OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-158-404-002

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that she suffered compensable injuries to her bilateral shoulders on December 18, 2020.

2. Whether Claimant proved by a preponderance of the evidence that she suffered compensable injuries to her bilateral knees on December 18, 2020.

3. If Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her bilateral shoulders, what medical benefits are reasonable and necessary.

4. If Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her bilateral knees, what medical benefits are reasonable and necessary.

FINDINGS OF FACT

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

1. Claimant is a 56 year-old woman who was involved in a motor vehicle accident in Casper, Wyoming on December 18, 2020, while employed by Employer.

2. The vehicle was traveling approximately 70 miles per hour, when the driver hit a patch of ice. The vehicle slid from the outside lane across the two-lane highway and struck the guardrail on the North side, causing significant damage to the front of the vehicle. The momentum spun the vehicle back across the two lanes and it struck the guardrail on the South side. The driver gained control of the vehicle and drove it off to the North side of the interstate. (Ex. 3).

3. Claimant testified she was seated behind the driver, in the back seat, at the time of the accident. She was wearing a seatbelt that came across her left shoulder. Claimant grabbed the armrests tightly, and braced her feet as the vehicle struck the guardrails. Claimant did not fall to the floor of the vehicle during the accident. The airbags did not deploy, but the impact caused Claimant's eyeglasses to fly off her head. Claimant further testified that her whole body was shaking after the accident. (Tr. 16:1-8, 27:1-22)

4. Claimant was taken by ambulance to the Emergency Department (ED) at the Wyoming Medical Center. According to the trauma flow sheet, Claimant had left knee pain, c-spine tenderness, and a right shin contusion. The ED records further note that Claimant reported having neck and back pain, a headache, nausea without vomiting, mild

abdominal pain and left knee pain. (Ex. 7). Claimant did not report any pain in her shoulders or right knee.

5. While in the ED, Claimant had a CT scan of her head and neck, both of which were negative. She also had a CT scan of her chest, abdomen and pelvis that was unremarkable. Claimant had an x-ray of her left knee that showed no evidence of an acute traumatic injury. The ED physician opined that Claimant most likely had a left knee strain or sprain. (Ex. 7 and I).

6. On December 22, 2020, Claimant saw Authorized Treating Physician (ATP), David Yamamoto, M.D. She presented with neck pain, back pain, bilateral shoulder pain, bilateral knee pain, jaw pain, and abdominal pain. According to Claimant, her bilateral shoulder pain started the day after the accident and she had pain every day since. She reported the pain as achy, intermittent and a 7-8/10. Claimant reported not being able to lift her arms over her head, and having some numbness in the fingers on her right hand. Claimant told Dr. Yamamoto that her bilateral knee pain also started the day after the accident. She reported that the pain was worse in her left knee, 7/10 pain. (Ex. 8).

7. Dr. Yamamoto noted that Claimant's primary diagnosis was neck strain, and he referred her to physical therapy for her neck strain. With respect to Claimant's bilateral shoulder and bilateral knee complaints, his assessment was injury of right knee, injury of left knee, injury of right shoulder, injury of left shoulder. Dr. Yamamoto's medical records do not evidence any examination of Claimant's shoulders and knees. (*Id.*).

8. Claimant returned to see Dr. Yamamoto on January 5, 2021. In addition to her neck, back, jaw and abdominal pain, Claimant continued to report bilateral shoulder and knee pain. Her shoulder symptoms were similar to what she reported at her previous appointment, but she now reported some numbness in her fingers on both hands, with the right hand being worse than the left. Claimant still reported pain in her knees, with the left being worse than the right. The medical records note Claimant's x-ray of her left knee showed no abnormalities. There is no evidence that Dr. Yamamoto ever ordered an x-ray of Claimant's right knee. (*Id.*).

9. Claimant had a pre-existing left knee injury. She suffered a work-related injury in 2016. Claimant testified that she twisted her left knee, but it improved with treatment. (Tr. 25:22-26:2).

10. On January 19, 2021, Claimant saw Dr. Yamamoto and reported that the pain in her shoulders was 8/10, and she was not able to lift her arms above her shoulders. There is no indication that Dr. Yamamoto conducted any examination related to Claimant's shoulders, but he diagnosed her with a strain of both shoulders. Similarly, there is no evidence that Dr. Yamamoto examined Claimant's knees, but he noted "unspecified superficial" injuries to both knees. Claimant was to return in two weeks for an evaluation of her neck strain, upper back strain and bilateral shoulder pain. Dr. Yamamoto did not note the need to evaluate her knees at a future visit. (Ex. 8).

11. Dr. Yamamoto referred Claimant for physical therapy on February 17, 2021. Although the treatment was authorized, Claimant did not begin physical therapy until May 2021. Claimant was reminded that this treatment was authorized on several occasions prior to her beginning physical therapy. (Ex. J and Ex. L).

12. Once Claimant began physical therapy, she reported severe pain to the point where she no longer wanted the therapist to touch her. Claimant complained of pain with any type of movement, including moving her arms overhead. Claimant's physical therapist documented significant guarding during her appointments. On May 27, 2021, Claimant's physical therapist noted that Claimant continued to "present with abnormal signs and symptoms." Furthermore, according to the records, Claimant wanted hands-on treatments to cease and she did not want to schedule any further appointments. (Ex. L).

13. On March 3, 2021, Dr. Yamamoto ordered MRIs of Claimant's cervical spine, right shoulder and left shoulder. He did not order any x-rays of her knees. Claimant underwent left and right shoulder MRIs on April 2, 2021. The MRI of the left shoulder revealed a partial bursal surface tear and degenerative changes. The right shoulder MRI showed tendinosis, bursitis, arthrosis, and other degenerative changes. (Ex. K).

14. Respondents retained J. Tasof Bernton, M.D. to perform an Independent Medical Examination (IME). Dr. Bernton reviewed Claimant's medical records, and examined her on October 5, 2021. Dr. Bernton opined that Claimant's shoulder and knee complaints were unrelated to her motor vehicle accident on December 18, 2020. He stated that it was "not medically probable that the shoulder and knee complaints or wrist numbness are related to the accident." (Ex. M).

15. Dr. Bernton credibly testified in support of his IME report. He testified that during his examination of Claimant, the range of motion in her shoulders was inconsistent and sub-maximal. (Tr. 36:18-19). He testified that Claimant performed a greater range of motion when she rolled over to her side than during the examination, indicating she was providing sub-maximal range of motion in her shoulders. (Tr. 36:4-10).

16. During the IME, Claimant also provided sub-maximal range of motion for her lower extremities. From a supine position, Claimant was only able to raise her right leg 12 degrees and her left leg seven degrees. But when Dr. Bernton asked her to sit up on the exam table, Claimant effectively performed a straight leg raise of 90 degrees. Claimant provided a greater range of motion when performing a normal task than she did when raising and flexing her knees. (Tr. 36:11-19).

17. With respect to Claimant's shoulders, Dr. Bernton diagnosed Claimant with bilateral degenerative changes in her shoulders with a partial left rotator cuff tear, noted to be present on a degenerative basis. (Ex. M).

18. Dr. Bernton credibly testified that if Claimant suffered an acute injury causing symptoms to her shoulders a year after the accident, then she would have experienced the symptoms immediately, not serval days after the accident. (Tr. 45:7-10). Claimant did not report or describe any pain to her bilateral shoulders while in the ED.

19. Dr. Bernton credibly testified that Claimant's right shoulder impressions did not show anything consistent with an acute injury. Claimant's right MRI impressions showed only degenerative changes, common with aging and osteoarthritis. Dr. Bernton credibly testified that there is no conceivable mechanism that the accident could have caused or exacerbated her degenerative changes in her right shoulder. (Tr. 43:7-44:14).

20. With respect to Claimant's left shoulder, Dr. Bernton testified the MRI showed pathology consistent with degenerative changes, not an acute injury. He testified that over time rotator cuff tears, both partial and complete, are common on a degenerative basis. Dr. Bernton further testified Claimant was not suffering from an acute injury on top of a chronic pathology. Specifically, Claimant did not have a mechanism of injury that would explain the pain in her left shoulder. (Tr. 45:16-48:21).

21. During the IME, Claimant told Dr. Bernton that her fingers get numb when she engages in repetitive motion (Tr. 48:25-49:2). The most common symptom of carpal tunnel syndrome is numbness in the first, second, and third fingers. (Tr. 49:3-16). Dr. Bernton diagnosed Claimant with likely carpal tunnel syndrome. (Tr. 50: 3-5).

22. In 2017, Claimant had a workers compensation injury, and was evaluated because she had a sudden onset of bilateral neck, shoulder, and hand pain. Claimant's EMG findings were consistent with a severe right median neuropathy at the wrist and a moderate left median neuropathy at the wrist. (Ex. G). Claimant, however, testified that she had carpal tunnel in her right wrist, but denied having carpal tunnel in her left wrist. (Tr. 28:16-21). Claimant was to follow up with a hand surgeon for her carpal tunnel syndrome, but she did not follow through with this recommendation. (Ex. G and Tr. 28:22-29:13).

23. Dr. Bernton opined that the motor vehicle accident did not cause Claimant's carpal tunnel syndrome. (Tr. 50:20-22). He testified that carpal tunnel is unlikely to resolve without intervention and will likely persist on some level continuously, unless surgical intervention is explored. (Tr. 61:1-7).

24. The ALJ finds that Claimant has a history of prior bilateral shoulder complaints and hand numbness. The ALJ further finds that Claimant's current complaints regarding numbness in her fingers is caused by her pre-existing carpal tunnel syndrome in both extremities.

25. With respect to Claimant's knee complaints, Dr. Bernton credibly testified that any persistent complaints present 10 months after the incident would have some objective evidence on exam. Claimant, however, did not have any objective issues with her knees upon exam. Claimant demonstrated significant restriction of motion in both knees, however, she did not display any pathology that would cause these symptoms. Dr. Bernton specifically noted that there was nothing that could explain Claimant's continued pain nearly a year after the accident. (Tr. 53:17-54:16).

26. Dr. Bernton noted in his IME report that there were no changes on examination during Claimant's year-long treatment with Dr. Yamamoto, and the medical records did

not outline a recommended course of treatment to bring her to MMI. Furthermore, Dr. Yamamoto did not provide any insight or analysis to why Claimant's pain complaints remain unchanged since the accident. (Ex. M).

27. Claimant continued to see Dr. Yamamoto on a regular basis, always reporting the same complaints. Dr. Yamamoto's medical records lack substantive recommendations or details regarding Claimant's progress. Dr. Yamamoto restated Claimant's alleged symptoms and complaints without providing any explanation for their cause.

28. Dr. Bernton credibly testified regarding the process a physician must follow to establish causation. He credibly testified that a claimant's complaints alone are not sufficient to establish causation. A physician must consider the physiology of the condition, and then address whether the incident as described could possibly cause that physiology. Taking these necessary steps into consideration, Dr. Bernton opined that the accident is not a reasonable cause for Claimant's ongoing symptoms with her bilateral shoulders and knees. (Tr. 63:14-64:12).

29. The ALJ finds that Claimant's bilateral shoulder complaints and her bilateral knee complaints are unrelated to the December 18, 2020 accident.

CONCLUSIONS OF LAW

Generally

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

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

Cordova v. Indus. Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both she and the employer were subject to the provisions of the Act, she was performing a service arising out of, and in the course of, her employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes that Claimant failed to meet her burden of proof regarding compensability. She did not present persuasive evidence to prove she suffered a compensable injury to her bilateral shoulders or her bilateral knees while working for Employer. The ALJ considered the evidence Claimant presented regarding her injury. A review of Claimant's and Respondent's exhibits indicate that there is no objective evidence that Claimant's bilateral shoulder complaints are related to the December 18, 2020 accident. (Findings of fact ¶ 29). The MRIs of Claimant's shoulders showed degenerative changes common with aging and osteoarthritis. *Id*. at ¶ 17. Claimant's ATP found that she had a strain of both shoulders, but offered no treatment plan, or insight as to why her pain complaints remained unchanged since the accident. *Id.* at ¶¶ 10 and 26. There is no objective evidence that Claimant suffered an acute injury to her bilateral shoulders in the accident. *Id*. at ¶ 18. Dr. Bernton credibly and persuasively testified that there was no mechanism of injury that would explain the pain in her bilateral shoulders. *Id*. at ¶ 20. The ALJ further concludes that the numbness Claimant is experiencing in her hands is due to her carpal tunnel syndrome. Claimant has pre-existing carpal tunnel syndrome in both extremities that has gone untreated.

Similarly, Claimant did not present evidence to prove she suffered a compensable injury to her bilateral knees. There is no objective evidence that Claimant suffered an injury to her knees that would explain her complaints a year after the accident. The only objective evidence presented was the December 20, 2020, x-ray of her left knee, which was taken immediately after the accident, but did not demonstrate evidence of acute trauma. *Id.* at ¶¶ 8 and 25.

The ALJ concludes that Claimant failed to present credible evidence to prove a compensable injury to her bilateral shoulders or bilateral knees, by a preponderance of the evidence.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her bilateral shoulders and this claim is dismissed.

2. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her bilateral knees and this claim is dismissed.

3. Claimant's request for medical benefits for her bilateral shoulders is denied.

4. Claimant's request for medical benefits for her bilateral knees is denied.

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: March 1, 2022

Victoria E. Lovato
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 the right knee Synvisc-One injection recommended by Michael DaRosa, M.D. is reasonable, necessary and causally-related treatment for his July 1, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is a 63-year-old man who is the sole owner and operator of Employer, a liquor store. Claimant's native language is Korean and his English is limited. Claimant brings his dog to work with him each day.

2. On July 1, 2020, Claimant locked up his store and took a work break to walk his dog in the surrounding neighborhood. Upon returning to his store Claimant observed a man climbing out of a window located at the front of the store. Claimant observed the individual carrying Claimant's pink backpack.

3. Claimant pursued the individual and grabbed the backpack, which contained liquor and other items from Claimant's store. Claimant then grabbed the man by his shirt with one hand while holding his dog's leash in the other hand.

4. Claimant testified that the man then punched and kicked Claimant and pushed him to the ground and that he and the assailant wrestled each other back and forth. Claimant testified he was struck in the ear, which produced blood. Claimant testified he continued to hold onto the man's shirt and his dog's leash while this occurred.

5. Two police officers arrived at the scene, at which time the physical exchange ended.

6. Officer Pablo Carrera was one of the officers on the scene and interviewed Claimant in English on July 1, 2020. Officer Carrera testified by deposition. Officer Carrera testified that, due to the language barrier, it was difficult to understand Claimant. He relied on the assistance of Claimant's English-speaking neighbor, Stephen Fink, to help with questioning Claimant. Claimant reported that the assailant punched him on the left side of the head behind his ear and kneed Claimant in the groin. His understanding was that Claimant was struck twice by the assailant.

7. Claimant testified that he did not mention any issue with his knee to the police because he was nervous and flustered, his knee pain was not so bad at the time, and he was more focused on his head symptoms.

8. [Redacted, hereinafter SF] testified at hearing on behalf of Claimant. At the time of Claimant's industrial injury, Mr. SF[Redacted] lived on the same block as Claimant's liquor store and frequented the store. SF[Redacted] communicated with Claimant in English. On July 1, 2020, Mr. SF[Redacted] heard shouting outside. Upon looking out of his window, Mr. SF[Redacted] had an unobstructed view and observed Claimant following a man with a backpack. He observed Claimant catching up to and grabbing the individual by the arm or shoulder. The individual then swung his arm and struck Claimant on the side of his head. Mr. SF[Redacted] observed Claimant pulling the individual to the ground.

9. Mr. SF[Redacted] then left his room and walked outside to the location of the incident, approximately 20-30 feet away. He estimated this took approximately 30 to 40 seconds. Once outside, Mr. SF[Redacted] observed Claimant sitting on his buttocks with his legs around the man's torso in a "scissor hold" applying pressure. Mr. SF[Redacted] estimated Claimant had the man in this position for approximately two to three minutes. Mr. SF[Redacted] did not recall seeing any blow to Claimant's right knee or any blows to Claimant's chest, back, or legs. He testified that Claimant's right knee was between the assailant and the pavement at some point. Mr. SF[Redacted] testified that subsequent to the incident Claimant's head appeared swollen and Claimant was touching the side of his head where he was struck. Mr. SF[Redacted] testified it did not seem as though there was much of a struggle once Claimant took control. Mr. SF[Redacted] heard Claimant tell the police officers he was fine. Claimant did not inform Mr. SF[Redacted] of any other pain or injuries on July 1, 2020.

10. Claimant filed a First Report of Injury on July 10, 2020, listing the injury as a contusion of the left ear.

11. Claimant did not seek medical treatment from July 1-13, 2020.

12. On July 14, 2020, Claimant called his primary care provider Kaiser Permanente and complained of a two- week history of otalgia, tactile fever, pain, and swollen eyes.

13. On July 15, 2020, Claimant presented to Sarah D. Brodhead, M.D. at Kaiser with an interpreter. Claimant's chief complaint was ear pain. He reported that he was assaulted and hit in the left ear and chest. Claimant complained of pain that gradually migrated from the left side of his head to his right ear and eye. He reported that his chest felt okay. The review of symptoms noted neck and upper back pain. The medical record from this evaluation does not contain any mention of reported knee complaints. No knee examination was performed. X-rays of the cervical spine and facial bones were taken. Dr. Brodhead consulted with an ear, nose and throat ("ENT") physician and prescribed prednisone to reduce Claimant's inflammation.

14. Claimant testified he sought treatment at Kaiser on July 15, 2020 because of swelling to his head, eyes, nose and mouth and difficulty seeing. Claimant acknowledged he did not initially tell his physicians about any knee issues. Claimant testified he began developing problems with his right knee around the beginning of

August 2020. Claimant testified he had difficulty walking and pain when ascending the stairs. Claimant testified he did not sustain any other injury or accidents between the date of the work injury and his onset of pain in early August 2020.

15. On July 20, 2020 Claimant was evaluated by Marcia Eustaquio, M.D. at Kaiser. Dr. Eustaquio noted that Claimant reported his right ear began swelling 1.5 weeks after the initial injury and the swelling went down after he began taking prednisone. Dr. Eustaquio completed a review of symptoms. No knee complaints were documented. Dr. Eustaquio concluded Claimant's right ear condition was unrelated to Claimant's prior trauma.

16. On July 28, 2020, Claimant presented to Michael DaRosa, D.O. at SCL Health Medical Group for concussion without loss of consciousness, neck pain, and back pain. Claimant reported his mid-back pain was greater than his right knee pain and that Claimant was assaulted by a robber that hit his head, chest, and back. On examination of the right knee, Dr. DaRosa noted crepitus with no effusion, edema, erythema, ecchymosis or deformity. Medial and lateral McMurray's tests were positive. Dr. DaRosa diagnosed Claimant with, *inter alia*, primary osteoarthritis of the right knee. He referred Claimant for physical therapy and to Brian Williams, M.D. to coordinate Claimant's care. He noted he would continue to stay involved with Claimant's spine and knee care.

17. On July 29, 2020, Claimant filed a claim for compensation listing the affected body parts as his left ear, face, head and stomach.

18. On July 30, 2020 Claimant presented to Mackenzee Jordan Mullins, PA-C at Dr. Williams' office. PA-C Mullins noted Claimant's primary source of pain as mid-back and headaches. Examination of the right knee revealed generalized tenderness to palpation over the patella and medial/lateral joint lines. PA-C Mullins' assessment included post-traumatic osteoarthritis of the right knee.

19. Dr. Williams evaluated Claimant on August 4, 2020, noting Claimant reported that his most bothersome pain was back pain, but that he also had left shoulder, neck and chest wall pain. On examination, Dr. Williams noted pain in Claimant's right knee when lunging and "fairly normal" range of motion. At a subsequent evaluation on August 14, 2020, Dr. Williams noted Claimant reported continuing neck and back pain with some improvement.

20. Claimant returned to Dr. DaRosa on August 18, 2020 reporting significant low back and knee pain. Dr. DaRosa ordered x-rays, which Claimant underwent on August 27, 2020. X-rays of Claimant's bilateral knees were unremarkable and without evidence of degenerative joint disease.

21. Dr. DaRosa reviewed the x-rays on September 15, 2020, noting the knee x-rays were normal. At that time he administered a steroid injection to Claimant's right knee.

22. At a follow-up evaluation with Dr. DaRosa on October 15, 2020, Claimant reported improvement in his right knee pain. On November 12, 2020 Claimant reported to Dr. DaRosa that his medial right knee pain had returned. Dr. DaRosa ordered a right knee MRI.

23. On November 12, 2020, Allison Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Insurer. Claimant reported to Dr. Fall that he was punched and kicked in his face, chest, back, and head during the work incident. Claimant reported various symptoms to Dr. Fall, including right knee pain. Dr. Fall reviewed Claimant's medical records, including Kaiser records dating back to January 29, 2018. She noted the January 29, 2018 Kaiser record documented Claimant's complaint of right knee pain when ascending stairs. On examination, Dr. Fall noted there were inconsistencies in Claimant's subjective complaints and reports about his function and his actual presentation. She further noted several non-physiologic findings. Examination of the bilateral knees revealed full range of motion with no meniscal signs or ligamentous instability. Dr. Fall noted that Claimant reported pain in four different areas of the knee without correlating objective findings.

24. Dr. Fall assessed Claimant with status post assault with left posterior ear contusion and likely right cervical thoracic strain, multiple resolved contusions, and significant psychological issues. She concluded that there is no evidence Claimant sustained an acute injury to his knee. Dr. Fall opined that Claimant's evaluations had mostly been benign with unremarkable examinations and that his ongoing subjective complaints are more likely based on psychosocial stressors than any residual physical injury. Dr. Fall recommended Claimant undergo continued psychological treatment until he reached psychological maximum medical improvement ("MMI"). She opined that Claimant reached MMI for his physical injuries.

25. Claimant underwent an MRI of his right knee on November 27, 2020. Vincent Herilhy, M.D.'s impression was as follows:

1) No evidence of a meniscal tear.
2) There is a mild moderate grade 2-4 chondral fibrillation in the weightbearing medical compartment with mild cystic change in the central femoral condyle.
3) Mild grade 2-4 patellofemoral chondromalacia with appropriate static alignment.
4) There is longitudinal split tearing of the proximal popliteus tendon with mild underlying tendinosis.
5) There is a 37 mm craniocaudal by 30 mm AP by 5 mm traverse sheetlike probable ganglion cyst extending superiorly from the proximal tibiofibular articulation along the fibular collateral ligament.

(Cl. Ex. 15, pp. 464-465).

26. Claimant returned to Dr. DaRosa on December 24, 2020. Dr. DaRosa noted Claimant was tender to palpation in various areas of the right knee, with positive crepitus and medial and lateral McMurray's tests. He reviewed Claimant's November 27, 2020 right knee MRI. Dr. DaRosa administered another right knee steroid injection and ordered that Claimant undergo a Synvisc-One injection. Dr. DaRosa submitted a request to Insurer for the Synvisc-One injection on December 29, 2020.

27. Upon referral from Dr. Williams, Claimant presented to Samuel Chan, M.D. on December 28, 2020 for evaluation and treatment for concussion/traumatic brain injury. Claimant reported that his initial pain complaint was over his right ear and then spread all over his body. Dr. Chan reviewed Claimant's medical records, noting that, in addition to Drs. DaRosa and Williams, Claimant had also seen Dr. Feldman for neurological evaluation, Dr. Lipkin for an ENT evaluation, Dr. Disorbio for psychological evaluation, and a Dr. Kim who is "well-versed in Korean culture. (R. Ex. G, p. 182). He reviewed, *inter alia*, the MRI of Claimant's right knee and noted degenerative findings with no evidence of a meniscal tear. Claimant complained of pain in several areas including his right knee. No knee exam was documented. Dr. Chan diagnosed Claimant with post-concussion syndrome and chronic pain syndrome. Dr. Chan opined that Claimant's underlying psychological dysfunction, such as anxiety, depression and PTSD-type symptoms, affected his recovery and current ongoing presentation. Dr. Chan agreed with the treating physician and Dr. Fall that Claimant has rather significant nonfocal symptoms and so far no significant pathology except for age-appropriate degenerative changes. Claimant continued to see Dr. Chan for follow-up evaluations and acupuncture treatment.

28. On December 30, 2020, Dr. Williams reviewed Dr. Fall's IME report as well as video of Claimant. He concluded that it was reasonable to think a man of Claimant's age may have had some exacerbations of pre-existing or latent conditions like osteoarthritis of the right knee as a result of the work injury. He opined that the corticosteroid injections were beneficial and that the viscosupplementation (Synvisc-One) injection recommended by Dr. DaRosa is reasonable.

29. On January 6, 2021 Albert Hattem, M.D. performed a physician advisor review regarding the request for the right knee Synvisc-One injection. Dr. Hattem reviewed records and opined Claimant's right knee injury was not related to the assault. Specifically, Dr. Hattem cited to the fact that there was no contemporary documentation of any assault to the knee and all of the initial care records made no mention of the right knee. He concluded that the recommended viscosupplementation injection is related to Claimant's pre-existing knee osteoarthritis and not causally related to Claimant's work injury.

30. At a February 3, 2021 follow-up evaluation, Dr. Chan remarked, "[Claimant] continues to produce a significant amount of pain complaints diffusely. Due to the language barrier as well as cultural barriers, it is rather difficult to quantify the patient's current symptomatology. Neither the patient nor the interpreter is able to provide accurate information." (R. Ex. G. p. 197).

31. On February 9, 2021, Mark C. Winslow, D.O. performed an IME at the request of Claimant. Dr. Winslow conducted a medical records review and physical examination of Claimant. His examination of the right knee revealed crepitus, tenderness and pain with full motion and palpation, but no effusion or instability. His impression included posttraumatic osteoarthritis aggravation of right knee. Dr. Winslow remarked that his examination did not produce overwhelming physical evidence to support the current physical complaints reported by Claimant. He noted Claimant's contention that no specialists had seen him was inconsistent with the medical records, which indicated Claimant had been thoroughly evaluated. Dr. Winslow further remarked there appeared to be some degree of cultural and language barrier and opined that Claimant is not malingering. He noted that despite records documenting knee osteoarthritis three years prior, Claimant was stable and did not require further treatment at that time. Dr. Winslow opined that Claimant likely experienced a significant aggravation due to the work injury. He concluded that the recommended injection is work-related and reasonably necessary to return Claimant to baseline.

32. On February 15, 2021, Dr. Chan noted "the patient does not do any of his own talking, but the interpreter is acting as a caretaker who answers all of the patient's questions without interpreting…There is definitely catastrophizing behavior from the interpreter." (Id. at 200-201). On March 1, 2021, Dr. Chan further noted,

> [i]t would appear the interpreter currently is directing his care, and I am rather concerned over the fact that the patient's interpreter at this juncture is catastrophizing the MRI findings to the patient. They are looking for a specific type of steroid injection. However, given his ongoing symptoms that are diffuse and nonfocal, again there is no specific focality to his examination that would indicate there is anywhere one may be able to inject.

(Id. at 204).

33. On March 9, 2021, Dr. DaRosa again requested authorization for a viscosupplementation shot. Dr. DaRosa noted Claimant reported to him that his right knee pain began after the July 1, 2020 injury and Claimant's July 28 2020 exam was consistent with a flare of arthritis that was more likely than not caused by the assault.

34. On March 29, 2021, Dr. Chan noted that Claimant's symptoms remained unchanged despite extensive treatment. Dr. Chan opined that Claimant's psychological issues were definitely affecting his presentation and ongoing pain symptoms. Dr. Chan concluded that Claimant had reached a plateau from a musculoskeletal standpoint and discharged Claimant from his care.

35. Dr. Fall testified by deposition on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Fall testified consistent with her IME report. Dr. Fall testified that the initial medical records after the work injury did not

contain evidence of an acute injury. She opined that Claimant would have experienced immediate pain had the work incident caused any injury or aggravation or acceleration of his knee condition. Dr. Fall explained that Claimant's MRI demonstrated longstanding, degenerative arthritis with no evidence of a meniscal tear. She opined that the injection recommended by Dr. DaRosa is to treat Claimant's degenerative arthritic condition, which is not causally-related to the work-injury or reasonably necessary to cure or relieve its effects.

36. Claimant testified at hearing that he continues to experience right knee pain and difficulty ascending and descending stairs. Claimant wants to undergo the injection recommended by Dr. DaRosa to help improve his pain.

37. The ALJ credits the testimony of Claimant and the opinions of Drs. DaRosa, Williams and Winslow over the opinions of Drs. Fall, Chan and Hattem and finds that Claimant proved by a preponderance of the evidence the injection recommended by Dr. DaRosa is reasonably necessary and causally related.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is

subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Treatment

Respondents are liable for medical treatment that 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).

Claimant proved it is more probable than not the right knee Synvisc-One injection recommended by Dr. DaRosa is reasonable, necessary and causally-related treatment for his July 1, 2020 industrial injury. Despite a prior diagnosis of right knee osteoarthritis in 2018, there is no evidence Claimant was undergoing treatment for or experiencing symptoms or limitations as a result of such condition leading up to his work injury. The altercation between Claimant and the assailant on the date of injury was, by credible description of Claimant and Mr. SF[Redacted], very physically involved and reasonably could result in aggravation of a pre-existing knee condition of a man in his 60s. Drs. DaRosa, Williams and Winslow all credibly opined that the work injury aggravated Claimant's pre-existing underlying arthritic condition. Dr. Williams reviewed Dr. Fall's IME report and continued to opine that the recommended injection is related and indicated.

The ALJ is not persuaded Claimant's delay in reporting knee symptoms is dispositive of the fact the work incident did not aggravate Claimant's knee condition. Claimant credibly testified he was initially more focused on his head symptoms, and later developed knee symptoms, at which time he notified his physicians. Despite noted psychosocial stressors documented in Claimant's records, based on the totality of the credible and persuasive evidence, the ALJ is persuaded the work assault aggravated Claimant's underlying knee arthritis, resulting in the need for medical treatment. The preponderant evidence further establishes that the injection recommended by Dr. DaRosa is reasonable and necessary treatment to relieve the effects of the work injury.

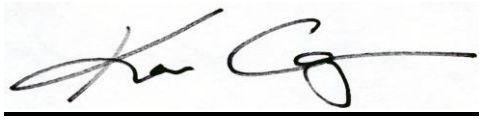
ORDER

1. Respondents shall authorize and pay for the right knee Synvisc-One injection recommended by Michael DaRosa, M.D., which is reasonable, necessary and causally-related treatment for Claimant's July 1, 2020 industrial injury.

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

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

DATED: March 3, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-011-488-006

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a reopening of her claim based upon an alleged change of condition in the injuries caused by her admitted March 22, 2016 industrial injury.

II. If Claimant established that she is entitled to have her claim reopened, whether she also established that she is entitled to additional medical treatment.

PROCEDURAL HISTORY

This claim has been the subject of a prior hearing before this ALJ on November 5, 2019. On November 27, 2019, this ALJ issued a Summary Order, a copy of which is located at Respondents Exhibit A and can be summarized as follows:

1. Claimant was entitled to maintenance medical care, including mental health counseling and additional physical therapy; however, this ALJ determined that ongoing prescriptions for opioid medications were not reasonable or necessary.

2. Claimant's request for treatment for alleged Complex Regional Pain Syndrome (CRPS) was denied and dismissed as this ALJ determined that until such time that Claimant completed an evaluation and met the criteria for a diagnosis of CRPS (either Type I or II), which was causally related to her March 22, 2016 accident and/or subsequent hip surgery, it was premature and contrary to law to order Respondents to provide and pay for such treatment.

3. Claimant failed to overcome the Division Independent Medical Examiner, Dr. John Tyler's determinations regarding MMI and permanent impairment.

4. Claimant failed to prove she was permanently and totally disabled. Consequently, her claim for permanent total disability benefits was denied and dismissed.

5. Claimant was entitled to and awarded $1,200 in disfigurement benefits.

(See generally, Resp. Ex. A).

On January 16, 2020, Respondents filed an Amended Final Admission of Liability (FAL) consistent with the November 27, 2019 Summary Order. As part of the Amended FAL, Respondents admitted to an MMI date of January 9, 2019. Respondents also admitted to a 5% mental and 17% right lower extremity impairment rating as assigned

by Dr. Tyler. Claimant did not object to the Amended FAL and the claim closed by operation of law.

On May 18, 2021, Claimant, proceeding *pro se*, filed a Petition to Reopen the claim alleging a change in medical condition. (Resp. Ex. D). On August 30, 2021, the Claimant through her attorney filed an Application for Hearing. (Resp. Ex. H) As noted, hearing to address Claimant's right to reopen her claim proceeded on December 14, 2021. At the commencement of hearing, the parties agreed that the only issues to be determined were Claimant's claim for reopening and medical benefits.

FINDINGS OF FACT

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

1. Claimant suffered an admitted industrial injury on March 22, 2016 when she slipped in a puddle of water at work and fell, injuring her right hip.

2. Claimant proceeded with treatment and ultimately underwent a Division Independent Medical Examination (DIME) with Dr. John Tyler on October 27, 2017. Dr. Tyler determined Claimant had not reached maximum medical improvement (MMI) and required additional evaluation/treatment for her right hip.

3. Claimant underwent imaging which demonstrated a tear of her right hip acetabular labrum and a CAM deformity, which was surgically repaired by Dr. Geoffery Donor on February 5, 2018.

4. After undergoing additional treatment, including post-surgical rehabilitation, Claimant returned to Dr. Tyler on March 29, 2019 for a follow-up DIME.

5. As part of this follow-up DIME, Dr. Tyler reached the following impressions: (1) Status post repair of right hip labral tear with 75% improvement reported by patient; (2) Complaints of pain throughout the right paralumbar region and gluteal region with no discernable evidence of spinal pathology based on diagnostic studies and [his] examination that day, but with evidence of some myofascial trigger points within the right gluteal musculature; (3) Situational depression; and (4) Significant exaggerated pain behaviors. (Resp. Ex. L, bates 090)

6. Dr. Tyler determined that Claimant reached MMI as of January 9, 2019 with a 17% right lower extremity and 5% mental impairment rating. (Resp. Ex. L, bates 090-091) Dr. Tyler also determined that Claimant did not suffer a permanent injury or any impairment to her lumbar spine. Dr. Tyler stated that Claimant's complaints of lumbar spine pain were not directly related to the industrial injury but rather to Claimant's own behaviors. (Resp. Ex. L, bates 091)

7. On 9/30/19, as a result of her complaints of persistent right hip pain, Claimant underwent an MRI arthrogram of the hip, which was read to show no acute abnormality other than a shallow partial-thickness cleft anterior labrum, which likely was incidental. (Resp. Exhibit K, bates 074) Claimant sought additional care for her persistent hip pain with Dr. Gerald Riley who noted that Claimant was being evaluated for CRPS on November 4, 2019. (Id.) Confirmatory testing was not completed by the time the matter proceeded to hearing on November 5, 2019. Nonetheless, Claimant suggested that she was suffering from CRPS at the time of the November 5, 2019 proceeding. As noted above, this ALJ found that insufficient evidence had been presented to establish that Claimant had been diagnosed with CRPS and thus, it was premature to order that Respondents pay for treatment to cure and relieve Claimant of this condition.

8. Claimant was evaluated for ongoing hip pain through the rheumatology service at National Jewish Hospital on May 14, 2020. Physical examination during this encounter revealed no thigh swelling and consistent temperature and color in the thighs bilaterally. Blood testing was ordered and depending on the outcome, further recommendation for a triple phase bone scan in an effort to confirm a diagnosis of CRPS. (Id. at bates 075)

9. Claimant would not undertake additional testing until March 19, 2021, when she underwent a triple phase bone scan, the results of which were interpreted by Dr. James Walton. According to Dr. Walton, the results of Claimant's bone scan revealed, "No areas of activity that demonstrate increased uptake throughout all 3 phases of the examination which is the most diagnostically accurate pattern. However, there is relatively increased juxta-articular uptake about the elbows and mild uptake about the shoulders and knees at 3 hours, and to a lesser degree at the ankles." (Resp. Ex. D, bates 016) Dr. Walton did not provide a diagnosis of CRPS in his report. Nor did Dr. Walton indicate that any findings from the bone scan were causally related to Claimant's workers' compensation claim.

10. Following her bone scan, Claimant underwent a full body thermography on March 31, 2021 with Dr. Kenneth Taylor. Dr. Taylor noted the thermal findings might indicate a low risk for developing pathology in Claimant's breasts. (Resp. Ex. D, bates 024) Dr. Taylor did not provide a diagnosis of CRPS in his report. Nor did he indicate that any findings from the thermogram were causally related to Claimant's workers' compensation claim.

11. Following thermograph testing, Claimant presented to Family Nurse Practitioner (FNP) Deanna Leyba for a pain management evaluation. During her initial encounter on April 14, 2021, Claimant reported deep cold burning type pain in her right quad and left arm. (Clmt's. Exhibit 4, bates 45) She advised that she had been "bed ridden" from 2016-2020. (Id.) Physical examination revealed subjective complaints of pain to palpation of the midthoracic to the lumbar spine, otherwise the cervical and lumbosacral spine was documented as being "normal". (Id. at bates 46) No edema was observed in the extremities and Claimant's strength in the upper and lower

extremities was documented as “normal.” (Id.) Claimant demonstrated a normal gait, no tremor and no rigidity in the limbs. FNP Leyba provided an assessment of “chronic pain disorder” and complex regional pain syndrome I of the right lower extremity. (Id.)

12. Careful review of the treatment records of FNP Leyba reveal that after Claimant was seen April 14, 2021, she attended follow-up appointments on 4/28/21, 5/25/21, 6/17/21, 7/19/21, 8/10/21, 9/8/21, 10/6/21 and 11/3/21. (Clmt’s. Ex. 4, bates 1-47) Treatment consisted of medication management with a focus on participation in alternative modalities, including trigger point injections, massage therapy, chiropractic treatment, yoga, physical therapy and acupuncture to help decrease Claimant’s pain. (Id.) During the entirety of Claimant’s treatment under FNP Leyba, there was never an effort to perform confirmatory testing to determine the diagnosis of CRPS nor did any provider in the clinic conduct a causation analysis consistent with the Colorado Medical Treatment Guidelines or Budapest criteria to determine whether Claimant, in fact, has CRPS Type I or Type II. Accordingly, the ALJ questions the validity of FNP Leyba’s CRPS Type I diagnosis.

13. Claimant returned to Dr. Doner for re-evaluation on April 20, 2021. Although the record from this date of visit is devoid of a causation analysis performed by any of Claimant’s providers concerning Claimant's alleged CRPS, Dr. Doner noted that Claimant reportedly had been diagnosed with CRPS and as stated by her, it was in her “whole body.” (Resp. Ex. D, bates 19-27) Based upon the content of the medical records and the diagnostic testing completed up to the date of this visit, the ALJ finds Dr. Doner’s suggestion that Claimant had been diagnosed with CRPS and that it was present throughout her body unconvincing. Indeed, Claimant’s report to Dr. Doner that CRPS had been confirmed in her “whole body” appears to be a gross exaggeration of the bone scan and thermography testing results.

14. Claimant underwent a Respondent requested independent medical examination (RIME) with Dr. Lawrence Lesnak on July 14, 2021. Claimant reported to Dr. Lesnak that she had constant severe pain diffusely from under her breasts to the tips of her toes. Claimant graded her pain on a level of 0-100 at a 100. Dr. Lesnak noted the pain level reports were unusual in light of the fact that Claimant utilized daily doses of oxycodone and edible marijuana products. (Resp. Ex. K, bates 063) Claimant reported to Dr. Lesnak that she had not worked since March 22, 2016. (Resp. Ex. K, bates 064) Upon physical examination, Dr. Lesnak noted that Claimant did not have evidence of peripheral edema in either the upper or the lower extremities; there was no evidence of abnormal skin temperature or color changes, and no evidence of muscle atrophy or skin lesions. Dr. Lesnak utilized skin temperature monitoring devices on Claimant’s feet, which he documented as providing symmetrical readings of 88 degrees. (Resp. Ex. K, bates 075-076) Dr. Lesnak ultimately concluded that based upon all information available, including the medical records, his clinical examination and the results of Claimant’s bone scan and thermogram, that there was no medical evidence to support a diagnosis of CRPS Type I or Type II for Claimant. (Resp. Ex. K, bates 079) Dr. Lesnak further opined that Claimant did not require any further medical care as related to the injuries she sustained on March 22, 2016. (Resp. Ex. K, bates 080)

15. Claimant underwent a second triple phase bone scan on August 31, 2021. The results were interpreted by Dr. Jim Hart, who also compared the August 2021 bone scan results to those of the March 2021 scan. Under impressions, Dr. Hart stated, "(1) Decreased delayed update in the elbows compared to prior exam, as well as decreased bilateral knee uptake on blood pool images, may reflect a response to therapy. (2) There is increased update in the shoulders on delays compared to prior exam, which is of uncertain significance." (Resp. Ex. N, bates 101) Overall, Dr. Hart noted that the August 2021 scan demonstrated some improvement in the results from the prior scan. Dr. Hart did not provide a diagnosis of CRPS. Nor did Dr. Hart indicate that any findings from the second bone scan were causally related to Claimant's workers' compensation claim.

16. In an effort to determine whether she had CRPS, Claimant sought the opinions of Dr. Giancarlo Barolat. Dr. Barolat evaluated Claimant on September 9, 2021. During this evaluation, Claimant reported that following her slip and fall and subsequent right hip surgery, she developed hypersensitivity in the right lower extremity. Claimant informed Dr. Barolat that she traveled to a "medical center in Oklahoma, where she was given injections of steroids and vitamin B12 which, according to her, markedly decreased her hypersensitivity in the right lower extremity." (Resp. Ex. M, bates 096) She also described developing swelling and a "reddish" discoloration of the skin in the right leg that spread to the left leg, which also became painful. (Id.) She expressed that she experienced dizziness, tinnitus and cognitive sequelae (brain fog) and a spread of her right hip pain to her upper extremities and left rib cage, which created some difficulty in her ability to breathe. (Id. at bates 097) She reported extreme pain levels of a 10+ on a scale of 1 to 10. (Id.) She insisted that she had swelling in her lower extremities along with discoloration of her skin, was completely sedentary and unemployed, having been out of work for the previous 6 years. (Id.)

17. Physical examination revealed no "difference in size between the two thighs." (Resp. Ex. M, bates 098). Dr. Barolat was similarly unable to discern any color changes in the skin covering the right thigh. According to Dr. Barolat, Claimant demonstrated "absolutely no allodynia or hypersensitivity to touch anywhere in the body and in particular in the right lower extremity." (Id.) Dr. Barolat concluded in his report, "At today's examination, I cannot make the diagnosis of complex regional pain syndrome. She does not have any allodynia or hypersensitivity to touch, which is one of the cardinal features of CRPS." (Id.)

18. Following his examination, Dr. Barolat noted that he would defer any final comments until he had a chance to review additional records concerning Claimant's reported desensitization treatment. He noted that Claimant had "very widespread symptomatology involving the upper extremities, the lower extremities, the lumbar area, the chest area, the brain, the inner ear, and the bladder." (Resp. Ex. M, bates 098) Based upon Claimant's examination, Dr. Barolat was unable to "make the diagnosis of complex regional pain syndrome" as Claimant did not have any "allodynia or hypersensitivity to touch, which is one of the cardinal features of CRPS." (Id.) Dr.

Barolat questioned the alleged swelling and color changes in the right thigh noting that he was "very puzzled by [Claimant's] clinical presentation and clinical course. He then reiterated his request to review additional treatment records before making any "further therapeutic or diagnostic recommendations." (Id.) Based upon the evidence presented, it is unclear if Dr. Barolat reviewed additional records. No subsequent reports issued by Dr. Barolat were included in the exhibits submitted to the ALJ and he did not testify at hearing.

19. Claimant underwent additional imaging (MRI) of the right hip on September 30, 2021. Results of this imaging were compared to Claimant's September 1, 2017 right hip MRI and revealed a recurrent tear of the anterior superior labrum with a 2-millimeter paralabral cyst located at the anterior superior aspect of the right acetabulum. (Clmt's. Ex. 5, bates 21).

20. On 10/18/21, Claimant was seen by orthopedist Dr. Douglas Robert Adams, having been referred there by Dr. Doner. Careful review of the report from this date of visit indicates that at the time of her evaluation, Claimant was a "36 year-old female with chronic right hip pain from multifactorial etiology . . . whose pain appeared "most consistent with chronic regional pain syndrome and irritation of the lateral femoral cutaneous nerve (injured during surgery) of the right hip as opposed to symptoms related to a labral tear." (Clmt's. Ex. 5, bates 1-20) Accordingly, Dr. Adams assessed Claimant with CRPS Type II of the right lower extremity and concluded that she was not a good candidate for surgical repair of the tear and cyst revealed on the September 30, 2021 MRI because revision surgery was likely to result in reactivation of her CRPS without addressing the damage to her femoral cutaneous nerve. (Clmt's. Ex 5, bates 3) Similar to the providers before him, Dr. Adams relied only on the prior medical records to support his conclusion that Claimant had CRPS. He did not comment on the results of Claimant's thermogram or bone scan testing results. Moreover, he did not comment on Dr. Barolat's evaluation nor did he recommend additional confirmatory testing or complete a causation analysis of his own. Simply because he listed CRPS among his assessments, does not persuade this ALJ that Claimant is actually suffering from CRPS currently.

21. During the December 14, 2021 hearing, Claimant testified that she currently experiences ongoing symptoms including severe pain, extreme hot and cold sensations and swelling in her right quadriceps extending upward to the hip and her left elbow up to her left shoulder, which she attributes to CRPS. She testified that she "got worse" immediately after the surgery with Dr. Doner on February 5, 2018.

22. According to Claimant, Dr. Doner referred her to Dr. Richard Adams in September 2021 for further evaluation of her right hip complaints. As noted above, Claimant confirmed that Dr. Adams felt she was a poor surgical candidate and recommended against revision surgery for the recurrent right labral hip tear.

23. Claimant testified that she wished to proceed with additional evaluations and treatment for her alleged CRPS, including a Quantitative Sudomotor Axon Reflex Test (QSART) and a ganglion stellate block.

24. During cross-examination, Claimant testified that she has been working at United RF, LLC since July 2020 on a part-time basis. Because United RF is owned by Claimant's father, Claimant testified that she "did hardly anything" for her job despite earnings wages on a monthly and even weekly basis over the year and half since July 2020. Based upon the content of her testimony, the ALJ finds that Claimant maintains that her work at United RF constituted sheltered employment.

25. During cross-examination, Claimant was asked about a news interview she gave January 2021. Claimant acknowledged giving the interview but testified that she was unable to recall any specifics of the exchange she had with the reporter. She specifically denied discussing receipt of an injection dubbed the "Jesus Shot" in Oklahoma that significantly improved her pain during the interview. She also denied discussing any fundraising efforts through her bakery Crumbl at the interview.

26. In an effort to refresh Claimant's memory and impeach her with her prior statements, Respondents played a video showing a KRDO NewsChannel 13 interview with Claimant from January 21, 2021. Claimant agree she was the person depicted in the video during which she made several statements to the interviewer, including: in January of 2020 (a year prior) she received an anti-inflammatory injection known as the 'Jesus shot' in Oklahoma which "changed her life;" Claimant was in "remission" from her condition; and that she had held "a fundraiser through her bakery Crumbl for Valentine's Day" for a missing person. Respondents moved for the admission of the video recording, which was previously withheld on foundation grounds at the outset of hearing. As noted, the ruling on the admissibility of the video tape was reserved. Having considered the arguments for and against admission of the video tape advanced by counsel and the purpose for which admission is sought, i.e. reviving Claimant's memory and impeaching her based upon prior inconsistent statements, the ALJ agrees with Respondents that a sufficient foundation was established to admit Exhibit Q into evidence over Claimant's objection. (Colorado Rules of Evidence (CRE), Rule 607 & Rule 613) Respondents failed to lay foundation for the admission of Exhibit P. Consequently, Exhibit P is not part of the evidentiary record in this case.

27. During cross-examination, Claimant testified about her medical condition and symptoms at the time of the follow-up DIME with Dr. Tyler on March 29, 2019. Claimant testified that she had been experiencing rib pain, right hip pain, low back pain, knee pain, and right leg pain at the time of the follow-up DIME. She also testified that as of November 2019, she believed she was not at MMI from her injury, and that she was permanently and totally disabled because of her industrial injury.

28. Claimant confirmed that as of the December 2021 hearing date, she had undergone two separate triple phase bone scans as well as one thermogram.

29. During rebuttal testimony, Claimant testified that she has experienced minimal hair growth on her legs and losing toenails since her right hip arthroscopy. Claimant sought to introduce photographs she purportedly took of her legs on July 14, 2021, after the RIME with Dr. Lesnak. The ALJ admitted the photographs into evidence as Claimant's Exhibit 7 for the limited purpose of challenging Dr. Lesnak's testimony regarding the condition of Claimant's legs at the time of the RIME appointment. The ALJ instructed Claimant's counsel to forward the photographs to the court and Respondent's counsel because they had not been exchanged previously.

30. Five images were submitted to the court for review. Images 3, 4 and 5 contain a date in the upper left corner of the photo, purportedly to demonstrate that the pictures were taken after Claimant's RIME with Dr. Lesnak, on July 14, 2021, as testified to by Claimant. Image number 3 is of particular interest to the ALJ. This picture contains an image of Claimant's left lower leg and foot; however, clearly depicted in the background of this photo is a partial view of a television containing the image of a person wearing a black judicial robe consistent with the one this ALJ wears when conducting hearings by video. The ALJ carefully scrutinized this particular portion of the photograph further to find that while there is no image of the face of the person appearing on the television, the person wearing the black robe is also wearing a striped tie consistent with one this ALJ keeps in his office. Finally, the person on the television is wearing a silver watch on his left wrist, consistent with the type of watch this ALJ wears and the wrist he wears it on. Based on the content of this image, this ALJ reviewed the recorded video of the December 14, 2021 hearing. In that video, the tie this ALJ is wearing is consistent with that depicted in image number 3 submitted to the court by Claimant's counsel. Based upon his review of the hearing video, this ALJ is persuaded that the person appearing on the television in picture 3 of Claimant's Exhibit 7 is, more probably than not, the undersigned. Consequently, this ALJ questions the date that the photos comprising Claimant's Exhibit 7 were actually taken. While it is possible that the photos were taken on July 14, 2021 as suggested by inclusion of the date in the upper left corner of the picture, it is also possible that the pictures were taken during the December 14, 2021 hearing and reveal bruising on the legs that was not present at the time of Dr. Lesnak's RIME.

31. Regardless of when the photos were actually taken, careful review of the pictures reveals what the ALJ finds to be small focal areas of bruising on the proximal thighs bilaterally. There is also an area of bruising on the left shin, which appears to be partially obscured by a floral themed tattoo (Image #3). Outside of these bruises, the ALJ is unable to discern any color changes in the thighs/lower legs bilaterally. No abnormal hair growth pattern is evident on the legs in the pictures submitted for review. Inspection of the only image of the foot/toes submitted (Image #3) reveals the nail on the great toe of the left foot to be intact and without obvious injury, checking, cracking or delamination. Due to poor picture quality, the nails of the remaining toes are not visible.

32. As noted, Dr. Lesnak testified at hearing via videoconference as an expert in physical medicine and rehabilitation (PM&R). Dr. Lesnak explained that the Colorado

Medical Treatment Guidelines ("MTG")[1] have adopted the Budapest criteria in evaluating and diagnosing CRPS. Dr. Lesnak testified that the Budapest criteria are accepted by the general medical community in evaluating and diagnosing a patient with CRPS. Dr. Lesnak testified that per Rule 17, Exhibit 7 of the MTG, symptoms and reproducible objective findings on examination must be satisfied before a potential diagnosis of CRPS could be considered. At that time, assuming the initial criteria are satisfied, the next step is diagnostic testing. Dr. Lesnak testified that the MTG allow for four categories of diagnostic tests as potentially confirmatory for CRPS: trophic tests (x-rays and triple-phase bone scans); vasomotor testing (thermography); sudomotor testing (QSART); and sympathetic nerve test (injection trial). Dr. Lesnak testified that the MTG do not require a provider to proceed with all four diagnostic tests. Firstly, subjective complaints must be established. Secondly, criteria for objective clinical exam findings must be met. Thirdly, after establishment of objective findings consistent with subjective complaints, a provider can proceed with the diagnostic tests. Two out of four of the diagnostic tests must be positive for a valid confirmation of a diagnosis of CRPS.

33. Dr. Lesnak testified regarding the clinical evaluation he conducted during his IME with Claimant. Dr. Lesnak measured Claimant's skin temperature utilizing skin temperature probes. He also looked for swelling (edema), skin color changes, and allodynia or hyperesthesia. Dr. Lesnak testified that Claimant did not present with any findings consistent with CRPS based upon his objective clinical examination. He also testified that the three-phase bone scan from March 19, 2021 was "completely nondiagnostic for CRPS" and the thermography testing from March 31, 2021 did not demonstrate "any findings consistent whatsoever with CRPS." Concerning the triple phase bone scan conducted on August 31, 2021, Dr. Lesnak testified that it too failed to demonstrate any findings consistent with CRPS – that it was a "completely negative test for CRPS."

34. Dr. Lesnak testified that while Dr. Adams had noted that Claimant might have CRPS Type II in his October 18, 2021 report, he (Dr. Adams) did not document performing a physical examination consistent with the MTG to evaluate Claimant for CRPS. Rather, Dr. Adams conducted a "focused exam" limited to the right hip and thigh.

35. Dr. Lesnak testified that Claimant does not require additional diagnostic testing, e.g. QSART or a trial injection because she has no reproducible objective findings identified by any provider who has examined her previously. Accordingly, Dr. Lesnak opined that Claimant failed to satisfy the second tier of criteria set forth in Rule 17, Exhibit 7 of the MTG to move forward with such confirmatory testing.

36. Dr. Lesnak noted that even though Claimant did not meet the second tier of objective criteria as defined by the MTG, she nevertheless underwent three

[1]The ALJ takes administrative notice of the Medical Treatment Guidelines, specifically Rule 17, Exhibit 7: "Chronic Regional Pain Syndrome/Reflex Sympathetic Dystrophy" as material officially promulgated by the Division of Workers' Compensation.

diagnostic tests, (two bone scans and a theromgram) all of which were negative for CRPS.

37. Dr. Lesnak testified that the most recent right hip MRI arthrogram demonstrated abnormalities consistent with postoperative changes and not specifically a new tear in Claimant's hip labrum. Dr. Lesnak disagreed with Dr. Adam's assessment of an irritation of the lateral femoral cutaneous nerve in Claimant's right hip, testifying that it would be nearly impossible for a lateral femoral cutaneous neuritis or neuropathy to occur following a hip arthroscopy procedure, since the portals for the arthroscopy instruments are not inserted anywhere near the lateral femoral cutaneous nerve. Moreover, Dr. Lesnak testified that Claimant had consistently presented to all medical providers over the past several years with complaints of pain over her entire body rather than isolated or localized to her right hip, which would also be inconsistent with a diagnosis of a lateral femoral cutaneous neuritis or neuropathy.

38. Dr. Lesnak testified that based on all medical records reviewed and his examination of Claimant; she had not suffered a change (worsening) of her condition as related to the March 22, 2016 industrial injury.

39. On cross-examination, Dr. Lesnak confirmed that he disagreed with Dr. Adams' interpretation of the October 2021 MRI arthrogram. Dr. Lesnak testified that the findings on the MRI arthrogram were consistent with post-operative changes following a hip arthroscopy. Dr. Lesnak further testified that had he observed changes to Claimant's leg hair, toenail growth, or skin color, he would have documented those in his report. Because Claimant did not have noticeable trophic changes at the time of his examination, Dr. Lesnak testified that such changes do not appear in his RIME report.

40. The ALJ credits the opinions to Dr. Lesnak to find that Claimant does not meet the objective testing criteria set out in Rule 17, Ex. 7(G)(3)(b) to confirm a diagnosis of CRPS. The ALJ also credits the opinions of Dr. Barolat to find that Claimant has failed to establish that she meets the clinical criteria for a diagnosis of CRPS. Together, the opinions of Drs. Lesnak and Barolat persuade the ALJ that Claimant is not likely suffering from either CRPS Type I or II.

41. The ALJ finds Claimant's testimony regarding the alleged worsening of her condition unconvincing. As presented, the evidence persuades the ALJ that Claimant continues to have symptoms similar to those she expressed following her placement at MMI and at the previous hearing before this ALJ. While she asserts that she has had a worsening of CRPS related symptoms, including sudomotor, vasomotor and trophic changes in her legs, feet, rib cage and upper extremities, there is no persuasive evidence of the same. Indeed, Dr. Barolat, Claimant's selected IME saw no evidence of edema or color change in the lower extremities. While Claimant reported that her CRPS type pain had spread to her arms and left rib cage, Dr. Barolat noted that she had no hyperesthesia and/or allodynia, which is a classic symptom of CRPS. Consequently, Dr. Barolat could not confirm a diagnosis of CRPS. Moreover, Claimant's objective testing belies her assertion that her condition has worsened with

time. Both her thermogram and bone scans fail to support a conclusion that Claimant has CRPS let alone that it is spreading.

42. Based on the evidence presented, the undersigned finds that Claimant failed to produce sufficient objective evidence of a worsening condition, which would warrant removing her from MMI and reopen the case for additional medical benefits. To the contrary, the undersigned finds that Claimant's current symptoms, including her pain levels are "old and similar to those she experienced when she was placed at MMI."

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) 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.

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 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).

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

C. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a change of condition, which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the injured worker to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to §8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which must be causally connected to the original compensable injury." *Chavez v.*

Industrial Commission, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted).

D. The question of whether Claimant has proven a change in condition of the original compensable injury or a change in 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 this case, Claimant alleges she has had a change in medical condition since being placed at MMI. Specifically, Claimant argues that she has a diagnosis of CRPS Type I or Type II related to her March 22, 2016 industrial injury and/or the hip arthroscopy necessitated by her slip and fall. As noted above, the ALJ is not convinced. Here, the persuasive evidence supports Dr. Lesnak's opinion that there is currently no clinical or diagnostic testing evidence that "in any way meets the specific criteria outlined in the State of Colorado Division of Workers' Compensation Medical Treatment Guidelines [to support] a diagnosis of CRPS, type I or Type II." While the ALJ is convinced that Claimant is experiencing physical symptoms (pain), there is sufficient evidence to support a conclusion that her complaints are somatically driven since her alleged symptoms cannot be accounted for by clinical observation/examination and/or detailed diagnostic testing. Certainly, Dr. Staudenmayer noted previously that Claimant was "over reporting symptoms" and "somaticizing her emotional distress." (Resp. Ex. M, bates 079) Moreover, Claimant had a strong somatic locus during her RIME with Dr. Lesnak. (Id.) Based upon the evidence presented, the ALJ concludes that further testing/treatment for CRPS would be in vain, as it is evident that Claimant does not suffer from the diagnosis.

E. Claimant also alleges that she has experienced a worsening of her medical condition related to her right hip in the form of a recurrent 2 mm tear in the anterior superior aspect of the labrum. While the ALJ is convinced that a recurrent tear in the labrum exists, insufficient evidence was presented to causally connect this tear to Claimant's March 22, 2016 slip and fall. Simply because Claimant has a recurrent labral tear does not mean that tear and any need for treatment is related to Claimant's prior slip and fall and right hip arthroplasty. Rather, Respondents are liable to provide medical treatment that is reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. § 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App. 2000). The mere occurrence of a compensable injury does not

require an ALJ to find that the need for subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Based upon the totality of the evidence presented, the ALJ concludes that Claimant has failed to establish a causal relationship her recurrent labral tear and her March 22, 2016 industrial injury. Even if Claimant had established that her recurrent labral tear was causally connected to her March 22, 2016 slip and fall, Dr. Adams declined to recommend surgery for Claimant. Rather he referred Claimant to her pain management physician for continued care. In resolving the conflicting medical opinions found in Dr. Adams' report and Dr. Lesnak's testimony regarding the nature of the right hip MRI arthrogram findings, the suggestion that Claimant is suffering from an injury to her lateral femoral cutaneous nerve and whether these findings/condition demonstrate a worsening of medical condition warranting additional treatment, the ALJ accredits the opinions of Dr. Lesnak as the most persuasive. As found, there is no credible medical opinion that Claimant has suffered a worsening of her medical condition as related to the right hip. The ALJ further finds there is no credible medical opinion that Claimant requires further medical treatment or evaluation as related to the right hip.

