I had to come in?
>
> G[Redacted]: That's what James asked me to do. Now that you can work 5 days and 25 hours.
>
> Claimant: But I cannot work on the weekends.
>
> G[Redacted]: I know, but that's what he said.
>
> Claimant: It is because I cannot do that, not because I don't want to. I lose more money in paying for a babysitter than what I make.
>
> G[Redacted]: I understand.

32. Claimant revisited the issue with Mr. G[Redacted] at work on December 13 or 14. Claimant reiterated her longstanding inability to work on Friday, Saturday, or Sunday. Mr. G[Redacted] acknowledged awareness of that limitation but said he had been instructed to put her on the schedule. Claimant testified Mr. G[Redacted] told her Employer was trying to get her to quit or create a basis for her termination.

33. Claimant did not work on Friday, December 17.

34. Claimant texted Mr. G[Redacted] on Monday, December 20 and asked if she was still on the schedule. She was concerned she might have been terminated because she could not work the previous Friday. Mr. G[Redacted] replied, "Yes, of course." Mr. G[Redacted] asked Claimant if she knew of anyone else looking for work. Claimant told Mr. G[Redacted] she might be able to work more hours, but reiterated she could only work Monday through Thursday.

35. Claimant did not work on Friday, December 24.

36. Claimant was absent from work on December 27, 28, 29, and 31. She had previously requested the week off because they were going to have her husband's children for the entire week. Claimant made this request at the same time she requested the time off in November. Claimant understood Mr. G[Redacted] to have approved the time off because he said there were enough people to cover her hours that week. Employer has a wall calendar in the kitchen to track at a glance when various employees will be off work. Claimant had marked herself out on the wall calendar after receiving approval from Mr. Go[Redacted].

37. Claimant reported to work on January 3, 2022, for what she believed to be her next scheduled shift. She was informed that she had been terminated.

38. Mr. G[Redacted] testified he first learned about Claimant's injury on July 19, 2021. He corroborated that Claimant had been approved for time off from November 19 to November 28. Mr. G[Redacted] agreed that Claimant's schedule before December 17 had always been Monday through Thursday, and he knew she could not work on Friday, Saturday, or Sunday. He conceded Claimant's absence on December 9 was excused because of illness. Mr. G[Redacted] disputed Claimant's testimony that he approved leave the week of December 27 through December 31. He did not recall Claimant asking for that week off, but testified he would have denied the request because that is typically a busy week at the restaurant. Mr. G[Redacted] denied telling Claimant that Employer was looking for an excuse to fire her.

39. Claimant's testimony regarding her missed work is credible and more persuasive than the contrary evidence offered by Respondents.

40. Claimant genuinely believed her request for time off the last week of December 2021 had been approved.

41. Claimant was still disabled and medically restricted from her regular job when she was terminated on January 3, 2022.

42. Respondents failed to prove Claimant was responsible for termination of her employment.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

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

As found, Claimant proved she suffered a compensable back injury on July 5, 2021. Claimant's testimony is credible and persuasive. She reported the injury and resulting back pain to co-workers within days of the accident. Any discrepancies regarding the exact timing of her conversations with co-workers in the 10 days after the accident are minor and do not appreciably detract from the persuasiveness of Claimant's testimony. Although Claimant agreed in hindsight she should have reported the injury to management immediately, her reasons for not doing so are plausible and reasonable under the circumstances. Claimant described the accident and progression of symptoms to multiple medical providers in a manner consistent with her testimony. Physical examinations at the urgent care and at Concentra showed muscle spasms in her low back, which objectively corroborates an injury. There is no persuasive evidence that Claimant had any low back problems before the work accident, nor persuasive evidence to suggest an alternate cause of the symptoms that started on July 5.

B. Claimant is entitled to TTD benefits from July 19, 2021 through September 7, 2021

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3).

As found, Claimant proved she was disabled from her regular job and suffered an injury-related wage loss from July 19, 2021 through September 7, 2021. Although she kept working for approximately 10 days after the accident, her condition worsened and she could no tolerate the standing, walking, and lifting associated with her job. Claimant is entitled to TTD benefits commencing July 19, 2021, first shift she missed because of the injury. Claimant remained off work until starting modified duty on September 8, 2021.

C. Claimant was not responsible for her termination

Claimant was disabled from her regular pre-injury work and Respondents stopped offering modified duty on January 3, 2022. Ordinarily, she would be entitled to TTD benefits under those circumstances. But Respondents argue they are not liable for TTD commencing January 3, 2022 because Claimant was responsible for termination of her employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The “termination statutes” are an affirmative defense to liability for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that the claimant performed a “volitional act” or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents failed to prove Claimant was responsible for termination of her employment on January 3, 2022. The ostensible basis for her termination—"excessive" absenteeism—is not supported by persuasive evidence. Her absence on December 9, 2021 was because she had a fever and was vomiting. Missing work because of illness is not a "volitional act" to justify termination, particularly in a food service position. Her absences on November 22 and 24, 2021 were covered by her pre-approved PTO leave. Regardless of whether it is within an employer's prerogative to terminate an "at will" employee for *excused* absences, the employee cannot reasonably be held "responsible" for their termination in such a circumstance. Claimant was a good worker with a longstanding positive relationship with her manager. No employee in similar circumstances would reasonably expect to be terminated for absences that were pre-approved and excused by their supervisor.

Admittedly, Claimant's absences on Friday, December 17, 24, and 31 were not excused. However, those absences are excluded from consideration as a basis for termination by § 8-42-105(4)(b). A claimant's refusal to work modified duty does not constitute responsibility for termination if the refusal was reasonable under the circumstances. Section 8-42-105(4)(b) references factors such as long-distance travel, unreasonable expense or financial hardship, or "any other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer." Claimant had advised Employer from the start of her employment that she could not work on Fridays, Saturdays, or Sundays. She cares for six young children on those days, and it would have been impractical and cost-prohibitive to secure daycare so she could work one shift at her relatively low-wage job. Employer was fully aware of her family situation, and never scheduled her to work on those days until after her injury. And when Employer changed Claimant's longstanding work schedule, it did so without discussion or reasonable advance notice.

The final question is whether Claimant's absences on December 27, 28, 29 were excused. Claimant's testimony that Mr. G[Redacted] told her she could take the week of December 27 is credible. But even if she misunderstood Mr. G[Redacted], the ALJ is persuaded she genuinely believed the leave was approved, and she otherwise would not have skipped work without calling in.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries on July 5, 2021 is compensable.

2. Insurer shall cover authorized medical treatment reasonably needed to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, treatment provided by Concentra, Dr. Kenneth Finn, the emergent visit to UCHealth Urgent Care on July 19, 2021, and treatment at Peak Vista Community Health Center on July 21, 2021.

3. Claimant's average weekly wage is $282.79, with a corresponding TTD rate of $188.53 per week.

4. Insurer shall pay Claimant TTD benefits from July 19, 2021 through September 7, 2021.

5. Claimant is entitled to a general award of TPD benefits from September 8, 2021 through January 2, 2022. The parties may request an additional hearing if they cannot agree on the specific amount of benefits due.

6. Respondents' defense that Claimant was responsible for termination of her employment on January 3, 2022 is denied and dismissed.

7. Insurer shall pay Claimant TTD benefits commencing January 3, 2022 and continuing until terminated according to law.

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

9. 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: June 23, 2022

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on August 6, 2021, he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received for his back is reasonable and necessary to cure and relieve him from the effects of the work injury.

FINDINGS OF FACT

1. The employer operates a roofing company. The claimant worked as a roofer.

2. The claimant testified regarding three different incidents that occurred during his employment. The first incident occurred in June or July 2021. The claimant testified that at that time he was picking up trash and debris around a job site. When he lifted a trash container he felt a slight pain in his back.

3. The second incident occurred in August 2021. The claimant testified that he was cutting TPO plastic from rolls and needed to move one of the rolls. While attempting to lift the roll, the claimant felt a "hard pain" in the right side and center of his back.

4. The third incident occurred approximately one month after the August incident. At that time, the claimant was on a roof and carrying hoses for the nail guns. The roof was icy, and the claimant slipped and felt more pain in his back.

5. The incident at issue before the ALJ is the one involving moving rolls of plastic. This incident has been identified as occurring on August 6, 2021.

6. TS[Redacted] is the company president for the employer. On September 1, 2021, Mr. TS[Redacted] created the First Report of Injury or Illness form regarding the August 6, 2021 incident. In that document, the injury was reported to the employer on August 20, 2021 and is described as "While working in Aspen, employee picked up a roll of material. Straining Mid Back."

7. Mr. TS[Redacted] testified that TPO is a membrane used in the roofing process. Each roll weighs approximately 400 pounds. It is Mr. TS[Redacted]'s understanding that the claimant and some coworkers were competing to see who could pick up the roll of TPO. Upon learning of the August 6, 2021 incident, Mr. TS[Redacted] sent the claimant for medical

treatment. The claimant did not report injuries related to picking up trash or slipping on a roof to Mr. TS[Redacted].

8. Ater the August 6, 2021 incident, the claimant continued working for the employer. In addition, after reporting the incident on August 20, 2021, the claimant continued performing his normal job duties.

9. Mr. TS[Redacted] testified that the claimant's last day of work for the employer was in early or mid-September. After that time, Mr. TS[Redacted] contacted the claimant regarding returning to work. However, the claimant declined any work offered to him by Mr. TS[Redacted].

10. The claimant was first seen for the August 6, 2021 incident on September 2, 2021. At that time, the claimant was seen by Andrew Henrichs, PA-C at Roaring Fork Family Practice. The claimant described all three incidents mentioned above. The claimant also reported low back pain radiating up his back to the base of his neck. PA Henrichs opined that the claimant's pain was likely muscular and referred the claimant to physical therapy.

11. On September 15, 2021, the claimant returned to PA Henrichs and reported increased pain. PA Henrichs continued to recommend physical therapy. In addition, he prescribed hydrocodone/acetaminophen.

12. The claimant began physical therapy on September 16, 2021. At that time, the claimant reported that his worst pain[1] was 10, best pain was 2, and his current pain **was 4.**

13. The claimant was again seen by PA Henrichs on September 30, 2021. The claimant reported worsening symptoms, with the addition of pain radiating down his right leg. PA Henrichs ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

14. On October 6, 2021, the claimant underwent an MRI of his lumbar spine. Dr. David Breland reviewed the MRI and on October 7, 2021 and noted normal alignment, no fracture, with normal discs and no canal stenosis at all levels. Dr. Breland identified the MRI as a "negative exam".

15. On October 14, 2021, the claimant returned to PA Henrichs. At that time, the MRI results were reviewed and PA Henrichs reiterated that the claimant's pain was likely muscular. The claimant was placed on light duty with work restrictions that included a lifting restriction of 10 pounds, and no kneeling, squatting, crawling, or climbing.

[1] Based upon a 10 point pain scale.

16. Subsequently, the claimant was referred for a surgical consultation. On October 20, 2021, the claimant was seen by Dr. Michael Campian at The Spine Center. Dr. Campian noted that the claimant's MRI was unremarkable and opined that the claimant's pain was myofascial. Dr. Campian recommended the claimant continue with physical therapy.

17. At a physical therapy appointment on October 26, 2021, the claimant reported his worst pain as 9, best pain as 6, and current pain as 9.

18. On February 11, 2022, the claimant attended an independent medical examination (IME) with Dr. J. Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In a questionnaire for the IME, the claimant reported that his current pain as 9, worst pain 10, and least pain 9. In his IME report, Dr. Raschbacher opined that the claimant did not suffer an injury at work. In support of his opinion, Dr. Raschbacher noted that the claimant's reported mechanisms of injury and subjective complaints are not supported by objective findings. Dr. Raschbacher also noted that the claimant's presentation at the IME was "remarkable for the nonphysiologic examination". Dr. Raschbacher further opined that the claimant does not need any permanent work restrictions.

19. On February 15, 2022, PA Henrichs determined that the claimant was at maximum medical improvement **(MMI)** and referred him for a functional capacity evaluation and an impairment rating.

20. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the medical records, the opinions of Ors. Campian and Raschbacher, and the testimony of Mr. TS[Redacted]. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury to his back at work on August 6, 2021.

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. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on August 6, 2021, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, he medical records, the opinions of Ors. Campian and Raschbacher, and the testimony of Mr. TS[Redacted] are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an August 6, 2021 injury is denied and dismissed.

Dated June 24, 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:1/oac.colorado.gov/resources/oac-forms.

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-478-001

ISSUES

1. Whether Respondents have established by a preponderance of the evidence sufficient grounds for withdrawal of their General Admission of Liability.

2. Whether Claimant has established by a preponderance of the evidence that physical therapy recommended by Dr. Rizza is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that a referral to Dr. Shoemaker is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is a 52-year-old man who worked for employer as a delivery driver. Claimant's job duties included driving a delivery truck and delivering products to retail and grocery stores, stocking shelves, and loading and unloading the delivery truck.

2. On September 7, 2021, Claimant reported an injury to Employer arising out of the course of his employment with Employer. Specifically, Claimant indicated to that he has sustained an injury to his lower back while delivering product to a grocery store in Estes Park, Colorado while working his delivery route. Claimant testified that he was pushing a cart full of product into a grocery store when the cart abruptly stopped because one of the cart's wheels dropped into a gap in the pavement. Claimant testified the cart weighed approximately 300 pounds when loaded with product. Claimant weighed 180 pounds at the time. Claimant testified that he felt a pop in his left hamstring. Claimant completed his remaining two stops in Estes Park that morning, and the pain in his leg increased. Claimant did not complete the remaining stops on his route drove his truck back to Employer's warehouse in Fort Collins, Colorado.

3. Later that day, Claimant had a telehealth visit with physical therapist, Tonya Davis, at Sozo Physical Therapy. Claimant reported feeling a discomfort in his left hamstring while pushing a cart, continuing to work and then noticing discomfort in his left buttock while driving. Claimant continued to receive physical therapy at Sozo through September 29, 2021. (Ex. G).

4. Employer prepared a First Report of Injury on September 7, 2021. (Ex. A). On September 30, 2021, Employer filed a General Admission of Liability (GAL) with the Division of Workers' Compensation, admitting for medical benefits, and temporary total disability benefits. (Ex. B). On September 21, 2021, Employer provided Claimant with a Designated Provider List which included Workwell Occupational Clinic in Fort Collins, Colorado, among others. (Ex. D).

5. On September 22, 2021, Claimant saw Pamela Rizza, M.D., at Workwell in Fort Collins. Claimant reported pain and tightness in his left hamstring and irritation of the left sciatic nerve radiating to his calf. Claimant denied lower back pain. On examination, Dr. Rizza noted moderately limited extension of the lower back, with positive straight leg raising on the left, with an absent reflex in the left Achilles. Dr. Rizza also noted decreased sensation over the lateral and posterior thigh and lateral foot, with difficulty toe walking on the left with giveaway weakness. Dr. Rizza noted that Claimant's examination was consistent with an L5-S1 radiculopathy and referred Claimant for a lumbar MRI. (Ex. F).

6. The MRI, performed on September 28, 2021, showed a prominent left paracentral disc extrusion at L5-S1 causing significant left lateral recess stenosis, and likely posterior displacement and impingement on the descending left S1 nerve root. (Ex. 5).

7. On September 29, 2021, Claimant saw Dr. Rizza who reviewed Claimant's MRI, and indicated that the disc extrusion "appears acute on the MRI, and is consistent with his mechanism of injury and current symptomatology." Dr. Rizza referred Claimant for an evaluation with a physiatrist, Dr. Shoemaker, for the performance of a lumbar epidural steroid injection (LESI) for a diagnosis of intervertebral disc disorder with radiculopathy, and referred Claimant for six sessions of physical therapy. (Ex. F).

8. On September 30, 2021, Respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability benefits. (Ex. B).

9. On October 13, 2021, Claimant again saw Dr. Rizza, who recommended that Claimant continue physical therapy. She also noted that Claimant's LESI was awaiting approval, and she would like it to be done urgently once authorized. Dr. Rizza also indicated that she anticipated Claimant would need ongoing physical therapy once the LES was completed. (Ex. F).