F. Based upon the medical records, evidence and testimony, the ALJ finds that Claimant's medical condition as related to the March 22, 2016 industrial injury has not worsened or changed. To the contrary, Claimant has alleged the same or similar complaints since the follow-up Division IME with Dr. Tyler in March 2019, wherein Dr. Tyler determined she had reached MMI. Claimant also alleged the same or similar complaints at the hearing previously held in this matter in November 2019, arguing she was not at MMI and that she was permanently and totally disabled. Consequently, Claimant's request to reopen the claim based upon a change of condition 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**. 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.

SO ORDERED this 3rd day of March, 2022

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the L4-S1 anterior lumbar interbody fusion ("ALIF") with revision of L3-S1 fusion requested by Michael Gallizzi, M.D. is reasonable, necessary and causally-related treatment for Claimant's industrial injury.

STIPULATIONS

The parties stipulated that the recommended removal of the spinal cord stimulator was reasonable, necessary, causally-related and authorized treatment for Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is a 64-year-old male who worked for Employer as an inbound storer.

2. Claimant sustained an admitted industrial injury on November 27, 2017 when he was loading 40-50 pound boxes from waist to shoulder height. Claimant experienced a pop and pain in his right low back at the time and later developed pain and numbness in his right lower extremity.

3. Claimant was diagnosed with a L3-L4 disc herniation and underwent treatment at Concentra with Thomas Corson, D.O.

4. On May 22, 2018 Claimant underwent a right L3-4 posterior lumbar interbody fusion performed by Scott Stanley, M.D.

5. Claimant continued to complain of low back pain and radiating pain and numbness in his right lower extremity. On September 18, 2018, an EMG/NCS of his right lower extremity revealed stable and chronic-appearing right-sided lumbar radiculopathy affecting the L3 and L4 nerve roots.

6. On February 22, 2019 Claimant underwent a L4-L5 transforaminal epidural steroid injection and selective nerve root block performed by Michael Gesquiere, M.D.. Claimant subsequently underwent implantation of a spinal cord stimulator performed by Dr. Gesquiere on June 25, 2020.

7. Upon Dr. Corson's referral, Claimant began seeing Michael Gallizzi, M.D. for chronic low back pain and lower extremity radiculopathy. Claimant first presented to Dr. Gallizzi on January 13, 2021. Claimant reported to Dr. Gallizzi that his symptoms only slightly improved following the L3-L4 fusion and had significantly worsened as of the

time of Dr. Gallizzi's evaluation. Claimant complained of pain, numbness and tingling in his right inner thigh and down his anterior thigh and shin, numbness in his right foot, and weakness in the right leg. Dr. Gallizzi ordered an MRI and CT scan of the lumbar spine to evaluate the status of Claimant's L3-4 fusion and hardware.

8. Claimant underwent the lumbar spine MRI and CT scans on January 25, 2021. Radiologist Trent Paradis, M.D. interpreted the results of both tests. His MRI findings included moderate spinal canal narrowing and mild bilateral neuroforaminal narrowing at L2-L3; mild bilateral neuroforaminal narrowing at L3-L4, spinal canal widely patent due to posterior element decompression; circumferential disc bulge and mild facet arthrosis at L4-L5 with moderate spinal canal narrowing slightly worse on the left side; circumferential disc bulge at L5-S1 causing minimal spinal canal narrowing and mild bilateral neuroforaminal narrowing, mild bilateral facet arthrosis. Dr. Paradis' impression was:

1. Bilateral posterior rod and screw fixation at L3 and L4 with corresponding interbody cage device. There is expected postsurgical soft tissue enhancement dorsal to the lumbar spine without a abscess or fluid collection.

2. Multilevel degenerative changes as above, worst levels are L2-3 and L4-5.

3. Stimulator electrode artifact is present in the subcutaneous tissues dorsal to the lumbar spine at L3 level and L4 level and extends into the spinal canal dorsally at T12-L1 level and continues cranially.

(Cl. Ex. 4, p. 15).

9. Dr. Paradis' CT scan findings included posterior element decompression at L3-4; osseous fusion of the remaining posterior elements bilaterally at L3-4; grade 1 anterolisthesis of L3 on L4; and straightening of expected lumbar lordosis. His impression was:

1. Bilateral posterior rod and screw fixation at L3-4 with corresponding interbody cage. There is osseous fusion of the remaining posterior elements at this level bilaterally. Grade 1 anterolisthesis of L3 on L4 is present. Hardware appears intact. No evidence of loosening.

2. There are stimulator electrodes in the subcutaneous tissues dorsal to the lumbar spine L2-L4 level with electrodes extending into the spinal canal dorsally at T12-L1 level and continuing cranially.

3. Multilevel degenerative disc disease throughout the lumbar spine, worst levels are L2-3 and L4-5.

(Id. at p. 16).

10. On January 28, 2021, Claimant attended a follow-up evaluation at Dr. Gallizzi's office with Adam Welker, PA-C. Claimant continued to report low back pain with right lower extremity radicular symptoms, which PA Welker noted had been an ongoing issue since Claimant's initial industrial injury in November 2017. PA Welker personally reviewed Claimant's recent lumbar spine MRI and CT scans. Regarding the MRI, PA Welker opined,

> Patient has severe neuroforaminal stenosis on the right side compared to the left at L4-5 and L5-S1. This is evident in the transfacet area. This has contact with the exiting nerve root at the L4 and the L5 level. He has concomitant increased fluid in his facet joint especially at L4-5.

(Id. at p. 15).

11. Regarding the CT scan without contrast PA Welker noted, "I agree that there is osseous fusion across the posterior lateral spot at L3-4 with residual grade 1 spondylolisthesis at L3-4. We did measure the patient's lumbar lordosis from the top of L1 to the top of S1 which measured only 33 degrees." (Id. at p. 16).

12. PA Welker recommended Claimant undergo right-sided L4-5 and L5-S1 transforaminal epidural steroid injections. PA Welker explained that the recommendation was,

> Based on the contact of the nerve in the neuroforamen with the disc which is evidenced on image 17 out of 21 sagittal T2 series showing the disc displacing the nerve root at the L4 and L5 neuroforamen with significant fluid in the facet joints at L4-5. The patient had incomplete resolution of his symptoms in reviewing in comparison to the 2017 MRI. I believe that these were missed opportunities to improve his right leg pain.

(Id. at p.18).

13. PA Welker also recommended Claimant undergo upright flexion-extension lumbar spine x-rays "as his lumbar lordosis is only 33 degrees with suspected significant sagittal imbalance of greater than 20 degrees this patient would likely need reconstruction." (Id.)

14. Claimant subsequently underwent the L4-L5 and L5-S1 epidural steroid injections and returned to Dr. Gallizi on March 3, 2021. Claimant reported that on the day of the injection and for approximately five days after feeling "a lot better but not 100% gone." (Id. at 20). Claimant's right foot paresthesia had improved. Flexion-extension x-rays of the lumbar spine revealed moderate L2-3 and mild L1-2, L4-5 and L5-S1 disc space narrowing; limited flexion-extension and no abnormal motion; and mild

sacroiliac joint arthritis. Curvature of the spine convex to the left measured less than 5 degrees.

15. Dr. Gallizzi opined that Claimant is a good candidate for L4-S1 ALIF with subsequent day 2 robotic assisted PSF. Claimant wanted the spinal cord stimulator removed as part of the procedure. Dr. Gallizzi noted Claimant needed to work on smoking cessation for at least one month prior to surgery.

16. Dr. Gallizzi reexamined Claimant on April 1, 2021. Claimant reported that he was making progress with quitting smoking. Dr. Gallizzi continued to recommend surgery to address Claimant's sagittal balance deformity and severe neuroforaminal stenosis at L4-5 and L5-S1. He explained,

> Patient will need nearly a 25 degree correction of his sagittal alignment due to his PILL mismatch of approximately 30 degrees. Based on his age and neuroforaminal stenosis as well as flat back deformity from his previous surgeries. I would recommend a staged L4-S1 ALIF with day 2 spinal cord stimulator removal hemilaminotomy to remove the leads out of the L1 level with revision L3-S1 fusion with concomitant hardware removal of his previous L3-4 fusion pedicle screws. This was discussed with the patient and we are okay to schedule him once he is on nicotine patches that he plans to wean prior to his surgery.

(Id. at p. 29).

17. On June 2, 2021 Brian Reiss, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Reiss performed a physical examination and reviewed Claimant's medical records which, at the time, did not include Claimant's imaging studies. He issued a report dated June 2, 2021. Dr. Reiss subsequently reviewed Claimant's imaging studies including several thoracic and lumbar x-rays as well as Claimant's January 25, 2021 lumbar spine MRI and CT scan. He issued a second report dated July 16, 2021. Dr. Reiss diagnosed Claimant with post laminectomy syndrome, degenerative disc disease low back pain, sciatica. He concluded that the imaging studies did not evidence any major stenosis or significant sagittal imbalance warranting reconstruction and extension of the lumbar fusion or decompression. Dr. Reiss thus opined that no further surgery was indicated.

18. Dr. Reiss testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Reiss opined that the recommended surgery is not reasonably necessary to improve Claimant's condition. He explained that Claimant's x-rays and clinical examinations did not reveal true sagittal imbalance or instability, nor did the MRI and CT scans evidence severe stenosis. Dr. Reiss testified that the mild to moderate stenosis seen on Claimant's imaging is normal with aging. He opined that although Claimant likely has nerve damage, no significant nerve compression is present as to warrant a decompression procedure. Dr. Reiss explained that, pursuant to the Medical Treatment Guidelines, a surgically correctable pain generator has not been

clearly identified in Claimant's case, noting that a positive response to a transforaminal epidural steroid injection did not mean there is a surgically correctable lesion. He further explained that, while disc bulges may be present, the imaging shows that the foramina has sufficient space. Dr. Reiss testified that had minor, pre-existing degenerative findings at L4-5 and L5-S1 with very significant findings at L3-4 which are likely causing Claimant's symptoms. He opined that there is not a surgically correctable pain generator in this case. Dr. Reiss disagreed that there were missed opportunities to improve Claimant's leg pain and opined that Claimant's nerve or low back condition would not likely be improved by further surgery.

19. Claimant credibly testified at hearing that prior to his work injury he did not have any pain or numbness in his low back or lower extremities. Claimant currently experiences pain and numbness in his right lower extremity. Neither his initial back surgery nor the implantation of the spinal cord stimulator have improved his symptoms.

20. The ALJ finds the opinion of treating physician Dr. Gallizzi more credible and persuasive than the opinion of Dr. Reiss and Dr. Paradis.

21. Claimant proved it is more likely than not the surgery recommended by Dr. Gallizzi is causally related to Claimant's industrial injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

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

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

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he determines it is entitled to considering the totality of the evidence. See *Adame v. SSC Berthoud Operating Co., LLC*., WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

As found, Claimant proved it is more probable than not the recommended surgery is related to his industrial injury and reasonably necessary to relieve its effects. Claimant credibly testified he did not have any issues or limitations with his low back or lower extremities prior to the work injury. Since undergoing an L3-4 fusion in May 2018 as a result of the work injury, Claimant has consistently experienced low back pain and right lower extremity numbness and weakness. Upon review of Claimant's imaging, Dr. Gallizzi opined that significant stenosis is present at L4-5 and L5-S1 in the neural foramen with the nerve contacting the disc, as well as disc displacement of the nerve root at L4-5. He further opined Claimant requires nearly a 25 degree correction of his sagittal alignment due to his PILL mismatch of approximately 30 degrees. Dr. Gallizzi

explained that his recommendation for surgery is based on Claimant's age, neuroforaminal stenosis and flat back deformity from previous surgeries. Claimant underwent an injection at L4-L5 and L5-S1 which provided relief and improved Claimant's right foot paresthesia, indicating identification of a pain generator. Dr. Gallizzi credibly opined there have been missed opportunities to improve Claimant's pain. The ALJ has considered the applicable Medical Treatment Guidelines as well as the opinons of Drs. Reiss and Paradis, however, based on the totality of the evidence, the preponderant evidence establishes the surgery recommended by Dr. Gallizzi is causally related and reasonably necessary to cure and relieve the effects of Claimant's industrial injury.

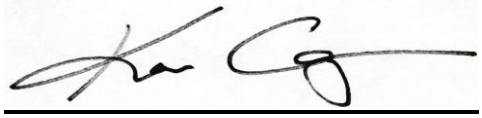
ORDER

1. Claimant proved by a preponderance of the evidence the L4-S1 anterior lumbar interbody fusion ("ALIF") with revision of L3-S1 fusion requested by Michael Gallizzi, M.D. is reasonable, necessary and causally related treatment for Claimant's industrial injury. Respondents are liable for the recommended surgery.

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: March 4, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the cervical Medial Branch Blocks ("MBB"), as proposed by his ATP and Dr. Laker, are reasonable, necessary, and related to his industrial injury?

II. Has Clamant shown, by a preponderance of the evidence, that any physical therapy following the MBBs is reasonable, necessary, and related to his industrial injury?

FINDINGS OF FACT

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

The Work Injury, and Subsequent Treatment

1. This is an admitted claim. On 2/9/20 Claimant tripped and fell on ice while shoveling snow at the school where he worked.

2. Claimant's initial complaints to the ATP, Dr. Bisgard, on 2/18/20 included complaints of pain in his neck, low back and elbow as well as a bump on the back of his head. As to his neck complaints, Dr. Bisgard initially diagnosed a "neck strain". (Ex. 2).

3. As to his initial complaints of cervical pain, Claimant was referred for physical therapy, and Dr. Bisgard provided a Toradol injection. Claimant was also assigned provided duty work restrictions. (Ex. 3, p. 152).

4. By 4/14/20, Claimant's primary complaint was continued neck pain, which was now also "going into his shoulder," along with ongoing headaches. Dr. Bisgard now suspected an underlying shoulder pathology. No neurological symptoms suggesting an underlying cervical pathology were identified at this point.

5. On 4/30/20, Claimant underwent a shoulder MRI, which revealed various pathologies, including an incomplete tear of the rotator cuff. Dr. Bisgard referred Claimant to an orthopedic surgeon, Dr. Genuario for a surgical consult.

6. On 5/29/20, Dr. Genuario requested a pre-shoulder surgery MRI, this time of Claimant's cervical spine. This cervical MRI was completed on 6/9/20 and revealed the following pertinent findings: 1) Facet joint degeneration is particularly severe at C3-4 2) No discrete disc herniations or sites of spinal cord compression or cord signal abnormality were found and 3) Degenerative neuro foraminal stenosis is severe on the left at C3-C4, bilaterally, at C6-7 and there was also moderate degenerative foraminal stenosis on the left at C4-5. (Ex. C).

7. Dr. Bisgard sent Claimant for a second opinion about his continuing pain with Dr. Scott Primack, who on 6/22/2020 offered Claimant trigger point injections. Dr. Primack apparently did not see the cervical MMI on that date. (Exhibit 4, p. 22).

8. Claimant was seen again by Dr. Primack on 7/20/20, with ongoing complaints of neck pain and left-sided headaches. Dr. Primack opined, "Previously, I did feel as though he very well may have a component of myofascial pain syndrome with occipital neuralgia. He is here today for occipital nerve block with trigger point injections along the splenius capitis." (Ex. E, p. 46). Dr. Primack injected .75 ml 1% lidocaine into Claimant's occipital nerve and 1 ml 1% lidocaine into four identified trigger points. (Ex. 4, p. 25) Dr. Primack did not diagnose a facet joint syndrome-nor did he personally perform a facet joint injection at any time.

9. Claimant returned to Dr. Bisgard the next day. "At the outset of her report, she noted: [Claimant, redacted] is her for re-evaluation of his neck and left shoulder injuries. He was seen [yesterday] by Dr. Primack and underwent facet injections yesterday. I did not [yet] receive a copy of the report but [Claimant, redacted] reports that he had significant relief. (Ex. F, p. 55). According to Dr. Bisgard's records of 7/21/2020, Claimant's pre-injection pain was 8-9 / 10 and Claimant's pain in his neck was reduced to zero, but began to return after the shots wore off and was 3 /10 when he saw Dr. Bisgard, and the time of total relief of neck pain and substantial relief of headache pain (down to 2 / 10) was 3 hours. (Ex. 3, p. 104).

10. Dr. Bisgard then stated, "As far as his neck issue I explained that he had a diagnostic response which is very encouraging. We have essentially localized the pain generator as far as his neck and headaches. Although his symptoms may worsen, Dr. Primack will likely recommend a repeat medial branch block ("MBB") and if he still has a diagnostic response, he will move onto a rhizotomy" (Ex. F, p.57).

11. At a follow-up visit on 8/10/20 Dr. Primack stated, "He [Claimant] had reasonable relief (from the trigger point injections) for approx. 48-72 hours" (Ex. E, p. 48). He further noted, "At this point in time, given that fact that he will be having surgery in a week, we both decided not to undergo a subsequent injection. I would like to see how he responds to his procedure [rotator cuff repair]. ...However, I cannot help but wonder, given the stiffness of the shoulder, how this does create problems with head and neck pain." *Id.*

12. At Claimant's follow-up visit on 8/12/20 Dr. Bisgard realized her erroneous assumption, upon receiving the actual report from Dr. Primack. She noted: "I had not received Dr. Primack's report but based on the [Claimant's] description of the injections, I thought he had undergone facet block. In fact, I received the records recently and learned that he went left greater occipital nerve blocks with trigger point injections. (Ex. F, p. 60). She then stated: "Now that I understand he had greater occipital nerve blocks, I will need to speak to Dr. Primack about his recommendations. I am hopeful that with the left shoulder surgery he will start getting some relief of the muscle tension contributing to his headaches." *Id* at 62.

Claimant has Successful Rotator Cuff Repair

13. In the interim, Claimant proceeded with arthroscopic shoulder surgery with Dr. Genuario, on 8/18/2020. In Claimant's six-month follow-up on 2/24/2021, Dr. Genuario noted: Patient is now 6 months postop. He was last seen three months ago. He is [to] continue to work with Nicholas [Schroeder] in physical therapy. (Ex. G, p. 89). "*Of note the shoulder is doing well without any limitations.* He is (sic.) also been *bothered by neck pain* and has under medial branch blocks of C3 and 4 with Dr. Scott Laker. Impression: 6 months out from a rotator cuff repair *doing well but limited by neck pain. Id.* Plan: Patient will follow up with Dr. Laker for potential ablations." *Id.* (emphasis added).

Also on 2/24/2021, PT Schroeder's notes indicate:

> Progress for improvement is: *excellent.*
>
> Prognosis is based on: a *positive response* to initial treatment, *attitude,* supportive family members, *the patient's apparent motivation to participate in therapy,* objective *and* subjective findings. (Ex. G, p. 90) (emphasis added).

Claimant's Neck Complaints Continue, Despite Shoulder Surgery Success

14. On 11/6/2020, Claimant returned to Dr. Primack, following his shoulder surgery. Dr. Primack again performed soft tissue trigger point injections, on the left side of Claimant's neck, into four different trigger points (Ex. E, p.50). At this visit, Dr. Primack noted:

> I still believe that as he recovers in reference to his rotator cuff repair, he would have less cervical spine discomfort. However, it is clear that in the face of recovery of his shoulder surgery, if there is still significant pain with facet loading, *medial branch block/facet joint injections* can be made at C3, C4 and C5-C6 *Id.* (emphasis added).

15. Claimant returned to Dr. Bisgard on 2/11/2021. She noted at this time: "Jeff is here for re-evaluation of his neck and left shoulder injuries. Unfortunately he has not done well over the past few days. Last night he experienced intense pain in his neck and had severe headache up to a level of 10 out of 10. (Ex. F, p. 66). "Jeff is scheduled for the MGG on Monday, Feb. 15. He is very concerned that he may not get relief and is not sure what to do after that." *Id* at 67. "I am optimistic that that Jeff will get relief with the medial branch blocks…If he has a diagnostic response, he will need a second confirmatory response prior to proceeding with the rhizotomy." *Id* at 68.

Claimant is Referred to Dr. Laker

16. Claimant was referred to Dr. Laker on 2/4/21, who noted, "I reviewed his *cervical MRI which does reveal some zygapophyseal joint fluid at left C3-4 as well as some edema at that joint.* (Ex. D, p. 32). "He has approximately 50% decreased range of motion on the left rotation. Cervical extension is limited by approximately 20% cervical flexion is intact." *Id.* (emphasis added).

17. Dr. Laker diagnosed Claimant with cervical facet joint syndrome, noting: "He has not made much headway with prior nonoperative care and it is reasonable to that point to move forward with a left medial branch block at C3 and C4 for degeneration/anesthesia of the left C3-4 facet joint. If this is helpful and he has appropriate anesthetic response, then a radiofrequency ablation would be indicated." *Id* at 31.

18. On 2/15/2021, Dr. Laker performed C3-4 Medial Branch Blocks ("MBB") on Claimant. Dr. Laker notes the following, immediately *prior* to the procedure:

> He is preprocedural VAS was a *6-7* out of 10.
>
> ***Right*** cervical rotation was ***50*** degrees, ***left*** cervical rotation was ***45*** degrees. Cervical *extension* was approximately ***15*** degrees. Cervical flexion was intact and normal. (Ex. D, p. 42).
>
> In is *Post-procedural* Summary, Dr. Laker then noted:
>
> After 15 minutes, I reexamined the patient. His pain at that point was a *1-2* out of 10. His ***right*** cervical rotation was ***75*** degrees, his ***left*** cervical range of motion was ***65*** degrees. Cervical *extension* was approximately ***35*** degrees. Cervical flexion was still intact and normal. *Id.* (emphasis added).

No more medical reports from Dr. Laker appear in the record herein.

19. Claimant returned to Dr. Bisgard on 3/2/21 following the MBB. She then noted: "He brought in his pain diary which as attached in the medical section as noted he had 6 to 7 hours of relief. *Based on his response, he is a candidate for rhizotomy.* If (sic.) is very anxious to proceed. (Ex. F, p. 72). (emphasis added). She further noted: "Jeff had an *excellent response to the medial branch block.* This is the best he has looked from the standpoint of his cervical spine and his exam has improved dramatically. He is anxious to proceed with definitive treatment and get back to work full duty. I have submitted a request to Dr. Laker to proceed…. As far as his left shoulder I am very pleased with how well he is done. He is no longer receiving directed physical therapy on his shoulder but is more directed to his cervical spine." *Id* at 74. (emphasis added).

20. After Dr. Bisgard recommended repeat MBB injections with Dr. Laker, Respondents denied authorization, pending a Rule 16 IME and records review by Dr. Lesnak. Following receipt of Dr. Lesnak's report of 3/25/2020 (Ex. A), and supplemental report of 6/9/2021, Respondent made official its denial of the repeat MBB on 6/17/2021. (Ex. I). Dr. Lesnak then authored an additional records review Addendum on 7/26/2021. His opinions did not change as a result of his supplemental reports.

IME of Dr. Lesnak

21. Dr. Lawrence Lesnak, DO, authored his IME, dated 3/25/2021, as noted above. After following the appropriate protocol, Dr. Lesnak's significant findings are summarized herein. He found that "Cervical facet joint loading activities reproduced

absolutely no symptoms on today's exam." (Ex. A, p. 13). "The patient exhibited occasional pain behaviors during today's evaluation, which appeared to be especially prevalent during cervical spine flexion and right cervical rotation activities" *Id.* "Subjective complaints *without any reproducible* objective findings on exam." *Id* at 14. He opined that Claimant had a *completely nondiagnostic* response to the initial round of MBBs. *Id* at 17. (emphasis added). "…there was *no* reported evidence of *any* injury trauma-related pathology on this [cervical] MRI report" *Id* at 7.

22. Dr. Lesnak did acknowledge, within his own record review, the medical record review of Dr. Kathy McCranie (dated 2/11/2021), wherein he summarized her findings: "In her report, Dr. McCranie suggested that Dr. Laker's recommendation for left-sided C3 and C4 medical facet nerve branch block trials appeared to be reasonable, necessary and related to [Claimant, redacted]'s occupational injury claim of 02/09/2020." *Id* at 10. [ALJ note: Dr. McCranie's actual IME records review report is not part of the record herein]. Apparently, she further opined that Claimant, on the videos, did not exhibit behaviors which should result in work restrictions. *Id.*

23. After grudgingly acknowledging at least the *possibility* that Claimant might have occupationally aggravated a preexisting shoulder condition, (while stating that the torn supraspinatus tendon as noted on the 4/30/2020 MRI was "*without any reported injury* or *trauma-related pathology whatsoever*") *Id* at 14. He assigned an extremity rating of 2%. However, he assigned no rating for Claimant's neck, concluding:

> However, there is *absolutely no medical evidence to suggest* that Mr. [Claimant] at this point in time has any type of symptoms stemming from cervical facet joints, and in fact, there is *absolutely no medical evidence to suggest* he developed or even aggravated any preexisting pathology involving the cervical facet joints at it relates to his reported occupational incident of 2/9/2020. *Id* at 15 (emphasis added).

24. Based upon the above, Dr. Lesnak reasoned that since Claimant reported relief from Dr. Primack's injections, as well as relief of headaches and neck pain three days following shoulder surgery, the source of his ongoing neck symptoms could not *possibly* be from his cervical facets. *Id* at 16, 17.

Claimant Continues Follow-up Visits

25. Claimant, however, continued to follow-up with Dr. Primack. At a visit. on 5/24/2021, Dr. Primack noted that the imaging studies "demonstrated degenerative changes at the facet joints", "consistent with facet arthropathy." (Ex. E, pp. 52, 53). Dr. Primack noted:

> On today's clinical examination, *facet loading* on the left side at C3-C4, C4-C5, and C5-C6 was *positive*...At this point in time, based upon the history, clinical examination, and a review of the medical records, I do believe that facet injections with RFA is a reasonable next step. It is clear that he does

not have *as much of* a myofascial pain component as he does a facet joint component. His exposure certainly can cause problems with facet arthropathy…Therefore, it is not unrealistic, given a slip and fall injury that someone can have facet arthropathy. This is also supported by the fact that he got over 85-to-90% better following the facet injections rendered by Dr. Laker.

It does not appear to be prudent to obtain authorization for trigger point injections. This is due to the fact that this is less of a myofascial problem as it is "a facet joint one." *Id* at 53. (emphasis added).

26. Claimant also continued to follow-up with Dr. Bisgard. Her notes from 6/2/2021 state: He was seen by Dr. Primack on May 24th. He feels the visit went well. Reviewed Dr. Primack's report with him. Dr. Primack explained how *the mechanism of his injury could lead to facet arthropathy* and also explained the anatomy of the shoulder girdle. He opined that TPI would not be useful at this point. He agreed with me that *Medical (sic.) branch blocks leading to rhizotomy is the best next step*…He [Claimant] reviewed the videotape surveillance and disputed Dr. Lesnak's interpretation. (Ex. F, p. 78) (emphasis added).

27. Claimant next saw Dr. Bisgard on 6/29/2021. She noted:" Jeff is here for re-evaluation of his neck pain. Yesterday, he woke up with one of the worst days he has had as far as his headache and neck pain up to 8-9/10...He is very frustrated after getting the denial letter for the facet injections. He also was notified the Lexapro refill was not authorized. …He is very pleased with the results of his shoulder surgery but is extremely frustrated that he is having ongoing neck pain that is limiting his activity." (Ex. R, p. 83)..."I will continue to disagree with Dr. Lesnak's opinion based on my 16 months of treatment and Dr. Primack's treatment of Jeff as well." *Id* at 85.

28. Claimant's next visit to Dr. Bisgard was on 7/21/2021. She noted:" This past week, he had 4 significant headaches (HA). He awoke in the mornings with neck pain and HA at 8-9/10 and lasted all day. …The Lexapro refills were not authorized and his PCP is only refilling the 10 mg dose…He expressed several times that he just wants relief from the pain. He would like to have the MBB that gave him significant relief and RFA if he has a diagnostic response." (Ex. 3, p. 38).

29. Claimant saw Dr. Bisgard on 8/31/2021 (Ex. 3, p. 29) and 10/7/2021 (Ex. 3, p. 27), at which times his cervical complaints continued, and Dr. Bisgard expressed her continuing frustration with the denial of the MBBs, which she continued to believe were warranted. On 11/3/2021, while his symptoms persisted, she noted, "I offered to send him home for the rest of the day but he is adamant that he has to go to work...I will see him after the [11/30/2021] hearing. *Id* at 18.

30. Claimant's frustration continued when he saw Dr. Bisgard on 12/1/2021, only to inform her that the hearing scheduled for 11/30/2021 had been continued. His pain complaints continued. Ex. 3, p. 10. The final report available from Dr. Bisgard is dated 12/21/2021, wherein she noted that a SAMMS conference had occurred on 12/8/2021, at

which she made the following recommendations:

> ●*Repeat medial branch block at C3-4.* If he has another diagnostic response, I would recommend proceeding with an RFA.
>
> ●The RFA should last between 12 and 18 months. If his symptoms recur, I would recommend repeating the medial branch block or RFA as recommended by the pain management specialist *up to 6 times.* I explained to Jeff that frequently patients only need an additional 1 or 2 blocks but *there have been some patients that require more over a several year period.*
>
> ●*In accordance with the Medical Treatment Guidelines, he should have 6-8 physical therapy sessions after the RFA's to help restore range of motion.* (Ex. 3, p. 5) (emphasis added).

31. At this same visit, she noted:

> I was also asked to address a preliminary impairment based on measurements today. As is typical for Jeff, his symptoms worsen throughout the day. He is being seen at the end of his workday, at 4PM so his range of motion measurements of his cervical spine are very restricted. *Id* at 5.

She then assigned his cervical ROM loss at 26%, combined with 7% for Table 53(II)(C), combined for 31% Whole Person. The shoulder was separately rated at 7% upper extremity. *Id* at 5-9.

Claimant Testifies at Hearing

32. Claimant stated that he has never been medically treated for his shoulder or his neck. He described his mechanism of injury (on a Sunday) as having his "feet go out from under me," while walking in the parking lot of Employer. This lot had ice under about an inch of fresh snow, which he was intending to clear.

> It all happened very quick…I landed on my back. I think I tried to catch myself on the left side a little bit. Then then when I hit the ground...the whole backside and my head and left side hit the ground. (Tr., p. 29).

33. He reported this to Employer the following Monday morning, but did not seek medical treatment, thinking he was just bruised, and thought he would just heal. But the pain "kind of progressively got worse over the next seven to eight days." He finally sought treatment on February 18th (2020), and treated with Dr. Bisgard.

34. Claimant described his symptoms during the ensuing months as a sore back (which resolved), shoulder pain, and neck pain. He described his neck pain as a little bit worse on the left side than right side if he tried to turn it. He overall described his neck pain as getting progressively worse as the day progressed, especially if he was

particularly active.

35. Claimant felt that the injections from Dr. Primack were initially helpful, but pain began to return after perhaps three hours, and after perhaps five to six hours, he was back to his pain baseline. After Dr. Lakers injection, the pain did not completely go away-maybe a 2- but it did return later maybe seven or eight hours. His symptoms remained much the same, but he was awaiting a second round of MBBs, but had to wait four to five weeks before the second one could be done. He noted that that appointment was finally set, and:

> And then I was actually leaving to go the that appointment to get that done, I was within about an hour of that appointment, and that's when I got a call saying that workmen's comp denied it (Transcript, p. 38).

36. Claimant expressed his confidence in his physicians, and just wants the pain to go away. If the ablation is what it takes, then he wants it to occur. His symptoms are ongoing, and tend to intensify as the day goes on. He has had no intervening injuries since his original work injury.

Testimony from Advanced Professional Investigations Personnel

37. Two private investigators from Advanced Professional Investigations, Robert Orozco and Richard Quiroga, described their roles in conducting surveillance of Claimant. Claimant was surveilled at various times and locations leading up to the date of the original IME by Dr. Lesnak on 3/25/2021. Dr. Lesnak subsequently relied, in part, in forming his IME opinions upon those surveillance videos. [After hearing their testimony, the ALJ concluded that sufficient foundation had been laid for the authenticity of said videos, and their reliance by Dr. Lesnak, at least in part, in forming his IME opinions. Upon this ruling, Respondents declined to call the third individual..., and Claimant declined the opportunity to cross-examine him. It is further noted that, despite their admission, Respondents did not request that the ALJ himself review the contents of said videos as a fact-finder].

Dr. Lesnak Testifies at Hearing

38. Dr. Lesnak was admitted as an expert as a Board Certified physician in the field of Physical Medicine and Rehabilitation with a sub-specialty in pain management. Dr. Lesnak is fully Level II accredited, and has personally performed injections including trigger point and medial branch blocks, for over 24 years.

39. Dr. Lesnak examined Claimant on 3/25/2021, and reviewed all of the existing medical records. He also viewed approximately 4 hours of the surveillance video which was supplied to him in CD format. He issued his original IME report on 3/25/2021, followed by two supplemental reports dated 6/9/2021 and 7/26/2021 (Ex. A, pp.1-25).

40. Dr. Lesnak testified that the cervical facets joints are a distinct mechanical joint of the cervical spine. They constitute a bony, moving joint as opposed to the soft tissues of the cervical spine, which are a totally different anatomical feature. Dr. Lesnak

also testified that the diagnosis of an injury to the facet joint vs the soft tissues involve different testing and different treatments, as discussed in the Medical Treatment Guidelines ("Guidelines").

41. Dr. Lesnak testified concerning various injections that which are used to diagnose and treat facet joint syndrome vs. soft tissue injuries and occipital headaches. One must distinguish the differences between trigger point injections, medial branch blocks, and occipital injections, and when and how each is to be administered and interpreted.

42. Dr. Lesnak noted that Dr. Primack performed only trigger point injections and occipital injections on two occasions, to wit: July 20, 2020 and Nov 6, 2020. Dr. Primack never performed facet injections or medial branch blocks in this case, as was initially assumed or believed by Dr. Bisgard when she first developed her diagnosis and causation opinions regarding Claimant's pain locator. (*see* Ex. A, E).

43. Dr. Lesnak opined that on each occasion following a trigger point injection into the soft tissues of the base of the neck, Claimant reported immediate 100% relief for approximately 3 hours, followed by partial relief for 6 to 7 hours, before an eventual return to baseline.

44. He further opined that there is substantial evidence from the medical records and Claimant's testimony that when Dr. Laker performed his first MBB, he failed to perform (or at least failed to document) that he performed the required pre-injection cervical facet loading test mandated by the guidelines to first establish the need for a facet joint injection trial.

45. Nonetheless, Dr. Laker proceeded with MBBs at C3 and C4 on 2/15/2021. (Ex. D). According to Dr. Laker's reports, Claimant's pain scores (VAS) were 1-2 /10 pre-injection and fell to 1-2 /10 within 15 minutes. Further, Dr. Bisgard reported on 3/2/2021 that Claimant reported 6 to 7 hours of relief per his pain diary and stated: "Based on his response, he is a candidate for rhizotomy" (Ex. F, p.72)

46. It is the medical opinion of Dr. Lesnak that the unrebutted evidence (including from Claimant) is that Claimant had an identical-or near identical-response to his pain complaints from both the trigger point injections, and the MBB. This, despite the fact such injections are intended to diagnose and treat distinct medical problems. Dr. Lesnak's ultimate medical opinions are that a) Claimant does not have a cervical facet joint syndrome/injury and, b) further diagnostic/treatment injections for facet joint syndrome such as MBB or rhizotomy/ablation are not medically related to the admitted injury, nor medically probable to relieve Claimant's cervical pain complaints.

47. Instead, Dr. Lesnak opined that the most likely cause of Claimant's ongoing neck pain "strongly suggest a presence of an underlying symptom somatic disorder or somatoform disorder, which are, in layman's terms, it is bodily complaints in the absence of anatomic pathology which are manifested by poorly controlled or uncontrolled

psychologic issues, such as anxiety or depression, things like that."

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) 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.

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 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 address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their 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 Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 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. 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).

D. In this instance, the ALJ finds that Claimant reported his injury to Employer as soon as reasonably practicable. As is not uncommon - and as is not unreasonable - Clamant

waited things out for a few days, thinking he would recover on his own. Once it became apparent that he needed medical treatment, he then described his symptoms to his treatment providers all along the way, in good faith, in a sincere effort to get better. Further, the ALJ finds that Claimant testified credibly, and in a forthright manner at hearing. It is duly noted that Claimant's reported responses to the treatments he received along the way did not always match a *perfect* paradigm. In any context, one cannot demand such *perfection* as a condition precedent to providing treatment. Such is not only the inexact *science* of medicine, but also the *art.*

E. It is further noted that the ALJ takes Dr. Lesnak at his word that, were Claimant his own patient, he would not administer the treatment being requested. As duly noted, the practice of medicine can often be an inexact science. The mere fact that other practitioners would proceed differently does not make them *wrong.* And as will be noted, *infra*, the ALJ does not find his ultimate conclusions to be sufficiently persuasive.

Medical Benefits, Reasonable and Necessary, Generally

F. Claimant bears the burden of establishing entitlement to any specific medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Medical Benefits, Related to Work Injury, Generally

G. Further, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Preexisting Condition, Generally

H. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation *or medical benefits* if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Are Claimant's Cervical Facet Complaints <u>Related</u> to his Admitted Work Injury?

I. Dr. Bisgard opines that they are. Dr. Primack reviewed Claimant's mechanism of injury, and concluded that they are as well. Dr. McCranie, it appears, was hired by Respondents, yet opined that Claimant's symptoms were also reasonable, necessary, and related to his occupational injury. Dr. Lesnak opines otherwise. While the ALJ must engage in more analysis than merely taking a head count, it is duly noted that Dr. Lesnak is the outlier here. However it is also duly noted that Dr. Lesnak unnecessarily weighed in on the causation issue of Claimant's *shoulder* as well. This was a moot issue, since Respondents had admitted for that, and Clamant was 7 months post-surgery, and doing well. Dr. Lesnak apparently threw shade at Respondents' admission even for that injury. And in an unpersuasive fashion, by stating that the torn supraspinatus tendon on the MRI was "*without **any** <u>reported injury</u>* or trauma-related *pathology **whatsoever**.***" (Ex. A, p. 14). By materially overstating his case, he has rendered his other causation/relatedness issues suspect.

J. Claimant hit the pavement-hard, and awkwardly. Ice is like that, especially when you don't see it coming. It is not unrealistic to believe that such impact, in whiplash fashion, could affect and damage the facet joints. Yes, the facet joints could well have been in some preexisting degenerative state on the day he fell, *but those were the facet joints that Claimant brought to work with him that day.* And Dr. Laker noted some zygapophyseal joint *fluid* at C3-C4, as well as some *edema* at that joint. All the while, Dr. Lesnak adamantly insisted that there is *absolutely no medical evidence to* even *suggest* trauma to Claimant's facet joints. And the ALJ duly notes that Claimant credibly testified that he has never been treated for his neck or shoulder prior to this work incident. Regardless of whether this was an injury *de novo* to Claimant's neck, or an aggravation of a preexisting degenerative condition of his facets, the ALJ finds, by a preponderance of the evidence, that Claimant's ongoing neck complaints were caused by, and related to, his admitted injury of 2/9/2020.

Is the Second Round of MBBs <u>Reasonable and Necessary</u>?

K. As previously noted, Dr. Lesnak is once again the outlier. And while Dr. Laker did not weigh in on the causation/relatedness issue [Nothing in the record addresses whether or not Dr. Laker is Level II Accredited], he now comprises the fourth physician who feels that the proposed MBBs are *reasonable and necessary.* And while a head count does not end the discussion, the ALJ must note that Drs. Bisgard, Primack, and Laker all have a duty to recommend and provide for the best medical outcome for Claimant. Dr. Lesnak bears no such duty-nor, interestingly did Dr. McCranie-who nonetheless sided with Claimant on this issue. Respondents, perhaps understandably, want to limit their exposure, given the severity of Claimant's symptoms and the possible prospect of years of ongoing treatment, if a second diagnostic response to the MBBs is elicited.

L. Without testifying, or presenting an IME report, the four physicians noted above have made a highly persuasive case on behalf of Claimant. Has Dr. Lesnak sufficiently made his own, such that Claimant has no longer met his burden of proof? At the outset, the ALJ notes that Dr. Lesnak has opined that the most likely cause of Claimant's ongoing neck pain "strongly suggest a presence of an underlying symptom somatic disorder or somatoform disorder." The ALJ is not persuaded. No one contests, (not even Respondents) save Dr. Lesnak, that Claimant injured his shoulder during this fall. He then went through the entire shoulder rehabilitative process with minimal complaints. Even when offered the day off by Dr. Bisgard, Claimant insisted that he return to work. His orthopedist was pleased with his progress (as was Dr. Bisgard), and his physical therapist even noted his very high prognosis for success, given his motivation to recover. The ALJ finds that, any paper testing notwithstanding, Claimant's behavior is in no way suggestive of any somatoform disorder. Quite the contrary, actually. The man's pain is very real.

M. Dr. Lesnak adamantly insists that Claimant has provided a *totally nondiagnostic* response to the first round of MBBs. Dr. Laker certainly did not see that, when Claimant's range of motion measurements went up dramatically within 15 minutes of the MBBs. Dr. Lesnak notes (and not without record support) that Dr. Laker did not *document* any facet loading tests prior to administering the MBBs. This does not lead the ALJ to conclude that it did not occur-albeit better documentation would have been preferable. Dr. Lesnak, in his own physical exam, did not perceive any facet loading arthropathy. Dr. Primack did. And while given the luxury of testifying, in order to explain in detail, the difference between MBBs and the trigger point injections from Dr. Primack, Dr. Lesnak has not made a persuasive case why the testing to date must necessarily yield a binary choice between myofascial pain and facet pain. In the early going, especially, Claimant could have been suffering from *both.*

N. Claimant's possible myofascial complaints-now largely resolved, as one might expect with the passage of time-could well have been temporarily alleviated by the trigger point injections. These affected parts of the neck are not exactly miles apart. And this does not mean that, *ipso facto,* Claimant could not *also* have underlying facet complaints-complaints which show a pattern of worsening as the day wears on. The timelines for a projected full recovery-had Claimant's complaints indeed been purely myofascial-could explain Dr. Primack's revised belief that something more structural must underlie

Claimant's complaints. Such as facet joints. Hence his referral to Dr. Laker. This is but one possible explanation that Dr. Lesnak dismisses out of hand.

O. There is nothing in the record that suggests that Dr. Laker erred in his administration of the MBBs. Nor is there sufficient evidence that he somehow misinterpreted his own results, leading to some erroneous conclusion that a second round of MBBs should not occur. As duly noted, apparently this is not the way Dr. Lesnak would do things with his own patients. But, politely stated, his armchair quarterbacking is simply not persuasive to overcome the well-founded opinions of Drs. Bisgard, Primack, Laker, *and* McCranie. The ALJ finds, by a preponderance of the evidence, that a second round of medial branch blocks, followed by a rhizotomy if warranted, is reasonable and necessary to treat Claimant's facet pathology.

Physical Therapy

P. There is adequate evidence in the record for the ALJ to conclude, by a preponderance of the evidence, that physical therapy following the second MBB, is also reasonable and necessary to treat Claimant's work injury. Dr. Bisgard laid a sufficient foundation for this in her 12/21/2021 report, in apparent compliance with the Guidelines. Dr. Lesnak has not addressed this particular component with any specificity; to the extent that he has, the ALJ finds Dr. Bisgard more persuasive. And it is duly noted that Claimant's medical reports from his orthopedic providers indicate a highly motivated person with very good prognosis for recovery, due to the mindset he has manifested to date.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the Medial Branch Blocks as proposed by Dr. Laker.

2. Respondents shall pay for any physical therapy administered in conjunction with these Medial Branch Blocks.

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

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

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

mailed it to the above address for the **Denver Office of Administrative Courts**. 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. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 3, 2022

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he suffered a compensable right shoulder injury on January 31, 2021 as a result of an admitted left knee injury on January 28, 2021.

FINDINGS OF FACT

1. Claimant is a 52-year-old who works for Employer as a heavy equipment operator.

2. Claimant has extensive pre-existing history of left knee symptoms and treatment, as well as falls, documented in his Kaiser Permanente medical records. On August 23, 2017, Claimant was noted to have bilateral knee joint pain, for which he was referred to physical therapy. Five days later he advised he had no cartilage in his left knee and he had been told by an orthopedic surgeon years prior he may need a knee replacement. On September 12, 2017, Claimant received an injection into his left knee. On September 26, 2017, Claimant reported "massive dizzy spells" occurring simply from walking, standing, and sitting. Two days later he reported an incident of severe dizziness from standing and making coffee. On October 12, 2017, Claimant reported bilateral shoulder pain from recent falls that started back in June. On December 4, 2017, Claimant reported there was always swelling in the left knee.

3. On April 4, 2018, orthopedic surgeon Dimitri Zaronias noted Claimant had severe left knee osteoarthritis which they could treat non-operatively until ready for a total knee arthroplasty. On July 13, 2018, Claimant reported unbearable left knee pain, also with burning pain from his knee to his left foot since 2012. He was noted to have a chronic ACL tear and instability. On October 26, 2018, Claimant requested a left knee MRI due to 9/10 pain. Claimant reported there was not much holding his together and that his knee was "shot." Three days later he reported he was limping around a lot due to his knee. He reported normal underlying pain of 6/10 and worsening symptoms impairing his functionality. On December 18, 2018, claimant underwent an EMG for his lower extremities. The indication for the study was left leg pain and weakness. The EMG revealed moderate chronic left L5 radiculopathy.

4. Claimant was scheduled to undergo left knee replacement surgery on February 20, 2019. Id. At a pre-op appointment on January 23, 2019, Claimant noted 7/10 pain. He reported being able to walk only 20 yards without stopping due to pain, the pain waking him up every night, and difficulty putting on shoes and socks. The medical records document that prior to the scheduled surgery Claimant cancelled, blaming a family situation causing him to leave town. On August 23, 2019, another fall is noted, this time due to Claimant simply stepping on a rock and falling over.

5. Claimant suffered an admitted industrial injury on January 28, 2021 when he slipped and fell on ice at a construction site, landing on his left side.

6. Claimant presented to Tory Manchester, M.D. on January 28, 2021 reporting that he slipped and fell, injuring his left shoulder, left knee and left side of his ribs. Claimant reported experiencing immediate left shoulder pain and pain to a lesser extent in his left medial knee, with the ability to ambulate with mild pain. Examination of the left knee was negative for deformity, ecchymosis, erythema or swelling. Diffuse tenderness was present over the medial knee with full range of motion. Lachman's, Posterior drawer sign, and lateral Mcmurray's tests were negative. There were equivocal results for the medial McMurray's test. Dr. Manchester assessed with Claimant left knee and left shoulder strains. He prescribed Claimant medication and a left shoulder sling, referred Claimant for x-rays of the left shoulder and left knee, and restricted Claimant from use of his left arm.

7. Left knee x-rays taken on January 28, 2021 revealed tricompartmental osteoarthritis.

8. Claimant alleges that the January 28, 2021 work-injury to his left knee caused him to fall and injure his right shoulder while at home on January 31, 2021 Claimant testified that on January 31, 2021 he was walking his dog out to the kennel with a sling on his left arm and a glass of water in his right hand. Claimant testified his left knee buckled, causing him to fall and land on his right shoulder.

9. Claimant returned to Dr. Manchester on February 1, 2021, reporting persistent left shoulder pain. Dr. Manchester noted that Claimant, "[f]ell yesterday stepping up 2 stairs. No new injury, but persistence of pain, limitation in rom." (R. Ex. F, p. 43). On examination of the right shoulder, Dr. Manchester documented no tenderness or signs of impingement, full strength, and full range of motion. The medial McMurray's test of Claimant's left knee continued to be positive. Dr. Manchester referred Claimant for MRIs of the left shoulder and left knee. No right shoulder complaints are documented in the medical record from this evaluation.

10. Claimant underwent an MRI of the left knee on February 1, 2021. The radiologist's impression was:

> 1. Advanced tricompartmental left knee osteoarthritis, most severe in the medical and lateral compartments.
> 2. Multifocal bone marrow edema within the lateral greater than medial compartments, most likely degenerative and reactive in etiology although associated bone contusion difficult to completely exclude given the history of recent injury. No fracture line identified.
> 3. Chronic absence of the ACL.
> 4. Complex degenerative tearing of the medical and lateral menisci.
> 5. Knee joint effusion, Baker's cyst, and extensive synovitis/bodies within the knee joint.

(R. Ex. J, p. 245).

11. Dr. Manchester reviewed the left knee MRI at a follow-up evaluation on February 3, 2021, noting evidence of medial and lateral meniscus complex tears. The medical note from this evaluation contains no mention of right shoulder complaints. Dr. Manchester referred Claimant to Joseph Hsin, M.D. for orthopedic evaluation of his left shoulder and left knee.

12. Claimant presented to Dr. Hsin on February 10, 2021. Claimant denied pre-existing issues with his left knee. Dr. Hsin reviewed Claimant's left knee and left shoulder MRIs. He opined that Claimant likely sustained an acute left shoulder injury on top of chronic rotator cuff tears, for which he noted Claimant could consider reverse shoulder arthroplasty under his personal insurance. Dr. Hsin opined that Claimant sustained an aggravation of his pre-existing left knee arthritis and recommended physical therapy to return to baseline. He further opined that Claimant ultimately would need to consider undergoing a left knee replacement under his personal insurance.

13. Claimant saw Dr. Manchester later in the day on February 10, 2021. Dr. Manchester noted that Claimant was, "[a]damant that he was functional prior to the [work] fall, but does state he was often pushing through pain to be functional." (R. Ex. F, p. 52). He referred Claimant for physical therapy for his left shoulder and left knee. Regarding Claimant's right shoulder, Dr. Manchester remarked,

> [Claimant] now tells me he had a second fall at home. On 1/31, he was walking out to feed his dog and tripped on the stair steps, because my (*sic*) left knee feels weak from pain. He fell to his right, landing on his right shoulder (previously repaired and was doing well without restriction). He did not mention this fall at our last visit 2/3 and did not map the pain on his intake document. Unclear reason why. His exam today of the right shoulder is limited on range at 90 degrees, no neck symptoms, no head injury and no right knee pain. He has a small abrasion on his right ankle that he attributes to the fall, but no complication and no ankle pain. Strange he did not mention it last visit.

(Id. at p. 53).

14. Claimant underwent physical therapy for his left shoulder and left knee condition beginning January 29, 2021. On February 16, 2021, Courtney Spivey, PT, noted Claimant complained of right shoulder pain "since I fell at home last week." (R. Ex. G, p. 131). On March 5, 2021, Xochitl Ashpole, PT, documented Claimant "tripped getting up from the couch yesterday and fell on his R side so that his R shoulder is very painful today." (Id. at p. 134).

15. At a follow-up examination with Dr. Manchester on February 22, 2021, Claimant continued to complain of bilateral shoulder pain and left knee pain. Dr. Manchester noted

Claimant had undergone a previous right shoulder surgery. Claimant continued to report to Dr. Manchester he did not have any ongoing pain or limitations in his left shoulder or left knee prior to the slip and fall. Dr. Manchester referred Claimant for a right shoulder MRI. He also referred Claimant for an evaluation of his left knee and left shoulder by orthopedic surgeon Michael Hewitt, M.D.

16. Claimant first presented to Dr. Hewitt on March 1, 2021. Claimant reported that approximately three days after his January 28, 2021 injury, his left knee buckled at home and he fell onto his right shoulder. Dr. Hewitt focused on Claimant's left shoulder and left knee, diagnosing with an acute on chronic massive rotator cuff tear and left knee preexisting advanced arthritis with acute exacerbation. Recommended reconstruction left shoulder. Claimant subsequently underwent left shoulder surgery.

17. As of April 8, 2021, Claimant continued to complain to Dr. Manchester of persistent pain in his right shoulder.

18. Claimant underwent a right shoulder MRI on April 14, 2021. The radiologist's impression was:

1. Multifocal labral tearing with moderate glenohumeral degenerative joint disease.
2. There has been prior rotator cuff repair with essentially complete re-tear of the infraspinatus and full-thickness, partial-width re-tear of the supraspinatus.
3. Moderate tendinosis of the subcapularis and long head of the biceps.
4. Acromioclavicular degenerative joint disease with additional degenerative changes around the os acromiale.

(R. Ex. J, p. 247).

19. On July 14, 2021 Jon Erickson, M.D. performed Independent Medical Examination ("IME") at the request of Respondents. Dr. Erickson issued an IME report dated July 29, 2021. Regarding the alleged January 31, 2021 incident, Claimant reported noting some pain in his left knee that day with a resultant limp. Claimant reported that his left knee buckled while he was walking across a flat concrete surface in his backyard carrying a glass of water for his dog. He reported that he did not stumble or twist, but that his knee simply buckled, causing him to fall and land on his right shoulder.

20. Dr. Erickson opined that Claimant sustained a minor sprain/strain of the left knee with advanced pre-existing tricompartmental osteoarthritis and non-work-related possible re-tears of his right shoulder cuff. Dr. Erickson noted that, due to the delay in obtaining a right shoulder MRI, it was impossible to tell if the right shoulder cuff tears at the time of his alleged fall on January 31, 2021. Dr. Erickson concluded that Claimant only sustained a minor sprain/strain of the left knee on January 31, 2021, and that Claimant's left knee abnormalities were all pre-existing. He explained that physical examination on the day of the work fall did not show any evidence of significant acute trauma and radiographic

evidence did not show aggravation or worsening. Dr. Erickson further opined that the reported buckling of Claimant's knee was not due to the minor sprain, but rather, likely occurred because of Claimant's chronic ACL deficiency. He stated that simply walking across a flat concrete surface would not cause a normal knee to buckle. Dr. Erickson opined that because Claimant's alleged fall on January 31, 2021 occurred as a result of a pre-existing ACL deficiency of the left knee, the resultant injury to his right shoulder should not be considered work-related.

21. As of August 9, 2021, Claimant was reporting a decrease in left shoulder function. Dr. Hewitt opined that a reverse left shoulder replacement would provide Claimant the most reliable outcome.

22. On August 12, 2021, Dr. Manchester noted treatment for Claimant's right shoulder claim remained denied by Respondents. Dr. Nathan Faulkner, M.D., on September 3, 2021, recommended a left reverse shoulder replacement. Claimant's claim remains open for the time being as he treats for his left shoulder.

23. Respondents took the pre-hearing deposition of Dr. Manchester. Dr. Manchester testified as a Level 1 accredited expert in occupational medicine. Dr. Manchester testified that the findings on Claimant's initial exams reflected only a mild left knee sprain. He testified that on February 1, 2021, Claimant reported falling at home, and Dr. Manchester specifically remembered Claimant stating he had no new injuries from the fall. Dr. Manchester confirmed he performed exams on Claimant's right shoulder at all appointments, per Concentra's policy to examine the contralateral side of an injury. He explained that on February 1, 2021 Claimant had no symptoms or signs of injury on exam in his right shoulder. Dr. Manchester further testified that the pain diagrams Claimant completed on February 3, 2021 did not indicate any right-sided pain.

24. Dr. Manchester testified Claimant's left knee MRI showed chronic issues. He explained that Claimant's preexisting chronic ACL deficiency could lead to knee buckling. Dr. Manchester also testified that Claimant did not tell him his knee buckled on a flat service, but that Claimant specifically told him he tripped walking up stairs. Dr. Manchester testified that when Claimant did report pain in his right shoulder, he asked Claimant why Claimant had not mentioned it before, to which Claimant did not have a clear reason. Dr. Manchester further testified that findings on exam for Claimant's right shoulder did not change until February 10, 2021, and it did not make any medical sense why those symptoms and limitations would first appear on that day from an injury which allegedly occurred on January 31, 2021. He confirmed that if Claimant's right shoulder injuries identified on MRI occurred on January 31, 2021, Claimant should have exhibited immediate symptoms. Dr. Manchester opined that if Claimant did fall on his right shoulder at home on January 31, 2021, it was related to Claimant's pre-existing condition and unrelated to Claimant's admitted left knee injury. He agreed with Dr. Ericson that a left knee sprain would not be expected to cause Claimant's knee to buckle.

25. Claimant testified at hearing that he had pre-existing right shoulder issues for which he had obtained surgery years prior and recovered well with no issues or

restrictions until his fall at home on January 31, 2021. Claimant testified that, on February 1, 2021, he told Dr. Manchester he fell the night before due to having difficulty walking, his right shoulder took the brunt of the fall, and that he felt there had been an injury from the fall with pain in his right shoulder. Claimant testified Dr. Manchester's records and testimony were incorrect that he first complained of right shoulder pain on February 10th. Claimant stated he also complained of right shoulder pain to Dr. Manchester on February 3, 2021. Claimant also testified Dr. Manchester did not examine his right shoulder at every appointment, as testified to by Dr. Manchester.

26. Claimant further testified he had some pre-existing issues with left knee pain due to arthritis. Claimant testified that several years ago a surgeon told him he was eligible for a left knee replacement surgery, but cautioned against the surgery and recommended a non-operative approach. On cross-examination, when presented with the medical records documenting Claimant cancelled a scheduled left knee replacement surgery due to a family emergency, Claimant testified that was also a cause but not the primary reason. Claimant testified he was candid with Dr. Erickson at the IME about his prior left knee problems. Claimant testified that his prior issues with dizziness were caused by him working long hours and that did he did not recall becoming dizzy simply from walking and standing, as is documented in the medical records. Regarding the August 23, 2019 Kaiser note referencing he fell after simply stepping on a rock, Claimant testified he actually fell because his leg got tangled in a hose. Regarding Dr. Hsin's note that he denied prior left knee problems, Claimant testified he told Dr. Hsin he was functional and that he had a prior ligament tear in his left knee.

27. Claimant testified that between 2019 and the January 28, 2021 work injury his left knee symptoms were better due to his weight loss and exercise. He denied treating with any providers during such time period. Claimant was asked about the fall at home in March 2021, documented in his physical therapy notes. He initially denied any knowledge of the fall. When referred to the record, which discusses the fall hurt his right shoulder, he then stated he remembered the incident. When asked if he needed treatment for his right shoulder resulting from a January 31, 2021 fall at home or the March 2021 fall at home, Claimant stated, "I'm no expert." Claimant further testified that his right shoulder pain has stabilized, but that he continues to experience issues with mobility, strength and flexibility of the right shoulder. Claimant was working full-duty with no restrictions prior to the January 28, 2021 work injury.

28. Dr. Erickson testified at hearing as a Level II accredited expert in orthopedic surgery. Dr. Erickson testified consistent with his IME report. He explained that Claimant's left knee x-rays evidenced end stage arthritis. He testified that Claimant's February 1, 2021 left knee MRI showed reactive bone marrow edema, which is a reaction to pressures on the joint due to degenerative loss of cartilage. He explained that this is called near-advanced osteoarthritis, meaning the joint was "shot." Dr. Erickson testified that there was no evidence of recent trauma in the February 2021 left knee MRI and that all conditions visible in the MRI were degenerative. On cross-examination, Dr. Erickson was asked about the findings of the reviewing radiologist for the MRI that: "while much of this was likely degenerative and reactive, bone contusion cannot be excluded particularly in the

resetting of recent trauma." Dr. Erickson testified he disagreed that was potential differential diagnosis and believed all findings were clearly degenerative. He explained there were macerated meniscal tears, in both cases clearly atraumatic and degenerative. He testified there is definitive research that these types of tears are related to advanced arthritis due to collapse of the joint space which pushes the meniscus out of the joint. Finally, Dr. Erickson testified Claimant's MRI showed a chronic absence of the ACL, which would have been caused somewhere in the past by a traumatic substantial injury.

29. Dr. Erickson further testified that lacking an ACL can cause knee buckling, because of what is called a pivot shift dislocating phenomena. He testified that, with the combination of the solely degenerative MRI findings, and lack of objective findings or severe pain complaints documented by Dr. Manchester indicating more than a mild sprain, Claimant's knee would have given out solely due to his pre-existing ACL deficient knee. He testified Dr. Manchester's notes showed he was very thorough in his examination, and Dr. Manchester was not concerned with any serious injury to Claimant's left knee over and above the diagnosed mild sprain. Therefore, Dr. Erickson testified that any injuries to Claimant's right shoulder from a fall at home were caused by the degenerative deficiencies in his knee, and therefore, were not work-related. He opined that the January 28, 2021 fall at work did not cause Claimant's reported fall at home on January 31, 2021 and the resultant right shoulder condition. Dr. Erickson testified Claimant was at a high risk for having falls from his knee buckling due to the presence of those pre-existing conditions.

30. Dr. Erickson further testified Claimant denied at his IME any prior left knee difficulties before his work injury, despite repeated inquires. Dr. Erickson testified he reviewed the Kaiser records after the IME report was completed. He believes Claimant was not being truthful to him about his medical history after reviewing the Kaiser records. Dr. Erickson testified Claimant would have had symptoms and limitations in his right shoulder fairly quickly if he hurt his shoulder on January 31, 2021, and those are not reflected in Dr. Manchester's notes for the visits which followed.

31. On cross-examination, Dr. Erickson noted his report stated Claimant's left knee had no laxity to varus or valgus stress, but that was printed incorrectly and it should have stated there was trace laxity, the most minor of findings on Lachman's testing. Dr. Erickson testified with longstanding ACL injuries, patients can effectively hide abnormal examinations due to how they compensate over time for their injuries, which could reflect why only trace findings were present on his exam and no findings on Dr. Manchester's exam were present in the presence of a chronic lack of an ACL.

32. The ALJ credits the testimony and/or opinions of Drs. Manchester, Erickson, Hewitt, and Hsin, as supported by the medical records, over the testimony of Claimant.

33. Claimant failed to prove it is more probable than not his January 28, 2021 work injury weakened Claimant's left knee causing Claimant to fall and injure his right shoulder on on January 31, 2021.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

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. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). Thus, if an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.,* WC 4-818-912, (ICAO, July 20, 2011). The preceding principle constitutes the "chain of causation analysis" and provides that a subsequent injury is compensable if the "weakened condition played a causative role in the subsequent injury." *In Re Fessler*, WC 4-654-034 (ICAO, Dec. 19, 2007); *see Martinez v. City of Colorado Springs*, WC 5-073-295 (ICAO, Sept. 12, 2019) (an infection that resulted from claimant's weakened condition was compensable because it was a natural, although not necessarily a direct, result of the work-related injury).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

Claimant failed to prove his January 28, 2021 left knee injury caused his fall on January 31, 2021, resulting in a right shoulder injury. Claimant has a significant history of pre-existing left knee problems, including severe osteoarthritis and chronic ACL tear and instability, dating back several years. Claimant's medical records reflect a history of reported unbearable left knee pain, impaired functionality, and left leg pain and weakness in 2018 and 2019. Claimant was scheduled to undergo left knee replacement surgery in February 2019, which Claimant cancelled. Dr. Manchester's records indicate Claimant admitted pushing through pain to be functional. Beyond severe pre-existing left knee issues, Claimant's prior medical records also document issues with dizziness and falling. While Claimant's pre-existing conditions do not preclude a finding that his fall on January 31, 2021 was caused by his January 28, 2021 work injury, the credible and persuasive evidence establishes it is more likely the January 31, 2021 fall was caused by the natural progression of Claimant's significant and long-standing pre-existing degenerative conditions and not any left knee condition resulting from the January 28, 2021 injury.

All of Claimant's treating physicians, as well as Respondents' IME physician, opine that Claimant's left knee MRI revealed severe, pre-existing chronic degenerative changes. Drs. Manchester and Erickson credibly and persuasively opined Claimant sustained no more than a sprain/strain of his left knee on January 28, 2021. Dr.

Manchester and Dr. Erickson also credibly opined that a minor sprain/strain would not likely cause Claimant's knee to buckle as it purportedly did on January 31, 2021. Both Dr. Manchester and Dr. Erickson credibly opined that the most likely cause for any spontaneous buckling of Claimant's left knee would be Claimant's pre-existing conditions in his knee, mainly the chronic lack of an ACL. Based on the totality of the evidence, the preponderant evidence does not establish any right shoulder condition Claimant sustained from falling at home on January 31, 2021 was caused by the work injury sustained on January 28, 2021.

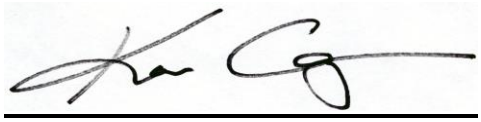
ORDER

1. Claimant failed to prove he suffered a compensable industrial injury on January 31, 2021. Claimant's claim for benefits is denied and dismissed.

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

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

DATED: March 4, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the discogram recommended by Dr. Wade Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

FINDINGS OF FACT

1. The claimant was employed with the employer as an HVAC service technician. On May 9, 2019, the claimant suffered an injury to his low back while lifting an item and placing it in the back of his work truck.

2. The claimant's authorized treating physician (ATP) for this claim is Dr. Theodore Sofish. During his treatment of the claimant, Dr. Sofish has referred the claimant for various modes of treatment, including physical therapy, massage, and injections.

3. On May 16, 2019, the respondents filed a General Admission of Liability (GAL).

4. On November 6, 2019, Dr. Kirk Clifford performed a left sacroiliac (SI) joint injection.

5. On February 25, 2020, the claimant attended an independent medical examination (IME) with Dr. Douglas Scott. In connection with the IME, Dr. Scott reviewed the claimant's medical records, obtained a history from the claimant and performed a physical examination. In his IME report, Dr. Scott opined that on May 9, 2019, the claimant suffered a lumbar strain, and was not yet at maximum medical improvement (MMI). Dr. Scott further opined that the claimant had possible radicular pain, possible facet syndrome at left L5-S1, and possible L5 or S1 nerve root impingement at the left L5-S1 neuroforamina. Dr. Scott recommended the claimant undergo core strengthening exercises. He also recommended that the claimant undergo a facet injection or epidural steroid injection.

6. On May 13, 2020, Dr. Clifford performed left L5-S1 and S1-S2 transforaminal epidural steroid injections (TFESIs). On January 13, 2021, Dr. Clifford administered bilateral L5-S1 TFESIs. The claimant testified that the injections he received from Dr. Clifford provided some short term pain relief.

7. Following a referral from Dr. Sofish, the claimant was seen by orthopedic surgeon Dr. Donald Corenman at The Steadman Clinic on February 19, 2021. On that date, Dr. Corenman ordered a magnetic resonance imaging (MRI) scan of the claimant's lumbar spine.

8. An MRI of the claimant's lumbar spine was performed on February 29, 2021. The MRI showed, *inter alia*, a mild annular bulge of the L5-S1 intervertebral disc; a mild annular bulge of the L4-L5 intervertebral disc; and a mild annular bulge of the L3-L4 intervertebral disc.

9. On February 23, 2021, the claimant returned to The Steadman Clinic and was seen by Ehrich Bean, PA-C. On that date, PA Bean discussed the MRI findings and Dr. Coreman's recommendations. Based upon the medical record of that date, Dr. Corenman recommended that the claimant undergo a discogram at the L4-L5 and L5-S1 levels to determine the claimant's pain generator prior to pursuing fusion surgery.

10. On June 11, 2021, the claimant was seen by Dr. Wade Ceola. The claimant testified that he was referred to Dr. Ceola by Dr. Corenman because Dr. Corenman was retiring. Dr. Ceola noted that the claimant had a central disc herniation at the L5-S1 level as well as degenerative discs at various levels. Dr. Ceola agreed that a discogram would be appropriate. Specifically, Dr. Ceola recommended a provocative discogram at L3-4, L4-5, and L5-S1 (with L2-3 as a control). Dr. Ceola explained that the discogram would determine what surgical option would be optimal for the claimant. If the claimant's pain is reproduced at only the L5-S1 level, then a disc replacement at that level would be appropriate. However, if the discogram shows multiple pain generators, then a minimally invasive transforaminal lumbar interbody fusion (MIS TILF) could be pursued.

11. On June 26, 2021, Dr. Scott authored a report to specifically address the discogram recommended by Dr. Ceola. The June 26, 2021 report references the February 25, 2020 IME as well as an April 20, 2021 examination of the claimant.[1] Dr. Scott opined that a discogram might be reasonable, necessary and indicated for the claimant. However, he recommended that the claimant first undergo a psycho-social evaluation, as required by the Colorado Medical Treatment Guidelines.

12. Dr. Scott authored an additional report on July 15, 2021. Again, Dr. Scott referenced the February 25, 2020 IME and an IME on April 20, 2021. In his July 15, 2021 report, Dr. Scott indicates that he is answering questions posed to him in an April 16, 2021 letter from the respondents' counsel. Dr. Scott opined that the claimant suffered a low back sprain on May 9, 2019. He further opined that the claimant had recovered from that incident because it was more than two years after the injury. With

[1] It does not appear that there was a contemporaneous report generated by Dr. Scott following his April 20, 2021 examination of the claimant. If an April 2021 report exists, neither party offered it as evidence for this present matter.

regard to the recommended discogram, Dr. Scott recommended a comprehensive psychiatric examination.

13. On August 18, 2021, the claimant was seen by psychologist, Dr. Melissa Carris. At that time, Dr. Carris performed a psycho-social evaluation with psychometric testing. Dr. Carris noted that objective testing did not present any risk factors of psychiatric distress. In addition, Dr. Carris opined that "there are no significant barriers to a discogram and lumbar surgery."

14. On September 6, 2021, Dr. Scott authored a report in which he recommended denial of the recommended discogram. Dr. Scott noted that while a discogram might be reasonable treatment for the claimant, the claimant's return to work indicated that the discogram was not reasonable. Based upon Dr. Scott's September 6, 2021 report, the respondents denied authorization of the discogram.

15. During this claim, the claimant has had different work restrictions. Primarily the claimant has been under a 20 pound lifting restriction assigned by Dr. Softish. However, on December 7, 2020, the claimant participated in a functional capacity evaluation (FCE). Following the FCE, the claimant experienced a worsening of his symptoms. The claimant reported this to Dr. Sofish at an appointment on January 4, 2021. On that date, Dr. Sofish took the claimant off of all work. On February 11, 2021, Dr. Sofish returned the claimant to a 20 pound work restriction.

16. However, following that February 11, 2021 appointment and until September 23, 2021, Dr. Sofish's records indicate that the claimant was restricted from all work. On September 23, 2021, Dr. Sofish noted:

> "Employee has been on no work capacity since exacerbation in late February 2021, previously always 10-20 [pounds] restriction. I failed to [reinstitute] the 20 [pound] restriction after he recovered from that acute exacerbation and am doing so now.

17. This clarification is pertinent to the present case because the claimant began self employment in the Spring of 2021. Specifically, the claimant and two friends established an ammunition company. The company's doors opened in mid-August 2021. The claimant credibly testified that while working on this new business venture, he complied with the 20 pound work restriction that was reinstated by Dr. Sofish on February 11, 2021.

18. The ALJ credits the claimant's testimony regarding the nature of his symptoms and his understanding regarding his work restrictions. The ALJ also credits the medical records and the opinions of Drs. Corenman and Ceola over the contrary opinions of Dr. Scott. The ALJ places weight on the initial opinion of Dr. Scott that a discogram might be reasonable, following a psychological evaluation. The change to Dr. Scott's opinion seems to only be due to his understanding that the claimant has returned to work. The ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended discogram is reasonable medical treatment necessary

to cure and relieve the claimant from the effects of the work injury. It is clear from the record that the discogram will be utilized to ascertain an appropriate surgical plan.

CONCLUSIONS OF LAW

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

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

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

4. 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 demonstrated, by a preponderance of the evidence, that the discogram recommended by Dr. Wade Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. As found, the claimant's testimony, the medical records, and the opinions of Drs. Corenman and Ceola are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the recommended disogram, pursuant to the Colorado Medical Fee Schedule.

Dated this 7th day of March 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 Respondents proved by clear and convincing evidence that the DIME physician's opinion regarding impairment was incorrect.

II. Whether the Claimant proved by a preponderance of the evidence that the ancillary treatments for the hardware infection and removal, blood clots, and heart attack were reasonably necessary and related to the injury.

III. Whether Claimant proved by a preponderance of the evidence that Respondents are responsible for the medical bills, including the flight for life by Helicopter, ambulance from West Metro Fire Protection District, emergency room care at Emergency services Platte Valley Ambulance and St. Anthony Hospital, wound care treatment at St. Anthony Hospital and specialist at Panorama Orthopedics.

STIPULATIONS

Respondents admitted to the compensability of the September 17, 2017 claim. The parties stipulated that the treatment Claimant received for the fractured left foot and ankle, and the fracture of the left little finger were authorized, reasonably necessary and related to the work injury of September 21, 2017. Respondents continued to dispute any treatment for the cardiac/stroke issues as well as the infection and blood clots as being related to the admitted claim.

The parties agreed that the issues listed above are the issues to be addressed by the ALJ at this time, in order to simplify the issues for hearing. All other issues listed in the Applications for Hearing and the Response to the Application for Hearing were reserved by the parties for future determination.

PROCEDURAL HISTORY

Administrative Law Judge Margot Jones issued Findings of Fact, Conclusions of Law and Order dated October 18, 2018 finding the September 21, 2017 work related injury compensable.

Respondents' filed an Application for Hearing on July 27, 2021 on issues that included overcoming the opinion of the Division of Workers' Compensation Independent Medical Examiner (DIME), Dr. Dwight Caughfield dated July 5, 2021. Among other issues listed were causation, relatedness, preexisting injury or condition, idiopathic injury, and overpayment.

Claimant filed a Response to Application for Hearing on July 30, 2021 listing issues that included medical benefits that were authorized, reasonably necessary and related to the injury, temporary disability benefits, average weekly wage, permanent partial disability and permanent total disability benefits. Claimant also listed overcoming the DIME physician's opinion as to maximum medical improvement (MMI) and impairment.

Respondents filed an Amended Application for Hearing on August 11, 2021 on additional issues of Respondents' denial of any change of authorized treating physician and termination for cause among other issues, including defenses to the permanent total disability claim.

On August 24, 2021 OAC granted a motion to hold the issue of permanent total disability in abeyance pending the result of overcoming the DIME as to MMI.

The parties agreed that this ALJ should assess the issue of disfigurement immediately by photographs submitted under Claimant's Exhibit 41. This ALJ issued a Disfigurement Award and Order served on January 13, 2022.

FINDINGS OF FACT

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

1. Claimant was injured within the course and scope of his employment with Employer on September 21, 2017. Claimant suffered compensable work-related injuries to his left lower extremity and left hand when he fell off a ladder on September 21, 2017, including multiple sequelae from the injuries.

2. The Platte Canyon Fire Protection District records indicate that Claimant was on a ladder when it twisted and he fell off of a ladder onto a roof below. The specifically found Claimant was being supported by a co-worker, was awake, alert and oriented to person, place, time and event,[1] with chief complaint of left open "tib fib"[2] fractures, left pinky fracture and abdominal abrasions. He had to be extricated from the roof and transported by ambulance to the Regional Specialty Center.

3. Claimant was transferred from Elk Creek area, Pine Junction by Flight for Life on September 21, 2017 to the emergency room at St. Anthony Hospital where he was seen by Andreas Henning M.D., who diagnosed a left open medial malleolar fracture, a left fifth digit fracture of the PIP with dislocation, with pain under control, and noted superficial abrasions, a 6 cm open wound. He was also in a cervical collar. Dr. Henning noted that Claimant's diabetes was not under control and that Claimant reported he had landed on his hands and knees.

4. Claimant was later evaluated by Dr. Richard Ott and Physician Assistant Sonya Burgers Silleck. Following examination she diagnosed fractured dislocation of the

[1] Abbreviation noted in report AAOX4.
[2] Medical abbreviation of fractures of the medial malleolus of the distal tibia and the lateral malleolus of the distal fibula.

right little finger proximal interphalangeal joint. She reduced the fracture and splinted the finger while in the emergency room. She also diagnosed a fracture of the left ankle, with a visible wound medially with visible tibial plafond (a pilon fracture), which she reduced bedside, applying a dressing and a 3 way short leg splint. PAC Silleck also noted a partially imaged occlusion of the left proximal superficial femoral artery. There was noncalcific atherosclerotic disease involving the distal aorta, common iliac arteries and common femoral arteries. She consulted with Dr. Nimesh Patel of Panorama Orthopedics, who advised that an open reduction and internal fixation surgery would be required with regard to the left ankle fracture.

5. The x-rays of the left hand showed a fracture dislocation of the little finger proximal interphalangeal joint. The tibia fibular x-ray showed comminuted, displaced distal fibular shaft fracture and mildly displaced medial malleolus fracture. The left ankle x-ray showed mildly displaced transverse medial malleolar fracture, comminuted distal fibular shaft fracture with mild posterior displacement of some of the fragments.

6. Claimant underwent emergency surgery on September 21, 2017 with Dr. Patel for the left ankle and left leg including incision and drainage and open reduction internal fixation of the left bimalleolar ankle fracture. Claimant was referred to Panorama Orthopedics for follow up care and treatment of his left lower extremity and left hand. He was also referred to St Anthony Wound Care.

7. Brian Morgan, PA-C performed a closed reduction via digital block of the left proximal interphalangeal joint due to the fifth PIP dislocation and then placed in an intrinsic plus ulnar gutter splint to the left upper extremity.

8. Claimant was seen by multiple providers while inpatient at St. Anthony Hospital including general practice, orthopedic follow up, physical therapists and occupational therapists.

9. Claimant presented to the Emergency Department at St. Anthony due to chest pain on October 3, 2017 by Holly Pyle, PA-C. She noted as follows:

> Patient recently with tib-fib fracture repair by panorama. He did not take blood thinners after the surgery as he was unable to afford these. Pulmonary embolus was considered, CTA PE does not show any central blood clots, peripheral blood clots not ideally visualize secondary to bolus administration. Patient not hypoxic or tachycardic however. Initial troponin is mildly elevated. Repeat troponin at 3 hours is positive. Patient had been accepted by CHIP Dr. Turner at this time, they were informed of these results as well as Dr. Thanavaro had been consulted from cardiology. Patient currently chest pain free. Plan is to start patient on a heparin drip, catheterization in the morning.

Ms. Pyle noted that Claimant had no prior history of blood clots. Claimant was diagnosed with a myocardial infraction and admitted into the hospital for treatment and care. Dr. Joseph Turner advised that cardiologist Tharavaro would be performing catherization the following day.

10. On October 3, 2017 Claimant had a second orthopedic consult at the emergency room at St. Anthony's with Brian Morgan, PA-C. Mr. Morgan described the surgical recent procedure but noted that Claimant failed to take prescribed blood thinners after the surgery as he was unable to afford them. He assessed that Claimant was having

a myocardial infarction. He noted that Claimant had a history of insulin-dependent diabetes mellitus, histoplasmosis, and acute myocardial infarction, but no history of blood clots. He noted that Claimant had an eschar[3] to his open wound of his left lower extremity medially with some scant drainage. He noted that Claimant had mild leukocytosis at that time, a probable indication of ongoing infection. Following examination, he recommended that Claimant be admitted to the internal medicine service for workup of the myocardial infarction. He noted that from an orthopedic standpoint Claimant was at risk of infection. He noted that Claimant had an elevated leukocytosis.[4] Mr. Morgan consulted with Dr. Desai who agreed.

11. Dr. Michael Ptasnik noted on October 4, 2017 that Claimant presented with risk factors, specifically diabetes, with very typical sounding ischemic pain with transient right bundle branch block (RBBB) and marked troponin elevation. He looked to have had a non-Q infarction. Likelihood of severe coronary disease was very high and planned for urgent catheterization that morning and stenting as appropriate.

12. Left ankle wounds were reviewed. There was a traumatic wound about the medial and posterior-medial left ankle and above the level of the medial malleolus extending superiorly and posteriorly in a mild angular fashion that had been closed, as there were stitches in place. Part of the wound appeared to be granulating in and possibly left open. The surgical lateral wound was closed. There was a contusion of the posterolateral left heel.

13. The cardiovascular specialist, Dr. Mark Edgcomb evaluated Claimant on October 7, 2017 and noted that Claimant was undergoing treatment for wound infection with antibiotics due to a non-healing wound of the left ankle, which continued to be achy and throbbing.

14. Claimant was reevaluated on October 17, 2017 by Dr. Patel, who examined in clinic 4 weeks status post ORIF left bimalleolar ankle fracture and medial wound eschar, and removed the sutures. Dr. Patel noted that Claimant was using a boot and ambulating with a wheelchair. He reported Claimant was under stress due to the pain. Dr. Patel noted Claimant was experiencing quite a bit of drainage from his ulcer and swelling around his ankle as well as compliant with home therapy working on range of motion. Claimant reported changing his dressing daily and seeing a wound care specialist at SAH. Claimant related that he has been icing and elevating as much as possible to help with the swelling. He disclosed that he was having mild heart attacks while at home and was admitted to the hospital as he suffered another heart attack due to having blood clots. Dr. Patel advised Claimant to continue with wound care treatment and referred Claimant to physical therapy for ROM.

15. On October 27, 2017 Dr. Patel stated that it was medically necessary for Claimant to utilize a wheelchair for ambulation as well as an elevating leg rest for edema and soft tissue management and only to maintain toe-touch weight bearing.

16. Family nurse practitioner Hilary Murphy at Metro Community evaluated Claimant on November 14, 2017. She noted that his surgical wound was not healing due

[3] Dead skin around the wound site.
[4] Elevated white blood cell count.

to his diabetes mellitus type II and that the myocardial infarction may have been caused by the blood clot from the trauma to his ankle on September 2017. She noted that Claimant had a myocardial infraction on October 3, 2017 and that Claimant "has established with cardiology (Dr. Potasnik) [sic.] they think that the MI was S/T blood clot from the trauma to his ankle. Troponis were strongly positive and symptomatic with new RBBB…possible thrombus that have cleared." She indicated that Claimant was required to follow up with his wound care specialist, Dr. Reynolds and his cardiologist, Dr. Ptasnik. She also noted that Claimant's diabetes continued uncontrolled.

17. Claimant attended by Dr. Patel on November 14, 2017 status post ORIF left tibial bimalleolar fracture and medial wound eschar related to the September 21, 2017 accident. He was ambulating with a wheelchair at that time. He had limited range of motion but continued to have the ankle wounds. He was to continue with Dr. Reynolds for wound care treatment. On December 15, 2017 Dr. Patel indicated that the continued open wounds were causing significant discomfort including swelling and inflammation. Claimant also continued smoking and this was causing delay in his healing as Claimant indicated he was having difficulty with smoking cessation on his own.

18. Claimant designated Dr. Yamamoto as his authorized treating physician as of March 8, 2018.[5] Dr. Yamamoto first saw Claimant on March 12, 2018 and took a history of the injuries. He examined Claimant finding that he continued to have two open non-healing wounds since his original surgery that continued to have drainage, as well as weakness and swelling of the left lower extremity.

19. On April 25, 2018 FNP Murphy noted that Claimant had symptoms of claudication in the stent due to blood clotting.

20. When Dr. Kret evaluated Claimant on May 3, 2018, he noted that given Claimant's family history, history of coronary artery disease at his age and co-existent diabetes, Claimant was at an extremely high risk of coronary vascular and peripheral arterial occlusive disease. Claimant had a stent placed in his thigh in May 2018 by Dr. Marcus R. Kret at St. Anthony Hospital due to the ongoing blood clots and occlusion. It is noted in the history that Claimant had a preexisting stent placement in his left lower extremity due to a gunshot to the left leg that hit a main artery.

21. Claimant again presented to the ED at St. Anthony on October 6, 2018 and was seen by Dr. Jason Roth. He reported Claimant had left ankle pain related to an open compound fracture of his left ankle, surgically treated on September 21, 2017 by Dr. Patel of Panorama Orthopedics. He stated since that time Claimant had had wounds to the ankle, he had been seeing wound care for and had just recently finished a 10 days course of antibiotics secondary to concern for infection of the left ankle. He initially saw improvement but then over the past 3 days he had had worsening throbbing pain radiating proximally to his left calf, redness and swelling to the ankle as well as some purulent drainage from the wound. He stated the pain was exacerbated with ambulation. He indicated he had been taking pain medication at home with minimal relief. He was

[5] This was determined by ALJ Jones in her Findings of Fact, Conclusions of Law and Order dated October 18, 2018.

anticoagulated on Plavix and was status post stent placement in vein in his left thigh secondary to a blood clot. Claimant was admitted to the hospital.

22. Dr. Mark Edgcomb examined Claimant on October 7, 2018 for a vascular consultation related to complaints of swollen distal left lower extremity with a wound located on the lateral aspect of his ankle. Dr. Edgcomb opined that Claimant had history of open ankle surgery complicated by delayed wound healing and chronic ulcer and a superficial femoral artery (SFA) occlusion status post stent placement on May 9, 2018. He recommended continued ASA (aspirin) and Plavix, would obtain vein mapping and an arterial duplex. He noted that Claimant would likely need a bypass as it would probably provide better long term results than trying to reopen the stent.

23. Dr. Marcus Kret opined that "[I]n my eyes, we have to assume his hardware is infected. He had normal ABI after SFA stent and still wound persisted. I discussed this with the ortho PA on call who will communicate with Dr. Patel." He went on to recommend that Claimant would be best served to have a left femoral pop bypass and a vein map while in the hospital but that he could not accommodate a bypass surgery for a week so recommended discharge with antibiotics.

24. Claimant also had an infectious disease consultation with Dr. Geoffery Clover, who confirmed a left lower extremity wound infection and recommended continued topical and antibiotic treatment intravenous while in hospital and after discharge.

25. On October 8, 2018 PA-C Leigh Rayette Brown noted that Claimant was positive for enterococcus and enterobacter bacterial infections. She noted that Claimant had had femoral arterial graft for PVD[6] which appeared to have occluded. She reported that the patient was compliant with his aspirin and Plavix but continued to smoke and that "Ortho" did not want any OR intervention at that time due to risk factors. On exam she found a lateral wound about 4 cm long with slight surrounding erythema and warm to touch, especially the superior calf area. Dr. Gordon McGuire also evaluated Claimant and diagnosed a chronic non healing ulcer in the lower extremity. He noted that the ultrasound demonstrated occluded left SFA stent and that Dr. Kret was to bring him back to hospital early the following week to consider operative procedure. He also noted that Claimant's obesity, smoking and diabetes were likely compounding his ongoing wound issues. He recommended Claimant continue to follow up with Dr. Reynolds, the wound care specialist.

26. On October 16, 2018 Claimant underwent surgery with vascular surgeon Dr. Kret due to a post stent occlusion. Dr. Kret performed an artery bypass with reverse greater saphenous vein graft. The post-op diagnosis was left leg peripheral arterial occlusive disease with ulcer of the left ankle.

27. Dr. Nimesh Patel examined Claimant on October 23, 2018 and opined that Claimant had infected hardware in the left lower extremity as he continued to have an open non healing wound since his open reduction with internal fixation (ORIF) of fracture of the left ankle, and recommended surgical intervention of an irrigation and debridement of the left ankle and medial and lateral hardware removal.

28. On October 24, 2018 Dr. Yamamoto noted that Claimant had arterial bypass surgery of the left femoral artery on October 15, 2018 after the stent failed, and Claimant

[6] Peripheral Vascular Disease.

seemed to be much better, noting that the medial wounds on the left leg were healed. Dr. Yamamoto reported that the lateral left leg wound continued to be significant but had already improved with continued care at the Wound Care Center at SAH. He also stated that Claimant's osteomyelitis[7] of the lower left leg was being treated with IV antibiotics for a deep infection. Dr. Yamamoto indicated on November 6, 2018 that Claimant was to have hardware surgery removal soon.

29. Claimant proceeded with the hardware removal surgery with Dr. Patel on November 16, 2018 at St. Anthony Hospital, which included the deep left fibular and medial malleolus ankle hardware, irrigation and debridement of the left ankle wound as well as scar revision and delayed primary closure. During the surgery Dr. Patel proceeded to remove some of Claimant's nonhealing wound tissue in an elliptical fashion to freshen the skin edges, including dissecting deeper down to the level of the fibular plate and muscle tissue from the lateral wound around the fibula.

30. Dr. Geoffery Clover, an infectious disease specialist, examined Claimant on November 28, 2018. He noted Claimant was being followed at the Wound Care Center. He had a fairly slowly healing wound with significant peripheral arterial disease, as well, and was being followed by the vascular service. He had a left femoral stent that was probably nearly occluded. He noted that the stent was placed in May. With regard to the lower extremity infection, Claimant was treated for a couple weeks of antibiotics, but was feeling that it actually got worse in the last few days so was admitted. The cultures from the wound showed bacterial infection.[8] Upon examination of the left lower extremity he noted a linear wound with abscess surrounding cellulitis.

31. On December 19, 2018 Respondents filed a General Admission of Liability admitting to the Claimant's work related injuries caused by the fall. However, the payment log dated January 7, 2022 fails to show any payment for any of the emergency medical care including emergency medical transportation, St. Anthony's Hospital emergency care and surgery to left lower extremity or subsequent left lower extremity wound care, and any/all related care and treatment at Panorama Orthopedics and their referrals.[9]

32. Claimant moved to Illinois and transferred his care was to Midwest Occupational Health Associates and Memorial Industrial Rehabilitation Center in approximately March 2019. Claimant was seen by Chandra Pierson-Rye, FNP-BC on March 29, 2019 who provided a long medical history and stated that they would attempt to reestablish the same kind of care Claimant had while in Colorado, including with the SIU Wound Clinic and would be seen by the pain management clinic. Claimant started physical therapy, and was complaining of left foot and ankle pain, joint pain, low back pain and shoulder pain but also had multiple conditions which were impacting recovery,

[7] Inflammation of bone or bone marrow, usually due to infection

[8] Enterobacter cloacae and enterobacter faecalis.

[9] Several internal use logs dated October 23, 2018, March 19, 2019, and January 7, 2022 showed multiple payments to individuals or providers, including AAPEX Legal Services, Hall & Evans, Mitchell international Inc., The MCS Group Inc., Injured Workers Pharmacy, Claimant, Guarco, Inc. Paladin Managed Care, Peak to Peak Family Practice (Dr. Yamamoto), Claimant, Department of Child Support Services, Cypress Care, TMESYS Inc., Memorial Medical Center, Midwest Occupational Health, Rehab Associates of Colorado Inc. (Dr. Reichhardt), One Call Transportation, Southern Colorado Clinic (Dr. Obrien), Exam Works.

including anxiety related to his care, diabetes, heart conditions, hypertension, peripheral vascular disease and multiple surgical procedures, as noted by physical therapist bill Montgomery.

33. Claimant was evaluated by Dr. Greg Reichhardt on January 11, 2021 for the purposes of an impairment rating. Dr. Reichhardt noted that Claimant's hardware in the ankle was infected and also that Claimant underwent a lower extremity arterial stent and arterial bypass. Dr. Reichhardt noted Claimant's vascular disease but did not opine that it was related to the work incident. Dr. Reichhardt provided ratings to Claimant's left fifth digit disfigurement and left ankle. He specifically stated that "He does have range of motion limitations, but because of his inability to get to the neutral position, he is most appropriately rated based on ankylosis of the plantarflexed position, which according to Table 37 carries a 40% lower extremity impairment." Dr. Reichhardt opined that Claimant had a 43% impairment of the left fifth digit, which converts to a 2% whole person rating. Dr. Reichhardt also diagnosed Claimant with ankylosis of the ankle and provided a 40% lower extremity rating which converts to a 16% whole person rating. When combining both rating, Claimant was provided with an 18% whole person impairment relating to the work injuries.

34. Respondents filed a Final Admission of Liability (FAL) on an unknown date.[10] The admission admits for a 40% of the left lower extremity impairment due to the ankle injury and a 43% for the left fifth digit, pursuant to the impairment rating provide by Dr. Reichhardt on January 11, 2021. However, since Respondents paid past the lower benefits cap in temporary disability benefits, no permanent partial disability was paid.

35. On February 17, 2021 Respondents filed a second FAL, which did not admit for any impairment but still relied upon Dr. Reichhardt's report of January 11, 2021, denying any further medical benefits after maximum medical improvement. The reports attached to the FALs both state that Claimant should follow up as needed and specifically outlines in the narrative that Claimant should have follow ups, medication, laboratory tests, and physical therapy follow ups as needed for the following four years with regard to the work related injuries. Dr. Reichhardt specifically list the left shoulder and low back conditions as "non-work related." He provided diagnosis of the left displaced medial malleolar fracture, comminuted distal fibular shaft fracture, left fifth digit dislocation, history of vascular disease, tobacco use disorder and peripheral polyneuropathy.

36. Claimant objected to the FAL and requested a Division of Workers' Compensation Independent Medical Examination (DIME). Dr. Dwight Caughfield was assigned as the DIME physician and performed the DIME on June 15, 2021. He completed a record review, ultimately opining that the shoulder condition was not work related in his June 21, 2021 report. Dr. Caughfield specifically opined that Claimant's peripheral vascular disease was not related to the work injury. He stated that maximum medical improvement occurred on January 11, 2021 in accordance with the evaluation issued by Dr. Reichhardt. He assessed impairment of the lower extremity and finger injuries. Dr. Caughfield stated as follows:

> His left ankle dorsiflexion is -24 with the knee extended and a -21 with flexed consistent with a fixed deformity and loss of ankle dorsiflexion. I agree with Dr.

[10] Certificate of Mail was not completed.

> Reichhardt that this represents an ankylosis of the joint and measured today as an average of -22° dorsiflexion (or 22 plantar flexion) for a 50% impairment of the lower extremity per table 37 page 66. There is 4% impairment for his 12° inversion and 3% impairment for his 7 degrees eversion which are added for 7% LE impairment. These are added to the ankylosis impairment of 50% for 57% lower extremity impairment of the ankle. I then assigned a 15% lower extremity impairment of the ankle for his fracture per the rating tips page 8. The 57% ROM is combined with 15% LE for the fracture for a total LE impairment of 63%. Per table 46 the 63% LE is 25% WP impairment.
>
> For his left small finger he has a DIP impairment of 12% for 46 degrees of flexion. His PIP is 28% for 94 degrees of flexion (3%) and -50 degrees extension (25%). His MP impairment is 8% for 75 degrees of flexion and 5% for 0 degrees extension for 13%. The small finger joints impairments are combined for 45% small finger impairment which is 5% of the hand per table 1 page 15. The 5% UE per table 2 page 16 which is 3% WP per table 3.
>
> The 25% WP impairment for the hindfoot is combined with the 2% WP for digit 5 to obtain a total WP impairment of 27%.

(The June 28, 2021 report cited above--Exh. 25-- is found to be the correct impairment over that which was issued on June 21, 2021—Exh.G.) He recommended both maintenance care and restrictions.

37. Respondents sent Claimant for an independent medical examination with Dr. Timothy O'Brien on November 17, 2021. He stated that Claimant continued to have chronic pain in his left ankle and had a semi-rigid plantar deflection contracture that causes disability. He did recommend an ankle arthrodesis for both pain relief and improved function, though discussed that due to comorbidities, there was some risks involved. Dr. O'Brien opined that the impairment rating by both Dr. Reichhardt and Dr. Caughfield were inaccurate and inappropriate. In particular he disagreed with applying the rating under the AMA Guides for ankylosis and the additional range of motion impairment. This opinion is not persuasive with regard to his opinions about Claimant's impairment, specifically the ankylosis.

38. Dr. O'Brien also testified at hearing. He stated that the infection and blood clots as well as the treatment related to them regarding Claimant's left lower extremity were related to the work related injuries. Dr. O'Brien opined that Claimant's vascular disease was pre-existing. He did not believe it was aggravated or accelerated by the trauma or the surgery. Dr. O'Brien testified that diabetes is a risk factor for heart disease. He stated that as Claimant was also a smoker and was at increased risk for heart disease. He described Claimant as obese, which is another risk factor for heart disease. Further Dr. O'Brien testified that, in his experience, a patient does not develop vascular issues as a result of ankle surgery.

39. Dr. O'Brien indicated that Claimant's ankle joint was stiff and that Claimant had loss of ROM in his left ankle and foot. He went on to testify that "ankylosis" by definition is stiffing of the joint. Dr. O'Brien testified that Claimant's foot was mispositioned as a result of his injury and had suffered a functional change. Dr. O'Brien testified that he disagreed with the ROM measurements obtained by the treating doctors and the DIME physician but that the ROM measurements provided by the DIME physician were valid.

40. Other preexisting documented medical histories that are significant in this matter: 1) Kyle Kirkpatrick of St. Anthony Hospital documented on November 22, 2016 that Claimant had a preexisting history of ongoing migratory intermittent chest pain over the past month which would occur three hours at a time and several episodes per day. He advised Claimant that he had uncontrolled diabetes and was scheduled to see his primary care physician. After history and physical exam differential diagnosis was considered for pleurisy, pneumonia, pneumothorax, Ml, cardiac arrhythmia, pulmonary embolism. 2) He was evaluated by Brian Holmgren, PA, on April 7, 2017 at St. Anthony Hospital for left leg pain and thigh muscle spasms with a history of gunshot wound two years prior. They conducted an ultrasounds that showed no evidence of infection or venous or arterial occlusion and Mr. Holmgren suspected muscular spasm were due to dehydration.

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 he 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 *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). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the

exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Overcoming DIME with Regard to Permanent Impairment

Respondents seek to overcome the Dr. Caughfield's determination of impairment in this matter. Respondents must prove that the DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation

from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of his present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

Here, Dr. O'Brien opined that the DIME physician inappropriately utilized the ankylosis table to provide an impairment because Claimant continued to have some range of motion in the ankle and should not have been provided with an ankylosis impairment. However, both Dr. Reichhardt and the DIME physician, Dr. Caughfield, disagreed with this

opinion. Specifically, Dr. Reichhardt stated that "He does have range of motion limitations, but because of his inability to get to the neutral position, he is most appropriately rated based on ankylosis of the plantarflexed position, which according to Table 37 carries a 40% lower extremity impairment." Dr. Caughfield stated that, and Dr. O'Brien himself stated, Claimant's injury resulted in stiffness of the ankle, especially with the ability to bring his hind foot backward into dorsiflexion and was very apparent as well as that there was no doubt that Claimant's ankle was stiff. Dr. O'Brien specifically defined that ankylosis means stiffness of the ankle. He further stated that Claimant had a malpositioned foot and that Claimant walks on the inside of his foot. He also stated that Claimant suffered a fracture of his lower extremity and a dislocation of his fifth digit of his left hand. Lastly he stated that Claimant does not have normal function.

While Dr. Caughfield calls the malformation of the healed fracture malalignment, Dr. O'Brien calls it malpositioning. Pursuant to the *Merriam-Webster Dictionary*,[11] the medical definition of malalignment is simply an incorrect or imperfect alignment of a joint, and the medical definition of malposition is wrong of faulty position. The medical records show that Claimant has difficulty walking and that he walks on the side of his foot. This was confirmed by Dr. O'Brien in his testimony. This ALJ infers that the terms could be used interchangeable and specifically finds, based on the totality of the evidence that Claimant has a malalignment, causing Claimant to be unable to plant his foot fully on the ground in a neutral position to walk. The AMA Guides under Sec. 3.2 notes that "[F]or purposes of impairment evaluation, ankylosis is defined as either: (a) complete absence of motion, or (b) planar restriction of motion preventing the subject from reaching the neutral position of motion in that plane. Dr. Caughfield specifically documented that Claimant's "[G]ait is left antalgic with equinus deformity and early toe strike with inability to reach neutral ankle." Dr. Reichhardt also found that Claimant could not "get to the neutral position." Therefore, Dr. Reichhardt and Dr. Caughfield's opinions with regard to the ankylosis of the ankle are more persuasive despite than contrary opinions of Dr. O'Brien, who is not persuasive with regard providing an impairment for ankylosis of the ankle. Respondents have failed to overcome the DIME physician's impairment rating with regard to the ankylosis. Dr. Caughfield's impairment due to ankylosis is correct.

Under the Impairment Rating Tips, Section 5 of Extremity Ratings, it states:

> The *AMA Guides, 3rd edition (revised)* does not include impairment ratings for foot and ankle fractures or arthritis. When documentation of functional change justifies a rating, choose a value from the given range that you deem appropriate for the injury. The following impairments must be **combined** with the appropriate range of motion impairment.

This ALJ infers from Dr. Caughfield's impairment rating that he opined that the fracture of the ankle was severe enough to justify a 15% lower extremity impairment. Claimant had a tibial pilon fracture. The Impairment Rating Tips indicate that an ankle fracture with malalignment including tibial pilon, may have up to a 25%. Dr. Caughfield designated less than the maximum. Based on the totality of the evidence, including review

[11] *Merriam-Webster Dictionary,*Merriam Webster, Inc,, 1st edition (January 1, 2016).

of the medical records, Respondents failed to overcome Dr. Caughfield impairment rating or that he was incorrect with regard to the impairment relating the fracture.

Further, Dr. Caughfield opined that Claimant had three types of loss of range of motion for the ankle. The first is dorsiflexion, which is what was measured to determine Claimant's ankylosed impairment. The other two are inversion and eversion. Dr. O'Brien agreed that the measurements made by Dr. Caughfield were valid. The *AMA Guides* specifically have requirements to measure all three of these losses independently and have an ankylosis table for dorsiflexion (Table 37) and for inversion and eversion (Table 38). Under Sec. 3.2 it states under Note: "Using an impairment rating of ankylosis excludes the simultaneous use of the abnormal motion measurements from the *same* table" (e*mphasis added*), and these are two separate and distinct tables. Therefore, it is inferred that the *AMA Guides* specifically require consideration for all three measurements. Whether these measurements are duplicative is a question of fact and this ALJ determines that they were not duplicative. These three measurements show a loss of range of motion and Dr. Caughfield's opinion with regard to the impairment due to these measurements are correct, despite Dr. O'Brien's contrary opinion. Respondents have failed to overcome the opinion of Dr. Caughfield in this matter.

Lastly, Respondents' argue that Dr. Caughfield failed to normalize the impairment rating for loss of range of motion for Claimant's finger injury. They rely on Dr. O'Brien's testimony that the AMA Guides require normalization. This ALJ reviewed the AMA Guides and was unable to find any mention of normalization. In fact, the Impairment Rating Tips under Section 1 of Extremity Ratings states that the AMA Guides "3rd Revised Edition has little commentary on this procedure." They also state that "when deemed appropriate, the physician may subtract the contralateral joint ROM impairment from the injured joint's ROM impairment." This ALJ infers from this commentary that it is discretionary with the DIME physician and in this case, Dr. Caughfield did not choose to do so. Further, the range of motion that Dr. O'Brien, Dr. Reichhardt and Dr. Caughfield obtained for the fifth digit were all different and simply a matter of when they were assessed. This is not sufficient to determined that the opinion with regard to range of motion of the finger was anything more than a simple difference of opinion, which is not sufficient to overcome the impairment rating by the DIME physician. Respondents have failed to overcome Dr. Caughfield's opinion with regard to the finger impairment by clear and convincing evidence.

This ALJ recognizes that Respondents need only prove that any one particular impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers'

Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence. However, in conducting this analysis, it has assisted the trier of fact in determining whether any particular element was overcome by clear and convincing evidence, in order to apply the lower burden, and it was not. Respondents' have failed to prove by clear and convincing evidence that Dr. Caughfield's opinions regard to the impairment assigned in this matter was incorrect. As found and concluded, Dr. Caughfield's impairment rating are appropriate and correct.

C. Treatments for the Hardware infection, Blood Clots and Heart Attack or Myocardial Infarction (MI)

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo.App. 1995). 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. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 11 (Colo. App. 2004). A Claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's preexisting condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). In *Seifried v. Indus. Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986) the courts determined that "[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition

to become disabling." However an injury nevertheless must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability. See *Colorado Fuel & Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). A claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). In other words, Respondents generally cannot be charged with the cost of treating non-work related conditions even if those conditions are discovered during the course of treatment for an industrial injury. See, *Antonio Prieto v. United Subcontractors, Inc.*, W.C. No. 4-572-001 (June 22, 2007), citing *5 Larson, Workers' Compensation Law*, § 94.03(5).

The duty to furnish medical care has been construed to also include paying for treatment of unrelated conditions when such treatment is necessary to achieve optimum treatment of the industrial injury. See *Public Service Co., supra; Merriman v. Industrial Commission, supra;.* In the *Public Service Co.* case, the court emphasized the factual nature of this determination and the Court of Appeals affirmed the ICAO decision requiring Respondent-Employer to pay medical benefits for treatment of a bipolar disorder to stabilize that condition before surgery was performed on Claimant's injured neck. The Court stated that "[T]he record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury," (relying on *Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App.1992). The Court further stated:

> [W]e conclude that ancillary treatment is a pertinent rationale for reasonably necessary care of a non-industrial disorder when such must be given 'in order to achieve the optimum treatment of the compensable injury' [5 Larson's Workers' Compensation Law]. *Id.*

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. 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).

In this matter, Claimant argues that the treatments for the hardware infection, and wound care, hardware removal, the blood clots, and the heart attack (MI) were all incident and/or caused or aggravated by the Claimant's ongoing lower extremity problems and were required care to treatment the sequelae of the lower extremity injury. These problems must be addressed separately.

1. <u>Wound Care (infection), Blood Clots, and Hardware removal</u>

Claimant has proven, by a preponderance of the evidence, that he is entitled to the medical care required for the wound care of the left lower extremity, the blood clots with subsequent occlusion and need for stent replacement, and for the subsequent infection and hardware removal due to the compensable work injury. In reaching this conclusion, the ALJ finds the opinion of the Industrial Claims Appeals Panel in *Jamie Gardea v. Express Personnel Professionals,* W.C. No. 4-650-961 (October 28, 2011), instructive. In *Gardea,* Claimant sought the provision of a gastric bypass procedure after injuring his ankle in an industrial accident and being unsuccessful in accomplishing the required weight loss on his own. In that case, the respondents suggested that claimant's need for bypass surgery was due to obesity that predated his industrial injury and because he needed it prior to injuring his ankle, there was no causal relationship to the work injury. In affirming the ALJ, the Panel found respondents' notion of the term "ancillary" overly narrow, concluding that it was not necessary for there to be a direct causal relationship in order for the bypass procedure to be compensable. Rather, as the Panel noted, in affirming the ALJ, all that was necessary for such treatment to be compensable is a finding/conclusion that it is necessary to achieve optimum treatment of the industrial injury.

The need for hardware removal was caused by the infection surrounding the tissue and potentially the hardware itself. Claimant continued to have lesions and open wounds from immediately after the surgery of September 21, 2017 throughout the time he was released at maximum medical improvement by the DIME physician and Dr. Reichhardt. Following the initial surgery, multiple medical providers, including Dr. Patel, the surgeon, referred Claimant to the St. Anthony Wound Care Center to address wound care. It is also clear from the record that Claimant had uncontrolled diabetes. This was documented by Dr. Henning when Claimant was transported to St. Anthony Hospital. It was also documented by Dr. Kyle Kirkpatrick of St. Anthony Hospital on November 22, 2016 and scheduled him to see his primary care physician.

The diabetes may have preexisted the condition, and in fact delayed the healing process, the same way obesity preexisted the injury and may have been a factor that kept Claimant from achieving MMI at an earlier date. However, treatment would have likely not been a factor but for the work related injury. This is supported by Dr. Patel's opinion that the hardware was infected. The infection was the cause of the continual open wounds, as supported by Dr. Reynolds and the St. Anthony providers that treated Claimant. Claimant had a prior injury caused by a gunshot to the leg and resulted in medical providers placing a stent in his artery. This is documented in the medical record history on October 3, 2017 by PA-C Morgan, who noted that Claimant had a history of insulin-dependent diabetes mellitus, histoplasmosis, and acute myocardial infarction, but no history of blood clots. As found, both or either required Claimant to obtain continual reasonably necessary wound care to address the open wounds and infection. As found, the blood clot clearly cause the occlusion and need for surgery. These were proximately caused by the September 21, 2017 work related injury and both the wound care and the hardware removal were reasonably necessary to treat the sequelae of the work related injury. Dr. O'Brien agreed at hearing that the blood clots, infection and treatment for the infection was related to Claimant's work-related injury and resulting surgeries. As found the care Claimant received at St. Anthony Central, St. Anthony Wound Care and Panorama Orthopedics as

well as by other providers that attend Claimant for the blood clots, infection and wound care were reasonably and necessary. As found and concluded, Claimant infection, blood clots and infection related medical treatment, including hardware removal, are related to Claimant's admitted work-related September 21, 2017 injury.

2. Heart Attack (MI)

It is clear, from the medical records that the myocardial infarction was not caused by the work related injury. Claimant had a history of MI problems, including a family history of MI. The question is whether the treatment for the MI was ancillary to treating the lower extremity fracture and the sequela caused by the ongoing open wounds, blood clots and infections. As found, it was not. The St. Anthony physicians on October 6, 2017 assessed that Claimant was having a myocardial infarction. While Dr. Murphy at Metro Community on November 14, 2017 noted the myocardial infarction may have been caused by the blood clot from the trauma to his ankle on September 2017, this was history that was being conveyed by Claimant, and not a medical opinion. Further, Dr. Patel also provided this history as recounted by Claimant. However, this ALJ perceives no concrete medical opinion from the record that concludes that the blood clots caused the MI and the fact that the MI was so close in time to the work related injury may very well be a coincidence. Dr. O'Brien provided testimony that the cardiovascular disease was related to multiple risks factors in this matter, including Claimant's uncontrolled diabetes and his obesity as well as his addiction to smoking. These are well known factors for the development of heart disease. As found and concluded, Claimant has failed to show by a preponderance of the evidence that any of the MI symptoms or treatment were either caused by the blood clots or that the MI was caused or aggravated by the work related condition.

D. Payment of Authorized, Reasonably necessary and Related Medical Costs

The requirements of Respondent's responsibility to pay for medical care that are reasonably necessary and related to the injury are set forth above and need not be repeated here. Respondents are liable for emergency treatment without regard to the right of selection or prior authorization. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, Claimant proved the treatment he received upon being transported for emergency medical services was reasonably necessary emergent treatment for the industrial injury, including but not limited to care by West Metro Fire Protection District, emergency room care at Emergency services Platte Valley Ambulance and Flight for Life Helicopter, and St. Anthony Hospital, wound care treatment at St. Anthony Hospital Wound Care Center and specialist at Panorama Orthopedics. Additionally, Respondents must reimburse Claimant directly for any compensable medical treatment he paid from his own pocket pursuant to. Section 8-42-101(6)(a) and (b); WCRP 16-10(F). Respondents must cover all authorized medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As a general matter our courts have held that medical "treatment" for purposes of § 8-42-101(1)(a) includes expenses for "medical or nursing treatment or incidental to obtaining such medical or nursing treatment," provided the emergent medical care teams.

Section 8-42-101(6), C.R.S. states in pertinent part as follows:

(a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, *the employer or carrier shall reimburse the Claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided*. An employer, insurer, carrier, or provider may not recover the cost of care from a Claimant where the employer or carrier has furnished medical treatment except in the case of fraud. (*Emphasis added*.)

(b) If a Claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the Claimant for the full amount paid. [co-pays and/or deductibles] The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

Respondents' admitted that the care for the Claimant's work related injuries for his lower extremity including St. Anthony Hospital and Panorama were reasonably necessary and related to the claim. Respondents indicated that they were negotiating with Medicare or Medicaid, whom paid for Claimant's care while the claim was under contest. However, Respondents admitted for the work related injuries including the fractures to the left ankle and the fifth hand finger on December 19, 2018 caused by the fall. However, the payment log dated January 7, 2022 fails to show any payment for any of the emergency medical care including emergency medical transportation, St. Anthony's Hospital emergency care and surgery to the left lower extremity or subsequent left lower extremity wound care, and any/all related care and treatment at Panorama Orthopedics and their referrals, nor to Medicare or Medicaid. It has now been over three years since that admission was filed. Claimant has proven that Respondents should have reasonably known that payment was due to these providers and the statute requires Respondents to make payment. Claimant has proven by a preponderance of the evidence that Respondents failed to make payment and require and order to accomplish this.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to overcome the DIME physician's opinion with regard to impairment by clear and convincing evidence. Respondents shall pay benefits and are ordered to file a Final Admission of Liability consistent with Dr. Caughfield's DIME report.

2. Respondents shall pay Claimant permanent partial disability benefits based on Dr. Caughfield's DIME impairment ratings of 63% left lower extremity impairment for the left ankle injury and 5% right hand impairment for left small finger rating.

3. Respondents are liable for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of the industrial injury, including the treatment related to the infection, hardware removal, blood clot causing occlusion of the preexisting stent, and the open wound care of the left lower extremity.

4. Claimant's heart attack/myocardial infarction is unrelated to Claimant's September 21, 2017 work-related injury. Claimant's claim for this care is denied and dismissed.

5. Respondents shall pay for all reasonable, necessary and related medical expenses incurred in connection with Claimant's work injury. Respondents are ordered to reimburse Claimant for any out of pocket costs and any insurer or governmental program in full and in accordance with the fee schedule up to any amounts paid by the third party insurer or governmental program for costs associated with medical care related to Claimant's work injury as found reasonably necessary and causally related to this claim as stated above.

6. Respondents shall pay interest to the lien holder for payment of medical bills at the rate of 8% per annum not paid when due.

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

8. All matters not determined 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 7th day of March, 2022.

Digital Signature

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the claim may be reopened pursuant to Sec. 8-43-303, C.R.S. as a consequence of error, mistake, fraud or change in condition.

IF CLAIMANT HAS PROVEN THAT THE CLAIM SHOULD BE REOPENED, THEN:

II. Whether Claimant has proven by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician's opinion was incorrect.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to permanent total disability benefits.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to further medical benefits,

V. Whether Claimant has proven by a preponderance of the evidence that he is entitled to penalties for alleged violations of procedural orders, including PALJ Barbo's orders of January 17, 2018, January 24, 2018 and June 6, 2018, PALJ Broniak's order of July 27, 2018, PALJ Sandberg's prehearing conference of August 5, 2019 and order of August 21, 2019, PALJ Phillip's order of October 8, 2021.

FINDINGS OF FACT

Based on the evidence presented at the hearing and multiple submissions accepted by this ALJ up to and through February 3, 2022, the ALJ enters the following findings of fact:

a. Procedural History

1. Claimant, through prior counsel, challenged the DIME physician's rating and requested further medical care. Respondents filed a Final Admission of Liability on May 26, 2017 admitting to a 7% whole person spinal impairment and a 1 % whole person impairment for psychological condition for a total 8% whole person rating, pursuant to the Division of Workers' Compensation Independent Medical Examiners' (DIME) opinion (Dr. John Sacha). Respondents' admitted to liability for post-MMI medical treatment provided by an authorized treating physician that was reasonable, necessary and related to the compensable injury. Attached to the FAL was the full DIME report.

2. PALJ John Steninger addressed holding the issue of permanent total disability (PTD) in abeyance on June 29, 2017.

3. A hearing was held before ALJ Kara R. Cayce on October 19, 2017. Claimant appeared *pro se*. On November 9, 2017 ALJ Cayce issued Findings of Fact, Conclusions of Law and Order. She determined that Claimant had failed to overcome the DIME physician's opinion by clear and convincing evidence and found Claimant failed to show he had any disfigurement. ALJ Cayce noted that Claimant testified at hearing that he continued to experience pain, paralysis, an inability to walk, blurred vision, and a change in his voice. He further testified that he sustained spine damage, traumatic brain injury, foreign-language syndrome, and a stroke or seizure due to the industrial injury. The claimant stated that he had been "mistreated" by various physicians and that they had committed "malicious acts" and "malpractice." He alleged that multiple physicians failed to consider his "neurological findings," specifically referring to Dr. Smith's May 31, 2016 note and Dr. Solomon's September 7, 2016 note. The claimant testified that Dr. Sacha erred by failing to address those medical records, along with a May 3, 2016 report by Dr. Rauzzino and a May 10, 2016 CT scan of the head.

4. Claimant appealed ALJ Cayce's order. The Industrial Claim Appeals Office (ICAO) issued an order on April 2, 2018 affirming ALJ Cayce's order.[1] Claimant filed a Notice of Appeal on April 11, 2018. On February 14, 2019, the Colorado Court of Appeals dismissed Claimant's appeal.[2] Claimant petitioned for certiorari, and the Colorado Supreme Court denied his petition.[3] On October 28, 2019 ALJ Cayce denied with prejudice Claimant's Motion to Vacate/void ALJ Cayce's November 9, 2017 order.

5. PALJ Michael Barbo issued a Prehearing Conference Order stating that Claimant was precluded from having the issue of PTD addressed at hearing until a final order was issued by the Court of Appeals with regard to ALJ Cayce's order.

6. Claimant proceeded to file multiple applications for hearing. ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgement in Favor of Respondents and Order Concerning Pending Motion on September 18, 2018 including issues of compensability; medical benefits; modification of temporary total disability benefits; death benefits; and, penalties. However, ALJ Felter ordered that Claimant could proceed on the issue of Permanent Total Disability benefits. Claimant filed a Petition to Review but the appeal was held in abeyance pursuant to ALJ Felter's order of December 13, 2018. Claimant filed a Petition to Review and the ICAO affirmed the decision.[4] Claimant did not pursue any further appeals in this matter.

7. On February 25, 2019 Paul Tauriello, Director of the Division of Workers' Compensation, issued an order prohibiting Claimant from filing any further Applications for Hearing without a PALJ order determining the ripeness of the issues.

8. ALJ Felter denied Claimant's motion for recusal and issued Findings of Fact, Conclusions of Law and Order on March 17, 2020 denying Claimant's claim for

[1] *Webster v. Czarnowski Display Service, Inc.,* ICAO, W.C. No. 5-009-761-08 (April 2, 2018).
[2] *Webster v. Industrial Claim Appeals Office*, 18CA0714 (Feb. 14, 2019)(NSOP),
[3] *Webster v. Czarnowski Display Service, Inc.,* 2019SC148 (April 22, 2019).
[4] *Webster v. Czarnowski Display Service*, W.C. No 5-009-761-003 (February 7, 2019).

permanent total disability benefits, maintenance medical benefits and Respondent's request for sanctions against Claimant for violation of PALJ Sandberg's Prehearing Conference Order. Of note, ALJ Felter found that "[W]ithout any medical or other visible means of support, the Claimant testified that he believes the opinions of Dr. Sacha are invalid based on allegations of fraud, malfeasance, and misrepresentations by Dr. Sacha, Respondents, Respondents' counsel and other treating providers." Neither did he find credible any allegations of collusion among providers or Respondents in the matter. ALJ Felter found the Claimant' testimony totally devoid of any merit or factual support in the record and rejected the same.

9. Claimant appealed ALJ Felter's order and the Industrial Claim Appeals Office affirmed the decision.[5] Claimant further appealed the decision. The Court of Appeals affirmed the ICAO's and ALJ Felter's order.[6] Claimant petitioned for certiorari, and the Colorado Supreme Court denied his petition.[7] Claimant exhausted the appeals process, and ALJ Felter's order of March 17, 2020 is final and not subject to further review.

10. On May 18, 2020 ALJ Felter issued an Order Concerning Filings which ordered Claimant to cease and desist from further filings during the pendency of his appeal. Despite the order, Claimant filed multiple applications for hearing. Following a prehearing conference on June 17, 2020, finding that Claimant had a profound misunderstanding of cases he cited to the ALJ and determining that there was a serious abuse of the Workers' Compensation Adjudication system to the detriment of other meritorious cases, ALJ Felter struck the applications and vacated four separate hearings.

11. On October 15, 2021 Claimant filed an Application for Hearing on multiple issues. On November 5, 2021 PALJ Marcus Zarlengo issued an order limiting the issues for hearing to the issue of Claimant's petition to reopen the claim. This ALJ affirmed that procedural order on November 15, 2021. This ALJ also denied Claimant's Motion for Summary Judgement on the same day.

12. At the time of the hearing Claimant failed to appear. Upon discussion with Respondents' counsel, he advised that Claimant had had prior problems signing into the Google Meet system. This ALJ called Claimant and provided instructions on how to sign into the video hearing in order not to cause further delays.

13. At the hearing, Respondents argued that if the claim was reopened without an award of benefits, the order would not be an appealable order. The parties agreed that, if Claimant was successful in reopening the claim pursuant to Sec. 8-43-303, C.R.S., all issues including medical benefits, permanent partial disability, permanent total disability, penalties, and appeal of the multiple prehearing conference orders, were all at issue for this hearing.

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[5] *Webster v. Czarnowski Display Service*, I.C.A.O., W.C. No 5-009-761-07 (August 26, 2020).
[6] *Webster v. Industrial Claim Appeals Office*, 20CA1529 (March 25, 2021) (NSOP).
[7] *Webster v. Indus. Claim Appeals Office*, 2021SC294 (August 16, 2021).

b. Recusal

14. At the commencement of the January 28, 2022 full day hearing, this ALJ addressed Claimant's Motion for recusal of this ALJ filed on January 10, 2022. The motion was not accompanied by the required affidavit, documentation or other evidence pertinent to recusal. The Claimant's Motion contains opinions and conclusions, based on the ALJ's previous rulings against the Claimant, and no assertions of evidentiary (basic) fact, which would create an individual in possession of the relevant facts to harbor doubts about receiving a fair and impartial hearing and decision. A litigant cannot trigger disqualification of a judge by assertions or allegations of bias and impartiality alone, challenging the judge's integrity, which the Claimant has done. The Claimant's motion for recusal was denied. The ALJ herein disregarded any insults by Claimant's and remains fair and impartial concerning the Claimant's claims.

c. Injury

15. Claimant was injured in the course and scope of his employment with Employer on Wednesday, March 9, 2016 when he tripped over a large tote while carrying a metal table base and fell. He stated that he was in the middle of a large area where his boss and other coworkers saw him fall. They ran over to help him up. He kept shaking his head because he immediately felt fuzzy vision. Once his vision cleared, he went to the tote or box and kicked at it, falling again. He continued to work that day, mostly walking around.