10. On October 14, 2021, Respondents sent a letter to Dr. Rizza (copying Claimant) recommending authorization ongoing physical therapy and physiatrist referral to Dr. Shoemaker for a left L5-S1 LESI. The letter indicated: "The medical provider, injured worker and workers' compensation claims adjuster have been notified that this specific service meets established criteria for medical necessity ONLY based on the information presented by the medical provider." The letter was authored by Jennifer Smith-Newsome, a case specialist for Sedgwick, which the ALJ infers was Insurer's third-party administrator for Claimant's claim. (Ex. F).

11. Claimant attended six sessions of physical therapy through Workwell from October 1, 2021 through October 18, 2021. (Ex. J).

12. Claimant returned to Dr. Rizza on October 27, 2021, noting there had been a slight improvement in range of motion, but Claimant still had "classic S1 radiculopathy findings on exam with an absent Achilles reflex and paresthesias in the L5-S1 dermatome." Ex. F. Dr. Rizza noted that "it continues to be my medical opinion that [it] is medically probable that the current injury is work related." Dr. Rizza also noted that "rehab care and LESI

referral pending case review by Sedgwick." (Ex. F). The ALJ infers that by "rehab care" Dr. Rizza was referring to physical therapy.

13. On November 30, 2021, Claimant was seen by John Burris, M.D., for a WCRP Rule 16 IME at Respondents' request. On examination, Dr. Burris noted that Claimant had numbness in the left leg S1 dermatome and an absent left ankle DTR (deep tendon reflex), which was consistent with a left S1 radiculopathy. He indicated that Claimant's diagnosis was a L5-S1 intervertebral disc disorder with left S1 radiculopathy. He indicated that Claimant's original "'hamstring injury' was likely the early manifestation of the S1 radiculopathy and not an actual hamstring injury, which is a common presentation for this condition." (Ex. E). Dr. Burris concluded that Claimant's mechanism of injury was inconsistent with his condition, therefore "from a medical causation standpoint, [Claimant's] low back condition cannot be causally related to the reported 9/7/2021 workplace event." In reaching this conclusion, Dr. Burris referenced the "AMA Guides to the Evaluation of Disease and Injury Causation," which indicated "there is insufficient scientific evidence to attribute the cause of lumbar disc herniation to any minor trauma or ergonomic risk factor. The cases in which there is just a temporal association between an event and the onset of sciatica from a disc herniation logically represent when the herniation occurs, but not why it occurs." The AMA Guides to the Evaluation of Disease and Injury Causation, cited by Dr. Burris were not offered or admitted into evidence. Dr. Burris testified that he believed Claimant sustained "minor trauma" which was insufficient to cause an injury. (Ex. E).

14. Dr. Burris was admitted as an expert in occupational medicine, and testified at hearing. He testified that Claimant's presentation, timing of reported symptoms, progression of symptoms and pain distribution were all consistent with an L5-S1 disc protrusion. Dr. Burris testified that he did not believe Claimant's injury was causally related to his work, because the is "insufficient evidence to associate disc herniations with minor trauma or ergonomic risk factors." Dr. Burris further testified that "up to 80 percent of the studies that have been done show that up to 80 percent of people have degenerative findings and are asymptomatic in [Claimant's] age group." Dr. Burris did not identify any specific study or studies upon which this testimony was based, and no such studies were offered or admitted into evidence.

15. Dr. Burris further testified that "Physical trauma is associated with approximately 1 percent of the appearance of disc herniations. It is much more likely that it's from a spontaneous event or from a natural progression of degenerative changes." Dr. Burris offered no cogent explanation for this opinion. He testified that over the past 25 years, that he has seen many injured workers who have had spinal herniations caused by exertional activity. Dr. Burris opinion that Claimant's disc injury is unrelated to the September 7, 2021 work incident is neither credible nor persuasive.

16. Claimant was not evaluated by a physiatrist, did not receive an LESI injection, and did not receive "rehab care" or physical therapy after November 30, 2021. Claimant testified that Insurer denied authorization for those treatments.

17. On January 18, 2022, Respondent's counsel sent a letter to Dr. Rizza asking if she agreed with Dr. Burris' opinion that Claimant's condition was unrelated to his September 7, 2021 workplace event. On February 18, 2022, Dr. Rizza responded "No," explaining "It is 75% medially probable that the mechanism described and a forceful push resulting in [illegible] lumbar hyperextension caused an acute disc herniation. The course of symptoms, onset, physical exam findings, and MRI imaging are all consistent w/acute S1 radiculopathy." (Ex. F).

18. At hearing, Respondents presented the testimony of KF[Redacted], one of Claimant's co-workers. Mr. KF[Redacted] is a relief driver employed by Employer who assisted Claimant with his route in Estes Park on September 7, 2021. Mr. KF[Redacted] did not ride in the same vehicle with Claimant and only assisted with Claimant's three stops in Estes Park that morning. Mr. KF[Redacted] testified he did not witness the incident Claimant asserts caused his injury, that Claimant did not complain of any injury to him, and he did not notice the Claimant exhibiting any signs of injury that day. After completing the Estes Park stops, Mr. KF[Redacted] did not see Claimant again that day. Mr. KF[Redacted] testified that he was the only person who transported product from the truck into the grocery store that morning, but that he was not constantly in Claimant's presence that morning.

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 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).

WITHDRAWAL OF ADMISSION OF LIABILITY - COMPENSABILITY

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), 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).

A compensable injury is one that arises out of the course and scope of employment with one's 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 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 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). There must be a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics,* W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment

aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Respondents have failed to establish by a preponderance of the evidence grounds for withdrawal of their General Admission of Liability. Claimant credibly testified that while performing his job duties, he felt a pop in his hamstring on September 7, 2021. Mr. KF[Redacted]'s testimony that he did not see the event occur or that he did not observe Claimant pushing a cart into the store does not contradict Claimant's testimony. Respondents have failed to establish by a preponderance of the evidence that the September 7, 2021 work incident did not occur as Claimant described.

Respondents have also failed to establish by a preponderance of the evidence that Claimant's lumbar disc herniation was not caused by the September 7, 2021 work incident. Both Dr. Rizza and Dr. Burris agree that Claimant's presentation, timing of reported symptoms, progression of symptoms, and pain distribution are consistent with an L5 disc protrusion. The ALJ credit's Dr. Rizza's opinion that Claimant's reported mechanism of injury is consistent with the injury sustained.

Dr. Burris' opinion that Claimant's injury was unrelated to the September 7, 2021 work incident, and more likely related to a "spontaneous event" or degenerative condition is neither credible nor persuasive. Dr. Burris relied primarily on unsupported statistics and an excerpt from an AMA text from which the context of the full statement could not be ascertained. No credible evidence was admitted from which the ALJ can assess the source from which Dr. Burris concluded that 80% of disc herniations are degenerative in nature or that only 1% of disc herniations are caused by "minor trauma." No credible evidence was admitted defining "minor trauma," or whether Claimant's injury fits into that purported category, beyond Dr. Burris' conclusory statements. Dr. Burris' admission that he has seen many patients with spinal herniations caused by exertional activities also contradicts his testimony. Nothing in Dr. Burris' testimony or written opinions or the other evidence presented established that it is more likely than not that Claimant's lumbar disc condition was not causally related to Claimant's September 7, 2021 work incident.

SPECIFIC MEDICAL TREATMENT

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 Dr. Rizza's referral to Dr. Shoemaker for a lumbar epidural steroid injection is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Rizza referred Claimant for a lumbar epidural steroid injection on September 29, 2021. The request was reviewed by Insurer's representatives and it was indicated that the treatment was approved as medically necessary. The evidence at hearing was insufficient to establish the reasons for which authorization was apparently denied. However, the basis for denial appears to be Dr. Burris' opinion that Claimant's injury was not work-related. The ALJ infers from Dr. Rizza's referral and the fact that it is undisputed that Claimant has a herniated lumbar disc, that the treatment is reasonably necessary to cure or relieve the effects of the injury. Claimant's request for approval of a referral to a physiatrist for the performance of a lumbar steroid injection is approved.

With respect to physical therapy, Dr. Rizza initially referred Claimant for six sessions of physical therapy on September 29, 2021. Claimant attended six sessions of physical therapy through Workwell from October 1, 2021 through October 18, 2021. Although Dr. Rizza indicated that additional physical therapy would be anticipated following performance of an LESI, the records do not indicate that a referral for additional physical therapy has been placed. Because no current request for authorization of physical therapy has been made, the ALJ lacks jurisdiction to authorize physical therapy at this time. *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 (ICAO May 4, 1995).

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their General Admission of Liability is denied.

2. Claimant's request for authorization of a referral to a physiatrist for an L5-S1 LESI is granted.

3. Claimant's request for authorization of physical therapy is not ripe for decision, and is therefore denied without prejudice.

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: June 24, 2022

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on December 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received for her back is reasonable and necessary to cure her from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits.

4. If the claimant is eligible for TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for the termination of her employment.

PROCEDURAL HISTORY

The current matter involves an alleged acute injury occurring on December 6, 2021. In October 2021, the claimant reported an occupational disease/cumulative trauma injury to the same employer. At hearing, the claimant agreed that the occupational disease/cumulative trauma claim is barred by the statute of limitations and she is not pursuing that claim. Therefore, the December 6, 2021 injury is the only injury at issue at this time.

FINDINGS OF FACT

1. The claimant was employed with the employer on a full time basis as a paraprofessional. The claimant's job duties included providing support needs for special education students.

2. The claimant testified that on December 6, 2021, she was assigned a special needs student "J". While walking with this student, the student tried to climb into her stroller. The claimant attempted to assist J into the stroller and felt spasms on the left side of her back. Following that incident, the claimant completed her work tasks for the day. The claimant also worked on December 7, 2021. However, the claimant was experiencing intense back pain and did not work December 8, 2021.

3. On December 8, 2021, the claimant sent an email to AB[Redacted], Principal at the school where the claimant worked. In that email, the claimant stated that her back was "out" and she planned to see a chiropractor the following day. The claimant also stated that it was possible that her back issues were due to her work with student J. When she was asked to clarify why the claimant believed her time with J was related to her back pain, the claimant replied that J's "needs were different" than her normally assigned student.

Back symptoms and treatment prior to December 6, 2021

4. The claimant has undergone chiropractic treatment for her back with chiropractor Eileen Macfarlane. In a medical record dated January 2, 2020, the claimant reported to Dr. Macfarlane that she felt stabbing pain in her ribs and back while lifting boxes. On January 27, 2020, the claimant reported neck pain, headaches, and a flu-like feeling. On February 8, 2020, the claimant reported to Dr. Macfarlane symptoms of neck pain. On February 15, 2020, the claimant reported neck pain, and pain in her upper thoracic spine. On February 22, 2020, the claimant reported low back pain. The claimant continued her treatment with Dr. Macfarlane throughout 2020 and 2021. At these visits the claimant reported waxing and waning neck and neck pain.

5. On April April 26, 2021, the claimant was seen via "telehealth" at Mountain Family Health Centers by Emily Borkovec, PA-C. On that date, the claimant reported that she had experienced low back pain "off and on for the past couple of years", however it has worsened over the last year. The claimant requested a letter from PA Borkovec regarding a "position change" at work. PA Borkovec identified the claimant's diagnosis as chronic bilateral low back pain without sciatica.

6. On August 23, 2020, the claimant reported to PA Borkovec that she had fluctuating, but persistent, low back pain. The claimant reported that she was picking up 50 pound toddlers at her workplace. PA Borkovec ordered lumbosacral x-rays and physical therapy.

7. On October 14, 2020, the claimant returned to PA Borkovec and reported worsening low back pain. At that time, PA Borkovec placed the claimant under work restrictions of "no lifting". The claimant testified that she understood that she was not to lift more than 10 pounds.

8. On October 18, 2021, x-rays of the claimant's lumbar spine showed multilevel degenerative facet arthrosis at the L3-L4 and L4-L5 levels, and most severe at the lumbosacral junction.

Treatment after December 6, 2021

9. On December 9, 2021, the claimant was seen by Dr. Macfarlane. At that time, the claimant reported a flare-up after she picked up a child at work. In a letter dated December 9, 2021, Dr. Macfarlane opined that the claimant reinjured her lumbar

sacral spine on December 6 and 7, 2021. Dr. Macfarlane recommended no lifting over 10 pounds.

10. On December 17, 2021, the claimant informed the employer that she was resigning from her position. The claimant testified that she resigned at that time because was not getting support from the employer.

11. On December 30, 2021, PA Borkovec took the claimant off of all work. In a letter of that same date, PA Borkovec opined that the claimant's pre-existing back condition was complicated by an injury on December 6, 2021.

12. In early January 2022, the claimant attempted to rescind her resignation. The employer declined to do so.

13. On January 19, 2022, the claimant was seen by Dr. Macfarlane. At that time, the claimant reported that her low back pain was seven out of ten after picking up boxes. On January 27, 2022, Dr. Macfarlane recorded that claimant alleged increased low back pain after driving and sitting at a computer for longer than an hour. On February 2, 2022 and February 15, 2022, the claimant reported to Dr. Macfarlane that her back pain was better. However, on February 21, 2022, the claimant reported to Dr. Macfarlane that her low back pain was five out of ten, after driving for several hours over the weekend.

14. The claimant testified that after the event of December 6, 2021, her pain was elevated from her baseline for roughly one month. The claimant also testified that she felt that she had returned to her baseline pain after 12 weeks of not lifting anything. The claimant denied reporting to Dr. Macfarlane that she had increased pain after driving or sitting at the computer.

15. On April 18, 2022, Dr. Albert Hattem performed a medical records review in this case. In his report, Dr. Hattem opined that the claimant has pre-existing lumbar spondylosis, which is not work related. Dr. Hattem explained that spondylosis is "a degenerative age related and genetically predisposed condition that typically causes waxing and waning low back pain that will worsen over time regardless of one's activities." Dr. Hattem noted that the claimant had regular treatment of her low back pain prior to December 6, 2021. Dr. Hattem further opined that the claimant's ongoing symptoms were a continuation of the ongoing waxing and waning back pain that she had been having for years.

16. The ALJ credits the medical records and the opinions of Dr. Hattem. The ALJ specifically credits Dr. Hattem's opinion that the claimant's ongoing symptoms were a continuation of the ongoing waxing and waning back pain that she had been having for years. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an acute injury to her low back on December 6, 2021. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not

that her pre-existing low back condition was aggravated or accelerated by her work activities on December 6, 2021.

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. 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. The occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the

employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, August 18, 2005). An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta, supra; 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).

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on December 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her pre-existing low back condition was aggravated or accelerated by her work activities on December 6, 2021. As found, the medical records and the opinions of Dr. Hattem are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's claim for workers' compensation benefits related to a December 6, 2021 incident is denied and dismissed.

2. All remaining endorsed issues are dismissed as moot.

Dated June 24, 2022.

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

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable left knee injury on June 24, 2021.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and causally related medical benefits, including the left knee surgery he underwent on September 1, 2021.

III. Whether Claimant proved he is entitled to temporary total disability ("TTD") benefits from July 4, 2021, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant has worked for Employer as a delivery driver for over six years. Claimant's job duties require unloading cases from a semi-truck and delivering the cases to various locations, which involves ascending and descending ramps and stairs.

2. Claimant's August 2017 medical records document a history of blood clots with left leg pain and swelling, as well as a lump and bruising behind his left knee. Claimant testified he was not experiencing any left knee issues or limitations leading up to the work incident.

3. Claimant sustained a work injury while making a delivery for Employer on June 24, 2021. Claimant testified at hearing that this particular delivery required making approximately four to five trips up and down 20 stairs carrying 200-300 pounds each trip. Claimant used a dolly to carry the product up the stairs. Claimant testified that on the last trip up the stairs he felt immense pressure on his left knee in the area of his knee cap. He testified it felt as though the muscle in that area was gone. Claimant testified he developed a bump in that same area. He further testified he had not previously felt a similar sensation in his knee nor did he previously have a bump on his knee in that area.

4. Claimant finished his delivery route for the day. Claimant testified the sensation in his knee worsened that evening. He reported the incident to Employer the following day and was referred to Concentra.

5. Claimant presented to David Kleberger, APN at Concentra on June 25, 2021. APN Kleberger documented, "…pt says yesterday his LT knee started to have a lot of pressure, no pain but a new bump right on the knee cap." (Cl. Ex. 4, p. 8). Claimant did not report experiencing a popping sensation at the time of the incident. APN Kleberger noted,

"[Claimant] denies any known workplace mechanism of injury including a trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow to his left knee. Says he thinks it might be from climbing stairs. Today says he has no left knee pain, but notice bump right over the patella." (Id.) Claimant reported a current pain level of 0/10 with pressure and stiffness. On examination of the left knee, APN Kleberger noted a callous over the patella. There was full range of motion with no tenderness, no crepitus, no clicking, no ecchymosis, and no instability. McMurray's test was negative. Claimant's gait was normal. X-rays of the left knee revealed no acute pathology or trauma. The radiologist noted findings of no joint effusion. APN Kleberger diagnosed Claimant with left knee pressure with no known work injury. He stated, "[b]ased on a careful exam of the patient, as well as the information obtained about their job duties and mechanism of injury, it does not appear that the presenting complaints arose out of their job duties in the course of the patient performing those duties." (Cl. Ex. 4, p. 11). APN Kleberger released Claimant to work full duty and discharged him from workers' compensation care. He advised Claimant to follow-up with his primary care physician.

6. Claimant testified he met with APN Kleberger for about five minutes. Claimant testified he advised APN Kleberger that he was moving a few hundred pounds of product up stairs and that he felt immense pressure on his knee when he got to the top of the stairs on his last trip. Claimant testified he had a bump on his left knee and that APN Kleberger felt the bump.

7. Claimant subsequently purchased a knee brace and returned to work. Claimant testified he attempted to work for four days but was unable to perform the work. Claimant testified he then contacted Insurer to attempt to schedule another evaluation with a workers' compensation provider but was denied. Claimant then made an appointment with his primary care physician.

8. On July 7, 2021 Claimant sought treatment with his primary care physician, Sara Buros, NP at West Physicians. Claimant reported that on June 24, 2021 he experienced an injury at work where he noticed pressure of the medial side of his knee and decreased strength. He reported experiencing some clicking and instability. On examination, NP Buros noted a positive medial McMurray test, cystic lesion over the anterior portion of the patellar tendon, mild tenderness to palpation over the medial patellar tendon and medial joint line, and decreased range of motion. NP Buros assessed Claimant with left knee pain. She referred Claimant for a left knee MRI.

9. Claimant underwent a left knee MRI on July 12, 2021. Frank Crnkovich, M.D. gave the following impression: "1. Menisci, cruciate ligaments, collateral ligaments, and chondral surfaces preserved. 2. Medial plica and some edematous change medial retinacular interface. Correlation with the patient's clinical exam for any signs and symptoms of medial plica syndrome suggested." (Cl. Ex. 6, pp. 28-29).

10. On July 15, 2021 Respondents filed a Notice of Contest.

11. On July 20, 2021 Claimant presented to Todd Wente, M.D. at Panorama Orthopedics & Spine Center for an orthopedic evaluation upon the referral of NP Buros. Claimant reported that his left knee symptoms began while lifting boxes up stairs and, at that time, he experienced immense pressure. Claimant reported that his left knee had since been clicking and locking with instability. On examination, Dr. Wente noted trace effusion and moderate to severe tenderness of the medial patella with rolling of medial infrapatellar plica. McMurray's test was negative. Dr. Wente reviewed Claimant's left knee x-rays and MRI, noting that the MRI revealed some edematous changes around a medial infrapatellar plica with no other significant internal derangement. He diagnosed Claimant with symptomatic left knee, medial infrapatellar plica.

12. Regarding treatment, Dr. Wente remarked,

> I had a long discussion with the patient today regarding his options. We discussed various non-operative treatment strategies ranging from various injections to physical therapy, to medications, etc. The patient at this point is a little unclear as to whether this represents a work-related injury or not. The pain certainly was brought about by work activities. I think we will leave that to him in terms of how he wants to manage it. I also did discuss arthroscopic intervention for a plica resection.
>
> I do believe that he is probably mostly symptomatic based on his exam today from the plica. We discussed that it is still possible to get this to calm down non-operatively. He is fairly confident he wants to move forward with the more definitive treatment, particularly in light of his very rigorous job demands. He is really unable at this point to do his job effectively and safely. We discussed arthroscopic intervention with a limited synovectomy. We discussed further assessment of the rest of the joint as well to confirm the MRI findings.
>
> (Cl. Ex. 6, p. 30).

13. Claimant elected to proceed with surgery for the synovial plica of his left knee. On September 1, 2021, Dr. Wente performed a left knee arthroscopy with limited synovectomy.[1]

14. Claimant developed calf pain and swelling post-operatively and was diagnosed with acute deep vein thrombosis, for which he underwent treatment.

15. Claimant continued to see Dr. Wente for follow-up visits and reported left knee stiffness and limited range of motion. On November 9, 2021, Dr. Wente noted Claimant's assessment as status post left knee patella chondromalacia, plica resection. He noted, "The more I am treating him, I think this is probably more of a patellofemoral problem particularly in light of the patella chondromalacia noted on his arthroscopy." (Cl. Ex. 7, p. 52). He recommended Claimant continue to undergo physical therapy.

[1] Dr. Wente's September 1, 2021 operative report was not offered as evidence.

16. On December 10, 2021, Mark S. Failinger, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. Failinger noted,

> He states he had a specific work event that occurred in late June 2021 while he was going up stairs using a two-wheeled dolly and was moving product. He was 12 to 15 steps up the stairs, and had already taken four or five loads up the stairs. On the last load, he states he was on the very last step at the top of the stairs, when he felt a 'pressure' and a popping that occurred on the inside of the knee. He states there was 'immense pressure,' and his muscle felt like it was 'deteriorating.'

(R. Ex. P, p. 1.)

17. Claimant reported to Dr. Failinger that he did not experience pain at the time of the incident. Claimant denied a prior history of left knee pain, injury, or treatment. Claimant reported he was not currently experiencing knee pain, but that the pain could reach 6/7-10 when going up and down stairs or hills. Dr. Failinger performed a physical examination and reviewed Claimant's medical records dating back to February 16, 2009. He did not have Dr. Wente's medical reports to review.

18. Dr. Failinger remarked that the mechanism of injury Claimant reported to him was different than that noted in APN Kleberger's report. Dr. Failinger concluded that, with no mechanism of injury, it was not medically probable a work injury occurred. Dr. Failinger noted that APN Kleberger specifically asked Claimant multiple questions to determine if any work injury did, or could have, occurred which would cause Claimant's symptoms, and that all questions were met with negative answers. He further noted that APN Kleberger found no positive findings on examination, with full knee range of motion and no tenderness. Dr. Failinger noted that, although Claimant reported pressure in his knee, no significant effusion was noted on APN Kleberger's examination, as would be expected if any actual pathology existed. Dr. Failinger opined there is no reasonable medical probability that the bump on Claimant's knee was work-related. He opined that the bump was likely due to a callus or pre-patellar bursitis, which does not occur unless there is repetitive kneeling onto the knee, or a direct blow to the knee. Dr. Failinger concluded that the imaging reports did not evidence any abnormalities except for possible evidence of medial plica. He opined there was "extremely low medical probability" any pathology was created in the June 24, 2021 work incident. Dr. Failinger explained that a plica is a developmental anatomical structure and not, by itself, a symptomatic nor pathological structure. He noted that, although it is rare and uncommon, plicas can became irritated, but that Claimant would have experienced immediate pain in such situation.

19. Regarding Claimant's left knee surgery, Dr. Failinger remarked,

> I do not have any follow-up clinic notes by the treating orthopedic surgeon, Dr. Wente. It is not known if Dr. Wente noted a specific and localized pain

> in the medial plica for which he determined that there was an inflamed plica as a reasonable diagnosis. It is unknown if the patient underwent any physical therapy or injections. Very few patients would require surgery for a medial plica syndrome, with the mainstay of treatment being first, relative rest, and physical therapy, as well as performing a possible cortisone injection. There are occasions when a plica syndrome exists, if diagnosed and corroborated by the physician examination, and the patient has ongoing pain for which surgery is performed. However, it would be uncommon for a plica syndrome to require surgery.

(R. Ex. P, p. 20).

20. Dr. Failinger ultimately opined that with no abnormalities found on June 25, 2021, and with no mechanism that would reasonably explain the possible occurrence of a work injury, it is not with reasonable medical probability that any work-related injury occurred on June 24, 2021.

21. Dr. Failinger testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Failinger testified consistent with his IME report and continued to opine that Claimant did not sustain a work injury on June 24, 2021. Dr. Failinger explained that Claimant's MRI demonstrated a plica, which is a common vestigular remnant. He noted that there was no effusion indicating an acute injury. Dr. Failinger reiterated that the typical treatment for plica is conservative. However, he testified that if the pain is localized to the plica, per examination and injection, surgery may be reasonable. He testified that if Claimant underwent conservative treatment for six months and continued to experience issues, surgery might be considered. He explained that if the plica was indeed causing Claimant's issue, Claimant's condition would have quickly improved after surgery, which it did not. Dr. Failinger again opined that Claimant's plica was not work-related.

22. Claimant testified he remains on work restrictions as a result of the work injury and has not returned to work since on or about July 4, 2021.

23. Claimant earned $30.86/hour and was paid on a weekly basis. Claimant's wage records reflect that the number of hours Claimant worked per week varied. Claimant earned $2,213.90 for the pay period ending The pay period ending June 19, 2021. In the three months preceding the pay period ending June 19, 2021 (21 weeks – from pay period ending 1/30/2021 to 6/19/2021), Claimant earned a total of $47,343.94. Based on the wage records, a fair approximation of Claimant's AWW is $2,254.47.

24. Claimant's testimony is credible.

25. The ALJ finds the opinion of Dr. Wente, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Failinger.

26. Claimant proved it is more probable than not he sustained a work injury that aggravated, accelerated or combined with a pre-existing condition, causing disability and the need for treatment.

27. Claimant proved it is more probable than not the left knee surgery performed by Dr. Wente was reasonable, necessary and causally related to his work injury, and that he is entitled to reasonable, necessary and causally related medical treatment for his left knee.

28. Claimant proved his 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. Claimant is entitled to TTD benefits from July 4, 2021, ongoing.

29. Claimant's AWW is $2,271.84. This represents a fair approximation of Claimant's wage loss and diminished earning capacity based on his wage records.

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).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Comm’n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (ICAO, September 9, 2016). 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).

As found, Claimant proved it is more probable than not he sustained a compensable work injury. While performing his job duties, Claimant experienced a sensation of immense pressure in his knee while moving a 200-300 pound load up multiple stairs, after doing so repeatedly. Dr. Wente opined that Claimant’s pain was caused by his work activities. Claimant’s work duties require going up and down multiple

stairs a day, handling hundreds of pounds of items. Claimant's left knee MRI demonstrated a medial plica with edematous changes. Symptomatic plica was found on Dr. Wente's physical examination. Dr. Wente subsequently also noted symptomatic patellofemoral chondromalacia. While August 2017 medical records indicate Claimant has a history of blood clots and a lump behind his left knee, there is no evidence Claimant was undergoing left knee treatment leading up to the work injury, or that he was experiencing similar symptoms he had subsequent to the work injury. Claimant credibly testified that leading up to the work injury he was not experiencing any left knee symptoms or limitations. Claimant was capable of performing physical work until the work injury. Subsequent to the work injury, Claimant was unable to perform his regular job duties and required medical treatment.

Dr. Failinger heavily relied on NP Kleberger's initial medical record in reaching his opinion that there was no mechanism of injury. NP Kleberger specifically noted Claimant denied any trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow, but did note that Claimant attributed his injury to climbing stairs at work. Claimant credibly testified he told NP Kleberger that he was moving a few hundred pounds of product up the stairs when the onset of symptoms occurred. Additionally, Dr. Failinger's analysis was limited as he did not review Dr. Wente's medical records. He specifically stated it was unknown to him if Dr. Wente noted specific and localized pain in the medial plica and if Claimant underwent any physical therapy or injections. The ALJ is persuaded Claimant's injury arose out of an employment risk and was precipitated by moving hundreds of pounds up and down multiple stairs. The onset of Claimant's symptoms was causally related to the performance of his work duties. The preponderant evidence establishes Claimant's work duties aggravated, accelerated or combined with his underlying asymptomatic condition, causing Claimant to become symptomatic, require medical treatment, and be placed on restrictions preventing Claimant from performing his regular job duties.

Medical Treatment

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).

As found, Claimant proved it is more probable than not he is entitled to reasonable, necessary and causally related treatment, including the left knee surgery performed by Dr. Wente. Dr. Wente initially opined that Claimant was likely mostly symptomatic from the plica based on his examination and MRI findings. Dr. Wente attempted conservative treatment in the form of injections prior to proceeding with surgery to relieve Claimant's symptoms. Dr. Wente subsequently also identified patellofemoral chondromalacia as a cause of Claimant's symptoms. While Dr. Failinger opined that it is uncommon to require surgery for medial plica syndrome, he acknowledged that surgery may be reasonable when the plica was identified as the source of pain and when conservative treatment failed. Here, Dr. Wente initially identified the plica as Claimant's source of pain, attempted

conservative treatment, and subsequently found it reasonable to proceed with surgery. The treatment Claimant received for the left knee, including the left knee surgery performed by Dr. Wente, was causally related to his work injury and reasonably necessary to cure or relieve the effects of the 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 found, Claimant proved he is entitled to TTD benefits from July 4, 2021, ongoing. As a result of Claimant's June 24, 2021 work injury, he was placed on work restrictions and was unable to perform his regular job duties. Claimant has not worked since July 4, 2021 as a result of the disability, resulting in actual wage loss to Claimant. As Claimant's 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, Claimant has proven entitlement to TTD benefits.

Average Weekly Wage

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, an AWW of $2,254.47 represents a fair approximation of Claimant's wage loss and diminished earning capacity, based on his wage records.

ORDER

1. Claimant proved by a preponderance of the evidence that on June 24, 2021, he injured his left knee arising out of and in the course and scope of his employment with the Employer.

2. Claimant proved by a preponderance of the evidence that he is entitled to medical benefits, including the September 1, 2021 left knee surgery performed by Dr. Wente, that are reasonably necessary and causally related to his compensable, June 24, 2021 left knee injury.

3. Claimant is entitled to TTD from July 4, 2021, ongoing, until terminated by operation of law, subject to any applicable statutory offsets.

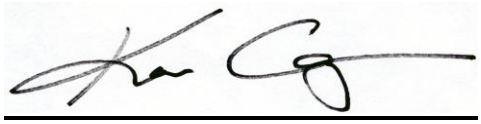
4. Claimant's AWW is $2,254.47.

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: June 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable left knee injury on June 24, 2021.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and causally related medical benefits, including the left knee surgery he underwent on September 1, 2021.

III. Whether Claimant proved he is entitled to temporary total disability ("TTD") benefits from July 4, 2021, ongoing.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant has worked for Employer as a delivery driver for over six years. Claimant's job duties require unloading cases from a semi-truck and delivering the cases to various locations, which involves ascending and descending ramps and stairs.

2. Claimant's August 2017 medical records document a history of blood clots with left leg pain and swelling, as well as a lump and bruising behind his left knee. Claimant testified he was not experiencing any left knee issues or limitations leading up to the work incident.