16. Once he went home that day, he started having symptoms in his arm, as if it was contracting and shaking. He also stated that he felt like someone jumped on his back and felt like something wrapped around his front. He stated that he passed out until Friday probably due to the pain. When he woke, he felt he was lost, scared and in pain. He called a friend to take him to his employer to ask for help. He was referred to Concentra for care.

17. Claimant reported the injury to Employer on March 11, 2016 and completed an Employee's Report of Work Related Injury. Claimant reported that he tripped and fell, hitting his chest and knee on the concrete. Claimant wrote that he sustained injuries to his right hand, left knee and low back.

18. Employer's First Report of Injury, dated March 15, 2016, noted that Claimant reported injuries to his right rib, left knee, lower back, and third and fourth right fingers.

d. Medical history

19. Claimant presented to Amanda Cava, M.D. at Concentra Health Services (Concentra) on March 11, 2016. Claimant reported that he fell, landing on his right hand and left knee. Claimant complained of lower back pain, left knee pain and right

thumb/wrist pain.[8] Dr. Cava noted normal musculoskeletal, spine, neurologic and psychiatric findings. X-rays of Claimant's right hand demonstrated no fractures, other than preexisting evidence of prior healed fractures. Dr. Cava diagnosed Claimant with a lumbar strain, wrist strain and knee contusion. She released Claimant to modified duty and recommended medication and occupational therapy.

20. Claimant continued to treat at Concentra with complaints of pain in his low back, abdomen, knees, and right thumb/wrist, as well as numbness in his left leg. On March 21, 2016, all other systems were reviewed and found to be negative. Claimant was released to regular duty. On March 25, 2016, Claimant reported to Dr. Cava with complaints of pain in his back and left side/ribs. X-rays of Claimant's chest revealed no acute fracture, infiltrates, or pneumothorax.

21. On March 29, 2016, Claimant was admitted to the emergency department at the University of Colorado Hospital complaining of pain in his low back, groin, and ribcage. Claimant was diagnosed with left-sided low back pain and left-sided sciatica, was referred for physical therapy, and provided with a medical excuse to be off work for two days.

22. On March 31, 2016 Claimant was evaluated by Dr. Brian Counts at Concentra. His principal complaint was abdominal pain, with back pain and abdominal pain radiating to his testicles. Dr. Counts noted a prior history of multiple fractures in the right hand and chronic posterior knee pain for several months. He had complaints of blurred vision, back pain, joint pain, muscle weakness and night pain together with numbness and tingling. After performing a full physical, musculoskeletal and neurologic exam, Dr. Count found normal findings with the exception of the spondylolisthesis at the L5-S1 level. He ordered an MRI of the lumbar spine.

23. Claimant underwent a lumbar spine MRI on April 8, 2016 which revealed (1) disc degeneration at L3-L4, L4-L5 and L5-S1, (2) L3-L4 mild bilateral lateral recess and foraminal stenosis without nerve root deformity, and (3) L5-S1 mild bilateral lateral recess and moderate to severe bilateral foraminal stenosis with compression of bilateral exiting L5 nerve roots.

24. Dr. Cava reevaluated Claimant on April 12, 2016 and assessed a lumbar strain, bilateral lumbar radiculopathy, muscle spasm of the back, and weakness of both lower extremities. She reviewed the lumbar MRI with Claimant and referred Claimant to Michael Rauzzino, M.D., an orthopedic spine specialist.

25. Claimant presented to Dr. Rauzzino on May 3, 2016. Claimant reported falling on his right hand and left knee. Claimant complained of pain in his back, sides and abdomen, numbness and tingling in his lower extremities, tingling in his neck, right shoulder and hand, neck stiffness, and trouble breathing. Dr. Rauzzino noted no acute sensory deficits on physical examination. He remarked, Claimant "had very diffuse

[8] Also shown on Pain Chart, C Exh. 8, p. 730. (Subsequent pain chart show progressively expanding complaints, C. Exh. 8, pp. 724, 722, 723, 718, 714, 712, 708, 705, and 702)

complaints of abdominal pain, headache, arm and hand numbness, low back pain, and leg numbness." Dr. Rauzzino commented that it was difficult to put complaints of symptom together anatomically. He stated that the lumbar spine MRI does not account for the symptoms and he did not see an acute structural change from his low back pain standpoint, therefore, he concluded that Claimant may have had a muscle strain and would benefit from physical therapy.

26. Dr. Rauzzino also recommended Claimant undergo an MRI of his cervical and thoracic spine and consider a referral for psychiatric evaluation due to the possibility of delayed recovery resulting from psychological issues. He stated that Claimant was not a surgical candidate for Claimant's low back injury.

27. On May 3, 2016 Dr. Cava reevaluated Claimant and made referrals for psychological evaluation for anxiety and depression due to the work related injury, and to a physiatrist for treatment as Claimant was not a surgical candidate.

28. On May 10, 2016, Claimant reported to Dr. Cava experiencing difficulty with his speech over the last two weeks. She remarked that Claimant's subjective complaints were greater than the objective exam findings. Dr. Cava diagnosed Claimant with bilateral lumbar radiculopathy, spondylolisthesis at L5-S1, thoracic strain, anxiety reaction, and dysarthria.[9] Dr. Cava recommended a head CT scan, which was negative for bleed, stroke, or other acute findings.

29. On May 31, 2016 Claimant sought treatment at the emergency department of Providence Health Center in Waco, Texas, with complaints of pain in his abdomen, back and leg, as well as a difference in his voice and a pulling sensation on the right side of his face. Jason Smith, D.O. noted, "He also states that he had a seizure-like episode yesterday in which he was shaking. Since then his voice has been dramatically changed, he has had tingling of both legs, and has had jaw pain." Claimant reported use of marijuana and family was concerned with possibility of a stroke. A CT scan of Claimant's head demonstrated no hemorrhage, mass or acute infarct. A CT scan of Claimant's abdomen/pelvis revealed questionable enlargement of the prostate gland and a pars defect at L5 with grade 1 anterolisthesis. Dr. Smith noted, Claimant had a very odd presentation, complains of slight shaking yesterday evening that was then associated with difficulty speaking. Dr. Smith assessed a possible stroke, with simple partial seizure and pars defect in the low back. Dr. Smith noted that he also discussed "the pars intra-articularis fracture with the patient."

30. Claimant testified that he went to the emergency room because his providers at Concentra were not listening to him and that Dr. Counts had advised him he had a fracture in his low back, a pars defect, but he was being forced to work despite

[9] According to the Mayo Clinic Patient Information website, dysarthria occurs when the muscles you use for speech are weak or you have difficulty controlling them. Dysarthria often causes slurred or slow speech that can be difficult to understand. Common causes of dysarthria include nervous system disorders and conditions that cause facial paralysis or tongue or throat muscle weakness.

restrictions and weakness in his limbs. He testified that he was turned away from the emergency room because he provided the workers' compensation information, making the association that they must have spoken with the insurance and that was the reason he was turned away. This ALJ does not find Claimant persuasive in this matter. It is clear from the hospital records that he was provided with a full work-up as they obtained a head/brain CT, and abdominal/pelvis CT scan, which were overall significantly normal, except for the pars defect and possible enlarged prostrate. Claimant was discharged with a diagnosis of simple partial onset seizure and neurosensory deficit. He was advised to follow up with his personal provider.

31. Claimant underwent an MRI of his thoracic spine on June 9, 2016 which revealed minimal disc bulges with no evidence of stenosis. Claimant also had an MRI of the cervical spine which demonstrated mild degenerative changes and disc bulging at multiple levels, with no acute abnormalities and no evidence of neural impingement.

32. Claimant's medical care was transferred to Concentra in Waco, Texas at this point. Claimant presented to Kathryn Wright, M.D. at Concentra on June 24, 2016. Claimant reported having gone to the emergency room with abdominal pain, back pain, leg pain, "his voice sounding different and a pulling on R side of face. He also said he had a seizure-like episode on 6/14/16." She remarked, "I spent close to an hour with this patient going over every work up of all of his MRIs, x-rays and ER visits. He is under the impression that since he never had any health issues before except a fracture to his R hand, all of his pain sites and changes are related to this fall injury." Dr. Wright physically examined Claimant and assessed bilateral lumbar radiculopathy, lumbar strain, spondylolisthesis at L5-S1, muscle spasm of back, thoracic strain, cervical sprain, and diffuse abdominal pain. Dr. Wright referred Claimant to a neurosurgeon.

33. Claimant presented to Stephanie Roth, M.D. at Concentra on July 20, 2016. Claimant advised Dr. Roth that he had done extensive reading and research on his condition and that he was concerned he had foreign language syndrome (FAS). Claimant attributed all of his problems to the work injury. Dr. Roth noted that Claimant demonstrated only 30 degrees of lumbar flexion on examination, but that on the exam table "he goes from supine to sitting up with legs out straight in full extension and able to quickly spin around 180 degrees to put legs at the other end of the table to exam is (sic) L knee." Dr. Roth further noted a normal neurologic and psychiatric exam, with speech appropriate in content and delivery. Dr. Roth assessed lumbar strain, muscle spasm of back, spondylolisthesis at L5-S1, and thoracic strain. She referred Claimant to a neurologist, physiatrist, and psychologist.

34. Claimant was seen at Scott & White Memorial Hospital on July 28, 2016, where x-rays of his lumbar spine showed L5 pars defects with grade 1 anterolisthesis of L5 on S1 and no significant abnormal translational motion.

35. Claimant was seen by a second neurosurgeon, James Cooper, M.D., on July 28, 2016. Dr. Cooper ordered x-rays of Claimant's lumbar spine, which demonstrated L5 pars defects with grade 1 anterolisthesis of L5 on S1 and no significant

abnormal translational motion. Dr. Cooper documented a normal examination and normal x-rays with no evidence of instability. Dr. Cooper opined Claimant was not a surgical candidate. Claimant was also evaluated by Dr. Hudspeth on this day and diagnosed Claimant with diffuse abdominal pain, bilateral lumbar radiculopathy and lumbar strain. As found, nothing in either Dr. Cooper's or Dr. Hudspeth's records showed findings or diagnosis that would change the decision made by ALJ Cayce.

36. Dr. Wright reevaluated Claimant on August 9, 2016. Dr. Wright remarked that she spent extensive time with Claimant regarding all of his complaints and did a thorough examination. She stated Claimant had no neurological deficits and she found no tenderness to palpation on his body from head to toe. Dr. Wright listed Claimant's complaints of pain, paresthesias, voice changes, sore throat, chest wall pain, abdominal pain, and decreased sensation of the scalp. She confirmed that multiple imaging studies had been performed without identification of brain injury, abdominal pathology, or anything other than degenerative discs with mild stenosis.

37. Dr. Wright also evaluated Claimant on August 22, 2016. She noted the chief complaints as "injuries to neck, low back, stomach, left knee and right wrist c/o pain and tingling that start from middle back and radiates to groin area." She documented that the pain in the abdomen extended to both legs to below the knees together with burning pain going down both thighs. Claimant stated that he was getting weak with head shaking sometimes. In her review of systems she detailed that Claimant had blurred vision, chest pressure, pain with bending, but no tenderness to palpation, negative straight leg test and normal sensation. She also commented regarding Claimant's accent but stated that he had normal volume, pace and tone. Her diagnosis was consistent with prior diagnosis. She referred Claimant for further neurological workup and impairment rating.

38. On September 7, 2016, Claimant presented to Martin Solomon, M.D. He sent Dr. Wright a two page letter. Dr. Solomon stated, "This patient reports a history of a work-related injury with resultant neck and low back pain. The patient does report pain in his low back moving down his lower extremities, which may be due to S1 radiculopathies, based on the results of the MRI scan." Dr. Solomon also stated that Claimant had "intermittent speech with a foreign accent. This suggests a possible traumatic brain injury." Dr. Solomon recommended Claimant be referred to pain management for further treatment of his low back pain. As found, the records admitted into evidence from Dr. Solomon failed to opine that Claimant's symptoms of FAS or TBI were work-related.

39. On September 2, 2016 Dr. Wright amended her August 22, 2016 report to retract the referrals she made. On September 15, 2016 she made further amendments to her report stating that she received Dr. Solomon's letter and advised Claimant keep scheduled appointments and/or return to Concentra.

40. Claimant was placed at maximum medical improvement (MMI) by Murray Duren, M.D. at Concentra on September 12, 2016. Claimant continued to complain of back, knee, wrist, abdominal pain and seizure or stroke. Dr. Duren documented, "After lengthy discussion by [Claimant] regarding his problems including his preexisting

conditions and subsequent health issues not supported by the mechanism of injury nor initial presenting complaints, the recommended Physical Examination was refused by [Claimant].” Dr. Duren assessed a lumbar strain, left knee contusion and right wrist sprain and released Claimant to regular duty with no restrictions.

41. John Burris, M.D. at Concentra performed an impairment assessment on October 21, 2016. Dr. Burris remarked, “Clear psychosomatic overlay presented throughout today’s encounter. He is tearful at times when discussing his claim. He is a very poor historian with bizarre symptomatology described.” Dr. Burris reviewed Claimant’s medical records and performed a full physical examination. The diagnostic work up was negative and Claimant's pain diagram did not follow a neuro-anatomical pattern. Dr. Burris found Claimant's examination to be benign with no objective findings. He noted that no pain generator had been identified and Claimant was seen by two neurosurgeons who had not recommended any type of surgery. Dr. Burris found that Claimant was at MMI with no evidence of residual deficits and concluded that Claimant did not sustain any permanent impairment. Dr. Burris did not recommend any permanent work restrictions or maintenance care.

42. Claimant underwent a psychosocial evaluation with Dr. Susan Frensley on March 21, 2017 to determine his mental status for purposes of disability coverage as referred by the Texas Department of Disability Determination Services. Claimant alleged to Dr. Frensley that he hit his head on the ground during the fall at work in March 2016, but did not know if he lost consciousness. Claimant reported that his speech changed in April 2016, which he described as “[I]t felt like a strain coming from my stomach to my throat. It felt like an octopus grabbing my stomach.” Dr. Frensley remarked that Claimant’s “speech is decidedly a Jamaican accent and seems consistent with Foreign Accent Syndrome,” which she noted is most often caused by damage to the brain or a stroke. She stated that despite the FAS, Claimant’s speech remained highly intelligible and was not disordered. Dr. Frensley noted that Claimant had some difficulty relating history. Claimant denied any depressive symptomology.

43. Respondents filed a Final Admission of Liability (FAL) based on the opinion of Dr. Burris. Claimant’s counsel, at the time, filed a timely Objection to the Final Admission of Liability and requested a DIME.

44. John Sacha, M.D. performed the DIME on April 18, 2017. He noted that he was asked to review Claimant’s left-side, which he deemed not work-related, and for “any other areas deemed work related by the examiner.” Dr. Sacha noted that he reviewed all of Claimant’s medical records in detail. Dr. Sacha performed a physical examination, including cognitive, cutaneous, neurologic and musculoskeletal exams. Claimant complained of, among other things, low back pain with radiation to the left abdominal and groin area and lower extremities, neck pain, mid-back pain, numbness and tingling in his arms and thumbs, seizures, anxiety and shakiness. On physical examination, Dr. Sacha noted marked pain behaviors and a normal gait pattern with free and easy movement onto and off of the exam table. Dr. Sacha further noted some paraspinal spasm and pain with range of motion, negative straight leg raise and neural tension tests bilaterally, full

neck range of motion, and minimal crepitus with range of motion in knees bilaterally. He remarked that Claimant had a non-physiologic presentation. Dr. Sacha determined that the majority of Claimant's complaints were not work-related, including personality disorder, cervical complaints, shoulder complaints, brain and shakiness complaints, and knee complaints. He opined that Claimant's low back injury was work-related and ratable.

45. Dr. Sacha opined Claimant reached MMI as of October 21, 2016. He assigned a total combined 8% whole person impairment under the AMA Guides, consisting of a 7% whole person lumbar impairment (5% under Table 53IIB and 2% for range of motion deficits), and a 1% whole person impairment for psychiatric dysfunction. Dr. Sacha agreed Claimant could work full duty without any restrictions. As maintenance care, Dr. Sacha recommended six visits to a pool therapist and six-months of a psychiatric medication regimen.

46. Dr. Sacha specifically states:

> I reviewed all of the medical records in detail and looked at his examination despite the myriad of non-work-related complaints. It does appear that he has had a consistent complaint and findings of low back issues, and I do feel the low back is work related and ratable. I do feel that he also qualifies for a small Impairment from a psychiatric dysfunction because of his poor coping skills and poor people skills. He likely needs some maintenance medications from a psychiatric standpoint to help with these Issues and the adjustment disorder… All other areas and complaints are deemed not work related.

47. Claimant was evaluated on March 21, 2017 by Dr. Susan Frensley, PhD at the request of the Texas Disability Determination for Social Security Administration. ALJ Cayce noted that Claimant only submitted page two of five.[10] However, pages one through five were found in the Court of Appeals record.[11] This documents Claimant's multiple symptoms, including Claimant's ability to work though he may not be able to do so consistently due to anxiety and chronic pain. She diagnosed Somatic Symptom Disorder with anxiety and chronic pain. She stated that Claimant was devoting excessive time and energy to his symptoms and health concerns. She also diagnosed conversion disorder with speech symptoms (FAS), which was only provisional. While this may have been inadvertently missed by ALJ Cayce, it is found, that the diagnosis and findings do not address causation and does not specifically attribute the conditions to the work related injuries, and is a harmless error. As found, Dr. Frensley's opinion does not support a different conclusion than that found by the DIME physician, or that Claimant failed to overcome the DIME opinion by clear and convincing evidence, as found by ALJ Cayce.

e. Claimant's alleged "New Medical Evidence."

48. Claimant submitted and is relying on "new medical evidence" in support of his arguments with regard to error, mistake or change of condition. (Claimant's Exhibit 2,

[10] ALJ Cayce Order of November 9, 2017, Finding of Fact No. 26.
[11] Claimant's Exhibit 7, pp. 172-179 (pp. 57-62 of the COA record, tabbed as Claimant's prehearing submissions).

C.Exh. 2). Exhibit 2 consist of 90 pages. The first record that was not dated prior the hearing held before ALJ Kara Cayce was a four page report[12] and consisted of an Individual Psychotherapy Treatment session with Ms. Lindsey Kidd, M.S., LPC, Intern, dated March 14, 2019. The records showed that Claimant participated in six sessions of therapy, was cooperative with the treatment but demonstrated limited ability to utilize the coping skills to help address his symptoms of depression and anxiety. He demonstrated some slight ability to cope with pain. Ms. Kidd stated that Claimant had plateaued with the treatment and recommended discharge. (The vocational report issued by Ms. Kristine Harris on December 9, 2019 lists the treatment Claimant received from January 24, 2019 through March 14, 2019.[13])

49. The next records were three pages of Texas Worker's Compensation Work Status Reports.[14] They were illegible, and this ALJ was unable to clearly detect the date or the author of the documents. However, two of these reports were found in a different exhibit[15] dated October 24, 2018 and December 8, 2018 by Dr. Gist. He provided work restrictions and noted that the work injury diagnosis were for the low back and psychological issues limited to coping skills. This ALJ infers that these are maintenance care status reports.

50. The next new record in Exhibit 2 was from Dr. Duane Marquart, a chiropractor and radiologist, reading x-rays dated April 5, 2019 which showed degenerative changes of the lumbar, cervical and thoracic spine.[16] These records did not provide a causation analysis or any other analysis that might support reopening.

51. No other "new evidence" medical records were found in this exhibit, though there are multiple other illegible records and pleadings.

f. Other medical records submitted after the October 19, 2017 hearing before ALJ Kara Cayce

52. Claimant was seen at Baylor Scott & White Medical Center on November 15, 2017.[17] The record is for a lumbar spine MRI. The impression was of L5-S1 spondylolysis and spondylolisthesis with foramen but no spinal stenosis; tear in the midline annular fibers at L4-5 with a minimal disc protrusion without spinal stenosis; facet arthritis does result in foramen stenosis.; and bilateral facet arthritis and disc bulge resulting in spinal and foraminal stenosis at L3-4. As found, this report shows nothing that would change the decision made by ALJ Cayce on November 9, 2017. The MRI findings are consistent with ongoing degenerative condition and there are no causation

[12] Claimant's Exhibit 2, pp. 78-81, tabbed as Slides 69-72. (Note: there are multiple reports in this exhibit that are not legible.)
[13] Claimant's Exhibit H, pp. 795-796.
[14] Claimant's Exhibit 2, pp. 82-83, Slides 73-75.
[15] Claimant's Exhibit H, pp. 801-802.
[16] Claimant's Exhibit 2, pp. 85-88, tabbed as Slides 76-79. These can also be found at Claimant's Exhibit I, pp. 803-804.
[17] C Exh. 7, Post Hearing Submission in Court of Appeal File)

analysis that relates the continued degenerative process to the March 9, 2016 work related injuries. As found, nothing in this document supports reopening in this matter.

53. Claimant was evaluated by Dr. Shamonica L. Trunell, a chiropractor on April 5, 2019[18] with complaints of multiple issues including the neck, low back, buttocks, bilateral hands, hamstrings, calves, feet and shoulders. Dr. Trunel stated Claimant had multiple trigger points, spasms, tender points, decreased range of motion and his muscles were starved of oxygen. Under assessment he stated that the goal was to continue treatment to decrease inflammation, segmental dysfunction, muscle spasm. He performed chiropractic manipulation to increase articular motion and flexibility. As found nothing in this report indicates that Dr. Trunell made a causation analysis of the multiple complaints, was recommending treatment to treat the March 9, 2016 work related injuries, and addressed permanent impairment or permanent total disability.

g. Claimant's fraud arguments

54. Claimant stated that he was dissatisfied with the medical treatment he had received and believed he had been "mistreated" by the physicians at various medical facilities. He testified that his providers had him on 5 and 10 lbs. lifting maximum but his physical therapists were pushing him to do up to 50 squats, lifting 50 to 110 lbs. He stated that he kept feeling weaker and weaker all the time while he was working, especially with his arms, but no one would listen to him. He testified that he went multiple times to his employers' human resources department to request that they change his medical provider because they were not listening to him but they never did. Claimant believed that the physicians that treated him committed "fraud." However, Claimant also testified that he was off two days following the accident and then returned to work but when he was provided with work restrictions on April 8, 2016 he was laid off. The FAL dated May 26, 2017 showed Respondents paid for temporary total disability benefits for March 9 through the 21st, 2016 and April 1, 2016 and to MMI. This would show that Claimant may have been working only from March 22, 2016 through March 31, 2016, only 8 working days. Due to the inconsistency of these statements, Claimant is not persuasive in this matter.

55. Claimant acknowledged that he had seven different attorneys representing him on his claim and that, at the time of the DIME with Dr. Sacha, he was given a copy of the DIME packet by one of his prior attorneys. Claimant further stated that at the time of the appointment Claimant himself provided supplemental records to Dr. Sacha for his review.

56. Claimant testified that Dr. Sacha failed to perform his job as a DIME physician, specifically stating that he received a call in violation of Sec. 8-43-503, C.R.S. As found, this section addresses utilization review of authorized treating providers, not DIME physicians.

[18] Found at Exhibit I, pp. 805-807.

57. Claimant stated that "someone" called Dr. Sacha with instructions that included that Dr. Sacha should not review the left side of his body. Claimant testified that there was no other possibility than Respondents calling the physician to provide these instructions. It is specifically found that Dr. Sacha did not receive a call but that he was following the instructions on the paperwork submitted by the parties to review body parts pursuant to the W.C.R.P. Rule 11. Nothing in the report indicates that Dr. Sacha received a call from anyone but that he "was asked to review the left side," which Dr. Sacha concluded was not work related. This ALJ declines to make any inference otherwise. As found, neither Dr. Sacha nor the parties communicated in this matter other than pursuant to allowed procedures.

58. Claimant also testified that Respondents had conspired with Dr. Wright. Claimant alleged that after he had a phone call from the adjuster and discussed with the adjuster that his medical providers were treating him well, all of a sudden things changed and he was placed at MMI suddenly. Dr. Wright did document that there was contact from Colorado, but not whether the contact was from providers from Colorado or from someone else. As found, this ALJ finds no collusion here.

59. Claimant argued that Respondents were committing fraud based on the fact that Dr. Wright changed her report after receiving a call from Colorado. This ALJ declines to make that inference. There is no credible evidence that Respondents acted inappropriately and this was addressed by ALJ Felter in his order, which Claimant was unsuccessful in appealing. This ALJ determines not reopen this case based on allegations alone. Claimant also attempted to implicate his own attorneys as complicit in the acts supposedly perpetrated by Respondents. As found, Claimant has failed to show that there was fraud in this matter.

h. Claimant's mistake arguments

60. Claimant alleged during his testimony that multiple physicians, including Dr. Sacha, failed to consider all of his medical history, medical records and the history of his complaints following the injury. Claimant specifically referred to the fact that Dr. Sacha did not review his complaints as listed by prior providers, including the list of fourteen complaints provided by Dr. Duren on September 12, 2016 and by other providers. As found, Dr. Duren did consider the list of complaints and ultimately assessed that Claimant only had a lumbar strain, contusion of the left knee and sprain of the right wrist as the work related problems.

61. Claimant testified that Dr. Sacha erred by failing to address those medical records he stated were favorable to him (Claimant) and alleged that Dr. Sacha failed to address Dr. Rauzzino's May 3, 2016 record, Dr. Cava's May 3, 2016 report, the May 10, 2016 CT scan and Dr. Solomon's report of September 7, 2016. He stated that these records contained evidence of neurological findings supporting his position, including a head injury. As found Dr. Sacha specifically refers to Dr. Rauzzino in the DIME report, noting that Dr. Rauzzino did not feel Claimant was a surgical candidate. Moreover, Dr. Rauzzino's May 3, 2016 note specifically stated that he did not document any acute

sensory deficits or acute low back structural change. The DIME report also references the CT scan of Claimant's head, which was negative. While he does not mention Dr. Solomon's report specifically, as found, Dr. Solomon did not relate the possible TBI to the work related condition and DIME physicians are only obliged to review the records not include an exhaustive list of all the records they have reviewed. It is found that, while Dr. Sacha did not list every report he reviewed, his findings were supported by the records he reviewed. As found nothing in the evidence provided by either party shows the DIME physician a mistake when issuing his report.

62. Next Claimant testified that since the January 2010 imaging demonstrated that he had no preexisting pathology, that Dr. Sacha and Dr. Burris were incorrect in stating that he had a preexisting condition. This ALJ finds this evidence unpersuasive. As found there were approximately six years between these events and a significant portion of the pathology of his spine was showing degenerative changes by 2016. Further, as found, Claimant admitted that the 2010 documents were before ALJ Cayce for consideration when she issued her order. Notwithstanding the fact that there were preexisting degenerative changes, Dr. Sacha rated the lumbar spine without apportionment, providing a 7% whole person impairment, including 5% for specific disorder and 2% for loss of range of motion. Ultimately, as found, this ALJ fails to see any fraud, mistake or a reason to support reopening based on this argument.

63. Claimant conveyed that Dr. Wright did not give him any documentation that he was going to be placed at MMI, she just stated she would await Dr. Solomon's findings and then he was released from care. He highlighted the fact that "someone" must have changed her report because the August 22, 2016 report then stated that she was withdrawing her referral to neurology after she received a call from Colorado and read the September 7, 2016 report from Dr. Solomon, which only recommended pain management for the low back despite Dr. Solomon's indication that Claimant may have a possible TBI.[19] Claimant stated "someone," he assumed the adjuster, spoke to Dr. Wright, or that the report was changed by "someone." As found, there is no persuasive evidence to support these allegations and it is clear from the August 22, 2016 report and addendums, Dr. Wright is the one to have made both amendments on September 2 and September 15, 2016.

64. Claimant argued that Respondents were in violation of Sec. 8-43-503(3), C.R.S., which states "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment." Claimant contended that Respondents contacted multiple providers throughout his claim. There is no error here as the evidence presented show that Claimant or his attorney, were notified at the same time as the medical providers of the communications or that the communications were not the complete document and this ALJ declines to assume that Claimant or his multiple counsels were not provided the documentation at the same time. Neither did Claimant deny receiving a copy of the letters at the same time they were sent to the providers. These arguments were before ALJ

[19] Traumatic Brain Injury.

Felter and will not be further readdressed. This ALJ is not persuaded that any of the communications or partial communications were dictating care and so finds. Also as found, nothing presented with regard to this argument supports reopening of the claim.

65. Lastly, Claimant argued that ALJ Felter was mistaken in failing to provide him maintenance medical benefits. However, the records submitted to ALJ Felter were the same ones before this ALJ with the exception of several records that do not recommend maintenance care for the diagnosed conditions causally related to the March 9, 2016 injuries. ALJ Felter found that based on the totality of the evidence and multiple references by providers as to Claimant's unwillingness to cooperate and symptom magnification, that no further maintenance care was reasonably necessary and related to the injury. This ALJ finds nothing to persuade that there was a mistake in this finding or anything to persuade this ALJ that sufficiently supports the reopening of the claim.

i. Claimant's error arguments

66. Claimant testified that Dr. Sacha was incorrect when he reviewed Dr. Rauzzino's report May 3, 2016 report, stating that Claimant was not a surgical candidate. Claimant emphasized the Dr. Rauzzino noted that there was "no simple surgery at this point," but that mean that there may be a complicated surgery. This ALJ notes that Claimant is taking this casual statement out of context. Dr. Rauzzino is very clear that Claimant had "no acute structural change" from his low back, had "a muscle strain," had "diffuse complaints" and numbness and would only benefit from physical therapy. He went on to state that the diffuse complaints and psychological overlay were the ones interfering with any other recommendations. Further, another surgeon, Dr. Cooper, opined Claimant was not a surgical candidate. This ALJ finds no error or mistake in Dr. Sacha's reasonable deductions of Dr. Rauzzino's report.

67. Next Claimant emphasizes that Dr. Rauzzino ordered MRIs of the thoracic spine and the cervical spine. The thoracic spine films showed degenerative changes and minimal bulging disc at multiple levels without stenosis. The cervical spine MRI showed multiple broad based central disc bulges or protrusions causing mild stenosis. Claimant testified that both Dr. Burris and Dr. Sacha erred in failing to appreciate the damage to Claimant's thoracic and cervical spine since he had no symptoms before the injury and had continued to have symptoms after the injury. Claimant further testified that both physicians minimized the damage to his spine. ALJ Cayce had this information before her at the time she issued her order in this case and these arguments were proffered during the prior hearings. This ALJ also agrees that the information presented does not rise to the level of clear and convincing evidence to overcome the causation opinion of Dr. Sacha in this matter. As found, this information rise to the level of an error or mistake that may allow Claimant to reopen his prior closed claim or litigation.

68. Claimant alleged that Dr. Sacha and Dr. Burris also disregarded the records of Dr. Solomon dated September 7, 2016 because Dr. Solomon diagnosed the TBI and other conditions. It is found that Dr. Solomon did not determine that the TBI

was work related. His conclusions and recommendations focus solely on the low back, which is what was rated in this case. As found, Claimant failed to prove error here.

69. Claimant stated that Dr. Sacha was in error because his report had conflicting information. Claimant mentioned to Dr. Sacha that he had a change in his voice as a result of the work related injury. Dr. Sacha advised him multiple times that he would terminate the DIME examination if he brought this issue up again, but he never did despite Claimant advising him multiple time that his voice changed. He also stated Dr. Sacha made an error because of the conflicting information that was in the report about walking normally but that Claimant continued to have pain. This ALJ finds nothing in conflict. One is Claimant's perception and symptoms, the other are the medical findings and opinions of the DIME physician. A DIME physician is permitted to review the records, make causation determinations based on those records he reviews and determine which, if any, are the conditions related to the claim that are rateable. As found, Dr. Sacha issued a report consistent with his findings that Claimant only had a spine impairment and a minor psychological adjustment problem related to the claim. This ALJ finds no error, mistake or fraud in Dr. Sacha's report or ALJ Cayce's conclusions with regard to the report.

70. Claimant stated that there was an error by Dr. Sacha in misreading the CT of the head dated May 10, 2016. Claimant focusses on the words "seizure vein and tightness since trauma 2 weeks ago." However, these are simply the "indications" or reasons for having the CT performed, not the findings. In fact, as found, the findings of the CT indicate that the cerebral cortical grey matter was normal and all other findings were normal. This ALJ concludes that there was no error here.

71. Claimant alleged that he had dysarthria and anxiety that were diagnosed and then overlooked. Dr. Duren on September 12, 2016 issued two separate reports. One of the reports stated that Claimant complained of 14 different issues including abdominal pain, anxiety, bilateral lumbar radiculopathy, dysarthria, lumbar strain, muscle spasm of back, paresthesias/numbness, radiculopathy, rib pain, spondylolisthesis al L5-S1 level, sprain of ligaments of cervical spine, strain of thoracic region, testicular/scrotal pain and weakness of both lower extremities. As found, Dr. Duren provided only an assessments as lumbar strain, contusion of the left knee and sprain of the right wrist as the work related problems. This ALJ infers that these are the work related diagnosis. This ALJ found particularly persuasive his statements as follows:

> Attempted discussion of the diagnoses, mechanism of injury, preexisting conditions, significance of the previous imaging results, findings of the neurosurgical consultation, cause of ongoing chronic pain and Impairment Evaluations regarding Colorado was unsuccessful and met with hostility and accusations of "you re [sic.] lying " and "you get paid by the insurance company."

72. Claimant testified that Dr. Murray Duren was not authorized to place Claimant at maximum medical improvement on September 12, 2016. He complained that Dr. Wright was his authorized treating physician and was the only authorized treating physician that had the authority to place him at MMI because she was the primary

authorized treating physician. Claimant also argued that Dr. Duren did not place Claimant at MMI on September 12, 2016. As found, there were two separate reports dated September 12, 2016. The first one documented examinations and a list of problems. The second clearly stated that Claimant was released from care, was at MMI without restrictions and may return to work his entire shift. It is found that both Dr. Wright and Dr. Duren were authorized treating physicians within the statutory definition, both worked at the same clinic and were authorized to treat Claimant, the same way that Dr. Counts, Dr. Cava, Dr. Hudspeth, and Dr. Rauzzino were authorized treating physicians working within Concentra. It is found that Dr. Duren was authorized to make an MMI determination and no error or mistake was made with regard to the diagnosis or finding of MMI to support reopening.

73. Claimant contended that records received by Claimant from social security were clear evidence that the prior findings with regard to permanent impairment was incorrect because Dr. Trunell, a chiropractor, in reading an x-ray found that Claimant had spondylolytic spondylosisthesis of the L5 of 15%. As found, this is simply the degree of fracture and slippage of the vertebra, not an impairment rating in accordance with the *AMA Guides to the Evaluation of Permanent Impairment* that are required to be used under by the Act by providers that are Level II accredited by the Division. Nothing in the records indicated that Dr. Trunell is a Level II accredited provider and this ALJ takes judicial notice of Sec. 8-42-101 (3.5) (a) (I) (A), C.R.S. that a chiropractor may only attain Level I status. As found, Claimant has failed to show mistake in the determination of impairment in this matter and ALJ Cayce made no mistake in finding that Claimant failed to overcome the DIME physician's opinions with regard to causation or impairment.

74. Claimant attempted to persuade this ALJ that ALJ Felter failed to provide a penalty because Respondents terminated temporary disability benefits in contradiction to Sec. 8-42-105(3)(C), which states that benefits cannot be terminated until a "the attending physician gives the employee a written release to return to regular employment." Claimant was found at MMI as of September 12, 2016 by an ATP, who released him to full employment. Benefits terminated pursuant to statute upon reaching MMI. This ALJ fails to see an error where benefits were provided in accordance with the Act.

75. Claimant also testified that he had an electronic box put on his back, which caused seizures on multiple dates. While this ALJ reviewed the records regarding the seizures, including the ER visit with Dr. Smith on May 31, 2016, the records do not suggest that the seizures occurred due to the work related injuries. Dr. Smith specifically stated that "patient's seizure history also seems to be consistent with simple partial seizure last night this is way too long for the patient to be postictal or Todd's paralysis. We'll treat with aspirin..." The records prior to this included Dr. Wright's referral for a CT scan of the head that was negative for bleeds, stroke or acute findings. Claimant later reported a seizure like episode on June 14, 2016. This ALJ determines that the evidence clearly indicated that the seizure disorder, stroke or foreign language disorder are not related to the work related injuries. No error, mistake or fraud has occurred that would justify a reopening and the already litigated claims or revisiting the findings, conclusions and orders by the prior ALJs. Further, at the time of the hearing, this ALJ did not perceive

any problems or alterations of Claimant's voice (FAS), volume, pace and tone, throughout the time Claimant was speaking at the January 28, 2022 hearing for over four hours, either while testifying or providing substantive arguments. In fact, this ALJ specifically finds that Claimant was extremely fluent in English, had cohesive thoughts and could articulate complex concepts and legal arguments throughout the hearing, though his arguments were sometimes not focused on the issues that needed to be addressed during the hearing or the specific evidence that supported his arguments.

76. Next Claimant stated that ALJ Felter was in error when he stated that Dr. Duren had not found that there was a TBI in this case as Dr. Duren listed that as part of the complaints that Claimant had. This ALJ interprets the list of "active problems," as complaints that Claimant was concerned about during the course of his care following the work related accident, not as diagnoses. Dr. Duren went on to state what the work related diagnosis were and none included a closed head injury, brain injury, stroke, neck injury or other work related injuries other than those expressed in his diagnosis and the DIME physician's report of impairment. This ALJ finds that Judge Felter did not commit any errors in this regard and Claimant has failed to show that there are any errors that would justify reopening of the claim.

77. Claimant also debated that ALJ Felter committed an error by putting great weight on the opinions of Drs. Duren, Burris and Sacha when determining that Claimant was not permanently and totally disabled. ALJ Felter found that all three advised that Claimant could return to regular duty and found them credible. Claimant again argues that Dr. Duren was not his authorized treating physician and that he did not release him to work. Claimant's arguments are faulty as stated above. As found, the ALJ had the discretion to make credibility determinations and proceeded to do so. Further as found, ALJ Felter's order was unsuccessfully appealed by Claimant. Nothing in the presentation during the hearing or the evidence submitted provides sufficient evidence upon which to base a claim of error sufficient to reopen the previously litigated claim.

78. Claimant contended that Ms. Kristine Harris' vocational report, introduced into evidence by Respondents, supported the arguments that she listed all records that were not listed in either Dr. Burris nor Dr. Sacha's reports, showing their bias against Claimant, which were beneficial to Respondents and minimized his complaints. But even Ms. Harris only relied on those reports that supported that Claimant could return to work. This ALJ finds no error in this. Physicians, like judges, do not have to regurgitate each and every medical record or report they have reviewed and Claimant testified that he had a copy of the DIME packet submissions and, in fact, took more records to the DIME for his consideration, when he was seen by Dr. Sacha. As found, Claimant was not persuasive in this argument.

79. Claimant claimed that ALJ Felter incorrectly denied him penalties as he is entitled to penalties for "negligence of a stranger," citing Sec. 8-42-203, C.R.S. This statutory provision applies to injuries (or death) caused by the negligence of a stranger and Claimant's ability to obtain benefits from that third party, that are not normally paid by under the Act. It also allows Respondents to seek a right of subrogation if Claimant

recovers from that third party tortfeasor. This ALJ finds that there is no error here either as there are no third party tortfeasors.

80. Claimant argued that ALJ Felter erred when he stated that there was no medical evidence to support that Claimant sustained any closed head injury, brain injury, stroke, neck injury, or other physical or psychiatric injury. As found, Claimant mischaracterized ALJ Felter's Finding of Fact 14 as he stated that there were no permanent injuries related to the claim other than those expressed by Dr. Sacha, the DIME physician in this matter. As further found, it is inferred that ALJs Cayce and Felter were not persuaded or found credible any documents or records that indicated that there were any permanent impairments related to the claim other than the lumbar spine injury and the psychological sequelae of the injury that Dr. Sacha found causally related to the March 9, 2016 injuries, despite any evidence to the contrary.

81. This ALJ finds and agrees with ALJ Felter who, at Finding of Fact No. 16 stated in his order of March 17, 2020:

> The Claimant also testified that other doctors who have treated him, including Dr. Cava and Dr. Solomon, had at times placed him on modified duty, diagnosed other work related injuries including, but not limited to, TBI and traumatic changes to his voice patterns, which were either overlooked or ignored or intentionally misrepresented by his other treating doctors, Respondents and ALJ Cayce, among others. The ALJ finds no credible evidence of any such collusion among the treating doctors, Respondents and/or the OAC or DOWC PALJs.

82. Lastly, Claimant made several other allegations, including but not limited to violations pursuant to Sec. 8-43-503(3), C.R.S. as a result of permitted communications with medical providers; failure of Respondents providing the court with a complete set of the medical records, and change of condition. This ALJ finds these arguments without merit and need not address the specific allegations as they are not supported by the facts, the medical records, or legal authority. Despite Claimant's allegations of wrongdoings, mistake and fraud, this ALJ finds none. It is clear that the medical providers, including the DIME physician, while noting the deficits Claimant was experiencing as well as the complaints, did not relate all other conditions to his workers' compensation claim and injuries of March 9, 2016. It is specifically found that even if there were any evidence that could have been inferred or interpreted as complicity among the providers and Respondents, that evidence is not credible and does not support a determination that there was any fraud, error or mistake to support a reopening of the prior decisions in this matter.

j. Claimant's appeal of the Prehearing Conference Orders

83. Claimant testified that he made a request for medical records from Respondents in November 2017. This was after the DIME took place. He explained that he went to Concentra and was provided with Dr. Solomon's records in an envelope. Claimant further stated that he did not recognize that there was a problem until he

received the Solomon records describing a possible head injury. Claimant claimed that Respondents failed to provide the medical records in this matter. This is not credible or persuasive. As found, PALJ Barbo specifically noted that records were to be provided to Claimant following the Order issued on January 24, 2018, it was confirmed to the PALJ by letter, and documented in his order of June 6, 2018 as well as the order of June 25, 2018 that the records were provided.

84. Further, PALJ Goldstein's order of July 27, 2017 also documented multiple instances of production of the claim file. He specifically stated that:

> At the prehearing conference, respondents counsel represented to the court and opposing counsel that she last supplied the complete claim file to attorney Britten Morrell on December 12, 2016. An order allowing Mr. Morrell to withdraw his appearance was entered by the Division on February 27, 2017. Claimant preceded (sic.) pro se (as a self-represented party) from that date until Robert James entered his appearance on May 19, 2017. At the prehearing conference, respondents' counsel represented to the court and opposing counsel that Mr. James requested and respondents provided all medical records and pleadings subsequent to December 12, 2017 (sic.) [2016]. According to respondents counsel, Mr. James did not request and was not provided the entire claims file. Mr. James, claimant's sixth attorney, filed a motion to withdraw on June 7, 2017 which was granted on June 20, 2017.
>
> At the prehearing conference, respondents objected to providing a new copy of the claim file. Respondents argue that production of the claim file was provided on December 12, 2016 and respondents' counsel has provided all requested documents on and after that date. Further, respondents' counsel argues that the parties agreed that this matter should first proceed to hearing on the issue of overcoming the DIME, and that the claim for permanent total disability benefits should be held in abeyance. Accordingly, respondents' counsel argues, claimant has everything he needs to litigate that issue, and there is no need to provide any documents in addition to those already provided.

PALJ Goldstein ordered supplementation of the claim file for those documents between the time they had been provide previously and the time of the order. This ALJ finds little to show that Claimant was not provided the complete claim file and medical records by Respondents or that they acted in any way inappropriately in this case to justify a reopening of all claims.

85. Claimant also maintained that PALJ Barbo committed an error because he denied Claimant the right to proceed on penalties for failure to admit or deny Claimant's injuries as required by law. Claimant agreed that he received the Notice of Contest Respondents filed on March 18, 2016, which was confirmed by PALJ Barbo according to the documents filed with the Division. Claimant alleged that they could not have been filed by March 18, 2016 because it was not until April 8, 2016 when the MRI of his lumbar spine was performed and his providers knew exactly what was wrong with him. This ALJ finds no error here, either. The statutory provision requiring notice is to admit or deny the claim within 20 days of having notice of the claim, not the specific injuries.

86. Claimant further seems to indicate that, since PALJ Barbo allowed the penalty issues to proceed to hearing that Claimant had already "proved" the right to the penalties. This is not the case. As found, Claimant failed to uphold his burden of proof in these matters and penalties were denied.

87. Claimant also indicated he was appealing multiple other prehearing conference orders, including PALJ Sandberg's, Broniak's, Phillip's and Steninger's. This ALJ finds no meritorious arguments here. As found, the orders were properly addressed by the prehearing administrative law judges who have the authority to address prehearing matters, discovery and ripeness to control the discovery and litigation process and proceeded to appropriately do so.

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or

interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. C.R.S. Sec. 8-43-201.

B. Reopening

Section 8-43-303(1) C.R.S., authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including *reopening* on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition. See *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). There is no basis to reopen a claim if the reopening does not lead to the award of additional benefits. *Richards v. ICAO*, 996 P.2d 756 (Colo. App. 2000).

Claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo.App.2000). The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1,* 924 P.2d 1177 (Colo.App.1996). See *Berg v. Ind. Claim Appeals Off. of Colorado*, 128 P.3d 270 (Colo. App. 2005).

Claimant raised several issues in this matter. However, the matter of issue preclusion should be addressed first, before the merits of reopening the claim.

1. Issue preclusion

Under issue preclusion "once a court has decided an issue necessary to its judgment, the decision will preclude re-litigation of that issue in a later action involving a party to the first case." *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 974 (Colo. App. 20l2) (quoting *People v. Tolbert*, 216 P.3d 1, 5 (Colo. App. 2007)); see also *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). See also *Davis v. Renfro & Co.,* ICAO, W.C. No. 4-960-859-008 (November 21, 2021)

Issue preclusion completely bars re-litigating an issue if the following four criteria are established: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom issue preclusion 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 at 47. Issue preclusion applies to administrative proceedings, including those involving workers' compensation claims. *Id.*

Claimant seeks to address the issues of causation, maximum medical improvement, permanent partial disability benefits, medical benefits, penalties, appeals of prehearing orders and permanent total disability benefits based on error, mistake, fraud or change of condition. However, these are identical issues as addressed by ALJ Cayce and ALJ Felter in their orders, which Claimant appealed and were upheld.

Claimant previously raised most, if not all, his allegations of mistake and fraud in the prior proceedings before ALJ Cayce and ALJ Felter. He maintained these allegations until exhausting his appeal rights. For example, all records either were tendered at the time of the litigation, were submitted to either ALJ Cayce or ALJ Felter for consideration or were available to all parties, including Claimant with some due diligence. Claimant was aware of who had treated, evaluated or examined him and had the same access to the records as Respondents. ALJ Felter addressed issues that concerned the alleged errors and Claimant further addressed the issue of error before ALJ Cayce. As such, Claimant is barred from re-litigating the same issues, or any issues that could have been previously raised, by the doctrine of issue preclusion.

2. Issue of Error or Mistake

Reopening may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party alleges that a prior award is based on mistake, the ALJ must determine whether a mistake was made, and if so, whether it is the type of mistake which justifies reopening the case. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). In determining whether a particular mistake of fact or law justifies reopening, the ALJ may consider whether the mistake could have been avoided if the party seeking reopening timely exercised procedural or appellate rights prior to entry of the award. *Industrial Commission v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967); *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984); *In re Claim of Davis*, 111221 COWC, 4-960-859-008 (Colorado Workers' Compensation Decisions, 2021)

A mistake in diagnosis has previously been held sufficient to justify reopening. See *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo.App.1989)(under circumstances where there is a mistake in diagnosis because the medical technology available to the treating physician at the time of the initial order is limited, a petition to reopen based on a mistake of fact may properly be granted). At the time a final award is entered, available medical information may be inadequate, a diagnosis may be incorrect, or a worker may experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, Section 8-43-303 provides recourse to both the injured worker and the employer by giving either party the opportunity to file a petition to reopen the award. The reopening provision, therefore, reflects a legislative determination that in "worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute." *Standard Metals Corp. v. Gallegos*, *supra,* 781 P.2d at 146 (quoting *Grover v. Indus. Commission*, 759 P.2d 705 (Colo.1988)); *Berg v. Ind. Claim Appeals Office*, 128 P.3d 270, 2005 WL 1903825 (Colo. App. 2005).

Claimant's request for reopening fails here, even if the allegations of mistakes were true, they are not the types of mistakes that justify reopening. By way of example, Claimant alleges that the DIME physician did not specifically address every medical report in the DIME report. Assuming for the sake of argument that this is a mistake, it is not the

type of mistake that would justify reopening. It is not material to the prior judicial decision upholding the DIME's ultimate opinion, specifically after the matter was already litigated and upheld through the appellate process. A second example is that ALJ Cayce cited that only one of the five page report of Dr. Frensley was in the record, which may have been considered a mistake. However, the report itself was insufficient as it provided no new evidence, diagnosis or causation analysis to support Claimant's allegation of impairment, thereby making this alleged mistake inconsequential and a harmless error. Further, the Court of Appeals record introduced into evidence by Claimant (Exhibit 7) showed that the complete report was available for review to both the panel and to the Court of Appeals either of which could have addressed the issue of error or mistake previously raised by Claimant and did not.

Next, the new information and medical records in Claimant's exhibits do not provide evidence upon which to link Claimant's conditions of head injury, stroke, dysarthria, anxiety, or other psychological conditions to the lumbar spine and psychological coping impairments related to the March 9, 2016 work related accident. The records that were before ALJ Cayce included these diagnosis, and ALJ Cayce did not consider them persuasive. This ALJ does not find them persuasive either or that they represented a dispute regarding a genuine issue of material fact. Accordingly, this ALJ determines that the request to reopen is no more than a bid by Claimant to re-litigate already determined issues.

Claimant requested reopening based on mistake and is relying on "new medical evidence," including Ms. Lindsey Kidd's report of March 14, 2019, Dr. Gist's Work Status Reports, Dr. Marquart's radiology reports. These records do not provide causation analysis or any other analysis that might support a reopening due to mistake. The "mistake" alleged by Claimant here is not the type of mistake which justifies a reopening. See *Department of Agriculture v. Wayne,* 30 Colo. App. 311, 493 P.2d 638 (1971) (ALJ does not abuse discretion if he denies petition to reopen because facts and evidence existed at time of prior order, and should have been within the knowledge of parties at that time). As found and concluded, the evidence provided by Claimant in the 1026 pages of records, is not sufficient to justify reopening in this matter.

Also as found, nothing in either Dr. Cooper's or Dr. Hudspeth's records showed findings or diagnosis that would change the decision made by ALJ Cayce by this ALJ. As found, Dr. Frensley's opinion does not support a different conclusion, that Claimant failed to overcome the DIME opinion by clear and convincing evidence. As found, the MRI report of November 15, 2017 shows nothing that would change the decision made by ALJ Cayce on November 9, 2017 as the MRI findings are consistent with an ongoing degenerative condition and there are no causation analysis that relates the continued degenerative process to the March 9, 2016 work related injuries sufficient to supports reopening in this matter. As found, Dr. Sacha did not receive a "call" but was only following the instructions on the paperwork submitted by the parties to review body parts pursuant to the W.C.R.P. Rule 11 and "was asked to review the left side," which Dr. Sacha concluded was not work related. As found, Dr. Solomon did not determine that the TBI was work related and his conclusions and recommendations focus solely on the low back,

which is what was rated in this case. As found, both Dr. Durren and Dr. Wright were authorized treating physicians legally qualified to make determinations with regard to MMI.

Neither did PALJ Barbo err when he denied Claimant the ability to proceed to litigate the issue of penalties for failure to admit or deny the claim in a timely manner. Sec. 8-43-203 (1) (a), C.R.S. States in pertinent part that "the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…" Sec. 8-43-101(1) requires Respondents to report an injury within 10 days if there is lost time or a permanent physical impairment. Nothing in either statutory provision requires the parties to wait until they know the nature or extent of the injuries to file a notice of contest. Here, Respondents filed a NOC by March 18, 2016, nine days after the injury and complied with the reporting requirements of the Act. As found, PALJ Barbo did not err in denying Claimant the ability to proceed to hearing on this issue as Claimant conceded that Respondents had filed and that Claimant received the NOC.

Claimant's request for reopening fails because, even if the allegations of mistakes and fraud were true, Claimant failed to prove that additional benefits should be awarded. For example, Claimant argues that Dr. Sacha's impairment rating was incorrect or in error, but without credible evidence that the rating was anything but 8% whole person impairment, no further PPD benefits can be awarded. Further, even if the mistake were true, the authorized treating providers, nor any other providers, are recommending treatment at this time, either for the low back or the sequelae of psychological problems related to the low back, at this time. Neither have any other vocational experts opined that Claimant is permanently and totally disabled. Therefore, Claimant has failed to show that there is any evidence to support any other decisions than the ones already litigated and concluded.

3. Issues of fraud

To reopen the claim on the ground of "fraud," a claimant must prove the following: (1) a false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth or concealment of a material existing fact; (2) knowledge on the part of one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) making of the representation or concealment of the fact with the intent that it be acted upon; (5) action based on the representation or concealment resulting in damage. *Tygrett v. Denver Water*, W.C. No. 4-979-139-002 (December 17, 2021).

Claimant previously raised most, if not all, his allegations of fraud in the prior proceedings. He maintained those allegations until exhausting his appeal rights, including allegations of collusion or violations of the Act and rules by Respondents in allegedly contacting the medical providers, medical providers mishandling or misdiagnosing

Claimant and providers failure to consider all the medical evidence in the matter as outlined in the findings above.

Allegations that Respondents contacted the DIME, that Dr. Sacha and Dr. Burris minimized his injuries or failed to appropriately document the injuries in their reports, that providers failed to acknowledge the pars defect or spinal fracture, or properly documented a preexisting hand fracture, that Dr. Wright's August 22, 2016 or Dr. Burren's September 12, 2016 reports were falsified or changed by someone; that the parties colluded with the DIME physician by contacting him; that Dr. Sacha or the parties communicated or colluded in this matter before the DIME physician issued his report or even that Claimant was denied discovery, are all issues that have been addressed and failed meet the harsh requirements of fraud in order to support a reopening of the claim in this matter. It is specifically found that even if there were any evidence that could have been inferred or interpreted as complicity among the providers and /or Respondents, that evidence is not credible and does not support a determination that there was any fraud to support a reopening of the prior decisions in this matter. Because Claimant has raised and exhausted his appeal rights, and because he failed to prove by a preponderance of the evidence that fraud occurred in this matter, Claimant's request to reopen the claim based on fraud is denied and dismissed.

4. Change in condition

While Claimant stated that he had had a change in condition, no evidence to support a change in condition was presented despite this ALJ's request that Claimant state what evidence was being presented to support a change in condition. In fact, all the medical records submitted were either records provided to ALJ Cayce or ALJ Felter or were available to Claimant in order for him to provide them to ALJ Felter at the December 10, 2019 hearing and/or the continued hearing March 2, 2020 when addressing future medical benefits. Claimant failed to do so. Respondents argue that Claimant was, in fact, improved compared to his presence at the prior hearings. While this ALJ has no present impression of the Claimant's status prior to the hearing held on January 28, 2022, Claimant advanced no persuasive testimony, evidence or argument that tended to show a worsening or change in condition. Claimant failed to show that there was a change in condition to merit a reopening in this matter.

C. Other issues

No other issues need be addressed by this order as Claimant failed to prove reopening based on error, mistake, fraud or change in condition. All other issues are moot.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's has failed to prove by a preponderance of the evidence that he is entitled to reopen the March 9, 2016 claim based on error, mistake, fraud or change in condition.

2. Claimant's claim for further benefits are denied and dismissed and the March 9, 2016 claim is closed.

3. All other issues are moot as Claimant failed to reopen the claim.

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 8th day of March, 2022.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-099-706-003

ISSUES

I. Whether Claimant is entitled to reinstatement of temporary disability benefits as of July 13, 2021.

II. Whether Respondents are subject to penalties based on their termination of Claimant's temporary disability benefits.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury when she struck the left side of her forehead on a steel beam on January 31, 2019, while employed by Employer.
2. Claimant's date of birth is February 17, 1953, making Claimant 65 on the day of the accident. (Ex., p. 58.)
3. As a result of her work injury, Claimant was diagnosed with a mild traumatic brain injury.
4. Claimant was eventually evaluated for her work-related problems on November 8, 2019, by Dr. David Reinhard, the agreed to authorized treating physician who diagnosed Claimant with head trauma resulting in post concussive syndrome.
5. On December 19, 2019, Dr. Reinhard provided an opinion that Claimant should not work over 4 hours a day, 4 days a week. Work restrictions were provided of no ladders, no waiting on customers, and no activities that required significant new learning, speed of task completion, or multitasking. (Claimant's Exhibit 8 #58)
6. Medical treatment was delayed until an order was entered by ALJ Kara Cayce on March 21, 2021, ordering Respondent's to provide the medical care recommended by Dr. Reinhard. (Claimant's Exhibit 6)
7. While waiting for medical care and treatment Claimant began work with ARC as a "volunteer" at the request of her employer on April 2, 2019. (Claimant's Exhibit 2 #7)
8. Respondent Insurer filed a revised General Admission of Liability on May 2, 2019, with an Employers Supplemental Report of Return to Work attached indicating that Claimant returned to work on April 2, 2019, at reduced wages. (Claimant's Exhibit 2 #10)
9. This modified job offer was provided on [Employer redacted]'s letterhead dated March 20, 2019. (Claimant's Exhibit 10 #61) Claimant began work at ARC as a volunteer working Monday-Thursday 10:00 am to 5:30 pm, with 30-minute breaks at $13.90 per hour. Claimant's doctors had provided restrictions of no stairs or ladders, kneeling or squatting. Sedentary duty 33% of the time. Claimant was requested to

sign an acknowledgement that she remained an employee of [Employer redacted]'s while performing the alternative modified duty with Bowles ARC Thrift Store and remained subject to the Employers attendance and HR policies. (Claimant's Exhibit 10 #62-63)

10. Claimant worked this modified job until March 15, 2020, when the Governor of the State of Colorado issued an emergency public health order as a result of the COVID pandemic. Claimant has a pre-existing condition of asthma that she was receiving active medical care for from Dr. Goodman. Dr. Goodman provided a medical note indicating that Claimant should avoid contagious environments and be able to socially distance for a period of 6-8 weeks. (Claimant's Exhibit 11 #71)

11. On March 16, 2020, Dr. Goodman issued a "Certificate to Return to Work/School." In this Certificate, he stated that Claimant should socially distance for the next 6-8 weeks and avoid contagious environments.

12. On May 15, 2020, Dr. Goodman, the physician who was treating Claimant for her asthma, completed another "Certificate to Return to Work/School." He stated that due to her moderately severe asthma, Claimant had to shelter at home longer due to the COVID 19 crisis. While he said Claimant could return to work on June 15, 2020, he also stated that Claimant should shelter at home until there was no longer a Covid 19 Crisis. (Claimant's Exhibit 12, #72) To the extent these two Certificates – work restrictions - conflict with one another, the ALJ finds that Dr. Goodman determined Claimant should shelter at home until the COVID 19 crisis was over.

13. On May 20, 2020, Respondent attempted to offer Claimant "volunteer" work with ARC using new work restrictions issued by Dr. Reinhard limiting Claimant's work to 4 hours a day for 4 days a week. In addition, he stated that Claimant should not use ladders, wait on customers, and not engage in activities that required significant new learning, speed of task completion, or multitasking. (Claimant's Exhibit 8 #58 and 12 #73-78) Claimant was unable to begin work in May of 2020 due to her pre-existing condition of asthma. As found above, Dr. Goodman, her asthma physician, provided a note indicating Claimant has moderately severe asthma and restricted Claimant to shelter at home until there was no longer a Covid 19 crisis. Thus, Claimant was precluded from working outside of her home by Dr. Goodman. (Claimant's Exhibit 12 #72)

14. Respondent filed an Amended General Admissions of Liability on August 13, 2020 & September 9, 2020, admitting for temporary partial disability benefits through March 25, 2020, and temporary total disability from March 26, 2020, through July 25, 2020, indicating that -0- temporary total disability was due for that period because the amount of unemployment received was greater than Claimant's temporary total disability rate. Respondent then began payment of temporary total disability at the rate of $53.46 per week because Claimant was receiving unemployment at the rate of $219.00 per week. (Claimant's Exhibit 3 #11 & Exhibit 4 #15)

15. On June 30, 2021, Dr. Reinhard, an authorized treating physician, approved another modified duty position with ARC. (Claimant's Ex. 18, #98-99)

16. On July 2, 2021, and based on Dr. Reinhard's approval, another modified job offer was made to Claimant. The job offer required her to begin modified work on July 13, 2021, at the ARC Thrift Store for 4 hours a day 4 days a week. The modified job offer stated that the job duties were "approved by her treating physician." However, Claimant was not only treating with Dr. Reinhard, her workers' compensation physician, she was also treating with her personal physician, Dr. Goodman, for her asthma. Although not an authorized treating physician, there is no indication Dr. Goodman signed off on the July 2, 2021, job offer.

17. On July 13, 2021, Claimant appeared for her shift at ARC. Upon arriving for her shift, a supervisor, Christina, requested Claimant sign a COVID release form. Claimant told Christina that she did not want to sign it because she was over the age of 65 and has asthma. Claimant noted that the COVID form indicates that she should not volunteer due to her age and asthma. The form specifically states that:

> Due to the state of emergency resulting from the COVID -19 virus, ARC Thrift stores is asking all volunteers to agree to the following guidelines while volunteering. *If you are in at risk category for this virus we ask that you do not volunteer. At risk categories included people aged 65 and older, individuals with chronic lung disease, asthma, or serious heart conditions, people who are immunocompromised, pregnant women, and individuals determined to be high risk by a licensed healthcare provider* (emphasis in original). (Claimant's Ex. 12, #81)

Thereafter, Christina looked at the form and went upstairs to the office and returned and told Claimant that the form needed updating and they would finish the paperwork later. Despite the form stating that Claimant should not volunteer due to her age and asthma, Claimant worked an entire shift that day.

18. On July 14, 2021, Claimant appeared and worked a second shift. At the end of her shift, Claimant was approached by the floor supervisor to complete her paperwork. Claimant testified that he requested that they complete the paperwork in the back room by the time clock. Claimant did not want to sign the ARC Thrift Volunteer Agreement and Release of Liability that is quoted above. As noted above, Claimant is over 65 years old and has asthma. The form itself indicates that people who are risk as defined by ARC are advised that they should not volunteer. Claimant did eventually sign the document believing that there had been changes to the form previously provided and that she was not releasing ARC from liability if she contracted COVID and sustained serious illness or death. (Claimant's Exhibit 19)

19. Claimant did sustain a brain injury and was presented with this paperwork in a very busy, noisy open area with a number of people working and talking called the "back room". Claimant described the area as a very large room where people are sorting, vendors are coming in and out by the time clock after she had worked her shift and was getting ready to leave. Claimant was struggling with the noise and confusion of the back-room area. The work in this area had increased her symptoms from the work-related head injury. Claimant felt confused, foggy and was struggling by the end of the shift.

20. The floor supervisor then requested a copy of Claimant's driver's license. Claimant did not want to give them a copy of her driver's license because she was standing by the file cabinet in the back room, which is where she believed the paperwork, including a copy of her license, would be stored. Claimant had previously worked there, and at that time the filing cabinet was located in a locked supervisor's office, which was a secure area. Given the new placement of the file cabinet, and all of the different types of people who were now "volunteering," Claimant did not feel secure with giving a copy of her driver's license to keep to the supervisor who would place it in the file cabinet.

21. Based on the totality of the circumstances, the ALJ finds that Claimant's reluctancy to provide a copy of her driver's license was reasonable due to her concerns about the safety of her driver's license. The ALJ is mindful that Claimant did not voice her concerns to ARC, but neither did ARC ask Claimant as to why she did not want to provide them a copy of her driver's license.

22. Claimant's supervisor then went upstairs, came back down, and told Claimant that she had to leave and that Claimant should call ReEmployability and her employer to get the matter straightened out.

23. As directed by ARC, Claimant contacted ReEmployability – the intermediary who was assisting with arranging Claimant's volunteer work at ARC - and her attorney in an attempt to deal with the issue. ReEmployabillity contacted Claimant's employer via email regarding the matter. Despite Claimant contacting ReEmployability there is a lack of credible and persuasive evidence that ReEmployability, Claimant's employer, or ARC ever contacted Claimant again about the issue and attempted to resolve situation. In essence, there was a breakdown in communication between Claimant, ReEmployability and ARC and why Claimant had to provide a copy of her driver's license and how to resolve the matter.

24. Emails from Cannecia Lowery at ReEmployability show that at 3:55 pm on July 14, 2021, they contacted ARC confirming that Claimant was asked not to return to ARC until she was able to present a photo ID. She was trying to confirm that information. (Claimant's Exhibit 20 #108) But there is a lack of credible and persuasive evidence that they discussed the matter with Claimant. Had they done so, they might have also realized that ARC already had a copy of Claimant's driver's license from her prior volunteer work with ARC.

25. The email response from Stephanie at ARC confirmed that it was a requirement that ARC take a copy of her identification card and confirmed that Claimant was told to contact ReEmployability because they needed to verify that Claimant was who she said she was. Despite the issue being discussed between ReEmployability and ARC, there is a lack of credible and persuasive evidence that this requirement was again discussed with Claimant and that Claimant was given an opportunity to resolve the matter with ARC.

26. As directed by ARC, Claimant did not return and was not contacted again by ReEmployability, ARC or Employer regarding returning to volunteer work at ARC. After contacting ReEmployability, no one contacted Claimant to advise her that she would have to provide a copy of her drivers' license to ARC in order to volunteer

there. Moreover, no one advised Claimant that her failure to provide a copy of her driver's license would be seen as a failure to accept modified employment and that her disability benefits would be terminated. Instead, Claimant received notification that her benefits were being discontinued because she did not appear for her modified work assignment at ARC – even though Claimant appeared for her modified work assignment and completed two shifts.

27. In order to volunteer at ARC, Claimant was required to sign an Employee Acknowledgement that she remained an employee of [Employer redacted]'s while performing alternative modified duty with the ARC Thrift Store in Littleton, Colorado. (Claimant's Exhibit 18 #104) There was also a statement that Claimant was required to comply with [Employer redacted]'s policies regarding employment issues, including attendance and HR policies. The Employee Acknowledgement did not indicate Claimant was also required to comply with ARC's HR policies. Again, the Employee Acknowledgement made clear Claimant was still an employee of [Employer redacted] and had to abide by [Employer redacted]'s HR policies.

28. Stephanie Raynor testified that she was the ARC assistant manager in July of 2021 at the Littleton store. She indicated that ARC has a number of volunteers from various systems working at the store. Some of them are referred through the court systems, others from the county food stamp assistance, in addition to the workman's compensation referred volunteers.

29. Ms. Raynor testified Claimant showed up at ARC and worked two full shifts. She testified that Claimant worked on July 13, 2021, and did not complete the required paperwork until the end of her shift on July 14, 2021. She indicated that because of some fraudulent activity that had been occurring only certain ARC employees could complete the employee paperwork. She also testified that she did not know Claimant and was not aware that Claimant had worked for ARC in 2019-2020, and provided a copy of her driver's license, because she did not begin working for ARC until October of 2020 after Claimant had already left ARC in March of 2020.

30. Ms. Raynor also testified that when she was reviewing paperwork in anticipation of testifying for the hearing she found Claimant's file from her earlier volunteer work with ARC that had a copy of Claimant's photo id in the file. Ms. Raynor testified that there are monthly audits of the files by corporate to confirm ARC's obligations to report hours particularly to the courts.

31. Ms. Raynor also testified that it was ARC's practice to have the supervisor complete the initial forms by asking the volunteer the questions and then circling the answers, then having the volunteer sign the form as well as themselves. (Respondent's Exhibit E #22)

32. Ms. Raynor testified that on July 14, 2021, ARC did actually have a copy of a photo ID confirming Claimant's identity from the previous period of time that she worked there that was located in the filing cabinet located in the back-room area by the time clock. As a result, the request for Claimant to provide a copy of her driver's license or a photo ID was duplicative and not necessary.

33. Ms. Raynor testified that if Claimant is over 65 and has asthma, that she is in a category of people that ARC indicates should not volunteer because ARC workers are "on the front line" of potential COVID exposure. She also testified that she is not able to change ARC policy. As a result, the job offered to Claimant was not reasonably available to Claimant in the first instance.

34. As found, Claimant has moderate to severe asthma and was over 65 at the time the job offer was made. As a result, based on ARC's policy, Claimant was not able to volunteer at ARC and perform the modified duty offered to her. Thus, [Employer redacted], through ReEmployability and Arc, offered Claimant modified employment for which Claimant was not eligible to perform. Therefore, [Employer redacted] did not provide Claimant a valid – or reasonable – job offer of modified employment in the first instance since ARC's policies precluded Claimant from volunteering there.

35. However, despite not providing Claimant a reasonable job offer in the first instance, Claimant did not refuse the offer of modified employment. Claimant appeared and started the modified work. The fact that her modified employment did not continue because Claimant did not provide a photo ID and ReEmployability never got back to her in an attempt to resolve the matter, does not negate the finding that Claimant accepted and started her offer of modified employment. Thus, Claimant began the modified employment.

36. Based on the circumstances, the ALJ also finds that Claimant did not constructively refuse an offer of modified employment. Instead, after beginning the modified employment, a dispute arose between Claimant and ARC about obtaining a copy of Claimant's driver's license and such dispute was not resolved. This merely resulted in Claimant not being allowed to continue performing the modified employment.

37. On August 27, 2021, and despite Claimant starting the modified employment, Respondents filed an Amended General Admission of Liability that terminated Claimant's disability benefits.

38. Because Claimant started the modified employment and worked two shifts, the ALJ finds that the unilateral termination of Claimant's temporary disability benefits was not the action of a reasonable insurer.

39. There is a lack of credible and persuasive evidence that Claimant was terminated from her employment with Employer - [Employer redacted]. Therefore, the ALJ will not make any at-fault findings regarding that issue.

CONCLUSIONS OF LAW

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

General Provisions

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

preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

I. Whether Claimant is entitled to reinstatement of temporary disability benefits as of July 13, 2021.

Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Because the respondents seek to terminate benefits under this section, they have the burden of proof to establish the factual predicates for application of the statute. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (I.C.A.O. December 16, 2004), citing *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000).

There may be more than one "the attending physician." *Popke v. Industrial Claim Appeals Office, 944 P.2d 677* (Colo. App. 1997). If there is a conflict between the attending physicians concerning whether or not the claimant is able to perform modified employment the ALJ may resolve the conflict as a matter of fact. *See Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App. 1995) (concerning physician's release to regular employment).

The Industrial Claim Appeals Office has held that under a proper interpretation of the statute the employment offered to the claimant must be "reasonably available under an objective standard." Whether the offered employment was reasonably available under an objective standard is one of fact for determination by the ALJ. *Simington v. Assured Transportation & Delivery,* W.C. No. 4-318-208 (I.C.A.O. MARCh 19, 1998). Factors that may be considered include the distance the claimant is required to travel and the availability of transportation to reach the employment. *Ragan v. Temp Force,* W.C. No. 4-216-579 (I.C.A.O. June 7, 1996).

Moreover, a failure to begin temporary modified duty includes a constructive failure to begin. *See Liberty Heights at Northgate v. Indus. Claim Appeals Office of State & Carol Vawser*, 30 P.3d 872 (Colo. App. 2001)

In this case, Respondents offered Claimant a job with ARC that was not reasonably available to her. The job offered to Claimant through ARC was not recommended for people 65 and over or those with asthma – due to the COVID 19 pandemic. At the time the job was offered to Claimant, Claimant was over 65 and suffered from asthma. As a result, the job was not reasonably available to Claimant in the first instance.

Moreover, even though the job was not reasonably available to Claimant due to her age and asthma, Claimant did start her modified employment. As found, Claimant started the modified employment worked her first two shifts with ARC until a dispute arose as to whether Claimant had to provide a copy of her ID or her drivers' license to ARC – even though they already had a copy. Claimant was directed to contact ReEmployability and her employer to resolve the issue. Claimant did contact ReEmployability as directed and they contacted her employer. However, neither ReEmployability nor Claimant's employer contacted Claimant in an attempt to resolve the matter and explain to Claimant why they needed a copy of her driver's license to discuss Claimant's concerns about the security of her drivers' license. Moreover, had such a discussion occurred, ARC might have realized that they already had a copy of her driver's license and a request for such was unnecessary or that they could find a safer place to keep Claimant's driver's license.

In addition, the ALJ has considered whether Claimant's conduct constituted a constructive failure to begin her modified employment. Under the circumstances, the ALJ finds and concludes that Claimant did not constructively fail to accept her modified employment. As found, Claimant started her employment as directed and worked two shifts. The court also found that the reason Claimant did not continue her modified volunteer work is because Claimant and ARC had a dispute about whether Claimant had to provide a copy of her driver's license – which ARC already had.

The court also wants to point out that it appears the disagreement and communication problems between Claimant, ARC, and ReEmployability were magnified due to Employer – [Employer redacted] – outsourcing the provision of modified employment to two other companies – ReEmployability and ARC. In other words, Employer – [Employer redacted] – did not directly offer and manage the offer of Claimant's modified employment and Claimant's modified employment. Instead, they

got two intermediaries involved – which only complicated the offer and acceptance of the modified employment and Claimant's continuation of her modified employment.

As a result, the ALJ finds and concludes that the job offer to Claimant was not reasonably available to Claimant in the first instance because at the time of the offer, Claimant was over 65 and had asthma. Thus, Claimant could not volunteer for ARC. The ALJ also finds and concludes that Claimant actually started her modified employment. Therefore, the ALJ finds and concludes that Respondents did not establish by a preponderance of the evidence that Claimant refused an offer of modified employment and that her temporary disability benefits should be terminated. As a result, Claimant is entitled to temporary disability benefits as of July 13, 2021, and continuing.

II. Whether Respondents are subject to penalties based on their termination of Claimant's temporary disability benefits.

Penalties of up to $1,000 per day may be imposed under § 8-43-304(1) based on an objective standard of negligence. Negligence is determined by the reasonableness of the insurer's actions and does not require the insurer's knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997). The imposition of a penalty, therefore, is a two-step analysis. First, it must be determined a violation of an order, rule or statute has occurred. It then must be found that despite the violation, the act or failure to act was not accompanied by circumstances that would have led a reasonable insurer to proceed as it did. Such circumstances typically are by their nature beyond the control of the insurer. Examples would include sudden illness of the individual responsible, power outages, faulty information, insufficient notice, unsound official advice, or horrific weather conditions, among others. Thus, as long as an insurer takes the action that a reasonable insurer would take to comply with either a lawful order, rule or a provision of the Workers' Compensation Act, penalties will not be imposed. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094, 1097 (Colo. App. 1996); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

Section 8-42-105(3)(d)(I) provides that temporary disability benefits terminate when:

> [T]he attending physician gives the claimant 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.

Moreover, WCRP 6-1(A)(4) provides that temporary disability benefits can be terminated without a hearing by filing an admission of liability form with:

> [A] letter to the claimant or copy of a written offer delivered to the claimant with a signed certificate indicating service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

Section 8-42-105(3)(d)(I) works in tandem with WCRP 6-1(A)(4). In order to terminate temporary disability benefits under Section 8-42-105(3)(d)(I) and WCRP 6-1(A)(4), the Claimant must be offered modified employment, that has been approved by an authorized treating physician, and must fail to begin such employment.

In this case, Claimant was receiving temporary disability benefits in July of 2021. On July 2, 2021, Employer made an offer of modified employment that complied with WCRP 6-1(A)(4). On July 13, 2021, Claimant began her modified employment and worked on July 14, 2021 as well. As found, a dispute arose as to whether Claimant had to provide a copy of her driver's license and Claimant was never called back to continue her modified employment. As further found, Claimant's employer – [Employer redacted] – has not terminated Claimant.

On August 27, 2021, Respondent filed an Amended General Admission of Liability terminating Claimant's temporary disability benefits. This was despite the fact that Claimant had began her modified employment. To the extent there was a factual dispute as to whether Claimant constructively failed to begin, such matter was a factual dispute that was subject to resolution through a hearing and not the automatic termination of benefits pursuant to Section 8-42-105(3)(d)(I) and WCRP 6-1(A)(4). As a result, Respondents violated 8-42-105(3)(d)(I) by unilaterally terminating Claimant's temporary disability benefits after she had accepted and started her modified employment.

In addition, the action of terminating Claimant's temporary disability benefits after accepting and starting the modified employment was not accompanied by circumstances that would have led a reasonable insurer to proceed as it did. Because Claimant accepted and started her employment, there was no basis to unilaterally terminate her benefits without a hearing based on Respondent's contention that Claimant refused to comply with the job offer. As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she is entitled to penalties.

The ALJ has wide discretion in determining the amount of penalties to assess. In determining such, the ALJ can consider the harm to Claimant. In this case, there was a lack of persuasive evidence that Claimant suffered substantial harm due to her temporary disability benefits being terminated. On the other hand, the ALJ finds that her benefits were terminated improperly. The ALJ has also taken into consideration the amount of temporary disability benefits being paid to Claimant at the time they were improperly terminated. As a result, the ALJ finds that Respondents should be assessed a penalty of $50.00 per day for the improper termination of Claimant's temporary disability benefits. Penalties shall run from August 27, 2021, the date the GAL was filed that terminated Claimant's disability benefits, through the date of the hearing, January 6, 2022.

Apportionment of Penalties

If a penalty is assessed under § 8-43-304, C.R.S. the ALJ must apportion payment of the penalty between the aggrieved party and the Colorado uninsured employer fund created by § 8-67-105 C.R.S. except that the amount apportioned to the

aggrieved party shall be a minimum of twenty-five percent of any penalty assessed. The ALJ determines that 65% of the penalty shall be apportioned and paid to Claimant and 35% shall be apportioned and paid to the Colorado Uninsured Employer Fund.

ORDER

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

1. Respondents shall reinstate Claimant's temporary disability benefits as of July 13, 2021.
2. Respondent shall pay a penalty in the amount of $50.00 per day from August 27, 2021, through January 6, 2022, which is 132 days. Therefore, the total penalty is $6,600.00.
3. Respondent shall pay 65% of the penalty - $4,290.00 - to Claimant.
4. Respondent shall pay 35% of the penalty - $2,310 - to the Colorado Uninsured Employer Fund.
5. 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: March 8, 2022.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-318-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right eye arising out of the course of his employment with Employer on May 4, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits from June 5, 2021 until terminated pursuant to statute.

FINDINGS OF FACT

1. The parties stipulated that Claimant's average weekly wage at the time of his injury was $800.26.

2. Claimant was employed by Employer beginning July 16, 2016, as a production associate. On May 4, 2021, Claimant was delivering materials at Employer's facility using a cart. Claimant was pulling the cart while walking backward when he stumbled over a wooden pallet. Claimant fell into the pallet and sustained a scrape on his right knee, and ended up on the floor.

3. On May 4, 2021, Claimant reported the incident to his supervisor, [Redacted, hereinafter JA]. Mr. JA[Redacted] testified that Claimant informed him he had scraped his knee on a pallet, but that he was fine. Claimant did not ask to see a physician, and no first aid was administered. Also on May 4, 2021, Claimant completed an incident report for Employer. In that report, Claimant described his injuries as a "scrape" to the right knee. Claimant described the incident as follows: "Just finished delivering totes to deburr department, still had cart, was backing up, tripped over a leaning pallet, scraped right knee on pallet, I fell to the ground." (Ex. 4).

4. At hearing, Claimant testified that his right knee became caught in the pallet, and that he fell on his right hip, shoulder and knee. A co-worker, [Redacted, hereinafter AL], was present in the room where Claimant fell, but did not witness the fall. Mr. AL[Redacted testified that he saw Claimant sitting on the ground on his buttocks. Mr. AL[Redacted asked Claimant if he needed assistance, but Claimant did not require help. Mr. AL[Redacted then returned to his work and did not have any further observations of Claimant.

5. Claimant testified that he began noticing vision problems several days after his fall, and his vision deterioration began accelerating approximately three weeks later. Claimant continued to work from May 4, 2021 until June 4, 2021. At which point Claimant stopped

working because he was not comfortable working due to the decrease in his vision. Claimant did not return to work for Employer after June 4, 2021.

6. On May 25, 2021, Employer's Environmental Health, Safety and Security Manager, [Redacted, hereinafter RP], spoke with Claimant about the May 4, 2021 incident. Mr. RP[Redacted] had been at home on Covid quarantine at the time of the incident. Mr. RP[Redacted] asked Claimant how he was doing, and Claimant indicated he was fine. Claimant did not report any issues with his vision at that time.

7. On June 9, 2021, Claimant was seen at the UCH Primary Care Clinic in Lone Tree, and was evaluated by Rachel Rodriguez, M.D. Claimant reported vision issues in his right eye. Dr. Rodriguez diagnosed Claimant with low vision of the right eye, with normal vision in the left eye, and referred Claimant for an optometry examination. (Ex. G).

8. On June 16, 2021, Claimant saw optometrist Julia Kimball, O.D., at the UC Health Eye Center. Claimant reported to Dr. Kimball that he began having blurred vision eight months earlier, and felt like he was seeing a bubble in his central vision. Claimant also indicated he was concerned his vision issues were due to prior use of Viagra. Claimant reported he had fallen at work one-month earlier, and reported that he "noticed profound vision loss in right eye at that time." Claimant's wife reported to Dr. Kimball that Claimant's right pupil became white after the fall. On examination, Dr. Kimball noted a dense cataract in Claimant's right eye. She also noted the cataract had "bowed the iris forward with concern for angle closure, although IOP measured in normal range today." Dr. Kimball indicated the vision loss appeared to be due to the cataract, but she was unable to tell if Claimant's optic nerve and retina were healthy. With respect to Claimant's right eye, Dr. Kimball diagnosed Claimant with a cortical age-related cataract and referred Claimant to Cara Capitena Young, M.D., for an ophthalmological evaluation. (Ex. 14).

9. On or about June 17, 2021, Claimant emailed Employer advising that he had attended an eye appointment the previous day. Claimant indicated his vision loss was "due to a dense white cataract and bowed iris [his] right eye." Claimant also stated, "Headache and eye pain have been prevalent since the documented fall on May 4th." Claimant requested information on how to initiate a workers' compensation claim. (Ex. 8). Employer then provided Claimant with a designated provider list.

10. On June 17, 2021, Employer filed a First Report of Injury, indicating Claimant sustained a contusion of the knee as the result of the May 4, 2021 incident. (Ex. 1). On June 24, 2021, Employer filed a Notice of Contest, contesting the compensability of Claimant's injuries. (Ex. 2).

11. On June 18, 2021, Claimant saw Kathryn Bird, D.O., at Concentra. Claimant reported right knee and shoulder injuries, and bilateral eye issues. On examination, Dr. Bird noted that Claimant's right knee and right shoulder were normal. Claimant did not recall hitting his head when he fell and indicated he started to develop headaches, nosebleeds, neck pain, and changes in vision after the fall. Dr. Bird could not opine that Claimant's cataract was caused by the May 4, 2021 fall because Claimant "does not

remember hitting his head during the incident. However symptoms started in close proximity to the fall." (Ex. 15).

12. On June 21, 2021, Claimant saw Dr. Capitena Young at the UC Health Eye Center. Dr. Capitena Young diagnosed Claimant with visually significant intumescent white cataract of the right eye. She also noted "Likely traumatic given time frame of vision loss associated with trauma at work but patient not sure if hit head, no history of open globe." A B-scan of Claimant's eye was performed that showed vitreous hemorrhage and retinal detachment. She noted that a detached retina could cause a white cataract. Dr. Capitena Young conveyed to Claimant the relative urgency in removing the cataract and referred Claimant to Marc Mathias, M.D. (Ex. 14).

13. On the same day, June 21, 2021, Claimant saw Marc Mathias, M.D., at the UC Health Eye Center. Claimant reported he had experienced blurred vision for 6-8 months, and after he fell at work his vision became significantly worse. Claimant reported he did not hit his head or eye when he fell. Dr. Mathias diagnosed Claimant with a mature cataract of the right eye, right retinal detachment, and vitreous hemorrhage of the right eye. Dr. Mathias indicated "highest suspicion for rhegmatogenous [retinal detachment] given trauma, but cannot completely rule out component of uveitis." He recommended that surgery take place within two weeks. (Ex. L).

14. On June 25, 2021, Claimant returned to Concentra where he saw Michael Pete, P.A. In addition to his vision issues, Claimant reported burning in the right knee but denied instability. Claimant also indicated he began to develop low/mid back pain on June 19, 2021. Claimant completed a pain diagram in conjunction with the visit identifying pain in the head, left lower back and right knee. On examination, Claimant's right knee was found to be normal, with the exception of the report of a burning sensation. Claimant's shoulder were both noted to be normal on examination with full range of motion, normal strength and no tenderness or impingement signs. Claimant was diagnosed with a right retinal detachment, right knee strain, and low back strain. Mr. Pete recommended physical therapy. Mr. Pete further opined that "based on findings of retinal detachment and onset of symptoms it is 51% probability this occurred with the fall." Mr. Pete offered no other rationale for his opinion that Claimant's retinal detachment was work-related. (Ex. 15).

15. On June 29, 2021, Dr. Mathias performed a retinal detachment repair of the right eye with pars plana vitrectomy, pars plana lensectomy, and posterior synechiolysis. Dr. Mathias' post-operative diagnosis was total retinal detachment, mature cataract and proliferative vitreoretinopathy (PVR). Intraoperatively, Dr. Mathias found extensive pathology in Claimant's right eye. These findings included poor pupillary dilation with 360-degree posterior synechiae, a completely detached retina with extensive subretinal bands and pigment deposition, anterior loop PVR inferiorly, and five retinal breaks. He further noted that the retina did not appear to relax, necessitating the removal of extensive subretinal fibrosis. Claimant saw Dr. Mathias for three additional post-surgical visits (June 30, 2021, July 7, 2021, and July 21, 2021). Dr. Mathias did not offer an opinion on the cause of Claimant's retinal detachment or cataract in any medical record. (Ex. K).

16. On July 8, 2021, Claimant saw Dilip Raghuveer, M.D., at UC Health. Dr. Raghuveer did not offer an opinion on the cause of Claimant's retinal detachment, indicating the issue was beyond his area of expertise. He indicated that Claimant's headaches were likely related to the retinal detachment. (Ex. 17).

17. On July 14, 2021, Claimant saw Kathryn Bird, D.O., at Concentra. Dr. Bird reviewed Claimant's chart, but did not have Claimant's ophthalmology records. Dr. Bird indicated Claimant "did start having eye symptoms within a week of the fall. Trauma, such as a fall, is a cause for retinal detachment. His retinal detachment is more likely than not work related." (Ex. 15).

18. On July 19, 2021, Claimant filed Worker's Claim for Compensation related to the May 4, 2021 fall. Claimant reported injuries to his head, right eye, neck, right shoulder, lower back, and right knee. (Ex. N).

19. At hearing, Clamant testified that 6-8 months before May 2021, he had an issue with visual acuity, which manifested as a "bubble" that distorted his central vision in his right eye, but that he could see around the periphery of his right eye. Claimant testified his vision was stable before May 2021, and did not affect his job. Claimant did not inform employer about his pre-existing vision issue before May 2021. Claimant does not know whether he struck his head when he fell, but did not have any marks or abrasions on his head after the fall. Claimant also testified he immediately had significant pain in his knee and shoulder on May 4, 2021, and that he also had pain in his head and eye on that day. Claimant's testimony that he felt immediate pain in his head, eye and shoulder was not consistent with the incident report he completed on May 4, 2021. Claimant began to develop headaches and nosebleeds two to three days after May 4, 2021, and his vision began to darken thereafter. Claimant testified that he did not associate his vision issues with the fall until June 9, 2021, and did not mention the vision issues to Employer until his June 17, 2021 email. Claimant testified that he has not worked for Employer since June 2021, and moved to Indiana in October 2021.

20. On September 2, 2021, Claimant underwent an independent medical examination with David Drucker, M.D. (With a report issued on September 12, 2021). (Ex. A). Dr. Drucker is a board-certified ophthalmologist, and was admitted to testify as an expert in ophthalmology and eye surgery. Dr. Drucker's testimony was presented by deposition. Dr. Drucker reviewed Claimant's medical records, and performed an examination of Claimant's eye. Dr. Drucker opined that the history and physical findings from Dr. Kimball, Dr. Capitena Young, and Dr. Mathias support the diagnosis of a super chronic right retinal detachment prior to May 4, 2021. Dr. Drucker explained that a "super chronic" retinal attachment refers to a retinal tear that has existed for more than two months.

21. Dr. Drucker noted that the June 29, 2021 surgical record notes shows Dr. Mathias found a bound-down pupil with 360-degrees posterior synechiae; intumescent lens; completely detached retina; extensive subretinal bands; subretinal fibrosis; pigment deposition; an anterior loop with PVR inferiorly; and retinal breaks at five locations. He also noted that Claimant's retina was inflexible and would not lay flat, necessitating an inferior retinectomy.

22. He opined that Dr. Mathias' surgical intraocular findings, (advanced PVR, inflexible retinal tissue, subretinal fibrotic bands, epiretinal fibrosis, and multiple retinal tears), were unlikely to be found in a retinal detachment occurring six weeks earlier. He noted that Claimant's report of a six-to-eight-month history of distorted vision with a visual "bubble" sensation was consistent with a vitreous hemorrhage, retinal tear and/or localized detachment. He indicated it would be normal for this type of pathology to progress over time to the pathology Dr. Mathias observed intraoperatively. Dr. Drucker also opined that it would be highly unusual to find this constellation of "catastrophic findings" after a fall that did not involve direct head or eye trauma six weeks earlier. Dr. Drucker's opinion was that it was unlikely Claimant's eye would deteriorate to the condition Dr. Mathias discovered between his fall on May 4, 2021 and surgery on June 29, 2021.

23. Dr. Drucker also testified that, although possible, it was unlikely that Claimant's pre-existing ocular pathology would be exacerbated or aggravated by the fall Claimant sustained, given the extent and severity of the intraocular findings. Specially, he stated "It is less likely as not that a relatively atraumatic fall not involving head or eye trauma would affect a fibrotic and membrane covered retina." In his deposition, Dr. Drucker indicated the Claimant's retinal tissue was rigid and adhered within the eye, such that the Claimant's relatively minor fall on May 4, 2021 would not likely have caused his pre-existing eye pathology to worsen. The ALJ finds Dr. Drucker's opinions credible and persuasive.

24. On October 10, 2021, Mark Winslow, D.O., issued a report related to an independent medical examination requested by Claimant's counsel conducted on August 12, 2021. Dr. Winslow is board-certified in neuromusculoskeletal medicine and family practice. Based on his review of medical records and examination of the Claimant, Dr. Winslow diagnosed Claimant with a retinal detachment "likely work related" and a mild knee strain, improved. Dr. Winslow was aware of Dr. Drucker's opinion that Claimant's retinal detachment was unlikely to be related to the May 4, 2021 fall based on the extent and severity of the intraocular findings. Dr. Winslow indicated that he disagreed with Dr. Drucker's opinion "and note[d] that the temporal relationship to the fall and the significant immediate changes following this fall make it more likely than not that this traumatic incident exacerbated the previously subclinical and undiagnosed underlying conditions." He further opined that while Claimant "did not strike his head one does not have to strike your head in order to create an intracranial lesion…. The sudden deceleration of a fall as described with traumatic force is sufficient to exacerbate underlying poor retinal condition." Dr. Winslow's opinion, which does not take into consideration Dr. Mathias' intraocular findings, is not persuasive. (Ex. 20).

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

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the 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. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in

an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

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,* W.C. No. 4-960-513-01, (ICAO Oct. 2, 2015)

Claimant has failed to establish by a preponderance of the evidence that he sustained compensable injuries as a result of his May 4, 2021 fall. The primary issue in this case is whether the Claimant's deterioration in vision and total retinal detachment was the result of the May 4, 2021 fall, either by causing the retinal detachment or aggravating or exacerbating Claimant's pre-existing eye pathology. Although there is no dispute that Claimant tripped and fell on May 4, 2021, Claimant has failed to establish that the fall resulted in a compensable injury to his right eye. Claimant's position relies primarily on the timing of Claimant's vision deterioration approximately two to three weeks after May 4, 2021. While there is a correlation between the timing of Claimant's fall, and the subsequent decline in his vision, this correlation alone does not establish causation.

The ALJ finds persuasive the opinion of ophthalmologist Dr. Drucker that Dr. Mathias' intraoperative findings indicated that the retinal detachment was likely a pre-existing, and that a fall such as the one Claimant sustained was unlikely to cause or aggravate the condition.

Dr. Bird and Dr. Winslow attributed Claimant's retinal detachment to the May 4, 2021 fall. However, neither physician provided a cogent, persuasive explanation for the attribution other than the fact that Claimant's vision began to worsen several weeks after the fall, and that trauma can cause a retinal detachment. Neither physician persuasively explained how Claimant's fall, in which he did not sustain trauma to the head or eye, and which resulted in only a scraped knee, caused, accelerated, or aggravated the extensive intraocular pathology found by Dr. Mathias during Claimant's June 29, 2021 surgery. Dr. Winslow's opinion that Claimant's fall was sufficient to result in a retinal tear was not persuasive, given that Claimant's only initial complaint was a scraped knee.

MEDICAL TREATMENT

Respondents are liable to provide 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. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). 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 determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Id.*

Because Claimant has failed to establish a compensable injury to his right eye, Claimant has failed to establish an entitlement to medical treatment for his retinal detachment or vision issues.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997

Claimant has failed to establish an entitlement to TTD benefits. The evidence demonstrates that Claimant worked without restrictions following his injury until June 4, 2021. Claimant then stopped working due to concerns about his vision. Because the Claimant has failed to establish that the May 4, 2021 fall caused his vision issues, Claimant has failed to establish the required causal connection between a work-related injury and the subsequent wage loss.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his right eye on May 4, 2021.

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

3. Claimant's claim for temporary disability benefits is denied.

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

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

DATED: March 8, 2022

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

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, an entitlement to temporary disability benefits.

2. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of his employment on September 2, 2021, and the wage loss resulting from his termination.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 39-year-old man who was employed by Employer as a night fleet fueler. Claimant's job duties included driving a fuel truck to various job sites and fueling vehicles at those sites. Claimant's job required him to carry a fueling hose from the fuel truck to other vehicles, climb ladders while carrying a fueling hose to reach the other vehicle's fuel tank. The fuel hose weighs more than ten pounds, and in performing his job, Claimant was required to drag or carry the hose up a ladder, and reach overhead with the hose, and reach his arm away from his body. Claimant's regular work hours were Tuesday through Saturday, from approximately 3:00 to 4:00 p.m. until after midnight.

2. During the night of August 24, 2021, Claimant sustained a compensable injury arising out of the course of his employment with Employer when he fell from a ladder while working to refuel a vehicle.

3. Claimant reported his injury to Employer that night and was advised to contact his supervisor, [Redacted, hereinafter RB]. Claimant contacted Mr. RB[Redacted] the following morning and was advised to go to Concentra for evaluation.

4. On August 25, 2021, at approximately 9:50 a.m., Claimant was evaluated at Concentra by Barry Nelson, D.O. Claimant reported a mild headache, jaw pain, neck pain and upper back pain. Dr. Nelson examined Claimant and diagnosed him with an acute neck strain and contusion of the jaw. Dr. Nelson assigned written work restrictions of ten pounds for lifting, repetitive lifting, and carrying, pushing/pulling of twenty pounds, no reaching overhead, and no reaching away from the body. Dr. Nelson indicated Claimant could return to modified duty on August 26, 2021, and that the restrictions would remain in place until Claimant's scheduled follow-up visit on August 30, 2021. (Ex. A). Claimant's restrictions remained unchanged until December 2, 2021. On December 2, 2021, Dr. Nelson changed Claimant's restrictions to include lifting, repetitive lifting, and carrying limits of twenty pounds, pushing/pulling of forty pounds, and no overhead reaching. These work restrictions remained in place through Claimant's last documented visit with Dr.

Nelson on December 23, 2021. No medical records were admitted demonstrating that Claimant's restrictions have been lifted. (Ex. A).

5. On August 25, 2021, Claimant provided his supervisor, RB[Redacted], with a copy of the written work restrictions via text message. The work restrictions imposed by Dr. Nelson were such that Claimant could not fully perform his job duties, which required lifting, carrying, pulling, and pushing in excess of the assigned weights, and required Claimant to reach away from his body and above his head. (Ex. C).

6. Claimant testified that during their phone call on August 25, 2021, Mr. RB[Redacted] indicated that another employee would take over Claimant's route, and that Claimant should be available by telephone to provide the replacement driver with information and assistance. Claimant testified that he was available and did speak with his replacement sometime during the week.

7. Claimant further testified that Mr. RB[Redacted] did not instruct Claimant to return to work, and Claimant's impression was that he was to keep Mr. RB[Redacted] updated with his medical restrictions. Claimant testified that he spoke to Mr. RB[Redacted] two to three times following his injury, which is consistent with Mr. RB[Redacted] 's testimony.

8. In internal emails on Friday, August 27, 2021, Mr. RB[Redacted] and others discussed assigning Claimant a limited duty position, including having Claimant ride with his replacement driver and provide instructions. No credible evidence was admitted indicating that this limited duty position was communicated to Claimant in writing or otherwise. Moreover, after receiving Claimant's written work restrictions on August 25, 2021, Employer did not provide Claimant with a written offer of modified employment pursuant to §8-42-105(3), C.R.S

9. Mr. RB[Redacted] testified that he texted and called Claimant several times on August 25, 2021, to ask Claimant to complete an "incident report" for Employer. Both Mr. RB[Redacted] and Claimant testified they exchanged text messages between August 25, 2021 and Friday, August 27, 2021. The text messages were not offered into evidence. Mr. RB[Redacted] characterized his messages to Claimant as instruction Claimant to "call me, and we still need to fill out the accident report, so we know what happened." Claimant testified that Mr. RB[Redacted] did request the incident report be completed. Although Claimant was aware that Employer was requesting the Incident Report, no credible evidence was submitted to indicate that Employer advised Claimant of the timeframe for returning the Incident Report, that Employer placed any urgency on returning the report, or that the failure to return it within any specific timeframe could result in termination or other disciplinary action.

10. On the morning of Monday, August 30, 2021, Claimant spoke with Mr. RB[Redacted] on the phone and also sent Mr. RB[Redacted] a copy of the doctor's report. In an email dated August 30, 2021 at 10:41 a.m., Mr. RB[Redacted] wrote: "[Claimant] just now contacted me, he was under the impression is not able to work at all. [Claimant] thought the light duty didn't start until 8/30. I told [Claimant] we had training

courses we could have had him doing and he was on light duty since he was seen by Concentra. He is currently filling out injury report." (Ex. C).

11. Mr. RB[Redacted] testified that he sent Claimant an email to permit Claimant to perform light duty work in the form of online "Safety Training," on August 30, 2021. He further testified that Claimant completed one night of safety training on August 30, 2021, and that Claimant performed the training for "one night and then he stopped doing it." Mr. [Redacted, hereinafter EB] testified that after August 30, 2021, the Claimant was "unreachable" and did not communicate with Employer until Wednesday, September 1, 2021, when Mr. B[Redacted] contacted Claimant by phone.

12. Mr. RB[Redacted]'s testimony on this issue is inconsistent with the documentary evidence. Exhibit C, p. 70, is an email from [Redacted, hereinafter TS], Employer's HSSE Manager, which shows Claimant was not set up to do online "Safety Training" until August 31, 2021 at 4:33 p.m. At that time, Mr. TS[Redacted] sent Claimant information to access the online training. (Ex. C). On the evening of August 31, 2021, Claimant performed on-line training as requested by Employer. (Ex. C). The email to Claimant communicating the online Safety Training instructions was not admitted into evidence, and no credible evidence was admitted regarding the specific instructions Employer provided to Claimant with respect to the online "Safety Training." Other than the August 31, 2021 email from Mr. TS[Redacted], no credible evidence was admitted demonstrating Employer attempted to contact Claimant on August 31, 2021.

13. On September 1, 2021, Employer's EB[Redacted] emailed Mr. RB[Redacted] asking if Claimant had performed light duty work. Mr. RB[Redacted] responded that Claimant was doing "a light duty course." (Ex. C).

14. At approximately 4:00 p.m., on September 1, 2021, Ms. EB[Redacted] indicated in an email that she had called Claimant and requested that Claimant return the "incident report" "ASAP." (Ex. C). Mr. RB[Redacted] testified that Claimant did return Ms. EB[Redacted] 's call and returned the incident report. The report contained in Exhibit C is undated. Mr. RB[Redacted] testified he did not know when Claimant returned the incident report, but also that Claimant returned the incident report on September 1, 2021.

15. Mr. RB[Redacted] testified that Employer made the decision to terminate Claimant on September 1, 2021, because Claimant had returned the incident report, was non-communicative and had stopped doing online training. On September 2, 2021, Employer's terminated Claimant's employment. (Ex. C). The termination letter authored by EB[Redacted] (Senior HR Manager), identified the reasons for termination as: "no call no shows, poor communication with your manager and not completing assigned work." (Ex. C). The termination letter does not reference the incident report.

16. On October 19, 2021, Respondents filed a General Admission of Liability, admitted for an average weekly wage of $100.00. (Ex. D).

17. Claimant began working for Employer in April 2021, at an initial pay rate of $21.00 per hour. After June 13, 2021, Claimant earned $27.50 per hour, and received a "shift

premium" of $2.50 per hour. Claimant also received overtime pay at the rate of $41.25 per hour, and a shift premium of $1.25, during this time. During the five full pay periods before his injury and after Claimant's raise to $27/50 per hour, (i.e., June 13, 2021 – August 21, 2021), Claimant worked an average of 95 hours per two-week period and earned an average of $1,451.35 per week, which included overtime pay and shift premiums. (Ex. B). The ALJ finds Claimant's average weekly wage at the time of injury was $1,451.35.

18. Claimant testified that he applied for and received unemployment benefits for approximately two months following his injury, ending in November 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 Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). 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.

Claimant suffered admitted injuries on August 24, 2021, and was under work restrictions through at least December 23, 2021. Notwithstanding that the Employer did not provide Claimant with a written offer of modified employment, Claimant returned to modified employment on August 31, 2021, when he performed online safety training. Accordingly, Claimant's right to TTD benefits terminated on August 31, 2021. However, upon termination of his employment on September 2, 2021, Claimant sustained actual wage loss due to his industrial injury and resulting disability. On and after September 2, 2021, Claimant remained under work restrictions that prevented him from resuming his pre-injury employment. Through at least December 23, 2021, Claimant was medically incapacitated with restrictions of bodily function that caused him to have work restrictions and impairment of his wage-earning capacity. His wage-earning capacity is thus impaired due to his industrial injury and resulting disability. No evidence was presented that Claimant has reached MMI or that his ATP has provided a written release to return to regular employment after September 2, 2021. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from August 25, 2021 to August 30, 2021, and beginning again on September 2, 2021.

Responsibility For Termination

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that 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). "Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011).

Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for his termination. Employer's stated reason for terminating Claimant's employment was "due to no call no shows, poor communication with your manager and not completing assigned work."

No credible evidence was admitted that Employer had a specific "no call/no show" policy or that Claimant violated any such policy even if one existed. Claimant was assigned work restrictions on the morning August 25, 2021, which did not permit Claimant to perform his regular job duties, and Employer was aware of these restrictions. Nonetheless, Employer did not provide Claimant a written offer of modified employment. It was not until 4:33 p.m., on August 31, 2021, that Employer provided Claimant with access to the online training program. Thus, between August 25, 2021 and August 31, 2021, Employer did not assign Claimant work, and Claimant was under no obligation to contact Employer to advise he would be a "no show." Respondents have failed to establish by a preponderance of the evidence that Claimant violated any purported "no call/no show" policy.

Respondents have also failed to establish that Claimant volitionally failed to complete assigned work. Employer did not provide Claimant access to the online training until the late afternoon of August 31, 2021, and Claimant performed the work that evening. The evidence indicates that Employer's expectation was that Claimant would complete the online training during his normal shift, during the evenings. As found, Employer decided to terminate Claimant on September 1, 2021, before Claimant would have had the opportunity to continue with the online training that evening. Thus, Employer decided to terminate after Claimant had completed the only work Employer assigned following his injury, and before he had the opportunity to complete the training on a second day. Although Claimant did not perform the online training on September 1, 2021, this was after Employer's termination decision and was not the reason for termination. Other than the online training assignment on August 31, 2021, no credible evidence was presented

that Employer "assigned" any other work that Claimant could have completed prior Employer deciding to terminate him on September 1, 2021. Accordingly, the ALJ finds that Claimant did not volitionally fail to complete "assigned work," prior to his termination.

With respect to the alleged "poor communication," the evidence was insufficient to establish by a preponderance of the evidence that Claimant's alleged poor communication was volitional. Claimant immediately reported his injury to Employer. Although Mr. RB[Redacted] testified that he left voice and text messages for Claimant, the evidence was insufficient to establish the content of those messages, other than Mr. RB[Redacted] testifying that he left messages to "call me" and to return an incident report. Thus, the ALJ is unable to determine whether Mr. RB[Redacted]'s communications to Claimant informed Claimant of the apparent urgency Employer placed on returning the incident report or returning Mr. RB[Redacted]'s calls within any set period of time. Nor was Claimant informed his failure to immediately return the incident report would result in termination. Mr. RB[Redacted]'s testimony that Claimant refused to communicate with Employer from August 30, 2021 to September 1, 2021, is not persuasive. The only evidence that Employer attempted to communicate with Claimant during that timeframe was Mr. ST[Redacted] sending Claimant the online training at the end of the day on August 31, 2021. The ALJ finds that Respondents have failed to meet their burden of establishing that Claimant's communication issues with Mr. RB[Redacted], were volitional acts rendering the Claimant responsible for his termination.

Although Claimant was capable of the modified work that Employer assigned to him post-injury (i.e., the online training), Claimant was not "responsible" for his termination by Employer during his period of temporary disability. As such, a causal link between Claimant's industrial injury and his post-termination wage loss is established, and Claimant is entitled to temporary total disability benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, continuing until one of the criteria of § 8-42-105(3)(a)-(d), C.R.S, is met.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's average weekly wage at the time of injury was $1,451.35.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, 2020, until terminated by law is GRANTED. Insurer shall pay Claimant TTD benefit during the relevant time period, until terminated by law, subject to any applicable offsets.

2. Claimant's average weekly wage at the time of injury was $1,451.35

3. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due

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: March 25, 2022

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

ISSUES

Whether the respondents have overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician on the issues of maximum medical improvement (MMI) and recommended medical treatment.

FINDINGS OF FACT

1. On November 30, 2018, the claimant was performing his normal job duties when he twisted while reaching for a hook and felt a pop and pain in his back. The claimant testified that the pain was immediate, sharp, and stabbing. The claimant reported this incident to the employer and was referred for medical treatment.

2. The claimant's authorized treating provider (ATP) for this claim is Dr. Daniel Smith. The claimant was first seen by Dr. Smith on November 30, 2018. On that date, the claimant reported left lower thoracic pain. Dr. Smith opined that the claimant's pain was muscular in nature. He placed the claimant under work restrictions that included only driving.

3. The claimant returned to Dr. Smith on December 7, 2018, and reported continuing thoracic back pain. Dr. Smith listed the claimant's diagnosis as thoracic back sprain. He referred the claimant to physical therapy and prescribed Tramadol. On December 21, 2018, the claimant was seen by Dr. Smith. On that date, Dr. Smith determined that the claimant could return to full duty. The claimant testified that Dr.Smith released him to full duty at that time at the request of the claimant. The claimant further testified that he asked to be cleared to return to work because he could not afford to be off of work.

4. The claimant returned to Dr. Smith on January 31, 2019. On that date, Dr. Smith noted that the claimant had "mostly thoracic pain", but was also reporting "some more low back discomfort with some radicular symptoms down legs". The claimant reported that physical therapy was helping and he was able to perform his work duties.

5. On February 27, 2019, the claimant was again seen by Dr. Smith. On that date, the claimant reported persistent pain that traveled down both legs, with numbness and cramping into his buttocks. Dr. Smith added the diagnosis of "low back pain with radicular component" and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

6. On March 11, 2019, a lumbar spine MRI was performed. The MRI showed multilevel spondylosis and stenosis; a mild broad disc bulge and mild thecal sac narrowing at the L1-L2 level; moderate disc space narrowing with a moderate asymmetric disc bulge at the L2-L3 level; and a mild disc bulge at the L4-L5 level.

7. On March 28, 2019, the claimant was seen by Dr. David Miller for consultation. Dr. Miller noted that the claimant had low back pain with bilateral radicular symptoms into his legs. Dr. Miller also noted that the lumbar spine MRI showed degenerative changes at all lumbar levels. Dr. Miller opined that surgery would not be beneficial to treat the claimant's condition. He also recommended that further physical therapy and injections would likewise not be beneficial. Subsequently, Dr. Smith referred the claimant to Dr. Wade Ceola for a surgical consultation.

8. On July 26, 2019, the claimant was seen by Dr. Ceola. At that time, the claimant reported persistent and significant back and leg pain. Dr. Ceola noted that the claimant had been through physical therapy without relief. Dr. Ceola noted the MRI results and opined that it was possible that the L4-L5 level was the pain generator. As a result, he recommended the claimant undergo injections to at that level. Dr. Ceola did not believe the claimant was a surgical candidate at that time.

9. In August and September 2019, Dr. Michael Campion administered bilateral L4-5 and L5-S1 facet injections. On September 4, 2019, the claimant was seen by Dr. Campion and reported that he did not experience any relief from the facet joint injections. Dr. Campion opined that it was possible that the claimant had bilateral L5 radiculopathy.

10. On October 24, 2019, the claimant was seen in Dr. Smith's practice by Andrew Henrichs, PA-C. At that time, the claimant reported that he could not continue working. As a result, PA Henrichs restricted the claimant from all work.

11. On November 8, 2019, the claimant returned to Dr. Ceola and reported that he had undergone injections, but the injections did not provide any relief. Dr. Ceola noted that the injections were not helpful from a diagnostic standpoint. On that date, Dr. Ceola referred the claimant to Dr. Kenneth Lewis for consideration of a spinal cord stimulator (SCS). Dr. Ceola also referenced the possibility of a future spinal fusion surgery.

12. On November 15, 2019, the respondents filed a General Admission of Liability (GAL).

13. On January 8, 2020, the claimant was evaluated by Dr. Kenneth Lewis for consideration for a SCS. Dr. Lewis opined that the claimant was not a candidate for SCS as he had symptoms of mechanical back pain.

14. On January 9, 2020, the claimant was seen by Dr. Smith. At that time, Dr. Smith noted that the claimant was not a candidate for a SCS. He opined that the claimant should obtain a second opinion from a surgeon.

15. On February 4, 2020, claimant was seen by Thomas Scruton, PA-C at Atlas Arch Neurosurgery. On that date, the claimant reported low back and extremity pain; right greater than left. PA Scruton opined that the claimant's pain was "multifactorial" and recommended diagnostic injections at the sacroiliac (SI) joint.

16. On March 2, 2020, Dr. Lewis performed the recommended SI joint injections. Subsequently, the claimant reported no improvement in his symptoms following the SI joint injections.

17. At the request of the respondents, Dr. Brian Castro performed a review of the claimant's medical records. In his March 29, 2020 report, Dr. Castro opined that on November 30, 2018, the claimant suffered a lifting sprain/strain injury. He also noted that the claimant's initial presentation was of lower thoracic/upper lumbar spine symptoms. It was not until later that the claimant began to report lower lumbar and hip symptoms. Dr. Castro further opined that the claimant's hip symptoms were not related to the November 30, 2018 work injury.

18. On May 7, 2020, the claimant returned to Dr. Ceola. At that time, Dr. Ceola noted that the claimant's pain generator had not been determined. Dr. Ceola recommended the claimant undergo a computed tomography (CT) scan and a psychological evaluation.

19. On May 19, 2020, a lumbar spine CT scan was performed. The CT scan showed mild to moderate loss of disc height and broad disc bulges at L1-L2; L2-L3; L3-L4; L4-L5; and L5-S1; and mild multilevel neural foraminal narrowing.

20. On June 11, 2020, the claimant was seen by Dr. Ceola and the results of the CT scan were discussed. In the medical record of that date, Dr. Ceola noted that the CT scan did not identify "surgically significant pathology". At that time, Dr. Ceola recommended the claimant undergo a discogram to determine if a surgical fusion would be appropriate.

21. On June 23, 2020, Dr. Giora Hahn performed a five level lumbar discogram. In the medical report, Dr. Hahn identified concordant discs at the L3-L4 and L5-S1 levels.

22. Following the discogram, Dr. Ceola recommended the claimant undergo surgery consisting of MIS TLIF[1] at both the L5-S1 and L3-L4 levels.

[1] Minimally invasive transforaminal lumbar interbody fusion.

23. On July 8, 2020, Dr. Castro issued a second report related to his further review of the claimant's medical records. Dr. Castro was specifically asked to state an opinion with regard to whether the recommended spinal fusion is reasonable, necessary and related to the claimant's November 30, 2018 work injury. In his report, Dr. Castro noted that the claimant has demonstrated "somewhat of a nonphysiologic presentation". In addition, Dr. Castro stated his opinion that a discogram is not an accurate assessment of pain, and "is known to be a very subjective test". Dr. Castro opined that the claimant suffered a thoracic sprain/strain injury, for which the claimant had reached maximum medical improvement (MMI). He also noted that all of the claimant's imaging studies show chronic degenerative changes. With regard to the recommended fusion surgery, Dr. Castro opined that the surgery is not related to the November 20, 2018 work injury. Based upon Dr. Castro's opinions, the respondents denied the requested lumbar fusion surgery.

24. On March 11, 2021, the parties appeared before ALJ Sidanycz. In an order dated March 30, 2021, ALJ Sidanycz found that the claimant failed to demonstrate, by a preponderance of the evidence, that the surgery recommended by Dr. Ceola was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 30, 2018 work injury.

25. On June 23, 2021, the claimant was seen by Dr. Davis Lorah for an impairment rating. Dr. Lorah assessed a whole person impairment rating of 15 percent. This rating was reached by combining a Table 53 impairment and additional impairment for range of motion. In the medical record of that date, Dr. Lorah identifies the claimant's date of MMI as May 17, 2021.

26. Subsequently, the claimant was seen by Dr. J.E. Dillon for a Division sponsored independent medical examination (DIME). In connection with the DIME, Dr. Dillon reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her DIME report, Dr. Dillon opined that the claimant was not at MMI. In support of this opinion, Dr. Dillon noted that the claimant "remains significantly symptomatic and would likely benefit from further active treatment." Dr. Dillon specifically recommended that the claimant pursue the spinal surgery recommended by Dr. Ceola. Dr. Dillon further opined that this procedure is indicated and warranted, as the claimant has failed extensive conservative care. Dr. Dillon also noted that prior to the work injury, the claimant was able to perform his physically demanding job duties, but now he is disabled as a result of his continuing symptomatology. In the DIME report, Dr. Dillon assessed a whole person permanent impairment rating of 22 percent.

27. The claimant testified that his current symptoms include constant and unbearable pain. The claimant wishes to pursue the fusion surgery recommended by Dr. Ceola.

28. Dr. Castro's deposition was taken on January 24, 2022 and is consistent with his written reports. Dr. Castro testified that he still does not believe the recommended surgery is reasonable, necessary, and causally related to the claimant's injury. More specifically, it is Dr. Castro's opinion that the claimant's pain generator has still not been identified. With regard to the results of the discogram, Dr. Castro opined that discograms are "very subjective". Dr. Castro does not believe that the risks of the recommended spinal fusion surgery outweigh the possible success. It is Dr. Castro's opinion that the surgery will likely diminish the claimant's function. Dr. Castro recommends that the claimant continue with physical therapy and medications as maintenance treatment.

29. The ALJ credits the medical records and the opinions of Dr. Dillon over the contrary opinions of Dr. Castro. The ALJ finds that the respondents have failed to demonstrate that it is highly probable that Dr. Dillon erred in reaching her conclusions as the DIME physician.

30. The ALJ recognizes that this is seemingly contrary to the March 2021 order regarding the same recommended surgery. However, as the ALJ explained at the outset of this hearing, this issue does not fall into an analysis of issue preclusion or *res judicata*. Previously, it was the claimant's burden, by a preponderance of the evidence, to demonstrate that the recommended medical treatment (the fusion surgery) was reasonable, necessary, and related to the work injury. In the current matter, it is the respondents' burden, by clear and convincing evidence, that the DIME physician's opinions are in error. While much of the evidence and facts presented at the two hearings were similar, the ALJ is able to reach a different conclusion at this time based upon the existence of a DIME opinion and the higher burden of proof.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

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

5. As found, the respondents have failed to overcome, by clear and convincing evidence, the opinion of the DIME physician on the issues of MMI and recommended medical treatment. The respondents have failed to establish anything other than a difference of opinion between medical providers. As found, the medical records and the opinions of Dr. Dillon are credible and persuasive.

ORDER

It is therefore ordered that the respondents have failed to overcome the DIME physician's opinions regarding MMI and recommended medical treatment.

Dated this 10th day of March 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. Evidentiary Issues

   a. Admissibility of witness statements obtained by Employer.

   b. Admissibility of OSHA Reports.

II. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her left leg in the course and scope of her employment with the Employer on January 29, 2021.

III. Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to reasonably necessary medical benefits to cure and relieve her from the effects of the alleged January 29, 2021, work injury.

IV. Whether Claimant is entitled to an award of temporary total disability benefits from February 8, 2021, to February 26, 2021 and from March 1, 2021 to March 26, 2021.

V. If the claim is found compensable, whether Respondents have shown Claimant violated a known safety rule thereby resulting in a 50% reduction in benefits.

STIPULATIONS

1. In the event of a compensable claim, the parties stipulated as follows:

   a. Claimant's average weekly wage is $676.55

   b. [Employer redacted] Health Services, UC Health, and Banner Health Burn Center are the authorized treating providers.

   c. Temporary total disability benefits from February 8, 2021 through February 26, 2021 and March 1, 2021 through March 26, 2021.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

Claimant's Alleged Work Injury on January 29, 2021

1. On January 29, 2021, claimant worked at [Employer redacted], a meat processing plant, trimming tripe, and cutting honeycomb. Hrg. Tr. 44:6-10.

2. Claimant testified she had been asked to wash the tripe table prior to lunch. Hrg. Tr. 47:20-21; 48:7-8; 48:11-12. Claimant testified she used the red hose with 180-degree water to clean the table. Hrg. Tr. 49:11-13. Claimant reported that the hot water had gotten into her work boot (in part because she did not have protective gaiters on) and burned her left leg causing severe first and second-degree burns. Hrg. Tr. 47:21-25 – 48:1-4; 51:15-18.

3. The severity of the burns is shown in Claimant's Exhibit 1.

Claimant Failed to Report the Work Injury for Nearly Seven Hours after It Occurred

4. On January 29, 2021, at about 6:30 pm, Claimant presented to the [Employer Redacted] Health Clinic and was evaluated by David Concha, EMT. Resp. Ex. E, p. 100. Claimant informed Mr. Concha the alleged injury occurred at 11:30 am earlier in the day. *Id.* Claimant told Mr. Concha she noticed the significance of the injury after returning home from the hospital with her mother and after changing her clothes. *Id*. Claimant reported she left work without reporting the injury because it was not painful. *Id*. Mr. Concha observed blistering with large amounts of swelling and yellow coloration and displayed limited range of motion at the ankle due to the severity of the blistering. *Id*.

5. A [Employer redacted] employment record noted Claimant reported an injury almost seven hours after it had occurred which is against company policy. Resp. Ex. E, p. 133.

6. Mr. Concha referred Claimant to the emergency room for further care. *Id*.

Claimant was Diagnosed with first and Second Degree Burns over her Left Leg and Foot

7. On January 29, 2021, Claimant was evaluated at UC Health Greeley Emergency and Surgery Center. Physician assistant Julie Menefee observed two areas that were likely "second-degree burns which were blistered over the crease of the ankle. Other areas are likely first-degree burns." Resp. Ex. B, p. 26. The extent of the burns is also demonstrated in the photographs submitted by Claimant in Exhibit 1. As a result, Claimant had significant and severe first and second degree burns which would have most likely caused immediate pain.