3. Claimant sustained a work injury while making a delivery for Employer on June 24, 2021. Claimant testified at hearing that this particular delivery required making approximately four to five trips up and down 20 stairs carrying 200-300 pounds each trip. Claimant used a dolly to carry the product up the stairs. Claimant testified that on the last trip up the stairs he felt immense pressure on his left knee in the area of his knee cap. He testified it felt as though the muscle in that area was gone. Claimant testified he developed a bump in that same area. He further testified he had not previously felt a similar sensation in his knee nor did he previously have a bump on his knee in that area.

4. Claimant finished his delivery route for the day. Claimant testified the sensation in his knee worsened that evening. He reported the incident to Employer the following day and was referred to Concentra.

5. Claimant presented to David Kleberger, APN at Concentra on June 25, 2021. APN Kleberger documented, "…pt says yesterday his LT knee started to have a lot of pressure, no pain but a new bump right on the knee cap." (Cl. Ex. 4, p. 8). Claimant did not report experiencing a popping sensation at the time of the incident. APN Kleberger noted,

"[Claimant] denies any known workplace mechanism of injury including a trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow to his left knee. Says he thinks it might be from climbing stairs. Today says he has no left knee pain, but notice bump right over the patella." (Id.) Claimant reported a current pain level of 0/10 with pressure and stiffness. On examination of the left knee, APN Kleberger noted a callous over the patella. There was full range of motion with no tenderness, no crepitus, no clicking, no ecchymosis, and no instability. McMurray's test was negative. Claimant's gait was normal. X-rays of the left knee revealed no acute pathology or trauma. The radiologist noted findings of no joint effusion. APN Kleberger diagnosed Claimant with left knee pressure with no known work injury. He stated, "[b]ased on a careful exam of the patient, as well as the information obtained about their job duties and mechanism of injury, it does not appear that the presenting complaints arose out of their job duties in the course of the patient performing those duties." (Cl. Ex. 4, p. 11). APN Kleberger released Claimant to work full duty and discharged him from workers' compensation care. He advised Claimant to follow-up with his primary care physician.

6. Claimant testified he met with APN Kleberger for about five minutes. Claimant testified he advised APN Kleberger that he was moving a few hundred pounds of product up stairs and that he felt immense pressure on his knee when he got to the top of the stairs on his last trip. Claimant testified he had a bump on his left knee and that APN Kleberger felt the bump.

7. Claimant subsequently purchased a knee brace and returned to work. Claimant testified he attempted to work for four days but was unable to perform the work. Claimant testified he then contacted Insurer to attempt to schedule another evaluation with a workers' compensation provider but was denied. Claimant then made an appointment with his primary care physician.

8. On July 7, 2021 Claimant sought treatment with his primary care physician, Sara Buros, NP at West Physicians. Claimant reported that on June 24, 2021 he experienced an injury at work where he noticed pressure of the medial side of his knee and decreased strength. He reported experiencing some clicking and instability. On examination, NP Buros noted a positive medial McMurray test, cystic lesion over the anterior portion of the patellar tendon, mild tenderness to palpation over the medial patellar tendon and medial joint line, and decreased range of motion. NP Buros assessed Claimant with left knee pain. She referred Claimant for a left knee MRI.

9. Claimant underwent a left knee MRI on July 12, 2021. Frank Crnkovich, M.D. gave the following impression: "1. Menisci, cruciate ligaments, collateral ligaments, and chondral surfaces preserved. 2. Medial plica and some edematous change medial retinacular interface. Correlation with the patient's clinical exam for any signs and symptoms of medial plica syndrome suggested." (Cl. Ex. 6, pp. 28-29).

10. On July 15, 2021 Respondents filed a Notice of Contest.

11. On July 20, 2021 Claimant presented to Todd Wente, M.D. at Panorama Orthopedics & Spine Center for an orthopedic evaluation upon the referral of NP Buros. Claimant reported that his left knee symptoms began while lifting boxes up stairs and, at that time, he experienced immense pressure. Claimant reported that his left knee had since been clicking and locking with instability. On examination, Dr. Wente noted trace effusion and moderate to severe tenderness of the medial patella with rolling of medial infrapatellar plica. McMurray's test was negative. Dr. Wente reviewed Claimant's left knee x-rays and MRI, noting that the MRI revealed some edematous changes around a medial infrapatellar plica with no other significant internal derangement. He diagnosed Claimant with symptomatic left knee, medial infrapatellar plica.

12. Regarding treatment, Dr. Wente remarked,

> I had a long discussion with the patient today regarding his options. We discussed various non-operative treatment strategies ranging from various injections to physical therapy, to medications, etc. The patient at this point is a little unclear as to whether this represents a work-related injury or not. The pain certainly was brought about by work activities. I think we will leave that to him in terms of how he wants to manage it. I also did discuss arthroscopic intervention for a plica resection.
>
> I do believe that he is probably mostly symptomatic based on his exam today from the plica. We discussed that it is still possible to get this to calm down non-operatively. He is fairly confident he wants to move forward with the more definitive treatment, particularly in light of his very rigorous job demands. He is really unable at this point to do his job effectively and safely. We discussed arthroscopic intervention with a limited synovectomy. We discussed further assessment of the rest of the joint as well to confirm the MRI findings.
>
> (Cl. Ex. 6, p. 30).

13. Claimant elected to proceed with surgery for the synovial plica of his left knee. On September 1, 2021, Dr. Wente performed a left knee arthroscopy with limited synovectomy.[1]

14. Claimant developed calf pain and swelling post-operatively and was diagnosed with acute deep vein thrombosis, for which he underwent treatment.

15. Claimant continued to see Dr. Wente for follow-up visits and reported left knee stiffness and limited range of motion. On November 9, 2021, Dr. Wente noted Claimant's assessment as status post left knee patella chondromalacia, plica resection. He noted, "The more I am treating him, I think this is probably more of a patellofemoral problem particularly in light of the patella chondromalacia noted on his arthroscopy." (Cl. Ex. 7, p. 52). He recommended Claimant continue to undergo physical therapy.

[1] Dr. Wente's September 1, 2021 operative report was not offered as evidence.

16. On December 10, 2021, Mark S. Failinger, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. Failinger noted,

> He states he had a specific work event that occurred in late June 2021 while he was going up stairs using a two-wheeled dolly and was moving product. He was 12 to 15 steps up the stairs, and had already taken four or five loads up the stairs. On the last load, he states he was on the very last step at the top of the stairs, when he felt a 'pressure' and a popping that occurred on the inside of the knee. He states there was 'immense pressure,' and his muscle felt like it was 'deteriorating.'

(R. Ex. P, p. 1.)

17. Claimant reported to Dr. Failinger that he did not experience pain at the time of the incident. Claimant denied a prior history of left knee pain, injury, or treatment. Claimant reported he was not currently experiencing knee pain, but that the pain could reach 6/7-10 when going up and down stairs or hills. Dr. Failinger performed a physical examination and reviewed Claimant's medical records dating back to February 16, 2009. He did not have Dr. Wente's medical reports to review.

18. Dr. Failinger remarked that the mechanism of injury Claimant reported to him was different than that noted in APN Kleberger's report. Dr. Failinger concluded that, with no mechanism of injury, it was not medically probable a work injury occurred. Dr. Failinger noted that APN Kleberger specifically asked Claimant multiple questions to determine if any work injury did, or could have, occurred which would cause Claimant's symptoms, and that all questions were met with negative answers. He further noted that APN Kleberger found no positive findings on examination, with full knee range of motion and no tenderness. Dr. Failinger noted that, although Claimant reported pressure in his knee, no significant effusion was noted on APN Kleberger's examination, as would be expected if any actual pathology existed. Dr. Failinger opined there is no reasonable medical probability that the bump on Claimant's knee was work-related. He opined that the bump was likely due to a callus or pre-patellar bursitis, which does not occur unless there is repetitive kneeling onto the knee, or a direct blow to the knee. Dr. Failinger concluded that the imaging reports did not evidence any abnormalities except for possible evidence of medial plica. He opined there was "extremely low medical probability" any pathology was created in the June 24, 2021 work incident. Dr. Failinger explained that a plica is a developmental anatomical structure and not, by itself, a symptomatic nor pathological structure. He noted that, although it is rare and uncommon, plicas can became irritated, but that Claimant would have experienced immediate pain in such situation.

19. Regarding Claimant's left knee surgery, Dr. Failinger remarked,

> I do not have any follow-up clinic notes by the treating orthopedic surgeon, Dr. Wente. It is not known if Dr. Wente noted a specific and localized pain

> in the medial plica for which he determined that there was an inflamed plica as a reasonable diagnosis. It is unknown if the patient underwent any physical therapy or injections. Very few patients would require surgery for a medial plica syndrome, with the mainstay of treatment being first, relative rest, and physical therapy, as well as performing a possible cortisone injection. There are occasions when a plica syndrome exists, if diagnosed and corroborated by the physician examination, and the patient has ongoing pain for which surgery is performed. However, it would be uncommon for a plica syndrome to require surgery.

(R. Ex. P, p. 20).

20. Dr. Failinger ultimately opined that with no abnormalities found on June 25, 2021, and with no mechanism that would reasonably explain the possible occurrence of a work injury, it is not with reasonable medical probability that any work-related injury occurred on June 24, 2021.

21. Dr. Failinger testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Failinger testified consistent with his IME report and continued to opine that Claimant did not sustain a work injury on June 24, 2021. Dr. Failinger explained that Claimant's MRI demonstrated a plica, which is a common vestigular remnant. He noted that there was no effusion indicating an acute injury. Dr. Failinger reiterated that the typical treatment for plica is conservative. However, he testified that if the pain is localized to the plica, per examination and injection, surgery may be reasonable. He testified that if Claimant underwent conservative treatment for six months and continued to experience issues, surgery might be considered. He explained that if the plica was indeed causing Claimant's issue, Claimant's condition would have quickly improved after surgery, which it did not. Dr. Failinger again opined that Claimant's plica was not work-related.

22. Claimant testified he remains on work restrictions as a result of the work injury and has not returned to work since on or about July 4, 2021.

23. Claimant earned $30.86/hour and was paid on a weekly basis. Claimant's wage records reflect that the number of hours Claimant worked per week varied. Claimant earned $2,213.90 for the pay period ending The pay period ending June 19, 2021. In the three months preceding the pay period ending June 19, 2021 (21 weeks – from pay period ending 1/30/2021 to 6/19/2021), Claimant earned a total of $47,343.94. Based on the wage records, a fair approximation of Claimant's AWW is $2,254.47.

24. Claimant's testimony is credible.

25. The ALJ finds the opinion of Dr. Wente, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. Failinger.

26. Claimant proved it is more probable than not he sustained a work injury that aggravated, accelerated or combined with a pre-existing condition, causing disability and the need for treatment.

27. Claimant proved it is more probable than not the left knee surgery performed by Dr. Wente was reasonable, necessary and causally related to his work injury, and that he is entitled to reasonable, necessary and causally related medical treatment for his left knee.

28. Claimant proved his 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. Claimant is entitled to TTD benefits from July 4, 2021, ongoing.

29. Claimant's AWW is $2,271.84. This represents a fair approximation of Claimant's wage loss and diminished earning capacity based on his wage records.

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).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Comm’n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (ICAO, September 9, 2016). 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).

As found, Claimant proved it is more probable than not he sustained a compensable work injury. While performing his job duties, Claimant experienced a sensation of immense pressure in his knee while moving a 200-300 pound load up multiple stairs, after doing so repeatedly. Dr. Wente opined that Claimant’s pain was caused by his work activities. Claimant’s work duties require going up and down multiple

stairs a day, handling hundreds of pounds of items. Claimant's left knee MRI demonstrated a medial plica with edematous changes. Symptomatic plica was found on Dr. Wente's physical examination. Dr. Wente subsequently also noted symptomatic patellofemoral chondromalacia. While August 2017 medical records indicate Claimant has a history of blood clots and a lump behind his left knee, there is no evidence Claimant was undergoing left knee treatment leading up to the work injury, or that he was experiencing similar symptoms he had subsequent to the work injury. Claimant credibly testified that leading up to the work injury he was not experiencing any left knee symptoms or limitations. Claimant was capable of performing physical work until the work injury. Subsequent to the work injury, Claimant was unable to perform his regular job duties and required medical treatment.

Dr. Failinger heavily relied on NP Kleberger's initial medical record in reaching his opinion that there was no mechanism of injury. NP Kleberger specifically noted Claimant denied any trip, slip, fall, twist, trauma, hyperextension, hyperflexion or direct blow, but did note that Claimant attributed his injury to climbing stairs at work. Claimant credibly testified he told NP Kleberger that he was moving a few hundred pounds of product up the stairs when the onset of symptoms occurred. Additionally, Dr. Failinger's analysis was limited as he did not review Dr. Wente's medical records. He specifically stated it was unknown to him if Dr. Wente noted specific and localized pain in the medial plica and if Claimant underwent any physical therapy or injections. The ALJ is persuaded Claimant's injury arose out of an employment risk and was precipitated by moving hundreds of pounds up and down multiple stairs. The onset of Claimant's symptoms was causally related to the performance of his work duties. The preponderant evidence establishes Claimant's work duties aggravated, accelerated or combined with his underlying asymptomatic condition, causing Claimant to become symptomatic, require medical treatment, and be placed on restrictions preventing Claimant from performing his regular job duties.

Medical Treatment

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).

As found, Claimant proved it is more probable than not he is entitled to reasonable, necessary and causally related treatment, including the left knee surgery performed by Dr. Wente. Dr. Wente initially opined that Claimant was likely mostly symptomatic from the plica based on his examination and MRI findings. Dr. Wente attempted conservative treatment in the form of injections prior to proceeding with surgery to relieve Claimant's symptoms. Dr. Wente subsequently also identified patellofemoral chondromalacia as a cause of Claimant's symptoms. While Dr. Failinger opined that it is uncommon to require surgery for medial plica syndrome, he acknowledged that surgery may be reasonable when the plica was identified as the source of pain and when conservative treatment failed. Here, Dr. Wente initially identified the plica as Claimant's source of pain, attempted

conservative treatment, and subsequently found it reasonable to proceed with surgery. The treatment Claimant received for the left knee, including the left knee surgery performed by Dr. Wente, was causally related to his work injury and reasonably necessary to cure or relieve the effects of the 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 found, Claimant proved he is entitled to TTD benefits from July 4, 2021, ongoing. As a result of Claimant's June 24, 2021 work injury, he was placed on work restrictions and was unable to perform his regular job duties. Claimant has not worked since July 4, 2021 as a result of the disability, resulting in actual wage loss to Claimant. As Claimant's 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, Claimant has proven entitlement to TTD benefits.

Average Weekly Wage

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, an AWW of $2,254.47 represents a fair approximation of Claimant's wage loss and diminished earning capacity, based on his wage records.

ORDER

1. Claimant proved by a preponderance of the evidence that on June 24, 2021, he injured his left knee arising out of and in the course and scope of his employment with the Employer.

2. Claimant proved by a preponderance of the evidence that he is entitled to medical benefits, including the September 1, 2021 left knee surgery performed by Dr. Wente, that are reasonably necessary and causally related to his compensable, June 24, 2021 left knee injury.

3. Claimant is entitled to TTD from July 4, 2021, ongoing, until terminated by operation of law, subject to any applicable statutory offsets.

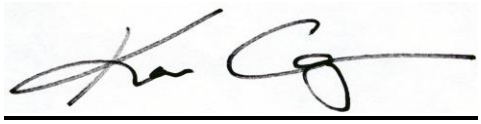
4. Claimant's AWW is $2,254.47.

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: June 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-181-109-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],
Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 9, 2022 and April 25, 2022, in Denver, Colorado. Both sessions of the hearing were recorded by Google Meets (reference: 3/9/22, Google Meets, beginning at 8:30 AM and ending at 12:10 PM. 4/25/22, beginning at 8:30 AM, and ending at 1:00 PM)

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

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

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ordered post-hearing briefs. Claimant's post hearing brief (erroneously designated as "proposed findings of fact, conclusions of law and order) was filed on May 2, 2022. Respondents' answer brief was filed on May 9,

2022. No timely reply brief was filed and the matter was deemed submitted for decision on May 12, 2022.

ISSUES

The paramount issue to be decided concerns whether a work-related event of August 17, 2021 caused a compensable injury to the Claimant's right shoulder. If so, is the Claimant entitled to medical benefits and temporary total disability (TTD) benefits from August 18, 2022 through January 2, 2022?

FINDINGS OF FACT

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

1. The stipulations of the parties were approved and accepted by the ALJ, however, in light of the fact that the paramount issue of compensability is hereby being decided against compensability, resolution of these issues is moot.

2. The Claimant was employed by the Employer, a construction/home improvement company, as an installer/foreman. He began working for the Employer in February 2021. In his free time, the Claimant plays Frisbee golf, professionally. On March 19, 2021, the Claimant received his second waring of violation of company policy from his Employer. It was noted that he had arrived late and left early for assignments and that Claimant had stated that the job had been completed when it was not. The Claimant acknowledged these infractions when he signed the write-up on March 25, 2021 (Respondents'. Exhibit H, 1-5).

The Event

3. On August 17, 2021, the Claimant was assigned to complete a project at a home in Parker, Colorado. Tile needed to be reinstalled on a bath/shower unit. The day before, other crew members had prepped the tub to install the tiles and brought the Claimant the equipment he needed to perform the job. Installation of the tiles should have taken 20 minutes to half an hour. The tiles had to be retrieved from another site as a full box of tiles was not needed. Sufficient tiles were there for the Claimant.

4. The Claimant alleges that at around 10:30 AM, he was straddling a tub when he saw a tile fall out of the corner of his eye. He states that he reached backwards and caught the tile and then fell in the tub as he was facing the water well at the time that he saw the tile fall. There were no witnesses to this event, and the Claimant did not inform the homeowner that he had an injury. The Claimant picked up his tools, installed the tiles and left the job site shortly after 11:00 AM.

5. The Claimant contacted his Employer at 12:47 PM to report the injury. He was instructed to seek medical attention at the local urgent care. The Claimant was not seen at the first facility and drove six miles to the next facility off Parker Road in Aurora. The Claimant reported to TT[Redacted that he had tried to catch a falling tile and extend his right arm externally and that the tile weighed 20 pounds. On physically exam there was swelling, and deformities noted on the right shoulder. The following were listed as normal, that the neck was supple with good range of motion (ROM); there was no tenderness across the clavicle or the shoulder joint, the trapezius and deltoid were normal, the **biceps tendon and rotator cuff were normal, and that the arm, forearm, elbow hand and wrist were normal.** The radiologist noted on X-ray that there was no sign of fracture, but that there were degenerative changes and osteophytes and there was no acute abnormality. There is no mention in this report that the Claimant had been referred there by another facility or that he had fallen backwards. (Respondents' Exhibit D 2-6).

6. On August 19, 2021, the Claimant gave a recorded statement with TL[Redacted], of the insurance carrier. Claimant's height was recorded at 6 feet. Claimant informed TL[Redacted] that he had arrived at the job site at 9:00 AM and that the incident occurred at 10:30 AM. The Claimant described the job. He told TL[Redacted] that he was sitting on the edge of the tub near the water well when he noticed out of the corner of his eye a tile tipping over. He stated his arm was straight out a when he reached to catch the tile. TL[Redacted] clarified that he reached straight out. The Claimant informed TL[Redacted] that he caught the tile in a parallel manner. The Claimant confirmed that he reached out the length of the tub. The Claimant did not mention that he reached backwards or fell backwards into the tub but that he caught the tile (Respondents' Exhibit I 4-5). Later in the statement TL[Redacted] clarified that the Claimant was sitting on the edge of the tub towards the water well and that the tile weighed 13 pounds. Claimant confirmed this. TL[Redacted] specifically asked that while the Claimant was sitting on the edge of the tub out of his right (eye) that he noticed a tile tipping over and that he "reached out to catch it" and the Claimant stated "yes." The recorded statement continued:

> Q: And it was, you're sitting on the edge of the tile, so it's straight out from your body, you, you weren't reaching up or down, or anything?
>
> A: No, I reached straight out, straight, you know what I mean? And that, that's where I was, kind of, in an awkward position, that's where it...
> (Respondents' Exhibit I pg. 13-14).

7. Later that afternoon VO[Redacted] of the Employer went to the home to inspect. All the equipment was there including the wet saw. She took photographs of the tub. She noted that the tile was on the first level of the tub and had not fallen from a higher level. There was no damage to the tub. This inspection contradicts the Claimant's version of the event and calls his credibility into question.

Medical

8. The MRI (magnetic resonance imaging) showed that the A.C. joint was hypertrophic and had fluid. There was a septated cyst present. The rotator cuff had severe tendinopathy, but no sign of tear. There was grade 2 atrophy present in the subscapularis. The glenohumeral joint was normal but had mild synovitis. The right bicep was torn with tenosynovitis. The final diagnosis was bicep tear, severe rotator cuff tendinopathy, acromioclavicular joint tendinopathy with a septated cyst. (Respondents' Exhibit D. 31-32).

9. On August 25, 2021, the Claimant was seen by David Frank, M.D. On physical exam it was noted that the right bicep had a "Popeye sign". The Plan was a referral to Ortho One at Swedish Hospital and the Claimant was set for a return appointment on September 8, 2021. The Claimant failed to attend the appointment. (Respondents' Exhibit D-25-29).

10. The Claimant was seen by Steven Horan, M.D., an orthopedic physician on September 3, 2021. Under chief complaints, it was noted that the Claimant informed Dr. Horan that he had previously had a separated shoulder, but that this present pain was different than that. Dr. Horan noted the Claimant's medications and examined the patient. Dr. Horan's diagnosis was rotator cuff tendonitis, and bicep ruptured. Dr. Horan performed an injection and recommended that the Claimant return in six weeks if the Claimant needed another injection. Dr. Horan noted that the Claimant did not wish to proceed with a bicep repair surgery. The Claimant failed to keep the follow-up appointment (Claimant's Exhibit 1-2).

11. The Claimant applied for Unemployment benefits on November 1, 2021, and was awarded a weekly benefit of $600.00. He returned to employment with a new employer on January 3, 2022.

Appaji Panchangam, Ph.D., Biomechanical Engineering

12. The Respondents retained Dr. Panchangam of Rimkus Consulting to perform a biomechanical analysis of the incident. An exemplar tub was inspected by Scott J. Simmons, P.E., of Rimkus, on November 22, 2021. The tub was 59 inches long, 29 inches wide, and 20 inches high (**Photograph 3**). The inner dimensions of the tub were 43 inches in length, 24 inches in width, and 13 inches deep. An identical exemplar tile was inspected by Dr. Panchangam, on December 20, 2021. The tile was 12 inches by 24 inches and approximately 1/2 inch thick (**Photograph 4**). It was made of porcelain, and the weight of the exemplar tile was approximately 9 pounds.

13. Dr Panchangam reviewed the medical records in order to obtain the vital statistics and diagnosis of the injury and review the history. He reviewed the anatomy

of the shoulder and biceps and the reported mechanism of injury. He noted that the tears present would have to be caused by forced external rotation of the right arm and elbow. The force needed was a 90-degree flexion of the elbow. He concluded that the injury sustained by the Claimant is not consistent with the mechanism of injury taking into consideration the Claimant's height, the width of the tub, the weight of the tile, and the described mechanism of injury. He further elaborated on the issue of the bicep tendon tear and that given the Claimant's base strength and weight of the tile, the load on the arm. He noted the photos of the tub in question and generated several diagrams depicting the injury. His conclusion was that the Claimant's reported injury did not correlate with the medical findings and that the Claimant did not incur an injury on the date in question. (Respondent Exhibit E).

Claimant's Independent Medical Exam (IME) BY Jack Rook, M.D.

14. The Claimant underwent an IME with Dr. Rook on February 10, 2021. Dr. Rook noted that the Claimant incurred an acute injury on August 17, 2021. Dr. Rook's review did not include a review the Claimant's recorded statements. Such a review would have been critical for Dr. Rook to appreciate the mechanism of injury. Dr. Rook noted that the tile weighed 18-20 pounds. This contradicts the Claimant's estimate of 13 pounds and Dr. Panchangam's verified weight of nine pounds. Dr. Rook noted that the Claimant caught the tile while straddling the tub and that the weight of the tile forced him to fall backwards and that the Claimant landed on his back, and stayed on his back for several minutes due to the shoulder pain. Dr. Rook then repeated the histories in the medical records. In reviewing Dr. Horan's report, he noted that the Claimant denied having had prior shoulder separations. He took note that the claim was presently denied. He did not note that the Claimant was presently working. He noted that the Claimant is a professional frisbee golf player. Dr. Rook concluded that there was no prior injury to the shoulder in part due to his playing Frisbee golf. Dr. Rook concluded that the mechanism of injury was severe, and that the Claimant had no other explanation for his injury as there was no history of prior injury. Dr. Rook concluded that this was a new and acute injury (Claimant Exhibit 4). Dr. Rook's conclusions were based, in part, on the erroneous misconception that the Claimant had no prior shoulder injuries. This misconception undermines Dr. Rook's ultimate conclusion supporting a compensable industrial injury.

Respondents' IME by Lloyd Thurston, M.D.

15. Respondents requested claimant to undergo an IME with Dr. Thurston on February 3, 2022. Dr. Thurston reviewed the medical chart, recorded statements of both the claimant and VO[Redacted]. He also reviewed the photographs of the tub in question, and the report of Dr. Panchangam. He took a medical history from the Claimant as well as social and Employment history. Noting that the Claimant was now working full time for a new employer. He did not note that the Claimant was a

professional Frisbee golf player. He reviewed the X-Ray, and MRI. He performed a physical exam and continued taking a history. He noted at times that the Claimant was very accurate on his history, but at other times appeared vague, such as concerning the weight of the tile.

16. The Claimant reported to Dr Thurston that he arrived at the work site approximately 10:00 AM. He then set up for the job and reported that the injury occurred at 11:00 AM and that he called his Employer 15-20 minutes later. The Claimant informed Dr. Thurston that he had to go to the Employer's shop first to pick up materials and that he left the shop prior to arriving at the job site.

17. Dr. Thurston noted that the Claimant was sitting on the side of the bathtub and the work was at umbilical height (or below), no reaching "up." Dr. Thurston was of the opinion that the described mechanism of injury is very unlikely to cause biceps tendon tear or subscapularis partial tendon tear because the Claimant was not reaching above shoulder height, the distance the tile would have tipped/fallen was likely 10-12 inches, the tiles would have been somewhat below shoulder height, and the actual weight of the tiles was less than half the weight he told the Dr. Rook (9 pounds versus 20 pounds).

18. Dr. Thurston noted that the Claimant informed him that he had to pick up supplies and set up for the job. The other information provided, however, indicated that the materials were already there and that the prep had been done the day before. Dr. Thurston, in reviewing the initial medical report, noted that the Popeye sign was not present at the time of that exam. In his examiners note, Dr. Thurston noted:

> Examiner's Note: This is 6 days after the injury and with atrophy visible at this time it is my medical opinion this injury was more than one week old. I have no way of knowing if this partial subscapularis tendon tear was causing [Claimant]any symptoms. Asymptomatic rotator cuff tears are very common in [Claimant] age group. The subscapularis partial tear was likely chronic, asymptomatic, and pre-existing.

19. Dr. Thurston then went on to note several other inconsistencies in the Claimant's history on the day in question and noted that the ring doorbell showed the Claimant at the front door of the house at approximately 10:00 AM and that this differed from what the Claimant told TL[Redacted] about arriving at 9:00 AM and other issues. The Claimant told Dr. Thurston that Dr. Horan had recommended to him a complete shoulder replacement surgery, and Dr. Thurston noted there was no mention of this in Dr. Horne's report. This statement of the Claimant seriously undermines his credibility. Dr. Thurston concluded that there was a prior injury to the shoulder and that findings on the MRI were present prior to the injury and the date of the MRI. He noted that the bicep tear was not present on initial exam and that it more than likely occurred after the August 17th date of injury. Dr, Thurston explained that the findings on the MRI would

not be uncommon for the Claimant to have been asymptomatic (Respondents' Exhibit G).

Dr. Rook

20. Dr. Rook reviewed the above reports and disagreed with both conclusions. He stated that neither Dr. Panchangam nor Dr. Thurston had performed a causation analysis, however, based on Dr. Rook's reliance of the Claimant's erroneous history and Dr. Rook's misconception of the facts, the ALJ finds Dr. Rook's ultimate conclusions lacking in credibility.

Analysis of the Evidence

21. Claimant and Dr. Rook specifically deny/reject the proposition that the event of August 17, 2021 was an aggravation of a pre-existing condition. Claimant denies pre-existing issues and specifically testified that Dr. Horan was incorrect in noting he had prior shoulder separations. Dr. Rook went to great length in his report there was no prior injury and he was of the opinion that the findings on MRI were of an acute injury. Both the Claimant and Dr. Rook over-state the weight of the tile. It was not until the Claimant saw Dr. Rook did he mention that he was straddling the tub and that he fell backwards landing on his back. The Claimant had just seen Dr. Thurston the week before and did not make this assertion. He also did not inform TL[Redacted], TT[Redacted], Dr. Frank or Dr. Horan of this alleged mechanism of injury. Dr. Panchangam thoroughly explained even with this new mechanism of injury that the biomechanical forces are not present to support the injuries allegedly sustained by the Claimant. Dr. Thurston is of the opinion that given the findings on both diagnostics and the initial physical exam, that the Claimant had pre-exiting shoulder pathology and that the biceps tear was not incurred until after the injury. He also was of the opinion that given the multiple inconsistences in the Claimant's history that the Claimant was not credible a historian and that the injury was not work related. The Claimant is not credible in his reporting of the injury and description of the injury. This fact fails to support the compensability of the alleged event of Augustv17, 2021.

22. It is undisputed fact that on both X-Ray and MRI, there are findings of degenerative changes and pre-existing changes to the shoulder. Claimant had a prior history of not communicating properly with the Employer and exhibited those same behaviors in the reporting of this alleged incident.

23. Dr. Rook's opinion that neither Dr. Panchangam nor Thurston performed a causation analysis is incorrect. Dr. Panchangam, while he did not interview the Claimant directly reviewed the Claimant's recorded statement and that of VO[Redacted]. Dr. Rook did not review these statements even though these had been provided to the Claimant. Dr. Panchangam noted the Claimant's height and weight as a vital statistic in performing his calculations. He also reviewed the medical records to obtain the diagnosis and obtain the history of the mechanism of injury. He also used a version of the AMA Guides to the

Evaluation of Permanent Impairment, 3rd Ed., Rev. in formulating his report. Essentially, he testified that his report is a causation analysis.

24. Dr. Thurston also performed a causation analysis in his report. He reviewed the medical records and compared the initial report to the MRI and the second office visit and concluded thee bi-ceps rupture was not present on the alleged date of injury. He examined and interviewed the Claimant and reviewed all the various materials in coming to his conclusions. He also disagreed with Dr. Rook that he did not perform a causation analysis.

25. Dr. Rook's causation analysis is flawed. First, in his report he noted that the tile weighed 18-20 pounds even though the Claimant admitted that this was incorrect. Even after reading Dr. Panchangam' s report which showed the tile in question weighed 9 pounds, the Claimant testified that the tile weighed 13 pounds and used this during testimony. Dr. Rook also expressed the opinion that the MRI showed an acute finding of injury despite both the X-Ray taken the day of the incident and the MRI showing degenerative and pre-existing conditions within the shoulder. Dr. Rook testified that the Claimant had to reach several feet for the tile. The tub is 29 inches in width. Dr. Rook's criticism of the Drs. Panchangam and Dr. Thurston that they did not address causation is refuted. Dr. Pangenome explained that the basis of his report is to determine causation and Dr. Thurston, a Level II provider, reviewed the medical records and interviewed the Claimant and addressed the issue of the bicep tear.