8. Ms. Menefee noted the "incident occurred today at 11:30 while working at [Employer redacted]. She did not notice the burn until she took her boot off at 5:30." *Id*. at 27. This history Claimant provided of not noticing the burn until 5:30 p.m. was directly inconsistent with her testimony at hearing in which she stated that she started to get undressed to take a shower about a half hour after getting home earlier in the day in which she noticed her skin was wrinkly.

9. Claimant was referred to Northern Colorado Burn Center for additional care after bacitracin was applied to the wounds. *Id*. at 22-23. On February 1, 2021, Claimant presented to physician's assistant Eric Hofmann reporting a burn injury to her left ankle and top of her foot. Resp. Ex. A, p. 2. Mr. Hofmann noted the blisters had not yet popped and documented Claimant's report that she was unable able to wear shoes due to the swelling and the pain. Claimant described the pain as "constant, burning, and stabbing." *Id*. at 3. Mr. Hofmann diagnosed Claimant with first- and second-degree burns. *Id*. at 5.

Claimant Admitted She Did Not
Immediately Report the Incident to her Employer

10. At hearing, Claimant testified her team lead, [Redacted, hereinafter PR] asked her to clean the tripe table prior to lunch at around 11:00 am. Hrg. Tr. 48:7-8. Claimant testified she used one hose to clean the table and floor which was the 180-degree hot water hose. Hrg. Tr. 74:15-19. Claimant testified she felt moisture in her boot but did not think to report the incident to her employer. Hrg. 51:2-8.

Video Surveillance Shows Claimant
Wearing Gaiters and Apron Over Her Clothing

11. Claimant testified she had no difficulty walking around after the incident and did not notice any burns because she did not change her leggings before leaving her shift early. Hrg. Tr. 50:22-23; 53:2-5. This testimony lacks credibility since she had suffered severe first and second-degree burns and it most likely would have been painful when the incident occurred.

12. Claimant testified at the time of the incident she was wearing her apron and work boots, but no gaiters. Hrg. Tr. 75:13; 45:16-23. Claimant told Dr. Smith, at UC Health she was not wearing gaiters or any other type of protective equipment which is usually used when handling the red hose. Resp. Ex. A, p. 12. Clamant told Dr. Smith that she did not have protective gaiters on because otherwise her contention about being burned at work would not make sense (since the gaiters would stop the hot water from going into her boot).

13. Video surveillance showed Claimant walking down the hallway in an apron and gaiters after the alleged work injury. Resp. Ex. H & I. As a result, her statement to [Employer redacted] and Dr. Smith that she did not have protective gaiters on at the time of the alleged incident lacks credibility.

14. When confronted with the fact that she had gaiters on right after the reported injury occurred, Claimant provided a different explanation that did not make sense. Claimant testified after she cleaned the table, she went to put on gaiters before going to ask her supervisor for permission to leave work early due to her mother's medical condition. Claimant testified she put on the gaiters after she returned from lunch in case her supervisor did not allow her to leave work early. Hrg. Tr. 71:9-13.

15. Again, Claimant's explanation does not make sense - that she was going to ask her supervisor to leave work but yet decided to put on gaiters for the first time that day minutes before she made such a request to the supervisor. Claimant had no reason to put on the gaiters at lunch as she was asking her supervisor to go home. As a

result, the evidence shows that Claimant was wearing gaiters at the time of the alleged work injury.

Following the Alleged Incident, Claimant Requested Permission to Leave Work Early

16. Claimant testified she requested permission from her supervisor to leave work early to tend to her mother who was experiencing medical problems and had to go to the doctor. Hrg. Tr. 50:12-17. Claimant testified she left [Employer redacted] around 12:15 pm and got home around 12:40 pm to 1:00 pm. Hrg. Tr. 50:10; 51:9-12. Claimant subsequently testified she only lived about a couple of minutes away from work. Hrg. Tr. 60:21.

17. Ms. [Redacted, hereinafter KP] was Claimant's former supervisor at [Employer redacted]. Ms. KP[Redacted] no longer works for [Employer redacted]. Ms. KP[Redacted] testified she talked with Claimant for about 20 minutes to calm her down (because of her mother's medical issues) before she allowed Claimant to leave. Ms. KP[Redacted] recalled it was around 12:20 to 12:30 when Claimant left. Hrg. Tr. 90:1-6; 93:1-4.

18. Ms. KP[Redacted] testified Claimant's clothes were not noticeably wet. Hrg. Tr. 92:14. Ms. KP[Redacted] testified Claimant wore light clothing which would have made it obvious if she was wet. Hrg. Tr. 95:10-14.

19. Ms. KP[Redacted] testified at no time during her conversation with Claimant, did she report she had hot water in her boot or had been burned at work. Hrg. Tr. 93:19-20. If Claimant had actually suffered severe first and second degree burns at work, she would have most likely felt pain immediately and mentioned it – or formally reported it - to Ms. KP[Redacted].

20. The ALJ finds Ms. KP[Redacted]' testimony to be credible.

Claimant Seen Walking Normally and Wearing Gaiters Prior to Leaving Work

21. On March 10, 2021, Dr. Smith reviewed video from [Employer redacted]. The video showed footage of Claimant waking down a hallway after the alleged incident wearing what appeared to be gaiters. Resp. Ex. A, p. 21. Dr. Smith noted that at the initial visit, Claimant was adamant she was not wearing gaiters when the injury occurred.

22. Claimant agreed she put on regular shoes before leaving the facility. Hrg. Tr. 77:19-24.

Claimant Delayed Returning to Work upon Discovering the Burn and Provided Further Inconsistent Statements about the Alleged Injury

23. Claimant testified that once home, she undressed to shower and noticed red bubbles on her shin. Hrg. Tr. 51:15-21. Claimant testified she thought about how she cleaned the table and felt water in her boot and went back to her job to report the injury.

24. Claimant initially testified she believed she returned to [Employer redacted] about an hour and half or two hours after she arrived home. Hrg. Tr. 52:7-8; 63:14-18.

25. Claimant testified she returned to work around 2:30 pm to report the injury. Hrg. Tr. 63:19-21. Claimant later testified it was maybe past 3:00 when she returned to work because different nurses were on shift. Hrg. Tr. 77:8-13.

26. Claimant testified she was in no hurry to rush back for care because she did not think the burns were that severe. Hrg. Tr. 66:9-14.

27. Claimant also testified she did not go to the hospital to see her mother. Hrg. Tr. 65:7-9. Instead, Claimant went home to check on her sister and remained at home for a few hours before returning to [Employer redacted]. Hrg. Tr. 63:17-18.

28. Claimant ultimately conceded it was around 6:30 pm. when she returned to [Employer redacted]'s occupational health facility. Hrg. Tr. 80:17-21.

29. Claimant's contention about when she noticed the severe first and second-degree burns is inconsistent. She told the medical provider detailed above that she first noticed the burn at 5:30 p.m. when she finally took her boots off after going to the hospital, etc. She testified at hearing that she took got undressed to take a shower shortly after getting home and noticed the burn which would have been around 1:00 p.m. to 1:30 p.m.

30. In any case, Claimant's story lacks credibility and was inconsistent. She provided numerous different and inconsistent timelines for when she discovered the burns for the first time.

Claimant's Authorized Treating Physician Found the Burns Were Not Work-Related

31. Dr. Smith opined in all medical probability that her alleged injury did not occur at work. *Id*. Specifically, Dr. Smith stated as follows: "it is very doubtful with the type of injury she sustained that she would not have immediately experienced significant pain that would have affected gait, behavior and prompted a report to someone that she was injured…if [Claimant] did not injure herself at work then she most likely injured herself at home in the several hours she was absent from work. Home accidents can occur such as with boiling or near boiling water that cause similar injures to those she sustained and therefore could be a plausible explanation for how she sustained her injury outside of work." *Id*.

32. Dr. Smith also noted that Claimant mispresented the fact that she was wearing protective gaiters at the time which would have protected her from the boiling water entering her boot. The ALJ finds Dr. Smith's opinions to be credible and persuasive.

Claimant is Witnessed Using the Blue Hose

33. Team lead, PF[Redacted] testified on January 29, 2021, he had asked Claimant to clean the tripe table before lunch. Hrg. Tr. 99:13-20. Mr. PF[Redacted] testified he personally observed Claimant using the blue hose to wash the floor which contains 120-degree water which would not have caused a burn. Hrg. Tr. 99:23. The ALJ finds Mr. PF[Redacted]' testimony to be credible and persuasive.

34. Mr. PF[Redacted]' observations are crucial because Claimant admitted that she used only one hose (the red hose) for the cleaning job. As a result, PF[Redacted]' testimony is directly inconsistent with Claimant's allegations about her using the red hose and suffering a burn injury at work.

Both Ms. KP[Redacted] and Mr. T[Redacted] Testified it was Procedure to Use the Blue Hose Prior to Lunch Breaks

35. Ms. KP[Redacted] testified it was standard procedure for employees to use the blue hose, which is 120 degrees, when cleaning tables and the floor prior to lunch. The red hose is only used during shift changes to prevent contamination. Hrg. Tr. 87:8-11.

36. Safety manager, Neil T[Redacted] also testified regarding the cleaning procedures at [Employer redacted]. Mr. T[Redacted] testified that prior to lunch, the tables are cleaned with the blue hose and prior to shift changes, the tables, and floors are cleaned with the red hose. Hrg. Tr. 111:6-10; 111:19-23.

37. Mr. T[Redacted] testified [Employer redacted] sought to limit the time employees used the 180-degree red hose because it increased the temperature index of the floor. Hrg. Tr. 112:2-5.

38. As a result, Claimant's contention that she was using a red hose and it caused a burn injury at work is not credible.

[Employer redacted] Representatives Testified Claimant Received Training on Using the Red Hose

39. Ms. KP[Redacted] further testified Claimant knew that any time the red hose was in use, the requisite proper protective equipment would need to be used. Hrg. Tr. 85:19-24. Ms. KP[Redacted] testified Claimant was provided this training when she was hired.

40. Mr. Fernandez testified that if the red hose is used, a yellow rain suit needed to be worn and is obtained from the supervisor or himself. Hrg. Tr. 102:4-5.

41. Claimant testified she used the red hose because it was faster and that is what others would do. Hrg. 48:14-17; 49:11-13.

42. Mr. T[Redacted] further testified Claimant had acknowledged she had received the requisite 180-degree testing and failure to wear the required yellow rain suit constituted a major safety violation. Hrg. Tr. 110:12.

Records of the Employer

43. Based on the statements of Counsel, the appearance of the documents and the contents of the documents, the witness statements and OSHA Reports were

maintained by Employer and therefore records of the employer and admitted into evidence.

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

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

Assessing the 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's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, 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 all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

I. Evidentiary Issues

a. Whether the witness statements submitted by Employer are admissible.

Witness statements and investigative reports maintained by the employer – hearsay – are admissible as "records of the employer" pursuant to 8-43-210.[1] Once a witness statement or investigative report is admitted into evidence - additional challenges to its reliability go to its weight. Thus, strong cross-examination, presentation of opposing evidence, and argument are the appropriate ways to attack questionable but admissible evidence.

1. Hearsay - in the form of medical records, physician reports, vocational reports, and records of the employer - is admissible under 8-43-210.

The admissibility of evidence in Colorado workers' compensation hearings is governed by Section 8-43-210 of the Workers' Compensation Act. It states in pertinent part:

> The Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; ***except that medical and hospital records, physicians' reports, vocational reports, and records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case*** (emphasis added).

Section 8-43-210.

One of the few Colorado Supreme Court cases to analyze the evidentiary rules applicable in workers' compensation cases is *Department of Labor and Employment v. Esser,* 30 P.3d 189 (Colo. 2001). In *Esser*, the Court wrestled with the conflict between the express language of Section 8-43-210 and 8-41-301. Section 8-43-210 allows medical records and physician reports - hearsay - to be admitted into evidence without being subject to the hearsay rules contained in the Colorado Rules of Evidence. That said, 8-41-301 provides that a Claimant must prove a claim for mental impairment by the oral testimony of a licensed physician or psychologist. The conflict exists because although 8-43-210 allows the admission of Claimant's medical records and reports into evidence to establish her claim for benefits, the lower court's interpretation of Section 8-41-301 required the claimant to have the psychiatrist or psychologist testify at hearing or by deposition.

[1] The analysis starts with the broad admissibility of medical records and physician reports under the same statute, 8-43-210.

In analyzing the evidentiary matter, the Court resorted to certain basic tools of statutory construction. The tools included determining the legislative intent of the act. The court, in determining the legislative intent, looked at:

i. the Act's policy declaration, and
ii. the plain and ordinary meaning of the words the General Assembly chose to use in 8-43-210.

Thus, the *Esser* court set forth the express purpose of the Act:

> It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" *be interpreted so as 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,* recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike.

Esser at 196.

The Court then went to Section 8-43-210, which contains the basic evidentiary provisions appliable to workers' compensation claims in Colorado.

The statute provides in pertinent part:

> [T]he Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; ***except that medical and hospital records, physicians' reports, vocational reports, and records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case*** (emphasis added).

In analyzing the evidentiary provisions of the Act, the Court noted that:

> The Act obviously includes relaxed evidentiary standards, see § 8–43–210, in pursuit of its purpose of cost-effective, timely delivery of workers' compensation benefits to claimants.

Esser at 196.

The relaxed evidentiary standards referenced by the Court pertain to the admissibility of medical records, physician reports, vocational reports, and "***records of the employer***" (emphasis added). As a result, the relaxed standards in Section 8-43-210 allows certain enumerated documents to be admitted into evidence without formal identification — foundation. In other words, documents containing hearsay, which might be excluded under the Colorado Rules of Evidence, are admissible as substantive

evidence for the truth of the matter asserted in a workers' compensation case. And as stated in the *Esser* opinion, the remedy to rebut the hearsay in the medical report is for the opposing party to obtain an order compelling the licensed professional to appear for cross-examination at the hearing or at a deposition, under Colo. Rev. Stat. §§ 8-43-207(1)(a), 8-43-207.5(2), 8-43-212, 8-43-315 (2000) *Esser* at 191. See also CRE 806.

2. Although there are no Colorado cases defining "records of the employer," the term "record" has been defined by the Colorado Supreme Court in other matters to mean "a documentary account of past events."

There is not a Colorado Court of Appeals or Supreme Court case that has determined whether investigative reports or witness statements are "records of the employer" and admissible under 8-43-210. The Colorado Supreme Court has, however, had a chance to determine what constitutes "a record." In *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361 (Colo. 2001) the Court embarked on defining "a record" since the term was not defined in the federal Pilot Records Improvement Act. To define "a record" the Court went directly to Webster's Dictionary and Black's Law dictionary. The Court cited the definition of a record set forth in Webster's and Black's. The Court stated:

> Generally, "a record is piece of writing that recounts or attests to something . . ." *Webster's Third New International Dictionary: Unabridged* 1898 (1993). *Black's Law Dictionary* 1279 (7th ed. 1999) defines a record as a documentary account of past events designed to memorialize those events.

Sky Fun at 367.

It is typical for witness statements and investigative reports to document past events. As a result, both witness statements and investigative reports fit within the plain and clear meaning of a record as stated in Webster's and Black's dictionary. Thus, when kept by the employer, the witness statements and investigative reports are records of the employer.

3. The statute does not restrict the admissibility of medical records, medical reports, and records of the employer – hearsay – just because they were prepared in anticipation of litigation.

In *Ackerman v. Hilton's Mechanical Men, Inc*., 914 P.2d 524 (Colo. App. 1996), the respondents submitted a letter written by a physician who evaluated the claimant's medical records and concluded the claimant was intoxicated at the time of the accident and that his intoxication most likely caused the accident. The ALJ credited the physician's opinion as stated in the letter and ordered the claimant's compensation to be reduced by 50%. *Id*. The claimant unsuccessfully argued that for evidence to be admitted pursuant to Section 8-43-210 without formal identification - foundation - such evidence must be inherently trustworthy, accurate, and reliable. Claimant argued that:

> [T]he only evidence which is inherently trustworthy and reliable in workers' compensation proceedings, and thus the

> only evidence that §8–43–210 is intended to include, consists of reports and records prepared to assist in the history, treatment, examination, diagnosis, or prognosis of claimants and their injuries, ***and not medical records which were prepared for litigation purposes*** (emphasis added).

Ackerman at 526

The court held that even though the report was prepared either in anticipation of litigation, or specifically for litigation, the statute did not provide any limiting language that prevented the report from being admitted into evidence. The court stated:

> Contrary to claimant's arguments, the General Assembly created no exceptions which made admissibility of a physician's report dependent upon either the type of physician's report being offered, i.e., treating or consulting, or the reason for which the report was written. And, since the General Assembly has not explicitly created such an exception, we have no authority to infer the existence of one.

Ackerman at 527.

In support of its conclusion, the court went through the legislative history of the statute since its inception in 1919. The court noted that in 1923, the statute was amended to limit the admissibility of physicians' reports to reports created by "attending or examining physicians." As a result, if a physician reviewed the claimant's medical records and rendered an opinion in a report, without examining the Claimant as done in *Ackerman*, the report would not be admissible. In 1983, however, the statute was repealed and reenacted. In the reenactment, the General Assembly deleted any reference to reports of specific classes of physicians, such as an "attending" or "examining." As a result, "physicians' reports" in general were to be admitted.[2] The court did not, however, analyze whether a physician's report would also qualify as a medical record. *Ackerman* therefore did not address the issue as to whether records encompass reports.

[2] In *Ackerman,* the court held that there is a distinction between "records" and "reports." The respondents in Ackerman sought the admission of a physician's letter that contained the physician's opinion about the claimant's blood/alcohol level at the time of a work-related accident. The court held that the term "report" refers to a "formal statement or account of the results of an investigation." *Ackerman*, 914 P.2d at 526. The court found that the physician's opinions, which were based on the results of toxicology tests, constituted a physician's "report," and therefore, held it was unnecessary to determine whether the physician's letter also constituted a "medical record." Thus, one could argue that a report that includes the results of an investigation is not a record. But that is a very persuasive argument because *Ackerman* specifically said they did not address whether the physician report was also a medical record. (*Ackerman* at 526.) ("We conclude that the letters at issue here are "physicians' reports" within the meaning of the statute; hence we need not determine whether the materials also qualify as "medical records.'")

4. The relaxed rule of evidence in Section 8-43-210 eliminates the need for medical records, physician reports, and records of the employer to be subject to the foundational requirements of the business record exception to the hearsay rule in CRE 803(6).

Medical records and physician reports are submitted and admitted into evidence under 8-43-210 in almost every workers' compensation hearing. The medical records and physician reports routinely consist of independent medical examinations that are undertaken and performed solely in anticipation of litigation. Despite being prepared solely in anticipation of litigation, and being hearsay, they are no doubt admissible pursuant to 8-43-210. *See Ackerman*, *supra.* (Letter – report - written by physician in anticipation of litigation is admissible under 8-43-210.).

Moreover, IMEs, are hearsay. *See Klein v. State Farm Mut. Auto. Ins. Co*., 948 P.2d 43, 50 (Colo. App. 1997) (IME reports are hearsay.) Plus, IME reports are hard to qualify as a business record under 803(6).[3]

5. A self-serving letter written by the employer is admissible as a record of the employer to establish the basis for Claimant's termination.

A letter written by an employer setting forth the basis for the claimant's termination – hearsay - is considered a record of the employer and admissible. *Churchill v. Sears, Roebuck & Co*., 720 P.2d 171. (Colo. App. 1986). In *Churchill*, the employer wrote a letter saying the claimant was terminated for lack of office skills, lack of interest in improving, absenteeism, and poor judgment. At hearing, the employer submitted the letter as substantive evidence of the basis for Claimant's termination. Claimant objected to the letter being admitted because she was not afforded an opportunity to cross examine its author. She also disputed the contents of the letter. Despite her objection, the court determined the letter was admissible under the statute as a "record of the employer." As a result, the *Churchill* court admitted the hearsay evidence based on the plain language of Section 8-43-210.

[3] IMEs performed in anticipation of litigation are admissible under 8-43-210 and not admissible under CRE 803(6) as a business record. There is not a Colorado case on point that specifically says an IME is not a business record. But there are several cases from other jurisdictions addressing the issue under evidentiary rules like Colorado's CRE 803(6). In *People v. Huyser*, 221 Mich App 293 (1997), the Michigan Court of Appeals concluded that the trial court erred by allowing the State to use, in its prosecution, an expert witness report of the doctor it [hired] to examine the victim of a sex crime. Because the report was prepared for the purpose of litigation, the Court believed it lacked trustworthiness of a record generated exclusively for business purposes. *Id.* Other courts faced with the same issue, such as the Supreme Court of Main in *State v. Tomails*, 736 A.2d 1047 (Me. 1999), reached the same conclusion, holding forensic expert reports are the antitheses of the business records addressed by the Maine version of Rule 803(6) and the fact that they are prepared in anticipation of litigation is a common reason for finding that they lack trustworthiness. Similarly, in *McElroy v. Perry*, 753 So.2d 121 (2000), the Florida Court of Appeal's reached the same conclusion. Thus, Defendants' insurance medical exams and reports (IMEs) and other expert reports are not admissible under the business record exception. *Id*.

6. An investigation into the possible cause of an accident, leading to a statement from a co-worker in an email — hearsay — is admissible as a record of the employer.

In *McIlravy v. Harpel Oil Co*. W.C. No. 4-756-089, the claimant alleged the ALJ based his conclusion that there was no toxic exposure to diesel fuel on improperly admitted hearsay – an email from a coworker. The claimant objected to Exhibit O, an email from an employee to the employer stating that he talked to the decedent one hour before he got back into town on April 2nd and that the decedent said nothing to him about being exposed to diesel fuel. An employer representative testified that when the claimant informed her that the decedent had been exposed to diesel fuel, she sent out a general email to all employees asking if anybody knew about the incident. The employer representative testified that she kept that information in the employer's records because it was part of her job duty as Director of Transportation to keep track of spills. The ALJ allowed the Exhibit, finding it to be an employer's record. On appeal, the claimant argued that the email is not a record of the employer but an investigative report, and that without this evidence the ALJ could not otherwise reasonably conclude that a diesel exposure had not occurred. The panel perceived no reversible error. The panel based its opinion on Section 8-43-210, which it classified as an exception to the general rule that hearsay is not admissible and found the email to be a record of the employer. The Panel concluded that "We are not persuaded that the ALJ was mistaken in his determination that the documents in this regard were employer records." *Id*.

7. Section 8-43-210 provides each party ample time to rebut any statements contained in the employer witness statements or investigative reports.

Section 8-43-210 requires the employer to exchange with claimant each employment record they intend to introduce as evidence at the hearing at least twenty days before the hearing. The statute provides:

> All relevant medical records, vocational reports, expert witness reports, and employer records shall be exchanged with all other parties at least twenty days prior to the hearing date.

This mechanism and due process safeguard of providing the records at least 20 days before the hearing allows the claimant to prepare to rebut the information in the records of the employer. As a result, if the claimant wants to rebut a witness statement or investigative report, the claimant can rebut the evidence at the hearing. The claimant can rebut the evidence by testifying at the hearing.[4] The claimant can also rebut the evidence by subpoenaing to the hearing the witness who provided the statement. Plus, the claimant can also subpoena any other witness with relevant information to rebut the records of the employer. *Esser* at 197. (A party may obtain an order compelling a

[4] *See Walker v. Director of Insurance*, Mo. Admin. Hrg. Comm., No. 05-1585, December 20, 2006), 2006 WL 4007572. (Ability of a party to testify and rebut hearsay statements in letters admitted at hearing, which were hearsay, provides "ample due process protection" in non-criminal matters.)

witness to appear for cross-examination at the hearing or deposition pursuant to sections 8-43-207(1)(a), 8-43-207.5(2),8-43-212, and 8-43-315.)

8. CRE 806 acknowledges that some hearsay will be admissible, and upon its admission, sets forth how to attack, or support, the credibility of the out of court declarant / statement.

Colorado Rule of Evidence 806 specifically addresses the methods by which a party may attack or support the credibility of an out of court statement. In other words, CRE 806 recognizes that hearsay evidence may be admitted under certain circumstances, and when it is admitted, sets forth how each party may either attack or support the credibility of the declarant – who is absent and cannot be cross examined. CRE 806 allows each party to attack or support the witnesses statement as if the witness had testified.

CRE 806 provides in pertinent part:

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

As a result, CRE 806, through other witnesses, lets you cross examine the declarant. For example, another witness can be questioned about a conflicting statement the declarant allegedly made to someone else. This occurred in *United States v. Bernal*, 994 F.2d 1518 (1st Cir. 1989). In *Bernal*, a co-conspirator's hearsay declaration was received into evidence against the defendant.[5] The defense lawyer impeached that declarant by eliciting, on cross-examination of a prosecution witness, that this same co-conspirator (the hearsay declarant) had given quite a different version which exculpated the defendant from guilt. Such evidence is received not as substantive evidence, but as non-substantive impeachment evidence to be considered by the fact-finder in determining the hearsay declarant's credibility.[6]

The rationale behind Rule 806 is sufficiently stated by the Advisory Committee's Note in the Colorado Rules of Evidence: "this rule recognizes that a hearsay declarant should be, so far as possible, subject to impeachment and rehabilitation as if he or she had testified. Evidence may thus be offered to show the declarant's bias, character for truthfulness, felony convictions, consistency [and inconsistency], and the like."

Therefore, if an employment record, in the form of a witness statement, is admitted into evidence pursuant to CRS 8-43-210, then another witness with personal knowledge should be able to testify as to any inconsistencies that

[5] See Anthony M. Brannon, Successful Shadowboxing: The Art of Impeaching Hearsay Declarants, 13 Campbell L.Rev. 157 (1991).

[6] *Id.* at 175, 176.

were made by the hearsay declarant. For example, if a witness statement is admitted into evidence which indicates that the hearsay declarant did not see the claimant injure himself at work while lifting a cinder block, another witness on the stand, maybe a co-worker of the hearsay declarant, can testify that he heard the hearsay declarant say while they were at lunch that he saw Claimant injure his back while lifting a cinder block at work.

CRE 806 also provides that the party against whom the hearsay statement has been admitted may call the hearsay declarant as a witness, and cross examine him as to the statement. The ability to call the hearsay declarant, or any other witness to refute the hearsay statement, is aided by the requirement of 8-43-210, which requires all relevant employer records, such as a witness statement, to be exchanged with all parties at least twenty days before the hearing date. Thus, 8-43-210 dovetails with, and is congruent with, CRE 806. In other words, 8-43-210 allows the witness statement into evidence and CRE 806 allows the party against whom the statement is offered to test the veracity of the statement through examination of other witnesses, or cross-examination of the declarant. In addition, the party against whom the hearsay statement is offered, can also argue to the ALJ, the limited weight to give the hearsay statement because of possible bias, inconsistency with other evidence, and the fact that the proponent of the statement did not produce the witness at the hearing and subject the hearsay declarant to provide the statement under oath – and be subject to direct cross-examination.

9. The ALJ does not have to credit or find persuasive an investigative report or witness statement.

The ALJ does not have to credit records of the employer that are admitted into evidence. *Jarnagin v. Busby, Inc.,* 867 P.2d 63, 66 (Colo. App. 1993)(the credibility of witnesses and the sufficiency, probative effect, and weight of the evidence are all within the province of the trial court); *Absolute Emp. Services, Inc. v. Industrial Claim Appeals Off.,* 997 P.2d 1229, 1234 (Colo. App. 1999)("Although there may be some evidence in the record from which the [trier of fact] could have drawn [a particular] inference ..., [the trier of fact] certainly was not compelled to find this evidence persuasive....") *Littlefield v. Bamberger*, 32 P.3d 615, 619 (Colo. App. 2001).

As a result, if a party submits a witness statement into evidence, but does not produce the witness to testify, the ALJ can determine the weight to give the witness statement under those circumstances. For example, the employer might submit a witness statement from a coworker that says the claimant told him he hurt his back at home and not at work. But if the coworker is not brought to testify in person – the judge may decide to not credit the hearsay statement.[7] But, on the other hand, if the employer also produces an emergency room report from the week before the alleged

[7] The mere maintenance of hearsay documents in a personnel file does not overcome the inherent reliability problem with the evidence. *See Lynch v. City of Philadelphia,* 87 A.3d 398 (Pa. Commw. Ct. 2014)

work accident, which says the claimant said he hurt his back at home, the ALJ might credit the witness statement.

Admissibility and Weight Given to Witness Statements

Section 8-43-210 governs the admissibility of certain hearsay in workers' compensation proceedings, but not the weight to be given to that hearsay. The clear meaning of the statute does not limit the type of employment records that are admissible. Moreover, any attempt to limit the admissibility of certain employment records based on factors set forth in the exception to the hearsay rule - 803(6) – would nullify the plain language of Section 8-43-210. As a result, once an investigative report or witness statement is admitted into evidence, additional challenges to its reliability go to its weight. Thus, strong cross-examination, presentation of opposing evidence, and argument are the appropriate ways to attack questionable but admissible evidence.

In this case, the ALJ has admitted the witness statements into evidence and reviewed them since they are records of the employer but has not credited them or given them any weight. Some are in Spanish and were not translated. Plus, some statements are illegible. Moreover, some of the witness statements contain double hearsay. Except for Mr. T[Redacted], Respondents did not produce any of the witnesses who wrote the statements to testify. Therefore, they were not subject to cross-examination at the hearing. As a result, the ALJ has not credited the witness statements and has not given them any weight.

b. Admissibility and Weight Given to OSHA Reports

In this matter, the same analysis applies to the OSHA records. The OSHA records were received and maintained by Employer and therefore became records of the employer. The OSHA reports were thus received into evidence. That said, the findings of the OSHA investigation are disputed and are being litigated. Therefore, based on the disputed findings contained in the OSHA reports, the ALJ has not credited the information contained in the OSHA reports and has not given them any weight.

I. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury to her left leg in the course and scope of her employment with the Employer on January 29, 2021.

For a claim to be compensable, the claimant must prove that: (1) the injury arose out of the claimant's employment, and (2) that the injury was in the course of the claimant's employment. C.R.S. §8-41-301(1)(b). The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). It is claimant's burden to prove by a preponderance of the evidence that she was injured in the course

and scope of employment. A preponderance of the evidence is that which leads the tier 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).

Claimant must also prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999). Further, while 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 the need for medical treatment, when the claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

Claimant testified at hearing that on January 29, 2021, she was cleaning the tripe table using the 180-degree hot water red hose, when she felt warm water trickle off her apron into her work boot and get her sock wet. Claimant testified she cleaned the table prior to the lunch at around 11:30 am and only used one hose (the red hose only) to clean the table and floor. Claimant also alleged repeatedly that she did have protective gaiters on that would have stopped the water from getting into her boot.

Claimant testified she did not think to report the incident because she felt no pain. Multiple witnesses credibly testified Claimant did not mention any incident prior to requesting permission to leave work early at around 12:15 pm.

In light of the photographs admitted as Claimant's Exhibit 1, this testimony lacks credibility. If Claimant had suffered the severe first and second degree burns at work as demonstrated by the photographs, she would have most likely experienced significant pain, had trouble walking, and notified the employer immediately. Dr. Smith credibly confirmed this fact in a report submitted into evidence at the hearing.

Video surveillance shows Claimant walking the [Employer redacted] corridors wearing a long apron and gaiters just minutes after the alleged work injury. Claimant is seen walking with a normal gait and no pain. Claimant told [Employer redacted] and Dr. Smith she had not being wearing gaiters at the time of the incident (because otherwise her contention about how the injury occurred would not make sense as the water would not have entered her boot).

When confronted with this fact at hearing, Claimant incredibly testified that she put on the gaiters right after cleaning the table, but before talking to Ms. KP[Redacted] to request the rest of the afternoon off due to a family emergency. Claimant would have had no reason to put on the gaiters at lunch if she was requesting to go home. Moreover, her foot was allegedly already wet so the story about putting protective gaiters on at lunch makes no sense. It is clear from the surveillance that Claimant had the gaiters on after the alleged injury which would have protected her from water getting into her boots or a burn occurring.

Claimant's hearing testimony regarding her timing of the discovery of the burns and return to [Employer redacted] to report said burns also conflicts with the history documented in the medical reports.

She told a doctor initially that she did not notice any burns until taking off her boots for the first time at 5:30. However, she testified at hearing that she took a shower at around 1:00 p.m. and noticed the burns and was back to report the injury at [Employer redacted] around 2:30 to 3:00.

Claimant eventually conceded there was about a seven-hour gap between when she alleged the injury occurred at 11:30 am and when she went back to [Employer redacted] to report the incident at 6:30 pm. Claimant testified she was in "no rush" to report the incident because she did not think the burns were severe. But the photographs demonstrate the severity of the burns.

Mr. Fernandez credibly testified he witnessed Claimant using the blue hose. This testimony aligns with Mr. T[Redacted]'s and Ms. KP[Redacted]' testimony that it was customary and procedure to use the blue hose to rinse off the table and floors before taking a lunch break. Claimant testified she did only use one hose when washing the table and floor. As a result, Claimant's contention further lacks credibility. If Claimant was using the blue hose, she would not have burned herself at work.

Dr. Smith noted in all medical probability that Claimant did not sustain an injury at work. Dr. Smith credibly documented that with the first and second degree burns Claimant sustained, it would be very doubtful Claimant would have not experienced immediate pain that affected her gait and behavior to prompt her to immediately report the injury. Dr. Smith also noted that claimant had lied to her about whether she was wearing gaiters.

Dr. Smith credibly noted Claimant likely injured herself at home in the several hours she was absent from work.

Claimant's story simply lacks credibility and was inconsistent. If she had suffered severe first and second-degree burns, she would have most likely noticed them immediately and would not have waited seven hours to go back to [Employer redacted] to report the alleged injury and seek medical treatment.

As found, the totality of the evidence presented persuades the ALJ that Claimant failed to prove, by a preponderance of the evidence, that she sustained a compensable injury on January 29, 2021.

ORDER

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

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

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: March 11, 2022.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-800-001

ISSUE

1. Whether Claimant overcame the Division Independent Medical Examination (DIME) opinion of Stanley Ginsburg, M.D. regarding the impairment rating by clear and convincing evidence.

2. If Claimant has overcome the DIME physician's opinion, what is the correct impairment rating?

FINDINGS OF FACT

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

1. Claimant is a 73 year-old male who worked for Employer as a Safety and Health Consultant. On February 24, 2020, Claimant sustained a work-related injury to his lumbar back when he was involved in a motor vehicle accident while driving in whiteout conditions. (Tr. 16:25-17:12).

2. Claimant was taken to the emergency room at Memorial Hospital of Converse County, Wyoming. He complained of lower back, right hand, and right hip pain. X-ray imaging revealed a compression fracture of the L4 vertebral body. (Ex. 6).

3. On February 27, 2020, Claimant began treating with Authorized Treating Physician (ATP) Kathryn Bird, D.O., at Concentra. After conservative modalities, including injections, did not improve Claimant's condition, surgery was recommended. (Ex. 15).

4. On September 17, 2020, Bryan Castro, M.D. operated on Claimant. The operation included a spinal fusion posterior transforaminal interbody fusion and decompression L4-5 and decompression right L3-4. (Ex. 13).

5. Following a course of post-operative rehabilitation, Dr. Bird placed Claimant at MMI on March 3, 2021. She also performed lumbar range of motion measurements on Claimant. (Ex. D).

6. When performing lumbar range of motion measurements, the physician measures a claimant's lumbar flexion, lumbar extension, right lateral flexion, left lateral flexion and straight leg raising maneuvers. Each category of measurements is done three times. *AMA Guides to the Evaluation of Permanent Impairment (Third Edition Revised).*

7. When performing lumbar range of motion measurements on Claimant, Dr. Bird measured Claimant' flexion at 7%, his lumbar extension at 6%, his lumbar right lateral flexion at 3%, and his lumbar left lateral flexion at 3%. The total lumbar range of motion

impairment was 19%. Dr. Bird's series of three measurements for each category resulted in only numbers divisible by five. (Ex. D).

8. Dr. Bird assigned Claimant a 29% whole person impairment rating for his lumbar spine, based on the 19% loss for range of motion and a 12% Table 53 specific disorder. *Id.*

DIME Examination

9. Respondents objected to the 29% whole person impairment rating assigned by Dr. Bird and filed a Notice and Proposal and Application for a DIME. Stanley Ginsburg, M.D., was selected as the DIME physician. The DIME occurred on July 8, 2021. (Ex. B).

10. Dr. Ginsburg performed lumbar range of motion measurements on Claimant. Dr. Ginsburg measured Claimant's lumbar flexion at 7%, his lumbar extension at 3%, his lumbar right lateral flexion at 2%, and his lumbar left lateral flexion at 1%. The total lumbar range of motion impairment was 13%. Dr. Ginsburg's series of three measurements for each category resulted in only numbers divisible by five. *Id.*

11. Dr. Ginsburg agreed with Dr. Bird that Claimant reached MMI on March 3, 2021. He assigned Claimant a 24% whole person impairment rating based on the 13% loss for range of motion and a 13% Table 53 specific disorder. *Id*.

12. On August 3, 2021, Respondents filed a Final Admission of Liability (FAL) consistent with the opinions of Dr. Ginsburg. The FAL admitted to a MMI date of March 3, 2021, and a 24% whole person impairment rating. (Ex. A)

Claimant's IME

13. Claimant's counsel requested that Gary Zuehlsdorff, D.O., perform a Claimant's IME. On October 6, 2021, Dr. Zuehlsdorff evaluated Claimant. (Ex. E.)

14. Dr. Zuehlsdorff performed lumbar range of motion measurements on Claimant. Claimant's lumbar flexion was measured at 7%, his lumbar extension at 4%, his lumbar right lateral flexion at 3%, and his lumbar left lateral flexion at 2%. The total lumbar range of motion impairment was 16%. Dr. Zuehlsdorff's range of motion measurements, unlike those of Drs. Bird and Ginsburg, are not all numbers divisible by five. *Id.*

15. Dr. Zuehlsdorff agreed with the MMI date of March 3, 2021. He assigned a 27% whole person impairment rating based on a 16% loss for range of motion and a 13% Table 53 specific disorder. *Id.*

16. With regard to the range of motion impairment, Dr. Zuehlsdorff stated in his IME report that "there are simply differences upon three different dates of 19% from Dr. Bird, 13% from Dr. Ginsburg, and 16% from [him]". *Id.* Dr. Zuehlsdorff opined that given the variability one would see in measurements of the lumbar spine on a day-to-day basis, the three range of motion impairments reflect a range of which Claimant could fall into. *Id*.

Respondents' IME

17. On November 8, 2021, Nicholas Kurz, D.O., evaluated Claimant at the request of Respondents' Counsel. (Ex. C).

18. Dr. Kurtz performed lumbar range of motion measurements on Claimant. Claimant's lumbar flexion was measured at 4%, his lumbar extension at 3%, his lumbar right lateral flexion at 0%, and his lumbar left lateral flexion at 1%. The total lumbar range of motion impairment was 8%. Dr. Kurtz's range of motion measurements, like those of Dr. Zuehlsdorff, are not all numbers divisible by five. *Id.*

19. Dr. Kurtz agreed with the MMI date of March 3, 2021. He assigned a 19% whole person impairment rating based on an 8% loss for range of motion and a 12% Table 53 specific disorder. *Id.*

20. Dr. Kurtz questioned Dr. Ginsburg's measurements because they were even numbers in increments of five (Dep. Tr. 44:2-22). Dr. Kurz credibly testified that Dr. Ginsburg's range of motion measurements met the Division of Workers' Compensation definition of valid. (*Id*. at 45:1-5). Dr. Kurz further testified that the ultimate say with respect to the impairment rating is with the DIME. (*Id.* at 29:13-18).

21. Dr. Zuehlsdorff, credibly testified that Dr. Ginsburg's range of motion numbers appear to be rounded. (Tr.45:16-18). Dr. Zuehlsdorff testified, however, that the Division of Workers' Compensation has never commented on this "rounding phenomenon." (Tr. 45:5-7). Dr. Zuehlsdorff testified that rounding the range of motion numbers would affect the actual impairment rating by, at most, a couple of percentage points. (Tr. 47:3-9).

22. The ALJ finds that while Drs. Kurtz and Zuehlsdorff both credibly questioned Dr. Ginsburg's measurements being in increments of five, this testimony is not persuasive. As both Drs. Kurtz and Zuehlsdorff testified, Dr. Ginsburg's measurements are not contrary to the Division guidelines or the AMA guides.

23. Dr. Zuehlsdorff testified that he and Dr. Ginsburg measured Claimant's lumbar flexion impairment at 7%. He testified that his left and right lateral flexion measurements each differed by 1% from Dr. Ginsburg's measurements. Dr. Zuehlsdorff testified that the 1% differences between him and Dr. Ginsburg can be attributed to a person's day-to-day variability. (Tr. 63:14-64: 8).

24. While Dr. Zuehlsdorff believes that his lumbar measurements are more accurate that Dr. Ginsburg's, there is no evidence that Dr. Ginsburg's impairment rating is incorrect.

25. The ALJ finds that Claimant did not overcome Dr. Ginsburg's opinions on impairment by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in 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).

DIME Physician's Impairment Findings

The party seeking to overcome the DIME physician's finding regarding permanent impairment bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must

be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Ginsburg, assigned Claimant a 24% whole person impairment rating. (Findings of Fact ¶¶ 10 and 11). That opinion must be overcome by clear and convincing evidence. Claimant's expert, Dr. Zuehlsdorff, assigned Claimant a 27% whole person impairment rating. (*Id.* at ¶¶ 14 and 15). While Dr. Zuehlsdorff and Dr. Kurtz questioned Dr. Ginsburg's measurements because the numbers were all factors of five, neither doctor opined that Dr. Ginsburg's measurements were incorrect. (*Id.* at ¶¶ 20 and 21). Dr. Zuehlsdorff noted the minor differences between his and Dr. Ginsburg's measurements, and credibly testified that it could be attributed to Claimant's day-to-day variability. (*Id.* at ¶ 23).

Dr. Ginsburg offered an opinion regarding Claimant's impairment rating that differs from the opinions of Drs. Zuehldorff, Bird and Kurtz. There is no evidence, however, that Dr. Ginsburg's opinion regarding Claimant's impairment rating is incorrect. Claimant did not introduce sufficient evidence to meet his burden of proof to overcome Dr. Ginsburg's findings regarding impairment.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by clear and convincing evidence that the DIME physician's impairment rating is incorrect.

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: March 11, 2022

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

ISSUES

I. Whether Claimant established that she suffered a compensable Coronavirus ("Covid") infection arising out of her work duties on or about November 24, 2020.

II. If Claimant established that she suffered a compensable Covid infection, whether she also established, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical treatment to cure and relieve her of the effects of said infection.

III. If Claimant established that she suffered a compensable Covid infection, whether she also demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits between July 12, 2021, and November 30, 2021.

Because the ALJ concludes that Claimant failed to establish that she suffered a compensable Covid infection, this order does not address issues II-III.

FINDINGS OF FACT

Based upon the evidence presented at hearing along with the deposition testimony of Dr. Fall, the ALJ enters the following findings of fact:

Background

1. Claimant, a 42 year-old woman, is employed as a case worker for Respondent-Employer. Claimant works at [Employer's facility, redacted]. Her job duties and responsibilities include assisting criminal offenders with job placement, preparing release documentation and assisting with court hearings. In November of 2020, Claimant's typical work hours were from 8:00 a.m. to 5:00 p.m. Monday through Friday with Saturdays and Sundays off.

2. Claimant's husband works at the same facility as Claimant but in a different department. During November 2020, Claimant's husband was working in the Transportation Department, which required that he move inmates around the correctional facility. His work shift was typically from 7:00 a.m. to 3:00 p.m., Monday through Friday with some 12-hour shifts as needed. In November of 2020, when Claimant and her husband were not working, including on weekends, they generally spent their time at home together.

3. During November 2020, Claimant, her husband and their daughter generally ate meals together at home. Claimant and her husband shared a bathroom, a

bedroom, and all other areas of their home. They also drove together in the same vehicle numerous times, went on community outings together, including shopping and dining and engaged in intimate contact with one another.

Claimant's Potential non Work-Related Exposure to Covid

4. During November 2020, Claimant shared a 3-bedroom, 1300 sq. ft. single family home with her husband and her daughter, who is 20 years old. The house is located in Florence, Colorado in Fremont County.

5. Neither Claimant nor her husband or daughter wore face coverings (masks) while together in their personal residence or when driving to and from places together in their vehicles. When conducting business in the community, Claimant, her husband and her daughter would only wear masks when required by the business establishment.

6. Claimant, her husband, and their daughter dined at Chili's Restaurant on November 6, 2020 and November 21, 2020. On each occasion, when dining at the restaurant, Claimant, her husband, and daughter took their masks off while at the table and while eating. Chili's was open to the public at that time and other diners were present in the restaurant without masks.

7. Claimant and her family members had numerous visitors to their family home during November 2020, while Claimant was present. None of the visitors wore masks while inside Claimant's house. The visitors included Paul Anderson, Claimant's father, and people who regularly worked in public places, including Shelby Murphy who worked at Walmart, Skyler Ross and Colton Walker who worked at Target, Jordan Brown who worked at Royal Gorge, and Desiree Fox who also worked at the Royal Gorge.

8. On November 22, 2020, Claimant's husband began to experience symptoms consistent with a Covid-19 infection, including fatigue, shortness of breath, headache and symptoms consistent with pneumonia. (Exh. J, p. 72).

9. Claimant testified that her husband tested for Covid on November 22, 2020, at a drive-thru test site. This test would return a positive result. According to Claimant's testimony, her husband tested positive for Covid on November 24, 2020, by a Binax Rapid test given by the Department of Corrections (DOC). (See also Exh. J, p. 72).

10. Per Dr. Fall, Claimant's husband probably had COVID on November 22, 2020 when he started having symptoms. (Fall Depo., p.25).

11. Claimant testified that she was scheduled to work on November 24, 2020 and would have reported to work that day, but just before her shift, she was advised by her husband that he had tested positive for Covid. (See also Exh. J, p. 72).

12. Claimant reported her husband's symptoms and positive test result to the call-in nurse line established by Respondent-Employer as soon as she learned that her

husband was Covid positive, i.e. on November 24, 2020. (Exh. J, p. 72). Claimant was instructed to go home, quarantine and test. She did not report to work.

13. Claimant inconsistently reported the onset of her symptoms to the nurse line. According to LB[Redacted] and Exhibit J, in one message Claimant reported being tired and run down on November 24, 2020. During another call, she reported her symptoms started November 25, 2020, when she was "real sick" with a sore throat, sinus problems and headaches. (Exh. J, p. 72).

14. Claimant testified that her own symptoms started on November 25, 2020, one day before Thanksgiving.

15. Claimant's first Covid positive test result came back on November 30, 2020, approximately one week after her husband had first tested positive.

16. Between August and mid-November of 2020, Claimant was required to undergo weekly PCR testing for Covid. For eleven weeks, Claimant tested negative for Covid. Claimant's first positive test result came after she spent hours and days in direct and unprotected contact with her husband, who had tested positive for Covid no later than November 24, 2020.

17. Between November 20, 2020 and December 1, 2020, the following events transpired:

- On Friday, November 20, 2020, Claimant took holiday and compensatory time; she was at home 24 hours. (Exh. N, p. 89). According to Dr. Fall, Claimant's husband [Redacted] was probably contagious for Covid by this date. (Fall Depo. p. 25).

- On Saturday, November 21, 2020, Claimant and her husband were at home together for extended time periods. (Exh. N, p. 89) (Exh. N, p. 89). Claimant testified she, her husband and her daughter went out to eat at Chili's restaurant.

- On Sunday, November 22, 2020, Claimant was at home 24 hours; her husband was also home during this time, during which he first complains of Covid like symptoms.

- On Monday, November 23, 2020, Claimant works 8 hours. Claimant's rapid Covid test is negative. Claimant is at home for the balance of the day with her symptomatic husband, whose symptoms persist. (Exh. N, p. 89).

- On Tuesday, November 24, 2020, Claimant was instructed to return home, quarantine and take a PRC test given that her husband had just tested positive for Covid by his rapid test.

Claimant returns home and spends the day with her Covid positive husband. (Exh. N, p. 89).

- On Wednesday, November 25, 2020, Claimant remains home in quarantine with Covid positive husband. (Exh. N, p. 89). Claimant reports developing Covid like symptoms on this date, approximately 3 days after her husband fist complained of symptoms. Based upon the evidence presented, it is unknown if Claimant takes another rapid or PRC test on this date.

- On Thursday, November 26, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89).

- On November 27, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89). Claimant's PCR test results from Nov. 24, 2020 are negative. (Exh. J, p. 72).

- On November 28, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p. 89).

- On November 29, 2020, Claimant was at home 24 hours with her Covid positive husband. (Exh. N, p.89).

- On November 30, 2020, Claimant was at home 24 hours with Covid positive husband. (Exh. N. p. 89). Claimant takes another Covid test. (Exh, D).

- On December 1, 2020, Claimant was at home for 24 hours with her Covid positive husband. (Exh. N, p.89). The results from Claimant's November 30, 2020 test are reported as positive for Covid. (Exh. D, p. 46).

18. The only known Covid positive person Claimant was exposed to without personal protective equipment (PPE) during the aforementioned time period was her husband.

19. When the facility received Claimant's Covid test results on December 1, 2020, Claimant was asked if she wanted to pursue workers' compensation benefits. Nine days later, she responded that she did not. (Exh. I, p. 69). No mention is made of any purported work-related exposure when she responded to this query.

20. Claimant worked a total of 3 shifts, or 24 hours, between November 18, 2020 and November 24, 2020, when she was sent home without working due to her husband's positive Covid test. She quarantined before testing positive herself on November 30, 2020. While at work during the aforementioned shifts, Claimant wore PPE, as did all other staff and facility offenders. During this time, Claimant was exposed to her

husband for approximately 248 hours during that period - almost 10 times longer than she was exposed to others at work. Further, Claimant never wore PPE around her husband whom the scientific data, according to Dr. Fall, demonstrates was probably positive for Covid on November 22, 2020, after developing symptoms. As noted, his diagnosis was confirmed on November 23, 2020.

Claimant's Contrasting Potential for Exposure to Covid While at Work

21. [Employer's facility] is located in Canon City, Colorado in Fremont County. The facility consists of at least five separate buildings that house offenders. The buildings are designated A, B, C, D, and E, which are referred to by names reflecting the letter assigned to the building, e.g. building E is referred to as Echo Unit. (Exh. O, p. 103). Claimant performs the majority of her work in her private office in Building E. The office has a door that could be closed to separate her from common areas within the building.

22. Strict safety protocols were in place in November 2020 concerning the use of protective equipment and social distancing due to the Covid pandemic. (Exh. O). The protocols changed over time from October 2020 to November 2020 to account for changes in the Center for Disease Control's (CDC's) knowledge of Covid transmission and spread. When in a building with any offenders known to have Covid, the staff was required to wear PPE including, goggles, an N 95 mask, a face shield over the mask, a gown and gloves. (Exh. O, p. 97). Claimant was required to, and did, wear at least a KN 95 rated mask at all times while in the facility as did offenders when interacting with staff.

23. The facilities Covid safety protocols were based on the best available scientific knowledge at the time and were authored based on input from Randolf Maul, M.D., Chief Medical Officer, and Health Authority for the Department of Corrections. (Exh. O, p. 96).

24. Both staff and offenders could be reprimanded or punished for failure to follow the aforementioned safety protocols. (Exh. Q. p. 107). Claimant testified that staff and offenders generally complied with the protocols. She testified that she never reported any staff to management for failure to comply with the protocols. Offenders who failed to comply could be subject to punishment under the Code of Penal Discipline, which could result in a loss of earned good time against the offender's sentence. Claimant never reported any failures of offenders to comply with the facilities safety protocols.

25. As stated above, Claimant's office was located in the Echo (E) building. As of November 19, 2020, Echo building did not house any known Covid positive offenders. (Exh. O, p. 103).

26. When Claimant met with offenders in her personal office, she would wear a KN 95 mask. As noted, offenders also wore masks during meetings with facility staff.

27. Claimant testified that she did not meet with known Covid positive offenders in her office. Rather, known positive offenders resided in buildings other than Echo

Building and were restricted to their assigned buildings. Covid positive offenders were not allowed to leave their buildings to travel to other buildings on facility grounds. Indeed, they were not even allowed to travel to the "chow" hall for meals. Instead, they had their meals delivered to their cells.

28. When Claimant had occasion to go into a building were Covid positive inmates resided, e.g. Alpha (A) Building, she wore the highest level of PPE available, including a gown, a personally fitted N 95 face covering, a face shield over that and gloves. (Exh.O, p. 96, 99). The N 95 is the highest-rated mask for personal protection. Every offender also wore a KN 95 mask when interacting with staff members. As of November 2020, out of 107-housed offenders in Alpha building, 27 were known to have Covid. (Exh. O, p.103).

29. Claimant testified that, other than Echo, the only building she recalls going into in November 2020 was Alpha building. Alpha building was being used as a quarantine unit at the time. The majority of the offenders housed in Alpha building, approximately 75%, did not have Covid. (Exh. O, p. 103). The cells in Alpha building had windows that could be opened.

30. The only time Claimant would have to go into Alpha building would have been to obtain the signatures of offenders who were scheduled to be released. Claimant did not present any credible evidence that she obtained signatures on release documents in the latter half of November 2020, which is when she contends she contracted Covid as part of her work duties.

31. Claimant did not establish that anyone she may have interacted with in Alpha building actually had Covid. She presented no persuasive evidence that she was in direct contact with a Covid positive offender in the latter half of November 2020. Rather Claimant contends that because the facility had an active Covid positivity rate of a least 40.44%, her infection had to have resulted from her work environment. According to Claimant, the prisons positivity rate means that she had a better than 40% chance of contracting Covid at work, which she contends, "far exceeds that risk of catching the virus outside of her work." As noted below the ALJ is not persuaded.

The Testimony of [Redacted, hereinafter SB]

32. SB [Redacted] testified as a member of the prisons management team. He oversees inmate programs administered by prison staff, including Claimant. At the time Claimant alleges she contracted Covid in the facility, SB[Redacted] was Claimant's Captain and direct supervisor. SB[Redacted] testified that only inmates who were on a discretionary release and were not Covid positive could be released in November 2020. Therefore, he testified that any signature Claimant obtained from an offender who was scheduled for discretionary release would not have been Covid positive. Accordingly, the risk that Claimant would have had close contact with a Covid positive offender was significantly reduced. If an offender was scheduled for mandatory release, he could be

released even if he had Covid; however, Claimant presented no convincing evidence that she obtained signed paperwork from such an inmate in the latter half of November 2020.

33. SB[Redacted] reiterated that anyone entering Alpha building, for any reason, was required to don full PPE. He also echoed that once an inmate was identified as Covid positive, that inmate was not free to leave the quarantine area or access the day hall. According to SB[Redacted], the facility instituted cohorting and restricted staff and inmate movement around the facility by November 2020. SB[Redacted] testified that if inmates were non-compliant with established safety protocols, incident reports were to be prepared. He testified that he received no such reports from Claimant outlining inmate non-compliance, nor did he ever receive any reports of face-to-face contact Claimant had with any confirmed Covid positive inmate. As noted, Claimant presented no convincing evidence that she interacted with a Covid positive offender during the two weeks before she became symptomatic on November 25, 2020, nor did she testify she had been in a building with Covid positive offenders, such as Alpha Building during that time. Even if there had been such an interaction, the evidence presented supports a finding that such contact would have likely occurred over minutes, not hours, and while both parties were wearing PPE.

34. During cross-examination, SB[Redacted] agreed that prior to November 2020, the facility experienced problems with staff and inmate compliance in wearing masks as instructed. Indeed, on October 13, 2020, an email sent by the Associate Warden, Lance Miklich, to prison staff verified that there was a problem getting staff members to wear their masks. The email provides in pertinent part:

> The department continues to struggle with staff and offenders wearing their masks as directed. CMC will now take the next step in holding our staff and inmates accountable. Our staff and inmates have been reminded and directed for several months prior to this point. (Exh. Q, p. 107).

35. Warden Thomas Little also sent an email to prison staff regarding the problem with Covid spreading throughout the facility on October 13, 2020. Warden Little noted: "As you all are aware, we have experienced staff positives here at CMC and there have been numerous outbreaks throughout the department."

36. Additional measures to distance staff from each other were instituted including suspension of communal meals. While some staff and inmates had an apparent problem adhering to the facilities safety protocols as documented in the aforementioned email, there is a dearth of evidence to suggest that Claimant was ever exposed to or had physical contact with a known Covid positive staff member or offender when neither party was wearing any PPE. Indeed, Claimant reportedly wore her PPE consistently.

37. On November 2, 2020, Warden Little sent out another email mentioning that the facility was experiencing a "spike" in Covid-19 cases. Nonetheless, Warden Little noted: "At this point, it appears that the risk to anyone being exposed has been relatively

low as our employees have been diligent in utilizing barrier masks while at the facility." Claimant contends that the evidence presented supports a finding that she was infected at the same time that this "spike" occurred in the facility.[1]

38. Accepting Claimant's assertion that she was infected no later than the date of Warden Little's November 2, 2020 email means that she did not experience symptoms for 23 days post infection until she developed symptoms on November 25, 2020. While Claimant argues that she was "infected" in early November 2020, the evidence presented persuades the ALJ that does not have a convincing understanding as to when she actually contracted Covid. Indeed, in her position statement, Claimant notes:

> Claimant tested positive on November 30, 2020, and was feeling symptoms as of November 25, 2020. That means she was infected sometime before the 25th, likely within five days of that time period, ***but it could have been fourteen days or more as well***. In any event, we know that the Claimant was infected at the same time that the virus was spreading rapidly throughout the prison where she worked, at an infection rate that exceeded 40%. (Emphasis added).

Thus, Claimant contends that "[i]t makes sense that the Claimant was infected as a result of her work at the prison." (Claimant's Post-Hearing Position Statement, p. 4).

The Testimony of [Redacted, hereinafter LB]

39. LB[Redacted] testified as Respondent-Employer's Human Resources Analyst. Ms. LB[Redacted] testified that she was part of the facilities Covid response team, which maintained a Covid hot line that employees were instructed to call to report, among other things, positive test results. According to Ms. LB[Redacted] , prison staff were required to undergo weekly PCR tests and daily Binax rapid tests before each shift. Ms. LB[Redacted] and Claimant both testified that staff members were not allowed to work if they had a positive Binax test on the day of work or if they were exposed to a known Covid positive person outside of work.

40. As noted above, Claimant contacted the hot line on November 24, 2020 and left a voice mail message that she had been exposed to her husband who had a Covid positive Binax test. (Exh. J, p. 72). Her voice mail message was returned and during a subsequent conversation with the hot line representative, Claimant indicated that she had taken a test and was "tired and rundown." (Id.) Claimant contacted the hot line again on November 27, 2020. She left a voice mail indicating that her husband was Covid positive, but her test result from November 24, 2020 was negative. Nonetheless, she reported experiencing symptoms. (Id.) During a follow-up phone conversation with hot line personnel, Claimant reported that she developed a sore throat, sinus symptoms and "really bad headaches" on November 25, 2020. She also reported that her husband's symptoms began on November 22, 2020. (Id.) Follow-up testing was scheduled for November 30, 2020 (five days after the onset of reported symptoms as recommended).

[1] See generally, Claimant's Post Hearing Position Statement, p. 4.

(Id.) Claimant was contacted after her November 30, 2020 test returned a positive result. During this conversation, Claimant reported that she worked the day shift and that prior to her positive test result she worked on November 19, 2020, November 20, 2020 and November 23, 2020, (presumably because her required daily Binax tests were negative). (Id.) She also advised that she worked in her office in Echo Unit, wore a N 95 and offenders wore KN 95 masks during contact with one another. (Id.) She did not identify any significant staff contact and noted that she did not carpool or socialize with staff. (Id.) Ms. LB[Redacted] testified that she determined there was no significant offender or staff contact that would have triggered further contact tracing measures at the facility. In other words, Claimant's reporting raised no concerns that she had indeed contracted the virus at the facility nor potentially infected anyone else at work.