26. Dr. Rook also accepted the Claimant's erroneous history in opining that the Claimant had no prior issues with the shoulder. Dr. Rook's explanation for the Claimant not having a prior shoulder injury was that Dr. Horan's notation of the Claimant having a prior separated shoulder was a "mistake". He also stated that the Claimant's ability to play Frisbee golf showed he had no prior issues. As Dr. Thurston explained in his testimony, Dr. Horan recorded that in his note that it was what the Claimant had told him. This is not a typo or misstatement of age; this is clearly the recording of a prior injury which is a standard question for a physician to ask of a new patient. Both the Claimant's testimony and Dr. Rook's opinion that this did not occur is not credible. Dr. Thurston explained in his analysis of the MRI, the cyst that is present is a clear sign of a shoulder separation and was it was caused by a prior shoulder separation. Dr. Rook does not explain these prior conditions.

27. The ALJ infers and finds that the Claimant tends to forget and exaggerate facts in his history. By increasing the weight of the tile and informing Dr. Rook that Dr. Thurston that Dr. Horan had recommended a complete shoulder replacement are compelling examples of this. Dr. Rook's opinions are based on the Claimant's inaccurate history.

28. The Claimant stated that he does not go to the doctor, and he has a high pain tolerance. Yet in his testimony, he admitted to two prior worker's compensation

claims, bi-lateral knee replacement and hip replacement. In his recorded statement he stated he that he had great health insurance and he also informed. TL[Redacted] in the recorded statement that when he was at the Urgent Care for the first visit, they wanted him to go see his regular doctor (Respondents' Exhibit I-9).

29. The Claimant is not credible on several facts for this claim, and thus Dr. Rook in supporting these assertions is also not credible. First, the weight of the tile. Claimant informed TT[Redacted], that the tile weighed 18-20 pounds. Dr. Rook noted this in his report. Claimant then changed the weight to 13 pounds when speaking with TL[Redacted]. VO[Redacted] reported that the tile weighed between 5-10 pounds and Dr. Panchangam' s testing revealed that the tile weighs 9 pounds. After seeing this result, Dr. Rook testified the tile weighed 13 pounds. This is not the case. While the size of the tile is not in dispute the weight is clearly less than what Dr. Rook relied upon for his conclusions.

30. Next, the Claimant's positioning in the tub is fraught with inconsistencies. The Claimant did not report straddling the tub until he saw Dr. Rook. Dr. Rook testified that the Claimant had to reach "several feet" behind him to catch the tile. If the Claimant was straddling the tub as Dr. Rook notes, this would place the Claimant's right arm and shoulder inside the tub thus decreasing the length of the width of the tub he would have to reach to catch the tile. Next, the Claimant has consistently stated that he saw the tile fall out of the coroner of his eye, (to his right), and then reached straight out to catch it. If he had to reach backwards to catch the tile as Dr. Rook testified, the tile *would have behind him and difficult to see if he was* forward as he is now postulating. As Dr. Thurston noted, the initial urgent care report not only does not record this alleged mechanism of injury, but there was no sign of injury to the Claimant's arm, neck back or head had he had fallen backwards. Dr. Panchangam demonstrated that even with this new reported mechanism the rotations and abductions of the elbow and shoulder are still not present to support the findings on MRI.

31. The Claimant's description of his exact duties for the day is inconsistent. VO[Redacted] credibly testified that the prep had been done the night before and that she had to retrieve the three tiles from a different client for the Claimant to replace the tiles. The simple application of the epoxy in order for the tile to stay in place once mounted would have to have been done the night before. Further, the Claimant informed TL[Redacted] that all the materials and tools were present when he arrived at the job site. This differs from what he informed Dr. Thurston and to what he testified. Dr. Thurston is correct in his report that the Claimant has multiple inconsistencies in his reporting's of the events leading up to and after the alleged event.

32. There is also the issue of the gap in time when the Claimant left the job site and when he was finally seen at Urgent Care. The Claimant left at approximately 11 AM. He contacted VO[Redacted] at 12:47 PM. His vital signs were taken at the Urgent Care at 3:30 PM. There is no mention of the Claimant having been seen at a prior facility. There is no explanation for the time gap in between the alleged injury 10:30-11 AM and the

Claimant's reporting of the alleged injury. The Employer had previously disciplined the Claimant for not being truthful as to his whereabouts, time of arriving at jobs and what had been performed. The Claimant's lack of time explanation and changing of what happen do not support his or Dr. Rooks assertions of what occurred on the alleged date of injury.

33. The Claimant denied that Dr. Frank set a third appointment for him. It is mentioned twice in the narrative report and is on the M-164. The Claimant also asserts that he did not inform Dr. Horan of a prior shoulder separation and that he was only to return to Dr. Horan if the injection worked. This is not what is stated in the report and the only mention of surgery was that the Claimant was not interested in bicep surgery. As Dr. Thurston noted in his report and testified to, the Claimant informed him that Dr. Horan recommended a shoulder replacement. This is not mentioned in Dr. Horan's report.

34. The recorded statement is the best evidence of what the mechanism of injury was at the time. It was only two-days after the alleged injury and the Claimant confirmed what was said on each occasion. The Claimant consistently stated he reached out with his arm and caught the tile. He never mentioned to TL[Redacted] of falling backwards or having to reach backwards. Dr. Panchangam was credible in his testimony in describing the flexion and abduction in both the described mechanism. Dr. Panchangam's conclusion is logically based in hat the forces are not present to cause injury as we have presently. He demonstrated the various angles and forces needed to cause the injuries found and concluded that neither mechanism coupled with the tile in question would generate the force needed to cause the structural damage found on the MRI.

35. Dr. Panchangam thoroughly explained that given that the tile was positioned on the edge of the tub the Claimant would only catch half the weight of the tile. The tub is simply not big enough for the Claimant to catch the full weight of the tile as Dr. Rook opines. Also given the Claimant's height of 5-11 to six feet, the elbow flexion and force are not present to sustain the type of injury, Dr. Panchangam also noted that the flexion/abduction motion of throwing a Frisbee would put wear and tear on a shoulder.

36. Dr. Thurston in his report and his testimony explained the multiple degenerative findings on X-Ray and exam. The osteophytes are an arthritic condition which was present well before the alleged date of injury. Dr. Thurston noted that the septated cyst forms over time, is not an acute injury and is a sign of prior shoulder operations. The tendinopathy represents micro tears from overuse and the joint deteriorates over time. The same applies to the arthropathy that is present on MRI. This is an arthritic condition which again develops over time. Dr. Thurston explained why Dr. Rook is incorrect that this was an acute injury.

37. Taken as a whole, there are too many inconsistencies in the Claimant's prior history, the mechanism of his injury, his whereabouts, activities, and what he actually did nor did not do on the date of injury. Dr. Thurston noted many of these inconsistences

in his reports including the mechanism of injury and the Claimant's reporting of the injury. He also noted the degenerative changes and the lack of physical finding on exam of the bicep tear initially. Dr. Panchangam is credible in his report and in his testimony that the force loads are not present in this claim to support the diagnosis. This is given both mechanisms of injury, the size and weight of the tile, Claimants height, and the size of the tub. Dr. Rook's report and in his testimony is wrong that this is an acute injury with no sign of pre-existing condition. The X-Ray and MRI simply do not support these conclusions. Claimant had a history with the Employer of miscommunication and not accurately reporting events. Given the Claimant's age, recreational activities and other factors, the Claimant has failed to prove a compensable event.

Ultimate Findings

38.. Based on the accuracy of the facts of the event relied upon by Dr. Pangangam and Dr. Thurston, the ALJ finds their ultimate conclusions more credible that Dr. Rook's ultimate conclusions, and Dr. Rook's ultimate conclusions do not support a compensable event nor do they support a compensable aggravation of a pre-existing condition.

39. Between conflicting histories and medical opinions, the ALJ makes a rational decision to accept the ultimate opinions of Dr. Pangangam and Dr. Thurston, and to reject the ultimate opinion of Dr. Rook.

40. The Claimant has failed to prove, by preponderant evidence, that he sustained a compensable injury or a compensable aggravation of a pre-existing condition on August 17, 2021, as alleged.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.

App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a 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). A workers' compensation case is decided on its merits. Sec. 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 Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of ALJ, *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 record. As found, based on the accuracy of the facts of the event relied upon by Dr. Pangangam and Dr. Thurston, the ALJ finds their ultimate conclusions more credible that Dr. Rook's ultimate conclusions, and Dr. Rook's ultimate conclusions do not support a compensable event nor do they support a compensable aggravation of a pre-existing condition.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of ALJ, *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 record. As found, between conflicting histories and medical opinions, the ALJ made a rational decision to accept the ultimate opinions of Dr. Pangangam and Dr. Thurston, and to reject the ultimate opinion of Dr. Rook. Based on the accepted medical opinions and the rejection of Dr. Rook's ultimate opinion, as well as the rejection of THE Claimant's version of the event of August 17, 2021, a compensable event or a compensable aggravation of a pre-existing is not supported by the evidence.

Compensability

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

compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). 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. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Compensable injury is one which requires medical treatment or causes a disability. 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. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). As found, the Claimant failed to prove, by preponderant evidence, that he sustained a compensable injury or a compensable aggravation of a pre-existing condition on August 17, 2021, as alleged.

Burden of Proof

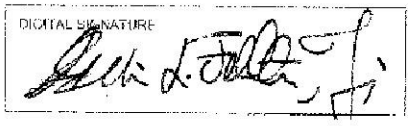
d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). 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. Section 8-43-201(1). As found, the Claimant failed to sustain his burden of proof on compensability, thus, a determination of the other issues is moot.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 30th day of June 2022.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did Respondent prove it properly terminated TTD benefits effective January 24, 2022 because Claimant failed to begin modified duty approved by his ATP?

- Did Respondent prove TPD benefits should be terminated on March 15, 2022 because Claimant was responsible for termination of his employment?

- Did Claimant prove TTD benefits be reinstated at any time on or after January 24, 2022?

- Did Respondent prove Claimant's nonwork-related cardiac condition is an efficient intervening cause sufficient to terminate Claimant's eligibility for temporary disability benefits?

FINDINGS OF FACT

1. Claimant worked for Employer as an overnight grocery stocker. He suffered a compensable injury to his right shoulder on November 15, 2020. The claim was initially denied but was later found compensable in a final order dated October 25, 2021. The parties stipulated to an average weekly wage ("AWW") of $867.44.

2. Claimant performed modified light duty for approximately 10 weeks after the accident, primarily cleaning COVID-19 "hot spots." On February 4, 2021, Employer stopped offering light duty because the claim was denied. The assistant store manager, [Redacted, hereinafter Mr. C], advised Claimant that Employer would only provide modified duty for work-related injuries. Because Employer determined the injury was not work-related, Claimant would "need to be 100%" before he could work. Mr. C credibly testified Claimant was not terminated but was put on an unpaid medical leave of absence.

3. After the claim was found compensable, Respondent filed a General Admission of Liability ("GAL") admitting for TTD benefits commencing February 4, 2021.

4. In November 2021, Claimant's ATP, Dr. Hanson, recommended right shoulder surgery. The surgery was authorized and scheduled for January 28, 2022. However, a cardiac condition was discovered during preoperative workup, which prompted Dr. Hanson to postpone the surgery pending clearance from a cardiologist. Claimant underwent quadruple bypass surgery on April 26, 2022. Claimant's cardiac surgeon estimated it would take Claimant eight to 12 weeks to recover from that surgery.

5. On December 14, 2021, Respondent's adjuster wrote to Dr. Hanson about a modified duty position Employer had available for Claimant. A copy of the letter to Dr. Hanson was simultaneously sent to Claimant's counsel. The modified job consisted primarily of "pacing," which involved walking the store greeting customers, answering

customer questions, and escorting customers to merchandise within the store. The work primarily involved standing and walking and required minimal, if any, use of the right arm. Dr. Hanson approved the job on January 5, 2022.

6. On January 13, 2022, Respondent mailed Claimant a written offer of modified duty. At hearing, Claimant confirmed the mailing address used by Respondent is correct. The job offer was simultaneously mailed to Claimant's attorney. The job description and Dr. Hanson's written approval were included with the offer letter. Claimant was offered 40 hours per week, starting on January 24, 2022. He was to be paid $19.16 per hour.

7. Claimant would have earned $766.40 per week performing the modified job, which is less than the admitted AWW of $867.44. Therefore, Respondent would have owed TPD even if Claimant accepted the modified duty ($867.44 - $766.40 = $101.04 x 2/3 = $67.36).

8. Claimant did not report to work on January 24, 2022, or any day thereafter.

9. On January 24, 2022, Respondent filed an amended GAL stating "TTD is being terminated as of 01/23/22 per the attached Rule 6 letter." The GAL was mailed to Claimant and Claimant's attorney.

10. Respondent filed a second amended GAL on March 2, 2022, admitting for TPD benefits commencing January 24, 2022. The GAL states, "TTD is being terminated as of 01/23/22 per the attached Rule 6 letter. On light duty he can only work 40 hours so TPD might be owed." The amended GAL was mailed to Claimant and Claimant's attorney.

11. As of the hearing date, Respondent was still paying TPD based on the March 2, 2022 GAL.

12. Claimant conceded he knew about modified job offer in January 2022. He testified he did not respond or accept the offer because he "didn't think it was valid until I got the surgery and the therapy and the rehab." Claimant testified he disagreed with Dr. Hanson's decision to allow him to return to work "before I had the surgery on my shoulder."

13. Claimant conveyed his disagreement to Dr. Hanson and Dr. Hanson's staff. On March 3, 2022, Dr. Hanson discharged Claimant from his care "effective immediately." Dr. Hanson stated, "My professional opinion, as your treating workmen's compensation orthopedic physician, is the decisions I have made regarding your employment capability and future treatment are valid and will not be changed. Apparently, the medical care decisions have not met with your satisfaction. Also, multiple staff members of our clinic have felt harassed and unable to respond to your demand. Therefore, Hanson Clinic feels strongly that there is no longer a viable doctor-patient relationship in which to continue providing medical care."

14. Despite discharging Claimant from his practice, Dr. Hanson did not amend or rescind his approval of the modified job.

15. Respondent proved Claimant's TTD benefits were properly terminated effective January 24, 2022 because Claimant failed to begin modified employment. Respondent satisfied the statutory prerequisites for termination of TTD benefits under § 8-42-105(3)(d)(I). The offer was sent to Claimant's correct mailing address and to his attorney of record. Claimant conceded he knew of the offer but chose not to accept it because he disagreed with Dr. Hanson's assessment and did not believe he could perform the work. However, the ATP's determination regarding the suitability of modified work is dispositive, notwithstanding a claimant's own contrary self-assessment of their work capacity. The work required minimal to no use of Claimant's injured right shoulder, and was reasonably available to Claimant under an objective standard.

16. Employer required Claimant periodically to submit documentation to verify his ongoing disability while he was on leave. On February 26, 2022, Employer sent Claimant a letter asking him to complete a medical information form and obtain an updated certification from his doctor. Claimant was instructed to return the completed forms no later than March 12, 2022. If he did not do so, "the Company will reevaluate your employment status in light of the information that is available to it, which may result in a change in your status, and potentially the termination of your employment."

17. Claimant did not return the requested documents to Employer. He testified he received the February 26, 2022 letter, but he took no action. Claimant testified he was unsure who could complete the physician certification portion of the form, because Dr. Hanson had discharged him. Claimant did not contact Employer to discuss the matter.

18. Mr. C credibly testified about multiple unsuccessful attempts to reach Claimant by telephone, email, regular mail, and certified mail. Mr. C credibly testified he would have worked with Claimant had he requested additional time to complete the paperwork. Claimant conceded he knew Employer "was trying to get ahold of me" but he did not respond. Claimant conceded he disregarded voicemails from Mr. C and another store employee regarding his status.

19. Employer terminated Claimant on March 12, 2022. The letter stated, "You have been absent without leave for 40 days as of today. You have failed to respond to earlier letters requesting that you contact your Store Manager. [Y]our employment with King Soopers is being terminated due to your absence without leave."

20. Respondent proved Claimant was responsible for termination of his employment on March 12, 2022.

21. Claimant proved no material change in his injury-related condition or other relevant circumstances on or after January 24, 2022 that would support reinstatement of TTD.

22. Respondent filed a Petition to terminate Claimant's TPD benefits effective March 15, 2022. The Petition stated,

> Claimant has been absent without leave for 40 days as of March 9, 2022. Respondent offered claimant a modified job approved by his treating

> physician pursuant to Rule 6-1 (A) . . . but claimant did not return to work. Claimant has never contacted respondent to discuss his modified job. Claimant is therefore responsible for his termination and resulting wage loss, and his temporary disability benefits should be terminated.

23. Claimant timely objected to the Petition and stated,

> I have been awaiting authorization for my right shoulder surgery. During the mandatory pre-op appointment, I was informed that I had a severe blockage in my heart that will not allow me to safely proceed with the shoulder surgery. Obviously, my surgeon will not operate given my compromised cardiac problem. I am therefore scheduled for heart surgery. I have never refused nor been offered modified employment I was capable of doing.

24. Respondent failed to prove Claimant's TPD benefits should be terminated because of he was responsible for termination of employment. Claimant has been continuously disabled from his regular job since the date of injury. The only modified work offered by Employer paid less than his pre-injury AWW. Claimant would have suffered a wage loss of $101.04 per week irrespective of his termination.

25. Respondent failed to prove Claimant's nonwork-related cardiac issues are an intervening cause with respect to temporary disability benefits. Claimant was disabled by the work injury before he developed the cardiac issues. There is insufficient persuasive evidence to prove his disability would have otherwise resolved by any specific date had he undergone the shoulder surgery as originally scheduled. Moreover, there is no persuasive evidence that Claimant had any control over the postponement of his shoulder surgery or that he has delayed treatment needed to resolve the cardiac condition. Claimant's ongoing temporary wage loss remains at least partially attributable to his industrial injury.

CONCLUSIONS OF LAW

A. Termination of TTD benefits effective January 24, 2022

Although Respondent initially disputed the claim, it commenced TTD after the injury was found compensable. Once commenced, TTD benefits shall continue until one of the terminating events enumerated in § 8-42-105(3). Under § 8-42-105(3)(d)(I), TTD is terminated when the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. Termination of TTD benefits is mandatory if the requirements of § 8-42-105(3)(d)(I) are satisfied. *Laurel Manor Care v. Industrial Claim Appealss Office*, 964 P.2d 589 (Colo. App. 1988). The term "fails to begin" is defined as "a failure to start the modified employment in the first instance." *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 874 Colo. App.(2001). The term "modified employment" means employment within the restrictions established by the attending physician. *Flores-Arteaga v. Apple Hills Orchard Juice Co*., W.C. No. 3-101-024 (February 15, 1996). The modified work must be reasonably available to the claimant

under an "objective standard." *Ragan v. Temp Force*, W.C. No. 4-216-578 (June 7, 1996). An injured worker's subjective beliefs about their work capacity are legally irrelevant, and the ALJ has no authority to question the ATP's determination that the claimant could perform the work. *Burns v. Robinson Dairy*, 911 P.2d 661 (Colo. App. 1995).

As found, Respondent proved Claimant's TTD benefits were properly terminated effective January 24, 2022 because Claimant failed to begin modified employment. Respondent satisfied the statutory prerequisites for termination of TTD benefits under § 8-42-105(3)(d)(I). The offer was sent to Claimant's established mailing address and his attorney of record. The work required minimal to no use of Claimant's injured right shoulder, and was reasonably available to him under an objective standard. Claimant conceded he knew about the offer but chose not to accept it because he disagreed with Dr. Hanson's assessment, and did not think he could tolerate the work. However, the ATP's determination regarding the suitability of modified work is dispositive, notwithstanding a claimant's own contrary self-assessment of their work capacity.

B. Reinstatement of TTD on or after January 24, 2022

Once TTD benefits are terminated because a claimant fails to begin modified employment, they cannot be reinstated merely by showing a causal connection between the injury and a subsequent wage loss. *E.g., Laurel Manor Care v. Industrial Claim Appealss Office*, 964 P.2d 589 (Colo. App. 1988). Otherwise "an employer could never rely on § 8-42-105(3)(d) to terminate TTD benefits." *Id*. at 591. Additionally, Claimant's termination on March 12, 2022 creates a separate bar to an award of TTD. Assuming, *arguendo*, that § 8-42-105(3)(d)(I) does not create a permanent bar to receipt of TTD, Claimant must show a material change to his circumstances, such a worsening of condition. *E.g., Anderson v. Longmont Toyota, Inc*., 102 P.2d 323 (Colo. 2004). Here, there is no persuasive evidence of a worsened condition or any other material change that would support reinstatement of TTD on or after January 24, 2022.

C. Termination of TPD benefits based on Claimant's termination for cause

Respondent admitted for TPD benefits commencing January 24, 2022 to account for the difference between Claimant's AWW and the reduced wage he would have earned while working modified duty. Respondent now seeks to terminate TPD because Claimant was responsible for the termination of his employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The "termination statutes" are an affirmative defense to liability for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that the claimant performed a "volitional act" or otherwise

exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondent proved Claimant was responsible for termination of his employment on March 12, 2022. Claimant failed to communicate with Employer despite multiple attempts to reach him by phone, email, regular mail, and certified mail. Claimant conceded he knew Employer “was trying the get ahold of me,” but did not respond. No extrinsic factors impeded Claimant’s ability to reply, and his failure to communicate with Employer was volitional.

However, the finding that Claimant was responsible for termination is not dispositive of his eligibility for temporary *partial* disability benefits. Even though a Claimant may be ineligible for TTD benefits based on the termination statutes, he may still be entitled to an award of TPD benefits if the pre-termination job (or job offer) paid less than the preinjury wage. *See e.g., Garbiso v. Wal-Mart Stores, Inc*., W.C. No. 4-695-612 (March 10, 2008); *Minter v. Diesel Services of Northern Colorado,* W.C. No. 4-513-118 (September 10, 2002)*; Clevenger v. El Paso Glass* Co., W.C. No. 4-712-079 (April 29, 2008); *Tarman v. US Transport*, W.C. No. 4-981-955-01 (June 2, 2016); *Sparks v. Mattas Marine & RV*, W.C. No. 4-982-976-01 (September 26, 2016). These cases stand for the proposition that, to the extent a claimant’s AWW at the time of the termination is (or would have been) less than the AWW at the time of the injury, the difference remains attributable to the injury and does not “result” from the claimant’s termination.

Here, Claimant would have suffered a partial wage loss even if he had accepted the modified job and not been terminated. Claimant was disabled from his regular job, and the only modified work offered by Employer paid less than his pre-injury AWW. Claimant would have lost wages in the amount of $101.04 per week, irrespective of his termination. Thus, he remains entitled to TPD benefits.

D. Termination of temporary disability based on intervening cause

To receive temporary disability benefits, a claimant must establish a causal connection between a work-related injury and the subsequent wage loss. Section 8-42-103(1)(a). A claimant need not prove that the work-related injury was the *sole cause* of the wage loss. Rather, eligibility for temporary disability benefits requires only that the work-related injury contributes *“to some degree”* to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Respondent seeks to terminate Claimant's ongoing eligibility for temporary disability benefits based on an "efficient intervening cause" that has severed the causal connection between the injury and the wage loss. *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986). The existence of an intervening cause is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Atlantic and Pacific Ins. Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Because temporary disability benefits are payable if the injury contributes "to some degree" to a wage loss, Respondent must show that the injury no longer contributes *in any degree* to the claimant's wage loss. *E.g*., *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

Horton v. Industrial Claim Appeals Office, *supra*, is dispositive of Respondent's intervening event defense here. In *Horton*, the claimant was receiving TTD benefits and awaiting surgery when she suffered a non-injury related fall. The fall aggravated a pre-existing condition and necessitated postponement of the surgery. An ALJ concluded that the fall was an intervening event and suspended TTD benefits. The ICAO reversed the ALJ, and the Court of Appeals affirmed the ICAO. The following language is pertinent:

> [P]etitioners admitted liability for temporary total disability benefits and they did not contend that the claimant's disability abated prior to the fall . . . . Since the claimant was already totally disabled by the injury at the time of the alleged "intervening event," the subsequent wage loss was necessarily caused to some degree by the injury. Thus, the ALJ's findings establish that claimant's injury contributed in part to the subsequent wage loss. Therefore, under *PDM Molding* [ ], claimant was entitled to temporary disability benefits for the disputed period. *Id*. at 1211.

Similarly, in *Parks v. Ft. Collins Ready Mix, Inc*., W.C. No. 4-251-955 (March 31, 1999), the claimant had refused a recommended surgery, so the respondents requested termination of TTD benefits based on an "intervening event." The ICAO held the claimant's refusal to proceed with surgery was not an "efficient intervening event" because "benefits are only precluded when the industrial disability plays 'no part' in the wage loss." The Panel stated,

> [I]t is undisputed that the claimant was temporarily disabled at the time Dr. Thomas recommended additional surgery. Thus, the industrial injury contributed "to some degree" to the claimant's wage loss . . . . Under *PDM*, it was incumbent upon the respondents to show that some particular point, the injury no longer contributed in any degree to the claimant's wage loss. . . . Absent evidence that the claimant's temporary disability would have resolved by a specific time but for his delay in undergoing surgery . . . the delay is not an efficient intervening event.

The ALJ perceives no meaningful distinction between *Horton*, *Parks,* and Claimant's case. Although *Horton* and *Parks* involved TTD rather than TPD, the rationale applies equally well to Claimant's situation. Claimant's ongoing temporary wage loss remains attributable, at least in part, to his industrial injury. Claimant was disabled by the industrial injury before he developed the cardiac issues, and there is no persuasive

evidence to prove his disability would have resolved by any specific date had he undergone the shoulder surgery as originally scheduled. Moreover, there is no persuasive evidence that Claimant had any control over the postponement of his shoulder surgery or that he has delayed treatment needed to resolve the cardiac condition. The ALJ is persuaded Claimant will proceed with the shoulder surgery as soon as he is medically cleared to do so. Accordingly, Respondent did not prove an intervening event sufficient to terminate Claimant's TPD benefits.

ORDER

It is therefore ordered that:

1. Respondent properly terminated TTD benefits effective January 24, 2022 because Claimant refused a written offer of modified employment.

2. Claimant's request to reinstate TTD benefits on or after January 24, 2022 is denied and dismissed.

3. Respondent's request to terminate Claimant's TPD benefits effective March 15, 2022 is denied and dismissed.

4. Respondent's intervening event defense is denied and dismissed.

5. All issues not decided herein are reserved for future determination.

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

DATED: June 30, 2022

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 24, 2021 until terminated by statute.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by Authorized Treating Physician (ATP) Michael J. Rauzzino, M.D.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage of $700.00.

FINDINGS OF FACT

1. Claimant is a 53-year-old male who worked for Employer as an order selector/forklift operator. His job duties involved pulling orders from shelves, unloading trucks and operating a forklift in Employer's warehouse.

2. Claimant testified that he began working on April 21, 2021 at around 5:00 a.m. He received a final written warning for a forklift incident and ongoing attendance issues. Claimant was also prohibited from driving a forklift. He was advised that, if he did not improve, he would be terminated.

3. Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt sharp pains in his neck and back. Claimant did not turn or rotate during the incident. He summarized that he experienced pain in his neck, back, hip and shoulder.

4. JH[Redacted] was Employer's warehouse coordinator on the date of the accident. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder.

5. Claimant reported the incident to Employer's production supervisor/warehouse manager MC[Redacted]. Ms. MC[Redacted] testified that she was pulled out of a meeting and met with Claimant in the break room after the incident.

Claimant told Ms. MC[Redacted] that he was pulling trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer directed Claimant to Authorized Treating Physician (ATP) Concentra Medical Centers for treatment.

6. On April 22, 2021 Claimant visited Concentra for an evaluation. He reported pain on the left side of his neck, left shoulder and back. After a physical examination, Deana Halat, NP diagnosed Claimant with a sprain of the left shoulder girdle and a strain of the left trapezius muscle. She directed Claimant for a left shoulder x-ray and physical therapy.

7. Employer completed a First Report of Injury on April 23, 2021. The report specified that the affected body parts were the upper extremity and shoulder. The document noted that Claimant felt a pop in the shoulder while carrying materials.

8. On April 26, 2021 Claimant returned to Concentra for an examination with Carol Dombro, M.D. Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. Dr. Dombro noted that Claimant could return to modified duty work on April 28, 2021.

9. On May 3, 2021 Claimant returned to Dr. Dombro for an examination. Claimant reported pain in the left lateral neck and left trapezius. He described the pain as moderate and aching in nature. Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro noted that Claimant had developed cervical radiculopathy. She determined that her objective findings were consistent with a work-related mechanism of injury.

10. Claimant underwent an MRI of the cervical spine on May 6, 2021. The MRI showed severe spinal canal stenosis with an abnormal cord signal at C4-C5 that was worrisome for the development of myelomalacia. The imaging also revealed severe bilateral foraminal stenosis at the same level.

11. On May 10, 2021 Claimant again visited Dr. Dombro for an examination. A physical examination revealed normal motor strength and no neurological symptoms. Dr. Dombro referred Claimant to neurologist Michael J. Rauzzino, M.D. based on the stenosis and myelomalacia in the MRI report. She restricted Claimant from working.

12. On May 11, 2021 Claimant visited Dr. Rauzzino for an evaluation. Dr. Rauzzino noted that Claimant had a markedly positive Spurlings maneuver, weakness of the hand-wrist bilaterally, diminished sensation in the left C6 and C5 distribution, moderate difficulty with tandem gait, and weakness of his left biceps and deltoid. He commented that Claimant was asymptomatic prior to his April 21, 2021 work injury. Dr. Rauzzino noted that an MRI of the cervical spine revealed a central left-sided disc protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the spinal cord at the same level. Claimant also had similar disease at C5-C6, but to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular symptoms, Dr. Rauzzino recommended surgery. He explained that the proposed surgery was designed to protect the spinal cord as well as

regain some motor and sensory functions. Dr. Rauzzino commented that conservative treatment in the form of injections and physical therapy was not indicated and Claimant would "benefit from decompression of neural elements."

13. On May 20, 2021 Claimant returned to Dr. Dombro for an examination. Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. An MRI of the left shoulder showed post-surgical changes and one centimeter low grade interstitial tearing of the supra/infraspinatus. Dr. Dombro determined that providers needed to repair Claimant's neck and allow time for his left shoulder to heal. She remarked that a return to work was on hold until Claimant completed the requested surgery. Dr. Dombro thus noted that Claimant would remain off work from May 20, 2021 until June 20, 2021.

14. On June 8, 2021 Claimant returned to Dr. Rauzzino for an examination. Dr. Rauzzino noted that Claimant presented for a follow-up visit based on a surgical request in the form of an anterior cervical decompression at C4-C5 and C5-C6 that was denied by Insurer. He could not understand Insurer's denial of the surgical request because he had no evidence Claimant exhibited symptoms prior to the occupational injury, Claimant immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with Claimant's neurological deficits. On physical examination, Dr. Rauzzino noted markedly positive Spurlings, weakness in Claimant's left hand and wrist, diminished sensation in the left C5 distribution and the first two digits of the left hand, moderate difficulty with tandem gait, and weakness in the left biceps and deltoid. Dr. Rauzzino cautioned that delaying surgery placed Claimant at increased risk for permanent neurological deficits.

15. Through July-August 2021 Claimant visit Dr. Dombro for treatment. Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRI of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Dr. Dombro continued to restrict Claimant from working until the proposed surgery was completed.

16. On September 15, 2021 Claimant returned to Dr. Dombro for an examination. Dr. Dombro continued to prohibit Claimant from working. She specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Claimant testified that he has not sought any medical treatment since he last visited Dr. Dombro.