The Medical Record Evidence

41. Claimant first sought medical care for reported Covid symptoms on December 12, 2020, at UC Health Urgent care in Canon City. Claimant arrived to the clinic with complaints of shortness of breath, cough, fatigue and loss of voice. (Exh. B, p. 25). She reported a positive Covid test result from November 30, 2020 and when asked by Medical Assistant (MA) Jessica Montelongo if there had been a known exposure to Covid, and if so to whom, Claimant reported: "Yes, husband". (Id.) Claimant did not report any known or suspected work exposures. However, she did report that her husband has been diagnosed with COVID pneumonia and the record reflects that he had been seen in the clinic the week before she presented there. (Exh. B, p. 21-22). A chest X-ray was ordered and revealed a normal heart size, clear lungs no consolidating infiltrates and normal pulmonary vascularity. (Exh. B, p. 22). Claimant was diagnosed with "bacterial sinusitis and bronchitis likely as a complication from Covid." She was prescribed antibiotics, a Medrol dose pack and an inhaler followed by a discharge to home with instructions to return if her symptoms worsened.

42. On January 4, 2021, Claimant was seen by Dr. Alfred Arline at Kaiser Permanente in Pueblo. Claimant reported headaches and sinusitis and was now status post 2 weeks of Covid leave, and some sick leave and vacation. Claimant complained of fatigue but no shortness of breath. She reported "initial COVID like symptoms, around 24th of November, after exposure to her husband, who was positive for COVID-19". (Exh. C, p. 38). With respect to Claimant's fatigue, Dr. Arline was "UNSURE OF HIS (sic) RELATED SOME OTHER ETIOLOGY, OR UNFORTUNATELY CONSEQUENCE OF PREVIOUS COVID-19 INFECTION". (Exh. C, p. 39). A cardiac exam, including an EKG for reported palpitations was reportedly normal.

43. As part of a questionnaire provided at check-in for her appointment on January 4, 2021, Claimant indicated that her visit was not related to Third Party Liability including workers' compensation. (Exh. C, p. 41).

44. On January 6, 2021, Claimant sent the employer an e-mail indicating that she wanted to file for workers' compensation benefits. (Exh. I, p. 70). At hearing, Claimant testified the impetus for this was her diminishing lack of personal/vacation leave.

45. After asserting on January 6, 2021, that her Covid infection was caused by an exposure at work, Claimant returned to UC Health Urgent Care in Canon City on January 7, 2021. During this encounter, Claimant reported that an "incident" occurred at work on November 23, 2020, which caused her to develop Covid-19 symptoms. (Exh. B, p. 12). Claimant did not mention a work incident exposing her to Covid to her medical providers previously nor did she testify at hearing about a specific incident purportedly exposing her to Covid at work on November 23, 2020. Finally, she did not testify that her symptoms began on November 23, 2020. Rather, she testified that her symptoms started on Wednesday, November 25, 2020, the day before Thanksgiving. Despite Claimant's report that she was exposed to Covid at work, the report from this date of visit indicates that it was "unknown" whether Claimant's exposure arose from a work related mechanism. (Id.) Repeat chest x-rays performed during this appointment revealed normal heart and lungs.

46. Claimant returned for treatment at Canon City Urgent Care on April 19, 2021 where she was reevaluated for persistent complaints of fatigue and shortness of breath by Physician Assistant (PA-C) Steven Quakenbush. (Exh. B, p. 9). PA-C Quackenbush did not opine on the cause of Claimant's Covid. Rather, he said MMI was pending a "decision on work-related causality and compensability."

47. On May 26, 2021, Claimant was seen at Kaiser Permanente to obtain Family Medical and Leave Act (FMLA) paperwork. She reported that she had been denied workman's compensation but felt too winded to go back to work. Claimant was informed that "the Kaiser FMLA office had determined that FMLA for HX of COVID was not allowed long term." (Exh. C, p. 44). Claimant then reported to her PCP on May 26, 2021, that she had been "trying to get FMLA but [the] Kaiser clinic denied." (Exh. F, p. 53).

48. Claimant underwent Holter monitoring for reported tachycardia at Pueblo Cardiology on February 2, 2021. She underwent monitoring for 72 hours and was evaluated by Dr. Bhavith Aruni afterwards on February 19, 2021. Results of Holter monitoring revealed an average heartbeat of about 66 bpm and a maximum heart rate of 170 bpm along with occasional PVCs. (Exh. H, p. 64). Although she had episodes of tachycardia (related to deconditioning after her Covid infection), no arrhythmias were noted on monitoring. (Exh. H, p. 65). Outside of being provided materials concerning diet, exercise and immunity, no further treatment recommendations were documented by Dr. Aruni following this visit.

49. Based upon careful review of the medical records admitted into evidence, the ALJ finds that none of the medical care providers who have treated or examined Claimant for her Covid symptoms have performed an analysis regarding the likely cause of Claimant's Covid infection, i.e. whether it stems from a work related exposure or arose from another cause.

Dr. Fall's Medical Records Review and Subsequent Deposition Testimony

50. Respondents sought the opinions of Dr. Allison Fall regarding the likely cause of Claimant's Covid infection. After review of Claimant's available medical records, her time sheets and her discovery responses, Dr. Fall issued a report outlining her opinions on September 10, 2021. (Exh. A). As noted, in addition to review of the available medical records, Dr. Fall scrutinized Claimant's answers to Respondents interrogatories. In those responses, Dr. Fall notes that Claimant reported that she had been tested for Covid on November 24, 2020 with a negative result. She also noted that Claimant reported being tested daily by Respondent-Employer prior to reporting to work and that all Covid testing yielded negative results until November 30, 2020, when a rapid test came back positive. According to Dr. Fall, Claimant's testing results supported an indication that the earliest exposure would be around November 18, 2020, with the positive test result placing the exposure around November 21, 2020. This would have been the weekend Claimant's husband became symptomatic and the same day Claimant and her family went to Chili's Restaurant. (Exh. N).

51. Dr. Fall noted that Claimant reported in her interrogatory responses that other than her husband, she did not have direct contact with anyone else outside her work that had tested positive. She also dismissed any suggestion that Claimant's exposure leading to her infection would have occurred in October or early November when Claimant was working in food service, as any such exposure timeframe would be inconsistent with the Covid testing results.

52. Concerning the situation Claimant suggested was a likely exposure from November 23, 2020, when she reportedly informed a Covid positive offender who was in her office for about 30 minutes that his parole was being suspended and he began crying, took off his mask and blew his nose, Dr. Fall noted that this was the only exposure she had at work between November 20, 2020 and the end of the month and that the exposure was short in duration and while Claimant and the offender were both wearing PPE. Comparing this incident to the time Claimant spent in direct contact with her Covid positive husband and her other movements about the community lead Dr. Fall to conclude that it was more probable that Claimant contracted Covid from her Covid positive husband.

53. Dr. Fall testified as an expert in the area of Physical Medicine and Rehabilitation (PM&R) by deposition on October 18, 2021. She is Level II accredited and by virtue of this accreditation is versed in performing causation analyses. While she is not an epidemiologist or infectious disease specialist, the ALJ finds that she is fully accredited and qualified to render causation opinions on respiratory, pulmonary and infectious conditions.

54. As part of the causation analysis in this case, Dr. Fall testified that she reviewed the available records/data and performed a risk analysis to answer the question of whether Claimant's Covid infection was more likely to have arisen as a result of her work duties or from other sources outside of her work. (Fall depo. pp. 8-11). Based upon the information she was provided, including Claimant's Covid testing results, Dr. Fall reiterated her opinion that Claimant was likely exposed to Covid virus between November 19th and 23rd, 2020. After concluding that Claimant's work on the food line in late October

or early November was not relevant since Claimant had serial negative tests for weeks thereafter, Dr. Fall then reviewed the potential for and nature of any exposure, i.e. duration and closeness of the contact and whether the contact was had while using PPE, to determine the cause of Claimant's Covid infection.

55. According to Dr. Fall, the highest risk scenario for the transmission of Covid is where one person has Covid and the other is exposed to that person and neither are wearing a mask. (Depo. Fall, p. 15). Length and type of exposure is also a risk factor. Parties who simply walk by and pass each other are at lower risk than people sitting in a restaurant for hours as this creates the potential for exposure to higher viral loads. (Depo Fall, p. 15). People who engage in one-on-one interaction within 6 feet of each other with neither party wearing a mask are at the highest risk for transmitting Covid. (Depo. Fall, p. 16). Certainly, direct contact, such as eating meals together and intimate contact, would increase the risk of transmission. (Depo. Fall, p. 26). Based upon her review of the information provided, Dr. Fall concluded that Claimant's risk for contracting Covid-19 was much higher outside of work than while at work. Indeed, Dr. Fall testified that it was medically more probable that Claimant contracted Covid outside of work because her husband was Covid positive and was probably infectious during time frames she had prolonged close contact with him without wearing any PPE. Accordingly, Dr. Fall concluded that Claimant was probably exposed to Covid by her husband who then transmitted it to her. (Exh. A, p. 6; Fall depo, p. 30).

56. The ALJ credits the unrebutted opinions of Dr. Fall to find that Claimant was at higher risk of contracting Covid from her husband than she was at work. While the evidence presented persuades the ALJ that Claimant was exposed to the virus sometime before November 25, 2020 and that there were cases of Covid among prison staff and inmates at the facility where she worked, Claimant presented no persuasive evidence that she was in contact with any known Covid positive staff member or inmate while at work.[2] Importantly, even if Claimant had established that she had been exposed to a Covid positive staff member or inmate, the evidence presented supports a finding that any interaction between the two would have occurred while Claimant was wearing her required full PPE whereas she was completely unprotected while she was around her husband who tested positive for Covid approximately one week before she did. The ALJ can't presume that Claimant contracted Covid at work simply because some staff and offenders had it.

57. Based upon the evidence presented as a whole, the ALJ finds that Claimant has failed to establish that her Covid infection was likely caused by an exposure to the virus at work. Indeed, the persuasive evidence supports a finding that Claimant was, more likely than not, exposed to Covid by her husband who transmitted it to her. Accordingly, her case must be denied and dismissed. Because Claimant failed to

[2] Based upon the testimony of Major Bourne, any suggestion that Claimant was exposed to Covid positive inmates in her office is unconvincing. Indeed, the undisputed evidence supports a finding that Covid positive inmates were not permitted to leave the quarantine area of the buildings where they were housed.

establish that she suffered a compensable Covid exposure, the remaining issues surrounding her entitlement to medical and indemnity benefits need not be addressed.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 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*. The Claimant shoulders the burden of proving, by a preponderance of the evidence, that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A 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, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. 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 all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Fall are supported by the medical record and the available medical literature concerning transmission and spread of Covid-19. Accordingly, the ALJ concludes that her opinions are credible and more convincing than the contrary testimony of Claimant.

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

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

Compensability

D. Under the Workers' Compensation Act, an injured employee is entitled to compensation where his/her medical condition is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, the question for determination is whether Claimant's alleged Covid infection arose out of an exposure related to her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). 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. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As noted above, proof by a preponderance of the evidence requires the proponent to establish the existence of a

"contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable Covid infection by interacting with co-workers and inmates within the correctional facilities where she worked. According to Claimant, repeated exposure to a work environment wherein the Covid positivity rate among staff/inmates was at least 40.44% caused her infection, which in turn lead to SOB, sore throat, sinusitis and persistent symptoms consistent with Long Haul Syndrome all of which hastened her need for medical treatment. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease.

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

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

H. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Anderson, supra*.

I. As noted, Claimant asserts that her repeated exposures to the work environment at Four Mile Correctional Center caused a Covid infection characterized by SOB, sinusitis headaches and heart palpitations. Claimant asserts that this infection and subsequent symptoms are compensable because they are fairly traced to the employment as a proximate cause, and they do not come from a hazard to which Claimant was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed caused her symptoms, her need for treatment and the disability for which benefits are sought.

J. In support of her claims, Claimant argues that there is a temporal connection between her symptoms and her presence at work to establish causation in this matter. However, as explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Crediting the opinions of Dr. Fall, the ALJ concludes that Claimant's subjective perception of occupational exposure is unreliable, probably incorrect and fails to establish the requisite causal connection to establish that she suffered a compensable injury. In this case, the evidence presented supports that Claimant worked in a facility where staff and inmates had tested positive for Covid. Nonetheless, she did not prove that she had direct contact with any Covid positive individual at work. Accordingly, she requests that the ALJ conclude that her infection was caused by exposure to Covid that may have existed in the air. She surmises further that because the infection rate at the facility was better than 40%, that there was a lot of virus which she could have come into contact which caused her infection. While Claimant may have been exposed to Covid in the air in the workplace, it does not support a sufficient nexus between her Covid and the work environment. Rather, the evidence presented supports a conclusion that Claimant's Covid symptoms were, more probably than not, caused by unprotected contact Claimant had with her husband, who was probably contagious by November 20, 2020. Indeed, the only known Covid positive individual that Claimant was exposed to between November 18, 2020 and November 30, 2020 was her husband to whom she was exposed for lengthy period of time without wearing PPE. Although the PPE Claimant was wearing at work may not have prevented 100% transmission of the Covid virus, the PPE Claimant was wearing in conjunction with the use of a mask by the offenders and/or other staff would have provided more protection against the virus than none at all. Accordingly, the ALJ concludes that Claimant's risk of exposure to Covid through her intimate contact with her known Covid positive husband was greater than any casual exposure Claimant may have experienced to Covid in the workplace when all parties were using some form of PPE.

K. Here, the evidence presented supports a conclusion that Claimant has failed to establish the requisite causal connection between her Covid infection and related symptoms and her work duties. Specifically Claimant failed to establish that her employment exposed her to a hazard that was more prevalent in the work place than in her own home given her prolonged exposure to her Covid positive husband. Claimant's failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to her claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Accordingly, her claim for benefits must be denied and dismissed and her remaining claims need not be addressed.

ORDER

It is therefore ordered that:

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

DATED: March 14, 2022

/s/ Richard M. Lamphere

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

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

ISSUES

- Did Claimant prove he suffered a compensable low back injury on March 5, 2021?
- If Claimant proved a compensable injury, what is his average weekly wage (AWW)?
- Did Claimant prove a lumbar CT scan and an epidural steroid injection recommended by Dr. Lee are reasonably needed to cure and relieve the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant has worked as a technician in Employer's Tire & Lube Express department since June 2018. He performs tire repairs and replacements, oil changes, and other basic vehicle maintenance tasks. He also stocks automotive merchandise. The job is physically demanding and routinely requires lifting up to 50 pounds. He occasionally lifts up to 75 pounds when working with larger truck wheels and tires.

2. On March 5, 2021, Claimant was removing boxes of oil from a "six-wheeler" and placing them on the floor. When he lifted one of the boxes, he felt a "twinge" and a "pop" in his right lower back.

3. Claimant reported the incident immediately to his supervisor, Tyler Crown. Mr. Crown completed an Employer's First Report of Injury and described the accident as "taking bulk oil boxes off six-wheeler and placing on floor." The injury was described as a back "strain."

4. Claimant continued working for a short time after the accident, but the pain worsened and he asked to leave early. He went home and applied ice and heat to his low back.

5. Claimant saw Dr. Lindsey Junk on March 6, 2021. Claimant explained he hurt his right low back the day before while lifting oil at work. Physical examination showed significant muscular tightness over the lumbosacral region "with the right significantly worse than the left." Dr. Junk diagnosed low back pain and muscle spasms. He prescribed Percocet and a muscle relaxer. Dr. Junk also took Claimant off work until his next appointment because of his "acute injury."

6. Claimant followed up with Dr. Junk on March 9, 2021. His back was feeling better after taking the pain medication and muscle relaxers. Examination showed "improved but still present muscular tightness in the right lumbosacral region." Dr. Junk scheduled Claimant to return in a week for "possible discharge from Workmen's Comp."

7. Claimant tried to return to work but his back pain quickly flared. As a result, Dr. Junk limited him to four-hour shifts.

8. On March 23, 2021, Dr. Junk referred Claimant to physical therapy and liberalized his restrictions to allow 8-hour shifts, split evenly between sitting and standing.

9. On March 30, 2021, Dr. Junk noted the longer shifts had exacerbated Claimant's back pain. Physical examination showed significant tenderness and multiple trigger points in Claimant's low back. His maximum shift was reduced to four hours.

10. Claimant followed up with Dr. Junk on April 13, 2021. Dr. Junk documented Claimant "has been having an intermittent course of progression and then regression with continuing pain in his lower back as well as some intermittent tingling in his feet." Dr. Junk again took Claimant off work.

11. Claimant had a lumbar MRI on April 28, 2021. It showed degenerative disc and facet changes, primarily at L4-5 and L5-S1. There were no disc herniations, nerve root impingement, or other acute abnormalities.

12. On June 2, 2021, Claimant told Dr. Junk he thought he could do light duty at work without exacerbating his back pain. Dr. Junk noted reduced soft-tissue tenderness to palpation of the lumbar region.

13. Claimant returned to part-time light-duty work on June 3, 2021 with a 25-pound lifting limit.

14. At his follow up appointment on June 15, 2021, Claimant stated he was "doing fairly well" with the light duty work assignment. Dr. Junk referred Claimant to Dr. Larry Lee for an orthopedic evaluation.

15. Claimant saw Dr. Lee on August 2, 2021. Dr. Lee noted Claimant underwent a left-sided L5-S1 microdiscectomy 10 years ago that resulted in "chronic nerve damage" and "chronic left lower extremity weakness." Claimant indicated the leg weakness had gotten worse since March 2021. Dr. Lee diagnosed degenerative disc disease and nonspecific "post-laminectomy syndrome." He was concerned Claimant may have developed an L5-S1 pars fracture and ordered a CT scan "to better evaluate the osseous structures" in Claimant's lumbar spine. He also indicated ESIs were "available" if Claimant wanted to pursue them but provided no specific discussion regarding their intended purpose or whether they were related to the industrial injury.

16. As noted by Dr. Lee, Claimant has a history of low back problems, including a lumbar surgery several years ago.[1] Claimant underwent ESIs after the surgery, the last in approximately 2016. Claimant testified the prior ESIs provided only short-term relief.

17. Claimant suffered a lumbar strain in January 2018 while lifting a toolbox. Treatment records from 2018 show the symptoms were primarily confined to the left lower back and left leg. A January 31, 2018 MRI showed post-surgical changes from a prior left L5-S1 hemilaminectomy and degenerative disc disease, most pronounced at the L5-S1 level. Claimant was referred to an orthopedic surgeon. In April 2018, Claimant told his

[1] There is conflicting evidence regarding whether the prior surgery was in 2010, 2011, 2012, or 2014.

PCP the orthopedic surgeon had suggested a fusion, but he wanted to try physical therapy first. Claimant participated in PT for approximately five weeks, with limited benefit. He stopped PT in June 2018 because he was moving to Lamar. Claimant had a primary care visit with Dr. Michaud on October 19, 2018. The primary focus of the appointment was hypertension and restless leg syndrome. The past medical history section of Dr. Michaud's report references Claimant's prior back surgery, but no current back-related symptoms or limitations were reported. Nor was any treatment recommended specifically for the low back. A previous prescription for hydrocodone-acetaminophen was listed as "discontinued . . . reason: course complete." On December 5, 2018, Dr. Michaud prescribed gabapentin for the restless leg syndrome. No complaints of back issues were documented. A review of past records performed by Respondents' IME showed no mention of Claimant's low back after December 2018. There is no persuasive evidence to suggest Claimant desired or required any further treatment for low back problems until the March 5, 2021 work accident.

18. Dr. Anant Kumar performed an IME for Respondents on November 9, 2021. Dr. Kumar also testified at hearing to elaborate on the opinions expressed in his report. Dr. Kumar agreed Claimant may have suffered a minor "sprain strain" from lifting the box of oil, but opined the injury should have resolved uneventfully within a few weeks. He opined Claimant could have been treated with heat, ice, and OTC medications. He opined the strain resolved and any ongoing back or leg symptoms are related to Claimant's underlying degenerative spine condition instead of the work accident. He noted Claimant's symptoms were initially limited to axial back pain and later "metamorphosed" to include leg symptoms. Dr. Kumar opined neither a CT scan nor ESIs are reasonably needed or causally related to the work accident. He pointed out Claimant had previously tried ESIs, without benefit. Because the recent MRI showed no new pathology to cause lower extremity symptoms, there is no reason to think ESIs will be effective now. He also thought it virtually impossible that the work accident could have caused a pars fracture. He did not believe a lumbar CT would appreciably add to the understanding of Claimant's current condition.

19. Dr. Kumar's opinions are partially credible. His opinion that Claimant suffered no compensable injury is not persuasive. His conclusion that Claimant reached MMI is beyond the ALJ's jurisdiction. His opinion that a CT scan is not reasonably necessary is less persuasive than Dr. Lee's opinion. However, the ALJ credits Dr. Kumar's opinion that bilateral L5-S1 ESIs are not reasonably necessary to cure and relieve the effects of Claimant's the work injury.

20. Claimant proved he suffered a compensable injury to his low back on March 5, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. Dr. Junk corroborated a muscle strain with spasms affecting Claimant's right lower back within a day of the accident. Dr. Kumar essentially conceded that Claimant suffered a strain at work on March 5. Claimant reasonably pursued treatment and suffered a period of disability proximately caused by the accident. These facts are sufficient to establish a compensable claim.

21. Claimant proved the lumbar CT requested by Dr. Lee is a reasonably necessary diagnostic evaluation for the work injury. The CT scan has a reasonable prospect of further defining the underlying pain generator, assisting Claimant's ATPs with causation determinations, and suggesting a course of treatment.

22. Claimant failed to prove bilateral ESIs are reasonably needed to cure and relieve the effects of his compensable injury. Dr. Lee provided no discussion or justification for bilateral ESIs other than to state they are "available" if Claimant wants them. Dr. Lee offered no explanation of how bilateral ESIs would be causally related to a right-sided soft-tissue injury. Dr. Kumar's opinions regarding the ESIs are credible and persuasive. Claimant previously tried ESIs with no benefit and the April 2021 MRI shows no new work-related pathology reasonably likely to be improved by ESIs.

23. Computation of Claimant's AWW is complicated by a work-related knee injury he suffered on August 23, 2020. He ultimately underwent a right knee arthroscopy, medial meniscectomy, and chondroplasty of the medial femoral condyle and patella on October 15, 2020. He participated in extensive post-operative physical therapy, and was released at MMI on February 26, 2021 (approximately one week before the low back injury). Although minimal records related to the knee injury were submitted at hearing, it is reasonable to presume Claimant ability to perform his physically demanding job was limited before[2] and after the surgery. Claimant testified he was working regular hours for approximately three weeks before the back injury, but that testimony is inconsistent with wage records that show less than 10 hours of work in the pay period from February 13 through February 26, 2021. Under the circumstances, it is more appropriate calculate Claimant's AWW using only pay periods before the knee injury.

Week Start	Hours	Week Start	Hours
2019-09-14	25.55	2020-03-07	39.37
2019-09-21	40.97	2020-03-14	39.87
2019-09-28	38.53	2020-03-21	39.78
2019-10-05	36.85	2020-03-28	39.35
2019-10-12	40.18	2020-04-04	38.92
2019-10-19	40.10	2020-04-11	38.87
2019-10-26	26.05	2020-04-18	38.62
2019-11-02	41.45	2020-04-25	30.05
2019-11-09	40.73	2020-05-02	0.00
2019-11-16	40.13	2020-05-09	7.90
2019-11-23	41.15	2020-05-16	30.77
2019-11-30	40.58	2020-05-23	24.13
2019-12-07	38.60	2020-05-30	0.00
2019-12-14	30.92	2020-06-06	0.00
2019-12-21	0.00	2020-06-13	0.00
2019-12-28	0.00	2020-06-20	24.07
2020-01-04	39.93	2020-06-27	40.55
2020-01-11	32.70	2020-07-04	39.77
2020-01-18	24.22	2020-07-11	39.45
2020-01-25	39.08	2020-07-18	0.00

[2] Dr. Morley's records show Claimant was still using crutches to ambulate shortly before the surgery.

2020-02-01	39.65	2020-07-25	0.00
2020-02-08	39.57	2020-08-01	40.82
2020-02-15	39.58	2020-08-08	31.45
2020-02-22	23.72	2020-08-15	39.17
2020-02-29	39.68		

Total hours:	1,462.82
No. weeks:	49
Avg hours:	29.8534
AWW:	$447.80

24. Based on the foregoing factors, Claimant's AWW is $447.80.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury to his low back on March 5, 2021. Claimant's testimony regarding the incident and onset of symptoms was

credible. Claimant has recounted the accident in a consistent manner on multiple occasions, including to his supervisor immediately after the accident. Dr. Junk corroborated a muscle strain with spasms affecting Claimant's right lower back within a day of the accident. Dr. Junk reasonably prescribed medication, ordered diagnostic testing, and referred Claimant to physical therapy. Although Claimant has a significant history of low back problems, his prior issues were primary on the left side of his back, whereas the injury affected his right side. Moreover, he performed a physically demanding job without limitation and required no treatment for any low back problems since 2018. There was a significant change in Claimant's functional status after the March 5 accident, and he was appropriately put on restrictions that precluded his regular work. Dr. Kumar essentially conceded that Claimant suffered a strain at work on March 5. Dr. Kumar's opinion that the strain did not result in a compensable injury because it required no treatment is not persuasive. Claimant reasonably sought treatment for an acute back strain directly caused by his work activity. And Dr. Kumar's argument that any strain resolved quickly and Claimant is at MMI does not persuade the ALJ that Claimant suffered no compensable injury in the first instance.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Compensable medical treatment includes reasonably necessary diagnostic evaluations and testing. The respondents must cover diagnostic testing that has a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

As found, Claimant proved the lumbar CT requested by Dr. Lee is a reasonably necessary diagnostic evaluation for the work injury. The CT scan has a reasonable prospect of further defining the underlying pain generator (even by ruling out potential conditions), assisting Claimant's ATPs with causation determinations, and suggesting a course of treatment.

Claimant failed to prove bilateral ESIs are reasonably necessary to cure and relieve the effects of his compensable injury. Dr. Lee provided no discussion or justification for bilateral ESIs other than to state they are "available" if Claimant wants them. He provided no explanation for how bilateral ESIs would be appropriate treatment for a right-sided soft tissue injury. Dr. Kumar's opinions regarding the ESIs are credible and persuasive.

C. Average weekly wage

Section 8-42-102(2), C.R.S. provides that 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 § 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. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $447.80.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on March 5, 2021 is compensable.

2. Claimant's average weekly wage is $447.80

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to the lumbar CT ordered by Dr. Lee.

4. Claimant's request for bilateral L5-S1 ESIs 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: March 15, 2022

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with Employer.

- If Claimant has proven she sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the L4-S1 anterior posterior fusion is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her industrial injury?

- The parties stipulated prior to the hearing that Claimant had sustained a compensable injury to her right shoulder in the course and scope of her employment with Employer. The parties further stipulated that Claimant's medical treatment to date for the right shoulder injury was reasonable and necessary to cure and relieve the effects of the industrial injury. The parties stipulated that the issues of average weekly wage ("AWW"), temporary total disability ("TTD") and temporary partial disability ("TPD") would be reserved for determination at a future hearing.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her right shoulder on January 21, 2021 when she was setting up a portable x-ray machine, grasped the locking handle on the machine and twisted the handle. Claimant testified that the portable x-ray unit weighs between 1200 – 1500 pounds. Claimant testified that when she squeezed the handles, her shoulder was immediately inflamed. Claimant testified she attempted to squeeze the handle again, but did not have enough strength, so she need to use both hands.

2. Claimant testified that following the injury, she did not have function of her right arm. Claimant testified that she completed x-rays of two more patients, but did not have function of her arm as she completed these duties. Claimant testified she finished her shift and did not report her injury to her employer. Claimant testified she went home and treated her injury with Aleve and ice.

3. Claimant testified her low back started hurting when she was trying to move patients and the portable x-ray machine. Claimant testified that as the day went on, her low back became inflamed. Claimant testified she did not recall a specific event that led to her low back pain. Claimant testified she was more concerned with her

shoulder initially. Claimant testified she had no low back pain prior to January 11, 2020. Claimant returned to work the next day and reported her injury to employer.

4. The Workers' Compensation First Report of Injury was completed by Employer on January 15, 2020. The First Report of Injury notes that Claimant reported her in jury on January 12, 2020, and reported she felt low back and right shoulder pain at the end of her shift which was "noticeable after use of portable imaging".

5. Claimant was referred to Dr. Staqg for medical treatment. Dr. Stagg initially evaluated Claimant on January 15, 2020. Claimant reported to Dr. Stagg that she was doing an x-ray on January 11, 2020 and developed pain in her right shoulder and low back. Claimant reported intermittent radiation in to the lower extremities, but denied numbness or tingling or loss of function. Claimant reported improvement with her right shoulder pain. Claimant was diagnosed with an acute shoulder strain and a lumbar spraint. Dr. Stagg referred Claimant for an x-ray of the lumbar spine and recommended physical therapy.

6. The x-ray of Claimant's lumbar spine was performed on January 15, 2020 and showed mild degenerative disc disease ("DDD") with grad 1 anterolisthesis of L4 andL5 and levocurvature of the mid lumbar spine.

7. Claimant returned to Dr. Stagg on January 21, 2020. Based on the results of the lumbar x-ray, Dr. Stagg recommended Claimant be referred to a neurosurgeon.

8. Claimant was examined by Dr. Wong on January 31, 2020. Dr. Wong noted Claimant reported lumbar spine pain after a lifting injury on January 11, 2020. Dr. Wong recommended a magnetic resonance image ("MRI") of the lumbar spine.

9. Claimant returned to Dr. Stagg on January 29, 2020. Claimant reported to Dr. Stagg that her back was doing worse. Dr. Stagg noted that Dr. Wong had recommended an MRI of the lumbar spine and agreed that an MRI was appropriate.

10. Claimant underwent the MRI of the lumbar spine on February 6, 2020. The MRI showed a L5-S1 small left paracentral disc extrusion causing mass effect upon the descending left S1 nerve root. The MRI also showed mild foraminal narrowing on the left with facet hypertrophy present bilaterally at L5-S1 and L4-5. A broad based disc bulge was noted at the L4-5 level.

11. Claimant returned to Dr. Stagg on February 20, 2020. Claimant reported to Dr. Stagg that she was still having pain with radiation to the left extremity. Dr. Stagg noted the results of the lumbar MRI and recommended that she return to Dr. Wong and also obtain an epidural steroid injection ("ESI") with Dr. Bullard.

12. Dr. Stagg's records note that he discussed the case with Dr. Wong on or about March 3, 2020. Dr. Stagg noted that Dr. Wong had reviewed the MRI results and was not currently recommending surgical intervention. Dr. Stagg noted Dr. Wong recommended possible injection and conservative treatment with therapy.

13. Claimant retuned to Dr. Stagg on March 9, 2020. Dr. Stagg noted Claimant reported being about the same. Dr. Stagg noted the ESI was scheduled to proceed on March 11, 2020. Dr. Stagg recommended that Claimant also continue with her physical therapy.

14. Claimant underwent a bilateral L4-5 and L5-S1 facet steroid injection with Dr. Bullard on March 11, 2020.

15. Claimant had a telephonic evaluation with Dr. Stagg on March 31, 2020. Claimant repotted to Dr. Stagg that she immediately had good relief after the injection, then her symptoms got worse for a couple of days, and then gradually got somewhat better. Dr. Stagg noted that they discussed what Claimant could do, and he recommended that she increase her activity and work on some stretching, the follow up in 2 to 3 weeks.

16. Claimant had another telephonic evaluation on April 22, 2020. Claimant reported still having a significant amount of pain in the back, with some radiation down both legs. Claimant also reported not being able to have her routine therapy due to the CoVid pandemic. Dr. Stagg recommended continued conservative treatment included four (4) massage therapy visits.

17. Claimant had a telephonic evaluation on May 13, 2020 with Dr. Stagg. Claimant reported being frustrated because things were not improving. Claimant reported she was still having pain in her back with some radiation into her extremities. Claimant reported her symptoms increased when she increased her activity. Claimant reported the ESI did not give her a great deal of relief.

18. Claimant was able to be physically examined by Dr. Stagg on May 27, 2020. Claimant reported doing better with less pain, but still some occasional radiation down her right leg when she is up and walking. Dr. Stagg kept Claimant on work restrictions and recommended she finish her course of therapeutic massage.

19. Claimant returned to Dr. Stagg on June 17, 2020 and reported she had not had much improvement. Dr. Stagg noted there was some improvement initially after the ESI, but Claimant still reported some intermittent pain down the right and left extremity which would happen 2-3 times per day. Dr. Stagg recommended Claimant explore a facet injection and referred Claimant back to Dr. Bullard.

20. Claimant underwent bilateral facet injections at the L4-5 and L5-S1 levels on July 17, 2020.

21. Claimant returned to Dr. Stagg on July 22, 2020 and reported marked improvement of her pain following the facet injections[1]. Dr. Stagg recommended Claimant continue with her exercise program and core strengthening.

22. Claimant returned to Dr. Stagg on August 12, 2020 at which time Claimant reported that while the facet injections had helped some, they were not long lasting. Claimant reported she felt she had not made significant improvement, but wanted to avoid surgery. Dr. Stagg referred Claimant to Dr. Frazho for a second opinion about possible future injections.

23. Claimant returned to Dr. Stagg on September 2, 2020 with complaints of continued pain. Dr. Stagg noted Claimant had been evaluated by Dr. Wong seven months prior, and recommended she return to Dr. Wong due to the fact that she had not had a resolution of her symptoms with the conservative treatment. Dr. Stagg provided Claimant with an Oswestry, which provided a score of 34 showing moderate disability. Dr. Stagg noted no depressive symptomatology.

24. Claimant underwent a repeat MRI of the lumbar spine on October 5, 2021. The MRI showed no change in the L5-S1 small left paracentral disc extrusion. Facet degenerative changes were also noted.

25. Claimant returned to Dr. Wong on October 21, 2020. Dr. Wong noted Claimant's medical treatment since his last evaluation and recent October MRI. Dr. Wong recommended that if Claimant wished to pursue surgery, he would recommend an L4-S1 fusion. Dr. Wong noted Claimant was unsure how she wished to proceed.

26. Claimant had a teleconference appointment with Dr. Stagg on October 26, 2020. Claimant reported Dr. Wong had recommended an L4 through S1 fusion, and she wanted to proceed with this recommendation as she was still having significant pain in her back. Claimant was able to be evaluated by Dr. Stagg on October 29, 2020. Dr. Stagg noted Dr. Wong's surgical recommendation and agreed with this recommendation due to the persistence of Claimant's symptoms. Dr. Stagg also referred Claimant to Dr. McCoy for treatment of her shoulder.

27. Claimant testified at hearing that she wishes to proceed with the surgery recommended by Dr. Wong.

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[1] Dr. Stagg's July 22, 2020 medical report appears to contain a typographical error with regard to the date of the facet injections. Dr. Stagg noted the injections occurred on 6/17/2020. However, the medical records show that the injections occurred on 7/17/2020.

28. With regard to the proposed surgery, Respondent obtained a records review from Dr. Larson on February 12, 2021. Dr. Larson opined that Claimant's low back condition was not related to the January 11, 2020 work injury. Dr. Larson opined that the imaging did not demonstrate any acute injury to Claimant's lumbar spine, but instead showed pre-existing lumbar degenerative disc disease. Dr. Larson opined that it was unlikely that work activities caused any long term or permanent change to Claimant's condition causing the need for medical treatment. Dr. Larson opined that at most, Claimant sustained a muscular strain at work, but the strain did not cause an aggravation or acceleration of her underlying degenerative disc disease.

29. Respondent referred Claimant to Dr. Ericson for an independent medical examination ("IME") on May 5, 2021. Dr. Erickson reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Ericson noted that Claimant reported that she noticed some brief episodes of muscle discomfort in her low back prior to January 11, 2020. Claimant reported the low back discomfort would resolve quickly with Aleve and rest. Claimant reported to Dr. Erickson that after the injury on January 11, 2020, she noticed some tightness in her lower back when she went home from work. Claimant reported later than evening she noticed a different sensation in her low back which was not muscular but seemed to be more structural and deeper.

30. In reviewing Claimant's MRI, Dr. Erickson elicited the help of Dr. Carpenter, an MSK expert radiologist. Dr. Erickson noted the MRI showed mild diffuse lumbar spondylosis with preservation for the most part of disc height. Significant degenerative changes were noted from L4-S1, with bilateral severe facet joint arthropathy without any pars defects. Dr. Erickson noted clear evidence of anterolisthesis, grade 1, at L4-5. Imaging studies confirmed this was a mobile defect, with mild instability. Dr. Erickson noted there was no evidence of any acute disc herniation or fracture, or any abnormality which could be clearly attributed to the injury on January 11, 2020. Dr. Erickson reported that the L4-5 instability was secondary to severe and progressive arthropathy of the involved faced joints.

31. Dr. Erickson opined that Claimant's work injury demonstrated evidence of a work-related sprain/strain of the right shoulder, which was now for the most part resolved. Dr. Erickson opined that Claimant's low back condition was most likely related to severely arthritic facet joints from L4-5 to L5-S1, causing grade 1 anterolisthesis, unstable, of L4 on L5. Dr. Erickson opined that this abnormality was a progressive degeneration which was now symptomatic, but was in no way caused by the work injury.

32. Dr. Erickson testified at hearing consistent with his IME report. Dr. Erickson testified he is Board Certified in Orthopedic Surgery and Level II accredited. Dr. Erickson testified Claimant has a very mild L4-5 anterolisthesis and pretty severe arthritic changes in her facet joints. Dr. Erickson testified that the radiology studies

showed no evidence of acute changes to Claimant's lumbar spine. Dr. Erickson testified it was his opinion that Claimant's low back condition was not related to her January 11, 2020 work injury.

33. Dr. Erickson testified at hearing that Claimant's low back condition that was being addressed involved instability at two levels. Dr. Erickson testified that his underlying condition was asymptomatic prior to the January 11, 2020 injury. Dr. Erickson testified this condition was not caused or aggravated by the work injury.

34. Dr. Wong issued a report on May 24, 2021 in which he opined that Claimant most likely had an asymptomatic lumbar degenerative condition consisting of L5-S1 degenerative disc disease as well as a L4-5 spondylolisthesis. Dr. Wong noted it was asymptomatic until Claimants work injury where she was lifting and moving the portable x-ray machine. Dr. Wong noted that Claimant's injury was reported appropriately and opined that a lumbar fusion would help her symptoms and was reasonable and necessary treatment to improve her pain.

35. Dr. Stagg issued a report on May 27, 2021 after reviewing the IME and the note from Dr. Wong. Dr. Stagg deferred to Dr. Wont's expertise regarding his treatment of the spondylolisthesis and agreed with his assessment.

36. The ALJ credits the opinions expressed by Dr. Wong over the contrary opinions of Dr. Erickson and finds that Claimant has demonstrated that it is more probable than not that the injury on January 11, 2020 aggravated, accelerated or combined with a pre-existing condition to cause Claimant's need for medical treatment involving her low back, including the recommended L4-S1 fusion.

37. The ALJ notes that the medical records demonstrate that Claimant's low back condition was asymptomatic prior to January 11, 2020, despite the degenerative changes shown on the radiology reports. The ALJ notes that Claimant reported to Employer on January 12, 2020 that the January 11, 2020 injury resulted in pain to her low back that necessitated medical treatment.

38. The ALJ relies on the testimony of Claimant at hearing along with the employer's first report of injury and medical records entered into evidence at hearing and finds that Claimant has established that it is more probable than not that the January 11, 2020 work injury aggravated, accelerated of combined with a pre-existing condition to cause Claimant's need for medical treatment to her lumbar spine, including the recommended L4-S1 fusion. The ALJ notes that the records establish Claimant's testimony that prior to the January 11, 2020 injury, her low back condition did not necessitate medical treatment to her lumbar spine. However, after the January 11, 2020 work injury which resulted in contemporaneous repots of pain in Claimant's low back, Claimant necessitated medical treatment for her low back condition. As such, the ALJ finds that the work injury on January 11, 2020 at the very least, accelerated or

combined with Claimant's pre-existing condition to cause the need for medical treatment involving Claimant's lumbar spine, including the L4-S1 recommended fusion.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

3. 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.*

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

5. As found, Claimant's injury on January 11, 2020 aggravated, accelerated of combined with a pre-existing condition to cause Claimant's need for medical treatment to her lumbar spine, including the recommended L4-S1 fusion. As found, the testimony of Claimant regarding the onset of symptoms related to the January 11, 2020 work injury along with the medical records and employer's first report of injury are found to be credible and persuasive in reaching this decision.

6. As found, Claimant has proven by a preponderance of the evidence that medical treatment to her lumbar spine recommended by Dr. Wong is reasonable and necessary to cure and relive the Claimant from the effects of the industrial injury. As found, the opinions expressed by Dr. Wong are credible with regard to this issue.

7. The ALJ therefore finds that Respondent is liable for the reasonable and necessary medical treatment necessary to cure and relived Claimant from the effects of the industrial injury to her lumbar spine, including the recommended L4-S1 fusion.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury, including the medical treatment to Claimant's lumbar spine. Respondent shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: March 16, 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

I. Whether Respondents proved by clear and convincing evidence that the DIME physician's opinion of Dr. Alicia Feldman has been overcome with regard to the impairment and what is the impairment.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 14, 2020 through December 9, 2020.

III. Whether Respondents proved by a preponderance of the evidence that Claimant was terminated for cause as of September 15, 2020.

IV. Whether Claimant proved by a preponderance of the evidence that he is entitled to an increase in average weekly wage due to discontinuation of health insurance benefits.

V. Whether Claimant proved by a preponderance of the evidence that he is entitled to maintenance medical benefits after maximum medical improvement.

VI. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award for disfigurement caused by use of a brace and alleged limping.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 13, 2021 listing the issues of compensability, medical benefits that are reasonably necessary, overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) on impairment rating as well as permanent partial disability benefits, offsets, credits and overpayments.

Claimant filed a Response to Application for Hearing dated September 22, 2021 adding the issues of authorized medical benefits after maximum medical improvement, temporary disability benefits, disfigurement, permanent total disability benefits and interest on benefits owed not paid when due.

STIPULATIONS OF THE PARTIES

The parties stipulated that Dr. Alicia Feldman, the DIME physician, was not provided, as part of the medical records packet, a copy of the preexisting injury and impairment records, at the time the DIME took place on August 17, 2021.

The parties further stipulated that, at a minimum, an apportionment of 7% impairment rating for Claimant's lumbar spine is appropriate as Claimant acknowledged

receiving these benefits based on the Final Admission of Liability (FAL) dated April 9, 2012.

The parties stipulated that Claimant was not seeking to overcome the DIME physician's determination of maximum medical improvement (MMI).

The parties stipulated that Claimant was not seeking temporary total disability (TTD) benefits after December 10, 2021, when Claimant was released to full duty by his authorized treating physician (ATP), Dr. Jeffrey Baker.

The parties stipulated that, if found appropriate, any increase in average weekly wage (AWW) would only affect an award for permanent partial disability (PPD) benefits.

The parties stipulated that, if called to testify, Ms. [Redacted, hereinafter AM] would testify that she sent a copy of the task letter to Claimant and/or his counsel on August 24, 2020. Claimant also stipulated that, if called, Ms. [Redacted, hereinafter ST] would testify that she sent the September 2, 2020 copy of the job offer with the attached task letter signed by Dr. Baker on August 31, 2020. Claimant stipulated that Claimant was not asserting a technical deficiency with regard to the modified job letter sent on September 2, 2020.

The parties stipulated that there was good cause for the delay in production of Dr. John Raschbacher's Additional Medical Record Review and Addendum report dated February 7, 2022. Claimant continued to object to the admissibility of the February 7, 2022 report issued by Dr. Raschbacher despite the stipulation for good cause. Claimant declined to request a continuance of the hearing against counsel's advice. Over Claimant's continued objection, the report, Respondent's Exhibit labelled BB was admitted into evidence.

FINDINGS OF FACT

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

1. Claimant was born on May 28, 1983 and 37 years old at the time of the admitted work related injury of July 22, 2020. Claimant worked as a blade operator for Employer on road projects since April 4, 2020. A blade machine or motor grader is a heavy equipment machine that grades roads. Claimant testified that he was fixing the roads with the blade to grade the roads, to build and repair the roads. Claimant was parked when struck by a large scrapper, a very large machine.

2. On July 22, 2020 a box scraper hit Claimant from behind, injuring Claimant's low back and neck. Claimant testified that box scrapper was a heavy equipment machine with two engines, one in front and one in back, that had a large container, and underneath the container a blade to smooth the ground that was much larger than the blade machine Claimant was sitting in. The scraper was travelling at approximately 30-35 miles per hour when it hit him. Claimant reported significant damage to the blade machine, including damaging the front windshield with the impact from behind.

3. Claimant was involved in a prior work related injury on August 1, 2011 while lifting roofing materials.

4. Dr. Robert Kawasaki evaluated Claimant with regard to prior injury on March 1, 2012 which noted that Claimant continued to have minimal symptoms with lumbar spine pain at 3/10 on a visual analog scale (VAS). He documented Claimant's prior MRI findings that showed minimal degenerative changes and shallow, mild disc bulge at the L4-5 level. He diagnosed a lumbar spine strain and provided an impairment rating consisting of 5% for Table 53, page 80, section II B of *the AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised)*, and noted loss of range of motion (ROM) of 2% whole person. Dr. Kawasaki assigned a 7% whole person impairment rating to the injury by combining the specific disorder of the spine and ROM rating. Dr. Kawasaki released Claimant to full-time, full-duty work based on a Functional Capacity Evaluation and indicated that Claimant did not need any further medication and discharged him from his care.

5. Dr. Steven Bratman of Concentra attended Claimant in follow up on March 8, 2012, releasing Claimant to full duty work without restrictions, the impairment assigned by Dr. Kawasaki and no maintenance care.

6. The Respondents on the 2011 claim filed a Final Admission of Liability on April 9, 2012 admitting to the 7% whole person impairment rating, which Claimant stipulated he was paid.

7. Claimant requested a Division of Workers' Compensation Independent Medical Examination (DIME) in the 2011 claim and Dr. Miguel Castrejón was assigned as the DIME physician. He evaluated Claimant on August 1, 2012 with Claimant still reporting a sharp and stabbing pain to the left of his midback and across his lower back with pain extending into the lateral posterolateral thigh with pain at a 5-6/10 on visual analog scare (VAS) following return to work on July 31, 2012, the day before the evaluation. The DIME physician reviewed the medical records and opined that Claimant was not at MMI. He recommended trigger point injections and a trial of medication for the thoracic spine myofascial symptoms and electrodiagnostic testing with regard to the lumbar spine, including possible right SI joint injections under fluoroscopy, and chiropractic treatment as well as medications. Dr. Castrejón provided a provisional impairment rating as required by the Level II accreditation teachings. Under the *AMA Guides,* he stated Claimant would qualify for a 10% whole person impairment rating for the SI joint dysfunction consisting of a 5% for the specific disorder, under Table 53IIB, and 5% for loss of range of motion.

8. Claimant proceeded to settle his 2011 claim by signing a settlement agreement on September 21, 2012, before the filing of a general admission was due. As part of the settlement for the claim, Claimant received the amount of $20,000.00. The Division approved the settlement on October 1, 2012. The Division records state that the DIME completion was cancelled as of October 26, 2012. The settlement documents do not show which portion, if any, was designated for lost wages (7 months), closures, waivers or medical benefits in order for Claimant to achieve MMI and which, if any, was designated for further impairment.

9. Claimant testified that, after he settled his claim, he continued doing his own therapy and exercises for a period of about eight months, his back and leg problems eventually resolved and he returned to full work without any problems including the kind of work he performed with Employer.

10. Claimant reported the July 22, 2020 work related injury to his employer and was referred to Concentra Medical Centers for care.

11. Claimant was initially seen by physician assistant Stephen Toth who document the injury consistent with Claimant's testimony and other medical record histories. He reported that Claimant complained of neck and upper back pain with numbness into his right extremity. He order x-rays of the cervical spine. He noted tenderness in the right paraspinal muscles, the right rhomboid muscles and the trapezius muscle with normal but painful range of motion of the cervical spine. He described Claimant's pain as constant, sharp, dull and aching in nature. The severity of the pain was moderate. Associated symptoms included back stiffness and exacerbating factors included bending. Claimant was released to modified work, restricted from driving company vehicles due to functional limitations.

12. A Physician's Report of Injury (M164) form for July 22, 2020 was completed by Dr. Jeffrey Baker stating Claimant was examined, provided medications and an order for x-rays of the cervical spine, as well as returned to modified duty including no driving company vehicles due to functional limitations. The cervical radiology report by Steven Abrams, M.D. was normal with no acute fractures or subluxation.

13. Claimant testified that Mr. Toth later apologized to him for failing to properly document Claimant's lumbar spine problems that he complained of at the time of the initial visit. Claimant also stated that he returned to work the following Friday, and was advised by the foreman, Guadalupe, that there was no job available until he receive a full duty release by his providers. This ALJ takes notice that the Friday after the initial visit would have been July 24, 2020.

14. Ms. Elva Saint, a therapist at Concentra, noted on July 24, 2020 that Claimant had back and right low back pain, with the pain going up into the right shoulder blade. She noted that the pain radiated into the right buttocks, was constant and aching. Claimant had decreased range of motion. Upon exam, she noted Claimant had right sided muscle spasms and tenderness in the right paraspinal muscles, the sciatic notch, sacrum and right sacroiliac joint. Ms. Saint recommended physical therapy to address objective impairment and functional loss. After the PT session, lumbar spine x-rays were performed.

15. Claimant was also seen by Nicholas Wright, DPT, who, after examination of the lumbar spine, recommended manual manipulation, noting that posteroanterior testing in thoracic and lumbar spine reproduced right paraspinal pain. He performed functional dry needling and L4-5 lumbar paraspinal stimulation.

16. Respondents filed a General Admission of Liability (GAL) for the July 22, 2020 work related injury on August 27, 2020 admitting to an average weekly wage (AWW) of $1,171.71. They also started temporary total disability benefits as of July 23, 2020 at the rate of $781.14 per week.

17. On September 2, 2020 Employer sent Claimant a letter advising that Claimant's treating physician had authorized modified duty and multiple different jobs beginning September 14, 2020. However, the letter specified a notation that Claimant "must call Billy the day before to ensure that the job is still in progress."

18. The list of approved jobs by Dr. Jeffrey Baker dated August 31, 2020 included machine inspection and lubrication, washing trucks or equipment, painting machines, sweeping the garage or shop, counting trucks, cleaning up work sites, answering phones, filing and purging or shredding files. The only restriction was that Claimant could not drive.

19. Claimant received the letter dated September 2, 2020. Claimant recognized the letter but it was only one page. He stated that Billy was one of the Employer owners. He stated that he did not know the address of the Mayfield subdivision, as he had not been there before. No exact address is noted on the letter. Further, Claimant stated that the list of jobs was not attached. This ALJ takes notice that the Certificate of Delivery shows a date of August 24, 2020, which was before the August 31, 2020 date of approval by Dr. Baker and that the September 2, 2020 letter fails to show that there was any attachment to the letter, despite the parties' stipulations above.

20. Claimant testified that he called Billy on three different occasions and on the third try he left a message letting Bill know he had received the letter and was calling him about the modified duty job to find out what was available. Claimant stated that the following Tuesday or Wednesday Bill called him back and Claimant was able to speak with him. Claimant testified that they discussed Claimant's accident and current condition. Bill advised that he would be contacting the insurance company to find out what he could do to get Claimant more medical care for his back, and would get back to him. Claimant stated that he never was contacted by Bill after that and Claimant never returned to work. Billy never advised Claimant whether the job was still "available," and Claimant would have shown up for work if he had been advised one was available, as well as where and when he should return to work. Claimant also testified that he contacted multiple Jennifer, the business' secretary, and the second supervisor and owner, Russ. Neither of them returned his calls. Claimant considered Employer's failure to return his phone calls, as well as Bill's failure to get back to him as promised, as a kind way of discharging from his employment. He stated that this is common in the industry where an Employer does not call back, it meant that they were not interested in having the employee come back to work.

21. Respondents filed a second GAL on September 15, 2020 terminating temporary total disability as of September 13, 2020 and starting temporary partial disability benefits at the rate of $61.14 from September 14, 2020 forward.

22. On November 20 2020 Dr. Scott Parker evaluated Claimant at Concentra for a chiropractic consultation. He obtained a history from Claimant consistent with his testimony and reviewed the lumbar spine MRI. He noted that Claimant's primary complaints related to the right sided cervicothoracic and lumbar pain, with tightness in the thoracic region and a sharp burning pain going into the gluteus muscles travelling into the hamstring and stopping at the popliteal fossa. He did not observe any pain behaviors. He noted restrictions palpated at the cervical spine and thoracic spine, specifically on the

right. He found trigger points palpable in the bilateral trapezius, rhomboid, and lumbar spine muscles. He palpated adhesions in the upper back and neck and mild muscle spasms as well. He diagnosed lumbosacral sacroiliac strain and dysfunction, and cervicothoracic strain. He proceeded with manual therapy, soft tissue mobilization, neuromuscular re-education, and low-grade manual manipulation. He recommended five additional treatments. Claimant returned to see Dr. Parker on November 25, 2020 noting right SI joint was mildly tender to palpation, but unrestricted.

23. Claimant saw Dr. Parker on December 2, 2020 and reported that he had done well with the prior treatment, being close to being pain-free but that evening he became very sore and his muscles spasming. He noted continuing sharp burning sensation in the right gluteus muscle travelling in to the hamstring. Claimant continued to have muscle spasms and trigger points. His diagnosis remained the same. Despite these findings, Dr. Parker would end this and other reports with stock language that "he [Claimant] transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors, and then ambulated well and appeared comfortable."

24. On December 2, 2020 Claimant was attended by Nicholas Wright, DPT. He noted that Claimant was reporting stress related to surveillance. Mr. Wright noted that Claimant was still restricted from driving company vehicles due to functional limitations. He reported conflicting information in his report as it states "Suboccipitals: No increased muscle tone. Severe increased muscle tone." He noted a bilateral positive slump test. He noted that Claimant continued with right lumbar spine concerns and that he was not progressing in therapy. He further noted that "Unfortunately I do not see him healing physically prior to his mental health improving." He also stated that Clamant "was educated in proper care of injury to optimize rehabilitation time, including education for pain management, activity modification, and expectations for recovery. Educated in the role of mental health in physical healing."

25. Claimant returned to Dr. Parker on December 9, 2020 for chiropractic care. Claimant reported that he had attended a massage therapy visit on his own, but continued to have a sharp burning pain in his low back and gluteus muscle travelling into his hamstring. He proceeded with chiropractic care and noted Claimant continued to have muscle spasms on palpation, adhesions and trigger points. Claimant retuned the following day and reported he was somewhat improved.

26. Dr. Baker examined Claimant on December 10, 2020 stating that Claimant reported he was feeling improved since the last visit, though continued to have sharp and burning low back pain that was continuous though the intensity varied and did not cause radicular symptoms though did cause numbness and tingling with prolonged sitting. Claimant was instructed to follow up with Dr. Richard and Dr. Brady as well as return to clinic for a follow up appointment in three weeks. He provide medication, transdermal patches and external cream. Dr. Baker stated that the objective findings were consistent with the work related mechanism of injury.

27. Claimant reported to Dr. Baker that he suspected that Employer was having him investigated, that someone had vandalized his house, and that he had once discharged his gun accidentally while cleaning the gun. Upon exam, Dr. Baker noted that Claimant's judgement and insight were normal, and mood and affect were appropriate.

He noted on exam Claimant had tenderness in the lumbar spine paraspinal muscles and the right sciatic notch and revealed muscles spasms with limited range of motion. He assessed a lumbar strain, cervical sprain and muscle spasms related to the motor vehicle accident.

28. Claimant reported to Dr. Baker he had not been working at that time. Claimant conveyed that he had 2 job offers but needed to have no work restrictions. Dr. Baker then released Claimant to return to full duty as of this date. It is inferred from this report, in conjunction with the approved job list and restrictions, Claimant continued to have the no driving company vehicles restrictions until this date, but no other restrictions. Claimant was instructed to follow up in 3 weeks.

29. Claimant testified that he did not return to work for Employer after the full duty release on December 10, 2020. Claimant stated that he did not reach out to his employer because they never contacted him about the modified duty despite saying that they would. Claimant did not wish to beg for a job. Claimant stated that it is commonly understood in the field he works in that if a worker called and was advised they would get back to them but failed to do so, that it was a nice way of saying that they were letting him go. Claimant testified that he had spoken with the company secretary Jennifer, as well as both owners, Billy and Russ, and no one ever got back to him, that is why he thought he was terminated.

30. Claimant stated he had applied for multiple jobs at multiple employers, but when he advised that he had an ongoing workers' compensation claim, they would not hire him because of the risk despite showing the full duty release. Claimant was unable to get a job until September 20, 2021, when he finally contacted a friend at a prior employer to get the job. Once he showed them the full duty release, they took a chance on him. Claimant stated that it was not necessarily because he thought he could perform the full duty well but that he felt that he had to provide for his family. Claimant stated that he would have returned to work for Employer if they had offered him any job, which they did not.

31. Respondents filed a new GAL on December 10, 2020 terminating TPD benefits as of December 9, 2020.

32. On December 11, 2020 Claimant was again treated by Dr. Parker and the report is very similar to prior reports including that he continued to have a sharp burning pain in his low back and gluteus muscle travelling into his hamstring. He noted restrictions palpated at the cervical spine and thoracic spine, specifically on the right. He diagnosed lumbosacral sacroiliac strain and dysfunction, and cervicothoracic strain. He proceeded with chiropractic care and noted Claimant continued to have muscle spasms on palpation, adhesions and trigger points.

33. Also on December 11, 2020 Dr. Baker completed an M164 stating Claimant was to return to consult the following Wednesday. Another M164 was issued on December 16, 2020 for Claimant to follow up the following Friday. It is not clear if Claimant was seen on either of these follow up dates.

34. Claimant was evaluated by Molly M. Brady, PsyD, on December 15, 2020. Claimant described the work incident consistent with his testimony. He reported to Dr.

Brady that he found chiropractic care helpful in combination with massage therapy but that physical therapy had been discontinued. Dr. Brady reported that Claimant was experiencing considerable distress secondary to what he described to be a pattern of investigation and vandalism that he believed was conducted by individuals hired by his employer. Claimant described anger and fear associated with these perceived acts. Claimant stated that several family members had also witnessed evidence of tampering of the home intrusions and that he and his family had been very upset. He explicitly noted to Dr. Brady that he was prepared to defend himself and his family from intruders with deadly use of force and was important to him that others understand the seriousness of his experience. Claimant described his pain levels and changes. Dr. Brady observed no obvious pain behaviors during the interview. Claimant answered without hesitation when asked for information omitted on the history intake forms.

35. Dr. Brady noted no changes to Claimant's concentration or memory but stated that he had changes to mood including increased irritability, anger and even lack of tolerance towards his children, which Claimant reported was not his parenting style. Claimant denied any plan to injure others and stated that he did not have a firearm in his home at that time. Claimant reported a reduction in appetite, increased sadness and tearfulness, increased withdrawal, fatigue, lower libido, as well as guilt for putting his family through the investigation issues. He reported being concerned with his family's safety, and was losing sleep. Claimant declined to be administered the Behavioral Health Inventory 2 (BHI2). Claimant explained that he was aware that he probably would never be able to get back to who he used to be but wished to achieve some sort of normal for him. Dr. Brady reported that Claimant was less satisfied with his medical providers in this case, that he did not believe his provider's interpretation of the MRI and wished a second opinion. Claimant reported that he was interested in having someone to talk to that would not judge him.

36. Dr. Brady diagnosed pain disorder associated with psychological factors and a medical condition. Dr. Brady declined to provide Claimant with psychotherapy as he failed to take the recommended testing. She noted that Claimant was struggling with chronic pain related to the injury and frustrations secondary to the perceived investigation and surveillance, especially the safety of his family. She strongly recommended that, if any surveillance was being conducted, that it be halted due to concerns of escalation. She further stated that Claimant's lack of trust in those that he is dependent upon for his care also represented a source of distress, a notable possible complication to his capacity to benefit from treatment and to successfully move forward after the workplace injury. Dr. Brady recommended collaborative communication regarding medical treatment options available as well as clarification/agreement between the medical providers and Claimant as to when MMI had been reached.