17. Claimant testified at the hearing in this matter. He explained that he continued to perform light duty work for Employer until he ceased working on May 24, 2021 after he was advised he required surgery. Claimant spoke with Ms. MC[Redacted] and she informed him that he would be unable to return to work until he completed his medical treatment.

18. The record reveals that Claimant has a history of prior cervical spine complaints. On November 5, 2016 Claimant sustained a work-related injury to his right shoulder and cervical spine. Claimant sought treatment through Workwell with Paul Ogden, M.D.

19. On April 4, 2017 Claimant underwent an MRI of the cervical spine. The imaging revealed degenerative disc and joint changes superimposed on a borderline narrow spinal canal with mild right paracentral cord indentation and mild right chronic myelomalacia at C4-C5.

20. On September 8, 2017 Claimant visited Barry A. Ogin, M.D. for an examination. Dr. Ogin noted that he was concerned about the spinal cord stenosis with evidence of mild right chronic myelomalacia at C4-C5. He recommended a surgical consultation. Dr. Ogin felt that a decompression would be required based on Claimant's stenosis and cord changes.

21. On November 10, 2017 Claimant underwent a repeat MRI of the cervical spine. The imaging revealed multilevel stenosis with signal alteration posteriorly and to the right of the midline at the C4-C5 level.

22. On December 28, 2017 Claimant was evaluated by Dr. Ogden. Dr. Ogden placed Claimant at MMI with 15% whole person impairment of the cervical spine. He recommended follow-up care with Bryan Andrew Castro, M.D. every six months for two years. Dr. Ogden noted that Claimant would likely need a follow-up MRI and Dr. Castro remarked that, if there was worsening of the myelopathic symptoms, there would be a chance for surgery.

23. On October 4, 2021 Claimant underwent an independent medical examination with Brian Reiss, M.D. Dr. Reiss also testified as an expert in orthopedic medicine in a post-hearing evidentiary deposition conducted on May 25, 2022. Claimant told Dr. Reiss that he was pulling material from about shoulder height onto his left shoulder when he developed sharp pain in the left side of his neck and left suprascapular area.

24. Dr. Reiss remarked that Claimant was reporting a high level of cervical symptomatology for more than a year by the time he reached MMI on December 28, 2017. He noted that Claimant's pain complaints at the time of MMI were the same as his current symptoms. Moreover, Dr. Reiss commented that Claimant's cervical stenosis and spinal cord changes were present in 2017.

25. Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI scan was a little more involved, it would be expected from degeneration over four years. Dr. Reiss explained that myelomalacia generally reflects some damage to the spinal cord. He testified that myelomalacia does not usually go away and there was damage to the spinal cord in 2017. Dr. Reiss commented that he reviewed the 2021 MRI films and there was no evidence of an acute injury including a disc herniation.

26. Dr. Reiss noted that, based on his interview and physical examination, Claimant was not experiencing any weakness, Spurlings was negative, and his tandem gait was normal. Claimant had no complaints of fine motor difficulty and there was no clumsiness or gait disturbance. Dr. Reiss testified that there were no signs of symptoms of myelopathy. He concluded that there did not appear to be any progressive neurologic symptomatology and surgery was not indicated for Claimant's primary complaint of neck pain. He summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

27. On May 24, 2022 the parties conducted the post-hearing evidentiary deposition of Michael J. Rauzzino, M.D. Dr. Rauzzino remarked that Concentra providers referred Claimant in a semi-urgent condition because of significant neurological findings and an enlarged herniated disc. He noted that the mechanism of injury involved a falling object that struck Claimant and caused him to jerk his head. He then felt pain in his neck and left arm as well as progressive neurologic symptoms. Claimant discussed his prior neck injury, but commented that he had been asymptomatic prior to his April 21, 2021 work injury. Notably, Claimant's prior industrial injury on November 5, 2016 involved right-sided symptoms while his current symptoms are located on his left side.

28. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant primarily suffered right-sided symptoms. Providers in 2017 remarked that Claimant had the congenital condition of spinal stenosis, or narrowing of the space surrounding the spinal cord, that predisposed him to injury. Dr. Rauzzino noted that Claimant could have undergone prophylactic surgery to address his condition but chose not to in 2017.

29. Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

30. Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits. Dr. Rauzzino recommended that Claimant not work until his spinal condition is surgically repaired.

31. Claimant has established that it is more probably true than not that he injured his left shoulder and neck during the course and scope of his employment with

Employer on April 21, 2021. Initially, Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt a sharp pain in his neck and back. Claimant summarized that he had pain in his neck, back, hip and left shoulder. Mr. JH[Redacted]'s testimony is consistent with Claimant's account of his injury. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder. Furthermore, Claimant immediately reported the incident to Ms. MC[Redacted]. Claimant told Ms. MC[Redacted] that he was in the aisle pulling some trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer then completed a First Report of Injury on April 23, 2021. The document noted that Claimant felt a pop in the shoulder while carrying material. The preceding chronology reflects that Claimant suffered an accident while moving materials at work on April 21, 2021.

32. Respondents assert that Claimant's left shoulder and neck symptoms constituted pre-existing conditions that only surfaced in response to a disciplinary action. However, the medical records reveal a sufficient nexus between Claimant's work activities and his symptoms to establish that he suffered compensable injuries to his left shoulder and neck. during the course and scope of employment on April 21, 2021. On April 26, 2021 Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. At a follow-up appointment on May 3, 2021 Dr. Dombro assessed Claimant with an acute strain of the neck muscle and noted that Claimant had developed cervical radiculopathy. She recommended MRIs of the left shoulder and cervical spinal canal. Dr. Dombro reiterated that her objective findings were consistent with a work-related mechanism of injury.

33. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRI of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Moreover, Dr. Rauzzino summarized that there was no evidence Claimant exhibited symptoms prior to the occupational injury, he immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with his neurological deficits. Accordingly, the bulk of the persuasive medical records reflect that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable injuries to his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

34. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute. On May 20, 2021 Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. Dr. Dombro remarked that Claimant could not return to work

until the recommended spinal surgery was completed. Dr. Dombro specified that Claimant would remain off work from May 20, 2021 until June 20, 2021. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. She continued to restrict Claimant from working until the proposed surgery was completed. On September 15, 2021 Dr. Dombro specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Finally, Dr. Rauzzino recommended that Claimant not return to work until his spinal condition was surgically repaired.

35. Claimant testified that he continued to perform light duty work for Employer until he was advised on May 24, 2021 that he required surgical intervention. Ms. MC[Redacted] informed Claimant that he would not be able to return to work until he completed his medical treatment. Claimant has thus not worked since May 24, 2021. Claimant noted that he has not sought any medical treatment since he last visited Dr. Dombro on September 15, 2021. The record thus reveals that Claimant's April 21, 2021 work accident 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. Moreover, Claimant has not reached MMI or been released to full duty employment. He is thus entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute.

36. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by ATP Dr. Rauzzino. On May 3, 2022 Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro also noted that Claimant had developed cervical radiculopathy. Dr. Dombro subsequently referred Claimant to ATP Dr. Rauzzino based on the stenosis and myelomalacia in the MRI report. Dr. Rauzzino noted that the MRI of the cervical spine revealed a central left-sided disk protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the cord at the same level. Claimant also had similar disease at C5-C6 to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular symptoms, Dr. Rauzzino recommended surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6.

37. Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

38. Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent

cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits.

39. In contrast, Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI was a little more involved, it would be expected from degeneration over four years. Dr. Reiss commented that there was no evidence of an acute injury including a disc herniation. He explained that there has not been any evolution of Claimant's neurologic complaints. Dr. Reiss summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

40. Despite Dr. Reiss' comments, the persuasive opinions of Drs. Dombro and Rauzzino reflect that Claimant's medical treatment and the proposed anterior cervical decompression surgery is reasonable, necessary and causally related to his April 21, 2021 industrial accident. Claimant's medical care through Concentra addressed his acute cervical strain that caused a significant disc herniation with compression of the spinal cord and warranted surgery. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant previously suffered primarily right-sided symptoms. The 2021 imaging showed a significant disc herniation with compression of the spinal cord. Claimant now suffers from a different condition than he did in 2017 involving a disc herniation on the left side. Accordingly, Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery recommended by ATP Dr. Rauzzino for his April 21, 2021 work injuries.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

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

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

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997)

("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has established by a preponderance of the evidence that he injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021. Initially, Claimant explained that on April 21, 2021 he was moving approximately 25-30 metal trays from a chest height shelf to rest on his left shoulder. He specified that, as he pulled the materials with both hands, he felt a sharp pain in his neck and back. Claimant summarized that he had pain in his neck, back, hip and left shoulder. Mr. JH[Redacted]'s testimony is consistent with Claimant's account of his injury. Mr. JH[Redacted] testified that he was standing about 20 feet away from Claimant on April 21, 2021 when he heard a loud crash and a yell. He approached Claimant within seconds. He observed metal on the ground and Claimant grasping his shoulder. Furthermore, Claimant immediately reported the incident to Ms. MC[Redacted]. Claimant told Ms. MC[Redacted] that he was in the aisle pulling some trays when he felt a pop in his shoulder and pain in his shoulder blade. Employer then completed a First Report of Injury on April 23, 2021. The document noted that Claimant felt a pop in the shoulder while carrying material. The preceding chronology reflects that Claimant suffered an accident while moving materials at work on April 21, 2021.

9. As found, Respondents assert that Claimant's left shoulder and neck symptoms constituted pre-existing conditions that only surfaced in response to a disciplinary action. However, the medical records reveal a sufficient nexus between Claimant's work activities and his symptoms to establish that he suffered compensable injuries to his left shoulder and neck. during the course and scope of employment on April 21, 2021. On April 26, 2021 Dr. Dombro assessed Claimant with a sprain of part of the left shoulder girdle and a strain of the trapezius muscle. She concluded that her objective findings were consistent with a work-related mechanism of injury. At a follow-up appointment on May 3, 2021 Dr. Dombro assessed Claimant with an acute strain of the neck muscle and noted that Claimant had developed cervical radiculopathy. She recommended MRIs of the left shoulder and cervical spinal canal. Dr. Dombro reiterated that her objective findings were consistent with a work-related mechanism of injury.

10. As found, through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro noted that an MRl of Claimant's neck reflected C4-C5 severe spinal stenosis with bilateral foraminal narrowing including possible early myelomalacia. She assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. Moreover, Dr. Rauzzino summarized that there was no evidence Claimant exhibited symptoms prior to the occupational injury, he immediately reported his symptoms, two supervisors witnessed the incident, the mechanism of injury was appropriate and imaging was consistent with his neurological

deficits. Accordingly, the bulk of the persuasive medical records reflect that Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable injuries to his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

Temporary Total Disability Benefits

11. 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* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that 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.

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute. On May 20, 2021 Dr. Dombro noted that an MRI of the cervical spine revealed C4-C5 severe spinal stenosis, bilateral foraminal stenosis and myelomalacia. Dr. Rauzzino thus recommended neck surgery. Dr. Dombro remarked that Claimant could not return to work until the recommended spinal surgery was completed. Dr. Dombro specified that Claimant would remain off work from May 20, 2021 until June 20, 2021. Through July-August, 2021 Claimant continued to report neck pain that radiated into his left shoulder. Dr. Dombro assessed Claimant with an acute strain of the neck muscle, cervical radiculopathy at C5, herniated nucleus pulposis at C4-C5 and C5-C6, and neuroforaminal stenosis of the cervical spine. She continued to restrict Claimant from working until the proposed surgery was completed. On September 15, 2021 Dr. Dombro specified that Claimant was unable to work from May 20, 2021 until November 30, 2021. Finally, Dr. Rauzzino recommended that Claimant not return to work until his spinal condition was surgically repaired.

13. As found, Claimant testified that he continued to perform light duty work for Employer until he was advised on May 24, 2021 that he required surgical intervention. Ms. MC[Redacted] informed Claimant that he would not be able to return to work until he completed his medical treatment. Claimant has thus not worked since May 24, 2021. Claimant noted that he has not sought any medical treatment since he last visited Dr. Dombro on September 15, 2021. The record thus reveals that Claimant's April 21, 2021 work accident 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. Moreover, Claimant has not reached MMI or been released to full duty employment. He is thus entitled to receive TTD benefits for the period May 24, 2021 until terminated by statute.

Medical Benefits and Proposed Surgery

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

15. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

16. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits including the proposed surgery recommended by ATP Dr. Rauzzino. On May 3, 2022 Dr. Dombro assessed Claimant with an acute strain of the neck muscle. She recommended MRIs of the left shoulder and cervical spine. Dr. Dombro also noted that Claimant had developed cervical radiculopathy. Dr. Dombro subsequently referred Claimant to ATP Dr. Rauzzino based on the stenosis and myelomalacia in the MRI report. Dr. Rauzzino noted that the MRI of the cervical spine revealed a central left-sided disk protrusion al C4-C5 with significant central and foraminal stenosis. There also appeared to be a signal change in the cord at the same level. Claimant also had similar disease at C5-C6 to a lesser degree. Because of Claimant's progressive neurologic deficits and severe radicular

symptoms, Dr. Rauzzino recommended surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6.

17. As found, Dr. Rauzzino explained that an April 10, 2017 MRI revealed a subtle T2 hyperintensity on the right side that was much different from Claimant's 2021 MRI. The 2021 imaging showed a significant disc herniation on the left side with compression of the spinal cord. Although Claimant still has cervical radiculopathy, it is now located on the left side because of the disc change. Moreover, there has been a significant change in the spinal cord as reflected by the whiteness in the center of the cord that was much more pronounced in 2021 than it was in 2017. Dr. Rauzzino reasoned that Claimant likely bruised his spinal cord during the April 21, 2021 work incident.

18. As found, Dr. Rauzzino concluded that, because Claimant was asymptomatic prior to his work accident, he suffered an acute injury that exacerbated his symptoms and warranted surgery. He also remarked that Claimant's mechanism of injury was consistent with his symptoms, he immediately reported the event, and underwent an emergent cervical MRI that revealed radiculopathy. Claimant's condition thus warranted surgery in the form of an anterior cervical decompression at C4-C5 and C5-C6. Delaying surgery placed Claimant at increased risk for permanent neurological deficits.

19. As found, in contrast, Dr. Reiss detailed that the 2017 MRI reports showed significant degeneration and stenosis at the C4-C5 and C5-C6 levels. Although the 2021 MRI was a little more involved, it would be expected from degeneration over four years. Dr. Reiss commented that there was no evidence of an acute injury including a disc herniation. He explained that there has not been any evolution of Claimant's neurologic complaints. Dr. Reiss summarizes that the surgery recommended by Dr. Rauzzino would be considered a prophylactic procedure based upon Claimant's pre-existing condition. The need for surgery was thus not caused, exacerbated or related to the April 21, 2021 work incident.

20. As found, despite Dr. Reiss' comments, the persuasive opinions of Drs. Dombro and Rauzzino reflect that Claimant's medical treatment and the proposed anterior cervical decompression surgery is reasonable, necessary and causally related to his April 21, 2021 industrial accident. Claimant's medical care through Concentra addressed his acute cervical strain that caused a significant disc herniation with compression of the spinal cord and warranted surgery. Dr. Rauzzino disagreed with Dr. Reiss that Claimant's condition has not changed since his April 10, 2017 MRI. He commented that Claimant previously suffered primarily right-sided symptoms. The 2021 imaging showed a significant disc herniation with compression of the spinal cord. Claimant now suffers from a different condition than he did in 2017 involving a disc herniation on the left side. Accordingly, Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery recommended by ATP Dr. Rauzzino for his April 21, 2021 work injuries.

ORDER

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

1. Claimant injured his left shoulder and neck during the course and scope of his employment with Employer on April 21, 2021.

2. Claimant shall receive TTD benefits for the period May 24, 2021 until terminated by statute.

3. Claimant earned an AWW of $700.00.

4. Claimant shall receive reasonable, necessary and causally related medical benefits, including the surgery proposed by Dr. Rauzzino, for his April 21, 2021 industrial injuries.

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

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

DATED: June 30, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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