37. On January 13, 2021 Dr. Baker reevaluated Claimant with reports of constant back pain as well as pain, weakness and a burning sensation in his right leg. Claimant reported that driving still caused increased pain in his lumbar spine. From Dr. Brady's report, he noted Claimant had refused further treatment but that she was very concerned about Claimant's "paranoid delusions" and that she reported Claimant believed Dr. Baker was not telling him the truth. Dr. Baker duplicated some of the reports of history from the December 10, 2020 report. On reexamination he found right sided

lumbar spine muscle spasms and limited range of motion. Claimant did agree, at that point to an evaluation pursuant to a psychiatry referral to help with his sleep. Dr. Baker stated that Claimant's psychiatric condition was making it very difficult to treat Claimant as Claimant believed Dr. Baker was lying to him. Dr. Baker indicated that if he did not follow up with psychiatry he would not continue to treat him. A referral was issued but did not specify the name of the psychiatric provider. He continued the current treatment plan and scheduled a follow up recheck in 3 weeks. Dr. Baker stated that the objective findings continued to be consistent with the work related mechanism of injury.

38. On February 1, 2021 Claimant was evaluated by Dr. Megan Richard at UCHealth for electrodiagnostic evaluation and consultation regarding lumbar spondylosis with radiculopathy. Claimant reported that he continued to have right sided neck stiffness as well as pain, right sided midthoracic pain and muscle spasm, and right sided lower lumbar spine with radiation down the posterior aspect of the thigh that does not cross the knee. He would also get anterior right leg burning pain with different positioning of his back and hips.

39. Upon examination, Dr. Richard found Claimant had a positive seated and supine straight leg raise on the right, positive slump test on the right, positive Kemp[1] test on the right - all of which caused burning pain at the right buttock and behind the right thigh and knee. She found that FABER[2] and FADIR[3] tests both exacerbate his right buttock pain and radiation of pain into the posterior right thigh, that facet loading maneuvers standing somewhat exacerbated his lumbar pain, but not severely. She noted 5/5 strength with the exception of reduced ability to perform calf raises on the right indicating a possible S1 nerve lesion. She noted an antalgic gait, offloading right lower extremity, and hesitancy to fully extend right hamstring/knee.

40. Dr. Richard reported that Claimant was attentive, pleasant and appropriate with normal speech, not rapid and pressured, delayed or slurred, and his behavior was not agitated, slowed, aggressive, withdrawn or hyperactive. She noted normal judgment and he was not impulsive or inappropriate.

41. Dr. Richard conducted a nerve conduction study that was normal. Claimant had an abnormal needle electromyography (EMG) study that demonstrated complex repetitive discharges and neurogenic recruitment in the right Tibialis Anterior (L4/L5) and Extensor Hallucis Longus (L5/S1), indicating a chronic L5 radiculopathy with subsequent reinnervation, suggestive of a chronic right lower extremity motor radiculopathy affecting the L5 nerve root. She stated that nerve conduction studies address mainly the function of large myelinated nerve fibers and patients with small-fiber neuropathy can have normal sensory nerve conduction studies. She diagnosed Claimant with lumbar spondylosis with chronic right L5 radiculopathy, chronic right-sided low back pain, chronic midthoracic back pain, chronic right-sided neck pain, muscle spasms, neuropathic pain.

42. Dr. Richard made a referral for physical therapy at Colorado in Motion in Loveland, CO for his chronic low back pain with right lower extremity radiculopathy,

[1] Kemp test is performed to evaluate pathology of the disc or disc involvement.
[2] FABER test is performed to evaluate pathology of the hip joint or the sacroiliac joint.
[3] FADIR stands for Flexion, Adduction, Internal Rotation test and refers to a clinical examination test performed to assess the hip function.

weakened core and gluteal musculature, muscle spasms, and impaired mobility. She stated that Claimant would benefit from lumbar spine injections in order to improve his current pain and impaired mobility and made a referral to Foxtrail Pain Clinic for his lumbar spondylosis and right lower extremity radiculopathy in the distribution of the L5/S1 nerve root. Dr. Richards recommended a trial epidural steroid injections as well as potentially facet blocks in the lumbar spine. She also recommended continued massage, acupuncture and chiropractic care as well as medications and patient education.

43. Claimant testified that Dr. Baker referred Claimant for the EMG/nerve conduction study to Dr. Richard as well as to Dr. Brady.

44. Claimant returned to see Dr. Baker on February 10, 2021 with continued constant back pain. Dr. Baker reported that Claimant did see a Dr. Perrin once but missed the second appointment due to some miscommunication. He was offered a job but declined because of his concerns about his back pain. Claimant advised Dr. Baker that he wished to transfer his care to another clinic and Dr. Baker agreed that he would follow up at another clinic but was to continue with specialist care, stating that "Injured Worker is not at MMI, but is anticipated to be at MMI in/on 5/1/2021."

45. Dr. Parker evaluated Claimant also on February 10, 2021. Claimant complained of low back pain and, to a lesser degree, cervical and thoracic pain. Claimant reported a sharp sensation in the right gluteus muscle traveling into the hamstring, problems with sleeping and exacerbation of his pain with cold weather. Claimant requested to continue with chiropractic care. On exam he noted trigger points in the bilateral trapezius, rhomboid, and lumbar muscles. He palpated adhesions in the bilateral thoracolumbar fascia and mild muscle spasm was also palpable. His impression was stable lumbosacral/sacroiliac strain/dysfunction and cervicothoracic pain/strain complaint. He proceeded with manual therapy, traction, soft tissue mobilization, neuromuscular re-education and low-grade manual manipulation. Dr. Parker advised the patient to continue his exercises and to be careful to slowly ease back into physical activity.

46. Claimant returned to see Dr. Parker on February 17, 2021, when Claimant stated that the treatment had been helpful but continued with the right sided spine discomfort. Claimant reported that the pain increased with the cold, had a sharp sensation in his right gluteus muscle going to his hamstring and continued to have disrupted sleep. He also reported he was taking medication he obtained from a doctor in Mexico, was performing his home exercises and awaiting the injection recommended by Dr. Richard. On exam Claimant had mild discomfort while performing range of motion of the cervical spine and lumbar spine. Straight leg and Patrick's were negative, but Claimant had mildly positive Hibbs[4] and hyperextension. Claimant was tender to palpation to the right sacroiliac join. He found adhesions as he palpated the bilateral thoracolumbar fascia and trigger points in the bilateral trapezius, rhomboid, and lumbar muscles with mild muscle spasm. He performed manual traction, neuromuscular re-education, soft tissue mobilization, and low-grade joint mobilization treatments. He stated that Claimant had maximized benefit from the treatment and released him from care.

[4] A positive Hibbs test is indicative of SI joint or ligament pathology.

47. Dr. Baker issued an M164 on February 17, 2021 which did not specify any return date for follow up but that Claimant was still not at MMI.

48. Claimant attended an independent medical examination (IME) at Respondents' request with Dr. John Raschbacher on February 26, 2021. Dr. Raschbacher took a history from Claimant, performed a physical examination and completed a medical records review. Claimant described the pain across his low back, right buttock pain that travelled to the right knee, sometimes felt numb to the right lateral ankle and foot, as well as neck pain. He stated that he also had discomfort that radiated up to the neck on the right side. Examination showed positive Gaenslen's[5] and Patrick's[6] tests that produced low back pain on the right. He had decreased sensation on the right foot and unweighted the right lower extremity, shifting his weight onto his left foot. He also had decreased range of motion.

49. Dr. Raschbacher stated that on history and physical examination and review of the medical records, it did appear that Claimant's presentation and request for medical care was related to the alleged injury suffered on the job. There was no evidence that it related to or stemmed from a pre-existing condition. He stated that, one might conclude medically, it was reasonable that based on his reported mechanism of injury that he did in fact likely have strains of the cervical spine, right shoulder area and lumbar spine. Due to psychological factors present, as long as Claimant's feelings of animosity toward his employer remained, it would be extremely unlikely that he would cease to complain of significant pain and significant inability to function physically, making any further medical care unlikely to produce effect and restore function. Dr. Raschbacher also stated that there was no reason from a medical standpoint that Claimant could not have performed the jobs described in the August 24, 2020 job task list.

50. On February 26, 2021 the Concentra Center Operations Director sent a letter to the adjuster in the claim stating as follows:

> Due to recent behaviors in our center, Concentra has made the decision to terminate the care of one of your injured worker[s]…
>
> In the most recent months, the injured worker has raised concerns with statements made throughout various visits with his medical provider and physical therapist. He has also refused to comply with recent treatment recommendations. As a result, we have determined that it is in the best interests of both parties for [Claimant] to seek care from another provider. …
>
> [Claimant] has been notified of the decision to terminate care by way of a certified letter signed by Dr. Jeffrey Baker. The letter refers [Claimant] to contact your office immediately to make arrangements to obtain health care services from another facility. *(Claimant's name, redacted.)*

51. Claimant was seen at the emergency room at UCHealth Medical Center of the Rockies on March 4, 2021 stating that he had had an increase in low back and right leg pain. He advised that his pain was a bandlike ache and intermittently sharp to the right buttock with ambulation. Claimant reported that his provider had discharged him

[5] Gaenslen's test detects musculoskeletal abnormalities and primary-chronic inflammation of the lumbar vertebrae and sacroiliac joint.
[6] Patrick's test or FABER test is performed to evaluate pathology of the hip joint or the sacroiliac joint.

from the Concentra practice and did not have one to replace them. Claimant was evaluated by nurse practitioner Bree Bacalis, who examined Claimant, finding he walked with a slight limp and determined that he required medications. He was diagnosed with acute right sided low back pain with right-sided sciatica. They administered a Norflex patch and Toradol, prescribed a Medrol Dosepack and Flexeril. He was advised not to lift anything heavy, stretch his back and leg, use a heating pad as needed and take over the counter medications as needed.

52. On March 30, 2021 Claimant was attended by Dr. Michael Brown at UCHealth Foxtail Pain Management for bilateral sacroiliitis, chronic sacroiliac pain, sacral spondylosis, myofascial pain syndrome and chronic pain due to trauma. They placed an order for spine injections at that time to take place with Dr. Brown at the Harmony Surgery Center for bilateral sacroiliac joint injection with flouroscopy.

53. Claimant testified that Dr. Baker, Dr. Richard and Dr. Brown agreed that he required the SI joint injection but it was not authorized. He further stated that he would like to obtain the injection.

54. On May 3, 2021 upon first examining and evaluating Claimant, Dr. Sanchez agreed with Dr. Raschbacher that Claimant was at MMI without impairment. On physical exam (PE) Claimant exhibited mild pain behaviors, mood and affect were appropriate but mildly anxious, with speech at a normal rate and tone. She noted that Claimant had complaints of balance and not feeling solid on the ground but had an equivocal Romberg's test. Claimant was tender to touch diffusely in the right paraspinal side and had bilateral positive straight leg tests. She found impressive that Nicholas Wright, PT, stated on December 2, 2020 "unfortunately, I do not see him healing physically prior to his mental health improving" which was then compounded by Dr. Raschbacher's assessment on February 26, 2021 stating that the patient is "unlikely" to exhibit "significant functional gain or positive response subjectively to further treatment." Dr. Sanchez found that the patient tended to externalize all of his problems and was unwilling to be introspective. She noted that Claimant seemed to be unwilling to acknowledge that personal stressors may be contributing to his ongoing pain complaints. Dr. Sanchez simply advised Claimant that if he would like to receive ESI injections he should use his private insurance. She highlighted to Claimant that she found his physical exam was not consistent with "expected" findings given his MRI and EMG and his lack of response to conservative treatment. On May 4, 2021 Dr. Sanchez summarized medical records.

55. On May 13, 2021 Respondents filed a Final Admission of Liability (FAL) terminating benefits pursuant to Dr. Sadie Sanchez's report dated May 3, 2021, and denying maintenance medical benefits after MMI.

56. Claimant objected to the FAL in a timely manner on May 26, 2021 and completed the Application for a Division Independent Medical Examination.

57. Claimant returned to UCHealth MCR on August 9, 2021 and was evaluated by Cole O'Hara, M.D. Claimant presented with ongoing back pain since a reported work-related injury around 1 year before. They noted the patient has had ongoing pain from his neck to his lower back with radiation of pain into both legs but denied any numbness or weakness. The patient denied any new injury, fever or chills. Claimant reported that he had multiple evaluations including pain management and neurology, and had an MRI

report with him several months old that revealed mild lumbar disc disease. The patient described sharp pain that involved the entire right side of his back from his neck to his tailbone region that worsened with movements. Claimant stated that he had a recommendation to have injections at the pain management clinic but work comp insurance denied it.

58. Dr. O'Hara's clinical impressions were of chronic neck and right sided low back pain and a differential diagnosis that included chronic low back pain, lumbar radiculopathy, cervical radiculopathy, cauda equina syndrome. Upon exam he noted that the pain involved almost his entire back, most consistent with muscular spasm. He noted that Claimant appeared quite uncomfortable and was given a dose of IM[7] dilaudid. He reviewed Claimant's PDMP[8] and did not see any concerning findings. He was prescribed a few days of oral pain medication to get him through the exacerbation of pain. Dr. O'Hara noted that, while Claimant had established care with pain management as well as spine surgery, he recommended that Claimant pursue acquiring Medicaid given his lack of success with the work comp claim. Dr. O'Hara stated Claimant would benefit from comprehensive pain management. He was prescribed Norco upon discharge, he was advised to follow up with Dr. Brown for injections and with Dr. Robert Benz for an orthopedic surgery consult at Orthopaedic & Spine Center of the Rockies.

59. The DIME physician, Alicia Feldman, M.D. of Colorado Clinic, evaluated Claimant on August 17, 2021. She reviewed the medical records and provided a summary of the relevant records. Dr. Feldman took a history consistent with Claimant's testimony of a heavy equipment motor vehicle collision. Claimant reported that he had initial thoracic pain and shortness of breath in addition to acute anger of the accident. Claimant had onset of pain in his neck, right scapula, and low back following the accident. He reported difficulty with activities of daily living including pain with lifting his children. He needed to sit down to get dressed. He reported difficulty bending while showering. On physical exam, Dr. Feldman found Claimant has diffuse tenderness to palpation over the right side of the cervical, thoracic, and lumbar spine, had tenderness to palpation over the right SI joint, pain with all bending, flexion, extension, and side bending, and decreased sensation to light touch over right L5 distribution. She found Claimant had a positive straight leg raise on the right, negative on the left, positive FABER on the right, positive thigh thrust on the right, positive pelvic disruption on the right. He also had limited range of motion.

60. Dr. Feldman provided a clinical diagnosis of work-related right-sided low back pain, lumbar sprain/strain, and possible right-sided sacroiliac joint mediated pain. Dr. Feldman stated Claimant reached MMI on May 3, 2021 as he had extensive treatment with physical therapy, chiropractic, and medications. He had an extensive workup including x-ray, MRI, electrodiagnostic testing, and psychological evaluation. He had refused psychotherapy, and at that point, the second opinion occupational medicine doctor did not recommend further treatment. Given Claimant's lack of trust in his occupational medicine providers, Dr. Feldman did not expect further treatment within the workers' compensation system to result in any significant functional gains and felt that

[7] Intramuscular.
[8] Prescription Drug Monitoring Program.

MMI was appropriate. She stated that Claimant deserved a second evaluation with an occupational medicine doctor which occurred on May 3, 2021.

61. Dr. Feldman noted that Claimant had had greater than 6 months of medically documented pain and rigidity, had actively treated with chiropractic through February, and had ongoing pain and functional limitations for which she thought it was appropriate to award an impairment rating. These add up to 12% whole person impairment for loss of range of motion of the lumbar spine. She stated that the straight leg raise validity test for lumbar flexion was valid. Utilizing Table 53IIB for unoperated medically documented injury and a minimum of 6 months of medically documented pain and rigidity with or without muscle spasms associated with none to minimal degenerative changes on structural tests of the lumbar spine she assigned a 5% whole person impairment. The 12% and 5% combined to a 16% whole person impairment. Utilizing the apportionment calculation worksheet, the current Table 53IIB 5% minus the previous 5% left an apportioned 0% for the specific disorder of the spine. Range of motion measurements was 12% minus the previous 0% resulted in a 12% whole person apportioned impairment rating. Dr. Feldman disagreed with Dr. Sanchez's 0% impairment rating. Dr. Feldman stated she felt Claimant had objective evidence of injury to his lumbar spine, likely SI joint based on his physical exam and history, although the true extent of his pain and impairment was somewhat complicated by the significant psychological distress and distrust he had for some of his providers. She did not recommend maintenance care as she agreed with Dr. Sanchez that Claimant should seek treatment outside of the workers' compensation system given his significant distrust for the occupational medicine providers and further treatment within that setting would not be productive.

62. The DIME process was concluded as of the Division's Notice of September 9, 2021.

63. Dr. Benz's report of May 17, 2021 stated that Claimant had ongoing pain in his lumbar spine that radiated to his lower extremities and upper back. He stated that the MRI showed moderate degeneration of the lower lumbar spine most severe at L4-5 with no evidence of nerve root compression. He diagnosed Claimant with mild multilevel lumbar disk degeneration and probable right SI joint dysfunction. He suggested that possible treatment options was an SI joint injection on the right and, if this was helpful, a CT scan of the lumbar spine to include the SI joints to determine if an SI joint fusion would be appropriate.

64. Dr. Raschbacher issued an addendum report on February 7, 2022 following receipt of the 2011 claim records. Dr. Raschbacher noted that it did not appear that Dr. Feldman, the DIME physician, was provided with the prior impairment rating and should be afforded the records for purposes of apportionment, though he continued to assert that there was no objective evidence of injury other than a strain/strain that should have resolved, and therefore, no impairment was appropriate in this matter. He also stated that the video surveillance should be provided to the DIME physician, if one existed. Dr. Raschbacher's opinion with regard to impairment is not credible.

65. This ALJ reviewed the video surveillance in this matter, which consisted of approximately 55 seconds, showing Claimant walking to a vehicle. This ALJ viewed that Claimant had a visible antalgic gait, favoring his right side.

66. Dr. Raschbacher testified as an expert in occupational medicine and a Level II accredited physician. He stated that the abnormal EMG showed that there was chronic damage to the L5 nerve root and that it was trying to reestablish enervation and normal nerve function. He stated that the report issued on February 26, 2021 summarized his opinions prior to receiving the 2011 injury medical reports.

67. Dr. Raschbacher stated he received training regarding apportionment of spinal impairments from the recent Level II accreditation course including receiving some apportionment tables. He stated that it was clear that Dr. Feldman did not have the prior records available when she did the impairment rating and she completed the forms correctly. He stated that Dr. Feldman used the apportionment tables when an impairment was not available and that she relied on Claimant's statement that he had a 5% rating from his 2011 claim. He stated that the Division requires physician to subtract like from like, so only a Table 53 from a prior specific spine impairment and loss of range of motion from other measurements of range of motion. He testified that, assuming that the correct apportionment was the 10% provided by Dr. Castrejón's, then the 5% for Table 53IIB from the 5% Table 53IIB would result in a 0% for specific disorder and the 5% for loss of range of motion is subtracted from the 12% ROM impairment found by Dr. Feldman, would result in a 7% whole person apportioned impairment. Assuming that the 7% whole person assigned by Dr. Kawasaki was correct, then the 5% for Table 53IIB would be subtracted from the 5% Table 53IIB resulting in a 0% for specific disorder, and the 2% for loss of range of motion would be subtracted from the 12% ROM impairment found by Dr. Feldman, resulting in a total of 10% whole person apportioned impairment rating.

68. Dr. Raschbacher testified that nothing in the *AMA Guides*, Impairment Rating Tips or the Level II accredited course materials indicated that a physician could not assign an impairment rating to a strain or sprain if it did not resolve but that most did resolve without impairment. Dr. Raschbacher stated that he did not see the surveillance, but was not specifically surprised that there was only 55 seconds of surveillance nor did he state he knew whether there were any objective evidence of anything in particular with regard to the surveillance. He testified that he agreed with Dr. Feldman's opinion with regard to maintenance care, where, since Claimant did not achieve any functional gains or improvement from the medical care he had received to date, Claimant should not have any maintenance care in the workers' compensation setting.

69. Under Division of Workers' Compensation (Desk Aid #11) Impairment Rating Tips: Updated July 2020, the Spinal Rating for specific disorder under Table 53, stated that "[W]henever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity." As found here, Claimant clearly had at least six months of documented pain and rigidity, the last of which is inferred as loss of range of motion, both of which are documented by the providers above, including pain, muscle spasms and adhesions as well as objective findings.

70. Claimant received a COBRA letter on December 10, 2021 which terminated his medical, dental and vision care showing a monthly premium of $914.59 beginning as of January 1, 2022. Claimant confirmed that he lost these benefits in December 2021. As found, the fair approximation of the Claimant's wages from May 3, 2021 forward is $1,171.71 plus the $211.06 (914.59x12/52) from the discontinued COBRA benefits for an AWW of $1,382.77 and a TTD rate of $921.86.

71. Claimant testified that he attempted to return to a similar field of employment from December 10, 2020 through September 2020, as a blade operator or grader, but he was unable to return to other similar jobs that required heavy lifting and other manual activities as part of the job. Claimant finally was able to locate and secure a job through a friend on September 20, 2021 with a prior employer.

72. Claimant testified that he uses a back brace that was recommended by Dr. Parker but that he cannot use the back brace all the time because then his back would become more weakened. He stated that he uses it intermittently as needed. He stated that he continues to have a limp and watched the surveillance video, confirming that the person in the video was him. As found, Claimant has a noticeable limp, favoring his right lower extremity. The ALJ finds that Claimant should be awarded $1,000.00 for this disfigurement.

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 he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Overcoming the DIME Physician's Opinion

Respondents seek to overcome Dr. Feldman's determination of impairment in this matter. Respondents must prove that the DIME physician's determination of impairment was incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, *supra.*

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician

correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, W.C.No. 5-078-454-001, (July 12, 2021).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*.

Respondents need only prove that any one particular impairment opinion is overcome by clear and convincing evidence. When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating

protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Therefore, if it is overcome, then the remainder of the decision need only be shown by a preponderance of the evidence.

Here, Respondents seek to overcome the DIME physician's opinion. Dr. Alecia Feldman complied with the requirements of the law by apportioning impairment to Claimant's preexisting injury based on the history provided by Claimant as the parties failed to provide the DIME physician with the preexisting records of impairment. However, the parties in this matter stipulated that Claimant's proper apportionment was "no less than 7% whole person impairment," contrary to Dr. Feldman's apportionment of 5% whole person impairment. Therefore, Respondents, based on this stipulation, have overcome Dr. Feldman's DIME opinion.

Respondents argue that the correct impairment in the 2020 claim is 0% whole person impairment as designated by Dr. Raschbacher, as Claimant suffered from a strain/strain that should have resolved within weeks of the work related injury. Dr. Raschbacher's opinion is not credible in this matter as Claimant testified that he continued to have pain in his low back going down his right lower extremity that has not resolved. Dr. Raschbacher's opinion is contrary to the *AMA Guides* and the Impairment rating tips that allow for a strain of the lumbar spine that has continued greater than six months, including pain and rigidity, to be assessed impairment under Table 53IIB. As found and concluded, it is clear from the records of Dr. Feldman, Dr. Richard and Dr. Benz as well as Dr. Baker and Dr. Parker that Claimant had ongoing low back pain and rigidity, including muscle spasms, positive findings on exam, and valid loss of range of motion, and these physician's opinions are more persuasive than Dr. Raschbacher's opinion.

In the alternative, Respondents argue that the proper impairment to be apportioned is the 10% whole person provided by Dr. Castrejón, the DIME physician in the 2011 claim. As found, the impairment rating by Dr. Castrejón was only a provisional impairment rating as he was not at MMI at the time of the evaluation, and Dr. Castrejón recommended further care that was anticipated to change the level of impairment. Claimant settled the matter within 30 days of the deadline. Claimant testified that he continued to perform home therapy and exercises and, after the following 8 months, no longer had problems with his low back. Based on this credible testimony, this ALJ determines that the 7% whole person impairment rating for the 2011 claim as provided by Dr. Kawasaki is the more appropriate and the correct impairment rating to apportion in this matter. Therefore, Claimant's correct impairment rating for the 2020 claim is 10% whole person apportioned impairment rating based on Dr. Raschbacher's application of the AMA Guides and the proper apportionment as well as Dr. Feldman's measurements. Respondents failed to show that Claimant should not have any impairment related to this claim. Claimant proved by a preponderance of the evidence that Claimant continued to have an apportioned impairment rating of 10% whole person.

C. 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). Under section 8-40-201(19), C.R.S. the cost of health insurance coverage shall not be included in the Claimant's average weekly wage, so long as the employer continues to provide such health insurance coverage. Under Sec. 8-42-107(8)(d), C.R.S. the AWW *shall* include the amount of the employee's cost of continuing the employer's group health insurance plan upon termination. However, *Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991) holds that where there is ambiguity in the Act we should construe the entire statutory scheme in a manner that gives consistent, harmonious, and sensible effect to all its parts.

An AWW calculation is designed to compensate for total wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Sec.* 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008).

Respondents argued that Claimant is not entitled to the increased average weekly wage as Claimant voluntarily left his employment by not showing to work pursuant to the September 2, 2020 offer of modified employment. There is nothing persuasive in the record that indicates that Claimant continued to be an employee or that he was eligible to return to work. In fact, Employer failed to return Claimant's calls with regard to continued employment. Health insurance benefits were formally terminated as of December 31, 2021 and COBRA to start as of January 1, 2022. This is a unique case where no medical impairment benefits have been paid to date. Based on the totality of the evidence, this ALJ finds and concludes that a fair approximation of the AWW should include the COBRA benefits, pursuant to Section 8-42-107 (8)(d), C.R.S., and that AWW is calculated as $1,382.77, only for purposes of calculating medical impairment benefits as PPD compensates Claimant for future loss of capacity to earn wages. Here, while Claimant

returned to a similar field of employment, he was unable to return to other similar jobs that required heavy lifting and other manual activities. It is further found that the Claimant's earnings at the time his COBRA benefits were terminated would more fairly compensate Claimant for his future loss of earning capacity rather than computing permanent impairment benefits based on the wages paid to Claimant by his employer at the time of the injury. See *Spencer Jones v. United Parcel Services*, WC No. 4-669-404, ICAO (November 12, 2008); *Gibbons v. Progressive Roofing*, WC No. 5-034-260-01, ICAO (September 21, 2017); *Nanez v. Mechanical & Piping Inc*., WC No. 4-922-618-04, ICAO (June 16, 2017). Claimant as proven by a preponderance of the evidence that the COBRA benefits should be included in Claimant's average weekly wage to bring it to $1,388.77 for a TTD rate of $921.85.[9] Claimant has shown that PPD benefits owed shall include the COBRA amount.

D. Temporary Total Disability Benefits

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

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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." However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008).

Respondents argued that Claimant's entitlement of temporary disability benefits should be terminated as of September 14, 2021, 2020 when Dr. Baker released Claimant to modified duty and Claimant was sent an offer of modified duty employment pursuant to W.C.R.P. Rule 6-1(A) and Sec. 8-42-105(3), C.R.S. Claimant conceded he was not alleging a technical deficiency in the Rule 6 letter dated September 2, 2020. However, Claimant argued that Claimant complied with the instructions in the letter, which required Claimant to call Employer, specifically stating that "[B]ut you must call Billy the day before to ensure that the job is still in progress." This ALJ infers that the words in the letter "still in progress" means "available." As found, pursuant to Sec. 8-42-105(4)(b)(II)(C), it was impractical for Claimant to return to modified work as Employer failed to advise Claimant that there was a job still available. See *Slafter v. Volunteers of America*, W.C. No. 5-125-703-001, ICAO, (December 9, 2020). As further found, Claimant was not responsible for

[9] This ALJ rounds down calculations from .055 and down to the next cent and up when it is above .055.

his loss of employment. Claimant credibly testified that he contacted Bill prior to the date he was to start his modified duty. It was not until, after leaving a message during the third call, that Billy returned Claimant's call and Bill never mentioned a modified duty job. He advised Claimant that he was going to contact the insurance adjuster to determine if he could get Claimant further care as Claimant reported he had ongoing problems, and then Bill would call Claimant back. Bill failed to call Claimant back. Further, Claimant also contacted multiple other Employer representatives including Jennifer, the business' secretary, and the second supervisor, Russ, without response. Claimant considered Employer's failure to return his phone calls, as well as Bill's failure to get back to him as promised, as a discharge or termination of his employment. As found, Employer's actions are objectively viewed as a discharge as Claimant complied with instructions and sufficiently followed up, without Employer's response. Claimant has shown that Claimant is entitled to temporary total disability benefits as the supervisor failed to provide further instructions after communicating with Claimant in this matter that a job continued to be available. As found Claimant has shown by a preponderance of the evidence that he was unable to return to modified employment as he did not have instructions regarding whether work was still available. Claimant is, therefore, entitled to temporary total disability benefits from September 14, 2020 to the date he was released by Dr. Baker to regular duty on December 10, 2020.

E. Grover Medical Benefits

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974, ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the

causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Here, Dr. Sanchez, Dr. Feldman, Dr. Parker and Claimant's physical therapist opined that he would not benefit from any further care under the workers' compensation system. Claimant was placed at MMI as of May 3, 2021. While Drs. Richard and Benz made recommendations for further care, the recommended care was in the nature of being curative and neither opined whether the recommended care was to maintain Claimant at MMI. Dr. Sanchez, Dr. Feldman, and Dr. Parker's opinions were more persuasive than the opinions of Dr. Richard and Dr. Benz in this matter. Claimant has failed to show by a preponderance of the evidence that he is entitle to maintenance medical care.

F. Disfigurement Benefits

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). Claimant has an observable limp and testified that he continued to have a limp. This ALJ finds and concludes that Claimant is entitled to compensation due to the observable limp. Claimant has proven by a preponderance of the evidence that the limp should be compensated and Claimant is entitled to $1,000.00 for the disfigurement.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay Claimant based on the apportioned 10% whole person impairment for his lumbar spine injury related to the July 22, 2020 admitted claim.

2. Claimant's average weekly wage for purposed of calculating medical impairment benefits is $1,388.77, which includes the COBRA premium amount.

3. Respondents shall pay Claimant temporary total disability benefits from September 14, 2020 through December 9, 2020 at the rate of $781.14 per week. Respondents may take credit for any temporary partial disability paid for this period.

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

5. Respondents shall pay Claimant a disfigurement award in the amount of $1,000.00.

6. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

7. 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 17th of March, 2022.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-076-766-002

ISSUES

I. Whether all physical impairment ratings are converted to a whole person and combined when determining the applicability of the cap provision in 8-42-107.5.

II. Disfigurement

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on March 19, 2018, within the scope and course of his employment with Employer to his low back and right knee while employed as a laborer.
2. As a result of his work injury Claimant underwent a right knee replacement surgery on October 21, 2019. Claimant underwent numerous procedures for his low back (facet injections, medial branch blocks, lumbar medial branch radiofrequency ablation and a recommendation for a lumbar fusion).
3. Claimant was placed at maximum medical improvement (MMI) on April 19, 2021, by Dr. McFarland. Respondents requested a 24-month Division Independent Medical Examination (DIME) which was performed by Dr. Robert Mack. Dr. Mack placed Claimant at maximum medical improvement (MMI) as of April 19, 2021, and provided an impairment rating of 15% whole person for the low back, and 36% of the right lower extremity which converted to a whole person impairment rating of 14%. Combining the two impairment ratings resulted in a 27% whole person impairment rating using the AMA Guides (Third Revised) combined values Chart. (Ex. 5, p.151-153)
4. On August 18, 2021, a Final Admission of Liability (FAL) was filed admitting for the DIME impairment rating providing of 15% whole person impairment and 36% scheduled impairment of the lower extremity. (Ex. A) The FAL also admitted for temporary total disability benefits (TTD) from 5-9-18 through 4-19-21 at the rate of $677.89 per week for a total of $104,201.37, and TTD paid of $115,241.30. In remarks the carrier indicated, "See attached DIME report no PPD owed as benefits paid past the first cap. All benefits not specifically admitted are denied. Overpayment to be collected from future benefits." Insurer claimed an overpayment of $27,771.12.
5. On August 24, 2021, the Division of Workers' Compensation Claims Management Unit requested a corrected admission within 10 days consistent with the legal concept that when a claimant is assigned a scheduled and a whole person impairment rating, the impairment ratings are reduced to a single whole person rating to the determine the applicable cap. The impairment ratings are then compensated separately. (Ex. B) The error letter went on to indicate that the medical report assigns a whole person

impairment rating of 27% whole person and as this is greater than 25% the $174,938.15 cap is in effect.

6. The Claims Management Unit calculated permanent partial disability benefits (PPD) as $175,938.15 less TTD admitted of $104,201.37 = $70,736.78 and advised that this should be listed in the benefits section and any amount credited against PPD should also be listed in the remarks section.

7. On September 7, 2021, a subsequent FAL was filed admitting for TTD in the amount of $104,201.37 and a 15% whole person impairment rating and a 36% scheduled lower extremity impairment rating. (Ex. C, p.1) In the remarks section, the carrier stated: "Second cap is taken in consideration when determining amount of PPD owed. 15% (whole person PPD rating from the DIME) × 400 weeks × 1.08 age factor × $677.89 = $43,927.27 14% (Extremity PPD rating from the DIME) × 208 weeks × $297.56 = $8,644.95- These total $52,595.22. Carrier paid $115,241.30 ‗ $87,470.18 (First Cap) = $27,771.12 = $24,824.10 left to be paid."

8. On September 27, 2021, the Claims Management Unit mailed another error letter (Ex. D) requesting that a corrected admission of liability be filed consistent with the statement in their previous letter that "when a Claimant is assigned a scheduled and a whole person impairment rating, the impairments are reduced to a single whole person prating to determine the applicable cap. The impairments are then compensated separately. The medical report assigns a whole person rating of 27%. As this is greater than 25%, the $174,938.15 cap is in effect. We calculate PPD as $174,938.15 - $104,201.37 = $70,736.78, which should be listed in the benefits. Any amount credit against PPD should be listed in the remarks section."

9. On October 6, 2021, a third FAL (Ex. E, p.1) was filed admitting for TTD in the amount of $104,201.38 and for 15% whole person impairment and 36% scheduled impairment of the lower extremity. The remarks section contains the following: "Claimant was placed at MMI on 4/19/2021 with a 15% whole person rating & a 36% lower extremity rating. See attached DIME report from Dr. Mack dated 7/30/2021. Calculations are 15% × 1.08 x 400 weeks × $677.89 = $43,927.27 & 208 weeks × 36% × $297.56 = $22,281.29. TTD overpaid by $11,039.92." Moreover, in the benefit history, Respondents admitted for TTD in the amount of $104,201.38. They also admitted for PPD benefits for Claimant's 15% whole person impairment rating in the amount of $43,927.27, as well as PPD benefits for Claimant's 36% scheduled impairment in the amount of $22,281.29. As a result, Respondents admitted for TTD and PPD benefits in the amount of $170,409.94. They also claimed an overpayment in the amount of $11,039.92. The Respondents did not, however, state that they were limiting Claimant's PPD award based on the statutory cap contained in C.R.S. Section 8-42-107.5.

10. Claimant has a surgical scar on his right leg around his knee area as a result of the total knee replacement surgery performed as a result of his admitted claim. The surgical scar is approximately 9 inches long, raised, discolored and uneven in appearance. Claimant also walks with an antalgic gait and uses a cane to assist with his balance when walking especially outside the home outside, and when he is going to be on his feet for long periods of time or walking.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether all physical impairment ratings are converted to a whole person and combined when determining the applicability of the cap provision in 8-42-107.5.

As set forth in their proposed order, Respondents contend that the statutory cap contained in 8-42-107.5 limits Claimant's PPD award. Respondents contend that only the whole person rating is used to determine the statutory cap. Thus, Respondents contend Claimant's 15% whole person impairment rating does not exceed the first statutory cap of 25% and Claimant's combined TTD and PPD benefits are limited to the

first statutory cap of $87,470.18. Therefore, under this scenario Respondents contend Claimant is not entitled to any PPD benefits because he received more than $87,470.18 in TTD benefits. In the alternative, Respondents contend that the first statutory cap applies to Claimant's 15% whole person impairment rating and that the second statutory cap of $174,938.15 applies to Claimant's 36% scheduled impairment rating. Under this second scenario, Claimant would not be entitled to any additional PPD benefits for his 15% whole person impairment rating, but Claimant would be entitled to PPD benefits for his 36% scheduled rating since his 36% extremity rating exceeds the first statutory cap of 25%. The ALJ disagrees with both of Respondents' proposed interpretations.

The determination of the applicability of CRS Section 8-42-107.5 (the caps provision) is a separate and distinct determination from the determination of the calculation of compensation to be paid for a permanent impairment pursuant to CRS Section 8-42-107 (scheduled impairments vs. impairments not on the schedule of injuries). Thus, when determining the applicability of the cap provision in section 8-42-107.5 all of the physical impairment ratings are converted to a whole person and combined.

Section 8-42-107.5 in effect at the time of Claimant's injury provides that:

> No claimant whose *impairment rating* is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose *impairment rating* is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments. For purposes of this section, any mental impairment shall be combined with the physical impairment rating to establish a claimant's impairment rating for determining the applicable cap……. (Emphasis added).[1]

Section 8-42-107.5 was enacted in 1991 to limit the total award a claimant receives for temporary and permanent partial disability benefits. The differentiated caps represent a legislative attempt to distinguish between those workers who are more seriously injured from those who are less seriously injured. *See Colorado AFL–CIO v. Donlon,* 914 P.2d 396, 403–04(1996).

Respondents take the position that there is no statutory or binding case law that requires an insurer to convert scheduled ratings to a whole person impairment rating and combine the whole person ratings for the determination of the applicable cap provision. There are, however, numerous Industrial Claims Appeals Office (ICAO) opinions regarding the issue of combining scheduled and whole person impairment ratings for the purposes of determining the applicable cap provision. The first case was *Quackenbush v. Tenant Roofing Inc.,* W.C. No. 4-218-272 (I.C.A.O. June 19, 1998). In *Quackenbush,* the ICAO panel addressed whether a claimant's right arm injury should

[1] The dollar amounts contained in the benefits cap provision, section 8-42-107.5 CRS, is adjusted each year by the percentage of the adjustment made by the director to the state average weekly wage pursuant to section 8-47-106. *See* 8-42-107.5. Based on Claimant's date of injury, the first benefit cap is $87,470.18 and the second benefit cap is $174,938.15.

be treated as a 29% extremity impairment or converted to a 17% whole person impairment for purposes of the application of section 8–42–107.5, the benefits cap provision. The panel held that the term "impairment rating" was ambiguous, and it determined that converting the extremity impairment rating into a whole person impairment was necessary in order to prevent giving greater benefits to less seriously injured workers in contravention of the legislative purpose behind the benefits cap provision.

There is not, however, a court of appeals or supreme court opinion directly on point. There is statutory support for the use of whole person impairment ratings in the statute and the rules. CRS Section 8-42-101(3.5)(a)(II) requires that all permanent impairment ratings shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition Revised, effective July 1, 1991. WCRP 12-1 implements the Division's permanent impairment rating guidelines of how to appropriately utilize and report permanent impairment ratings. WCRP 12-4 specifically instructs that "Any physician determining permanent physical impairment shall: (B) Use the instructions and forms contained in the AMA Guides and; (C) *convert scheduled impairment rating to whole person impairments* (emphasis added) and (D) report final whole person and/or scheduled impairment rating percentages in whole numbers." The AMA Guides to the Evaluation of Permanent Impairment Section 2.2 also requires the determination of impairment to be based upon the "whole person." The AMA Guides specifically provide that: "To support systems that require such determinations, the reference tables of the Guides take into account all relevant considerations in reaching "whole person" impairment ratings." AMA Guides, Section 2.2.

In this case, the DIME doctor, utilizing the AMA Guides to Physical Impairment (Third Edition Revised) Lower Extremity Impairment Records Part II (Hind Foot, Knee, Hip), provided a 36% impairment rating of the knee for a total lower extremity rating of 36% which converted to 14% impairment rating of the whole person (Table 46). (Ex. 5, p.152). The DIME doctor then, using Figure 84 Spine Impairment Summary, provided a 15% whole person for the lumbar spine, and pursuant to #7 on the form for impairments of other organ systems, included the right knee and provided a 14% impairment rating pursuant to page 68 of the AMA Guides. The whole person impairment ratings were then combined for a total of a 27% total whole person impairment rating. (Ex. 5, p.153)

Using this framework, the Supreme Court in *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996) held that when an employee is involved in a work-related accident that results in both a scheduled injury and a non-scheduled injury, the scheduled injury must be converted to a whole person impairment rating and combined with the non-scheduled injury whole person impairment rating in calculating permanent disability benefits and paid by the whole person formula.

In response to the *Oqueda* decision, the General Assembly amended subsections 8-42-107(7)(b)(I) to (III) in 1999 to end the whole person calculation and payment of benefits pursuant to the whole person formula whether scheduled or not by clarifying that each type of injury shall remain separate and be compensated solely on the basis of applicable statutory schedule or benefit formula. The General Assembly added to the statute in this 1999 amendment a legislative declaration and provision that provides for

mental and emotional distress to be compensated under a different provision of the Act, and prohibits such impairments from being combined with a scheduled or a nonscheduled injury. Ch. 103, sec. 1, § 8-42-107, 1999 Colo. Sess. Laws 298, 299.

After the General Assembly overruled *Mountain City Meats* in 1999 legislation, ICAO revisited the issue and reached the same result in *Schank v. Wizard,* W.C. No. 4-497-494 (I.C.A.O. Sept. 19, 2003); In *Schank,* a DIME physician rated the claimant as having 22% impairment of the cervical spine and a 38% impairment of the upper extremity, which the physician converted to 23% whole person impairment. The physician then combined the ratings for a combined total of 40% whole person impairment. The ALJ awarded scheduled disability benefits based on 38% impairment to the upper extremity, and 22% whole person impairment. Relying on *Quackenbush v. Tennant Roofing, Inc*., W.C. 4-218-272 (June 19, 1998), and the claimant's combined whole person rating of 40%, the ALJ determined the claimant is subject to a combined limit of $120,000, rather than $60,000 for TTD and PPD benefits.

In *Schank*, the panel reviewed the analysis of their decision in *Quackenbush* to confirm that the 1999 amendments to subsections 8-42-107(7)(b)(I) and (II) CRS, did not change how section 8-42-207.5, the cap provision is applied to injuries. The panel held that when a claimant has scheduled and nonscheduled impairments all the physical impairments are converted to a whole person impairment rating for the purposes of determining the applicable cap in section 8-42-107.5 CRS.

In *Quackenbush*, the issue was whether the claimant's right-arm injury should be treated as 29% impairment of the arm or converted to 17% whole person impairment for purposes of the application of section 8-42-107.5 CRS. In resolving the issue, the panel noted that the term "impairment rating" is not defined in the Workers' Compensation Act and is ambiguous. As a result, the legislative intent and history was reviewed.

The panel noted that the language enacted in Senate Bill 218, which is currently codified at Section 8-42-101(3.7) CRS, provides that all "impairment ratings used under articles 40 to 47 of this title" are to be calculated in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised (AMA Guides). The AMA Guides provide for both extremity ratings and whole person ratings but express the preference that all ratings be converted to the whole person. In *Mountain City Meat Co. v. Oqueda*, 919 P.2d 254, the Court held that by incorporating the AMA Guides into the Act, the legislature explicitly created authority for the conversion of an upper extremity injury to a whole person impairment rating. Therefore, in *Quackenbush*, the panel held that the reference to the claimant's "impairment rating" in section 8-42-107.5 CRS was ambiguous.

In view of the statutory objectives inherent in the schedule and section 8-42-107.5 CRS, the panel concluded in *Quackenbush* that application of the claimant's 29% scheduled disability rating would do violence to the statutory scheme by giving greater benefits to less seriously injured workers who suffer scheduled disability injuries. In contrast, conversion of the claimant's scheduled disability rating to a whole person rating caused the claimant's injury to be subject to the cap intended for less serious injuries. Therefore, the panel held that the cap applied to scheduled disabilities, and for purposes of determining whether the $60,000 cap has been reached, the scheduled

disability must be converted to a whole person impairment so that scheduled and nonscheduled injuries are treated similarly.

Respondents in *Schank* argued that sections 8-42-107(7)(b)(I) and (II), CRS [1999 Colo. Sess. Laws, Ch. 103 at 298 which apply to injuries that occur after July 1, 1999], were enacted to overrule *Mountain City Meat Co. v. Oqueda*, and to ensure that when the claimant sustains both scheduled and nonscheduled injuries, the loss shall be compensated on the schedule for scheduled injuries. Section 8-42-107(7)(b)(II) CRS provides that, "[W]here an injury causes a loss set forth in the schedule in subsection (2) of this section and a loss set forth for medical impairment benefits in subsection (8) of this section, the loss set forth in the schedule found in said subsection (2) shall be compensated solely on the basis of such schedule and the loss set forth in said subsection (8) shall be compensated solely on the basis for such medical impairment benefits specified in subsection (8)."

The panel was not persuaded that section 8-42-107(7)(b)(II) CRS undermined the holding in *Quackenbush* and disagreed with the respondents' contention that scheduled injuries are not subject to the benefit cap. In particular, the panel rejected the respondents' contention that because *Quackenbush* relied on *Mountain City Meat Co. v. Oqueda*, and *Mountain City* was expressly overruled by section 8-42-107(7)(b)(II) CRS, *Quackenbush* was necessarily overruled. The panel explained that in *Quackenbush* they relied on *Mountain City* for the proposition that the legislature created a methodology for converting scheduled disability ratings to whole person impairment ratings by incorporating the AMA Guides into the statute. Section 8-42-107(7)(II) CRS did not alter the statutory requirement that medical impairment ratings be completed in accordance with the AMA Guides or the fact that the AMA Guides contain a method for converting extremity ratings to whole person impairments. Accordingly, the principle on which the panel relied in *Mountain City* was not overruled by subsections 8-42-107(7)(I) and (II) CRS.

The panel also noted that section 8-42-107.5 CRS is designed to create a maximum benefit cap on the recovery of TTD and PPD benefits. Although TTD benefits are intended to compensate for a claimant's immediate wage loss, both TTD and PPD benefits compensate a claimant for the extent to which his or her physical impairment impacts the claimant's past and future ability to earn wages. *See Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 404 (Colo. App. 1995). The panel noted that under the respondents' construction, all wage loss benefits payable under the schedule of disabilities would be excluded from the statutory limit on wage loss benefits. Consequently, the panel held that the respondents' construction is inconsistent with the overall purpose of section 8-42-107.5 CRS.

Using the respondents' analysis would elevate scheduled injuries above whole person impairments because a scheduled disability award would be payable regardless of the statutory cap. For example, a claimant who has a 29% scheduled disability, which would convert to 17% whole person impairment, would not be subject to the $60,000 limitation in section 8-42-107.5 CRS if scheduled disabilities were irrelevant to the cap. However, a claimant whose injury results in whole person impairment from 17 through 25% would be subject to the $60,000 combined cap. Under these circumstances, the less seriously injured worker could actually recover the more generous award of

permanent disability benefits that was reserved for workers with whole person impairment. This result would frustrate the statutory scheme for compensating permanent partial disability enacted by Senate Bill 218.

In *Dillard v. Industrial Claim Appeals Office,* 134 P.3d 407 (Colo. 2006), the Supreme Court held that section 8-42-107(7)(b)(III) CRS precluded combining a mental impairment rating with a physical impairment rating for the purpose of obtaining the benefit of the higher cap set forth in section 8-42-107.5 CRS. In *Dillard*, Claimant was assigned 23% whole person impairment to the cervical spine, 2% rating for the damage to the left hip which equaled 25% whole person impairment when combined. The DIME physician also assigned 5% rating for mental impairment. The DIME physician opined that Claimant suffered a total of 29% whole person impairment. (*See Dillard v. Pepsi Bottling* (WC No. 4-467-177 March 19, 2004)

The Court in *Dillard* held that the "shall not be combined" language is unique to section 8-42-107(7)(b)(III) (then existing section that indicated that a mental impairment should not be combined with a scheduled or nonscheduled injury). The Court noted the preceding subsection section 8-42-107(7)(b)(II) CRS contains nothing like it to prevent combining scheduled and nonscheduled injuries into a whole person impairment rating for the purposes of section 8-42-107.5 CRS. Thus, the mental impairment language, "shall not be combined with a scheduled or a nonscheduled injury," must have meaning. That meaning, when applied to section 8-42-107.5 CRS, is that mental impairment ratings are not to be combined with scheduled or nonscheduled injuries when calculating the applicability of the higher cap contained in section 8-42-107.5 CRS.

In this case, the medical report assigns a whole person impairment rating of 27%. As this is greater than 25%, the $174,938.15 cap is in effect. The amount of TTD and PPD to which Claimant is eligible for is $174,938.15. Since Claimant was entitled to $104,201.37 in temporary disability benefits, there remains $70,736.78 under the statutory cap that can be paid in permanent partial disability benefits. In this case Claimant's 15% whole person impairment rating has a value of 15% × 1.08 × 400 weeks × $677.89 = $43,927.27. Claimant's right lower extremity rating has a value of 208 weeks × 36% × $297.56 = $22,281.29. As these combined amounts total $66,208.56 and are less than $70,736.78, Claimant is entitled to the payment of $66,208.56 in permanent partial disability benefits. Respondents, may, however, reduce such amount by any overpayment of temporary disability benefits.

ORDER

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

1. Claimant's 15% whole person impairment rating has a value of 15% × 1.08 × 400 weeks × $677.89 = $43,927.27. Claimant's right lower extremity rating has a value of 208 weeks x 36% × $297.56 = $22,281.29. Claimant's total permanent partial disability benefit award equals $66,208.56.

2. Respondents admitted for $104,201.37 in temporary disability benefits. Therefore, the total amount payable for temporary and permanent partial disability benefits is $170,409.93.

3. Claimant's combined whole person impairment rating is 27% which is greater than 25%. Therefore, the applicable cap pursuant to 8-42-107.5 is $174,938.15.

4. As a result, Respondents shall pay Claimant $66,208.56 in permanent partial disability benefits – less any overpayment of temporary disability benefits.

5. Claimant has a surgical scar on his right leg around his knee area as a result of the total knee replacement surgery performed as a result of his admitted claim. The surgical scar is approximately 9 inches long, raised, discolored and uneven in appearance. Claimant also walks with an antalgic gait and uses a cane to assist with his balance when walking especially outside the home and when he is going to be on his feet for long periods of time or walking. Therefore, Respondents shall pay Claimant disfigurement benefits in the amount of $3,500.00.

6. The parties specifically reserved the issue of permanent total disability benefits. Therefore, such issue is reserved.

7. All other issues not expressly decided herein are also 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: March 17, 2022.

/s/ Glen Goldman

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment on or about April 10, 2020 in the form of CoVid-19?

- If Claimant has proven an occupational disease, the parties have stipulated that the medical treatment Claimant has received is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the occupational disease.

- If Claimant has proven an occupational disease, the parties have stipulated that Claimant's average weekly wage ("AWW") is $1,674.50 from the date of the injury up until April 13, 2021 when his AWW increased to $2,175.00 due to his COBRA health insurance benefits.

- If Claimant has proven an occupational disease, the parties have stipulated that Claimant is entitled to temporary total disability ("TTD") benefits beginning April 13, 2020 through ongoing.

- If Claimant has proven an occupational disease, the parties have stipulated that Respondents reserve the right to claim any allowable offsets against Claimant's TTD benefits in the future.

FINDINGS OF FACT

1. Claimant was employed in Employer's underground coal mine as a bolter. Claimant testified that over the course of his employment with Employer, he performed numerous jobs including Ram Car Operator, Scoop Car Operator, Materials Hauler and Log Truck Driver. Claimant testified he began working for Employer on August 28, 2019. Claimant testified that he lived with his wife and two children in Eckert, Colorado.

2. Claimant testified he worked on Crew C, with approximately 40 to 50 other people on the crew. Claimant testified that when the COVID-19 pandemic began in March 2020, Employer begin to stagger the sub-crews in locker rooms so that all of the workers in Crew C would not be getting showered and dressed before and after work shifts at the same time. Claimant testified that members of Crew C would interact throughout the work day and in locker rooms, and that during shift changes members of Crew C would briefly interact with Crews A and B.

3. Claimant testified that employees were required to wear masks while traveling in the mantrip to move into or out of the mine, but otherwise, it was his understanding that masking was not required at work. The mantrip is a truck that fits 8 people and is utilized by the employees to drive into the mine to perform their work. Claimant testified he would be underground in the mine during his entire shift. Claimant testified his shift was 8 hours long.

4. Claimant testified that the level of participation in mask-wearing was not good. Claimant testified that his coworkers did not wear masks during work shifts, and that members of Crew C ate lunch together in a small, 5-foot by 12-foot chamber, without masks. Claimant testified that members of Crew C were also in close contact during their safety meeting each morning. Claimant testified that while underground, the employees would have to scream at each other in order to be heard.

5. Claimant testified that during an eight-hour shift, he was in close contact with his bolt partner and third man all day. Claimant testified that close contact would be within several feet of his bolt partner and third man. Claimant testified he was also in constant contact with his supervisor, [Redacted, hereinafter AC], during the day, including close contact in the kitchen for approximately 45 minutes during the day.

6.Claimant testified that in the mine, air only flowed one way. Claimant explained that the intake air comes into the mine through a vent and is blown down through the mine and then recycled out the exhaust shaft.

7.Claimant testified that he took Employer's CoVid policies seriously, but that it was not feasible to wear masks underground and there was not much social distancing while working underground due to the confined space.

8.Claimant testified he became aware on April 10, 2020 that Mr. AC[Redacted] was quarantined due to suspected CoVid symptoms, but testified that members of Crew C were never formally advised of any employee who was on Crew C who tested positive for CoVid.

9.Claimant entered into evidence at hearing a spreadsheet maintained by Employer that listed employees who has suspected CoVid symptoms or exposure to CoVid. Claimant testified that his wife had not had any cold or CoVid symptoms in the week prior to April 12. Claimant testified that he and his family took precautions against CoVid in March and April 2020, including wearing masks to the grocery store.

10.Claimant testified his only non-work activities in the days leading up to his getting sick were going to the grocery store and a pet food supply store. Claimant testified he did not see either of his two older daughters from January to July 2020. The ALJ finds Claimant's testimony with regard to this issue to be credible.

11. Delta County's health department issued press releases indicating the status of CoVid infections confirmed via testing early in the pandemic. On March 20, 2020 there were zero positive cases in the county. The county reported its first positive case on March 24, 2020. Three additional cases were reported on April 3, 2020. A fifth case was reported April 6, 2020.

12. By the time Claimant first developed his symptoms on April 12, 2020, one additional CoVid case was confirmed via testing in Delta County for a total of six CoVid cases.

13. Claimant testified he awoke on the morning of April 12, 2020 and felt like he had a severe head cold, with fatigue, fever, runny nose, sore throat, and cough, and was worried he had contracted CoVid. Claimant testified he contacted Employer's human resources manager, [Redacted. herinafter SL], on Monday, April 13, 2020, and told him he was sick and would not come to work. Claimant testified that Mr. SL[Redacted] did not instruct him to undergo a CoVid test or give instructions on where he could get tested.

14. Claimant sought care with Dr. Craig Delta County Memorial Hospital on April 15, 2020. The report from Dr. Craig noted that Claimant had been sick for approximately five (5) days and noted his wife was sick as well. Dr. Craig noted Claimant's symptoms were consistent with CoVid and that Claimant works at a pleace that likely has positive coronavirus at this time. Dr. Craig diagnosed Claimant with coronavirus infection, and advised him to go home, isolate, and not go to work.

15. Claimant testified at hearing that the report that his wife was also sick was not accurate. Claimant testified that his wife did end up getting CoVid symptoms, but not until April 17, 2020. Cliamant testified that his children developed symptoms on April 20 and 21, 2020, but that the rest of his family did not undergo CoVid testing because they were presumed positive for CoVid through their symptoms and exposure to Claimant. Claimant's testimony in this regard is found to be credible.

16. Claimant testified that he and his wife both continued with CoVid symptoms. However, Claimant did not see a doctor again until May 13, 2020, because his physician did not want to see him until several weeks after the onset of his symptoms. Claimant testified that when he was eventually evaluated, the physician would only evaluated Claimant in the parking lot.

17. Claimant began treating with Dr. Purvis, Dr. Abuid, who is a pulmonologist, Dr. Gilbert, who is another pulmonologist, and then eventually to a post-CoVid care clinic in Fruita, Colorado. Claimant testified he developed Covid long hauler syndrome and has not felt well since April 11, 2020.

18. Claimant was eventually terminated by Employer on April 13, 2021 after that he had exhausted all his paid and unpaid leave of absence and short-term disability benefits.

19. Claimant testified he believed he contracted CoVid due to his employment because he worked in a mine with one-way ventilation with many coworkers who did not wear masks while working. Claimant testified that during the state's shelter-in-place order, he was an "essential worker". Claimant testified all he did outside of the home was go to work and buy groceries for his family. Claimant testified he and his family stayed home and did not see any other people outside their home. Claimant testified that he believed the only place he would have contracted CoVid was at work.

20. Claimant testified that after contracting CoVid, he continued to have severe fatigue, tremors, headache, dizziness, weakness, brain fog, difficulty with memory, and difficulty articulating thoughts. Claimant testified he is still undergoing treatment for these symptoms.

21. AC[Redacted] testified at hearing on behalf of Employer. Mr. AC[Redacted] is an underground production supervisor for Crew C and was Claimant's direct supervisor. Mr. AC[Redacted] testified that on an average workday, he would interact with Claimant several times per shift. Mr. AC[Redacted] testified that he worked on Thursday, April 9, and awoke on Friday, April 10 with fever and body aches. Mr. AC[Redacted] testified he returned to work on April 27 after getting a doctor's clearance, and after the Employer-ordered quarantine of Crew C ended. Mr. AC[Redacted] testified that he never underwent a test for CoVid during the time he was in quarantine.

22. SL[Redacted] , human resources manager for Employer, testified at hearing on behalf of Employer. Mr. SL[Redacted] , as part of his job with Employer, began preparing a chart to track employees' health status after the CoVid outbreak started in March 2020, A copy of the chart was entered into evidence as Claimant's Exhibit 7 and Respondents' Exhibit E. According to the chart, an Employee in Crew C, represented in both lines 15 and 24 of Employer's spreadsheet, went off of work on March 30 with symptoms in his ears and throat, as well as fatigue and aches. That employee returned to work on April 1 0 (a day Claimant worked), and then later tested positive for CoVid on or about April 14, 2020.

23.Mr. SL[Redacted] testified that 24 workers were identified as having CoVid symptoms or contact with an employee with symptoms between March 23 and April 14, 2020, including Claimant. Mr. SL[Redacted] testified that because there were positive CoVid cases in Crew C, the entire crew was shut down for approximately one week. Mr. SL[Redacted] testified that as the pandemic was starting, Employer did not require a negative CoVid test in order for an employee to return to work after developing symptoms. Mr. SL[Redacted] testified that four employees of Employer tested positive on April 13 or 14, 2020, including Claimant. Mr. SL[Redacted] testified all four of these employees were all on Crew C.

24. The ALJ notes that the spreadsheet does not indicate which workers tested for COVID-19 or which workers had negative tests. The spreadsheet also indicates that certain employees returned after getting a doctor's note.

25. Mr. SL[Redacted] testified they had an employee who carpooled with another Crew C member on April 7 who later tested positive for CoVid. The other employee who was in the carpool then tested positive for COVID on or about April 20, 2020.

26. Mr. SL[Redacted] testified that the State of Colorado's data showed an outbreak at Employer's location as of April 21, 2020.

27. Respondents obtained a record review independent medical examination ("IME") report from Dr. Barton Goldman on October 22, 2021. Dr. Goldman reviewed Claimant's medical records and the CoVid symptom spreadsheet prepared by Employer is preparing his IME report. Dr. Goldman opined Claimant contracted CoVid in April 2020, and had ongoing need for treatment for his Post-Acute Sequelae of SARS Co-V-2 Infection ("long CoVid"). Dr. Goldman noted that based on the data contained in the employee case spreadsheet provided by the employer, approximately 17 employees reported upper respiratory tract infections prior to April 13, 2020, but it was not until those cases reported on April 13, 2020, including that of Claimant, that confirmed positive CoVid testing results are being documented. Dr. Goldman ultimately opined in his report that Claimant was equally exposed to CoVid outside his employment.

28. Dr. Goldman opined in his report that the overall medically probably exposure timeframe for Claimant in this case would begin around March 27, 2020 to as recent as April 7 or 8, 2020. Dr. Goldman noted that whomever was the vector that resulted in Claimant's CoVid infection was likely not symptomatic for at least another 1-2 days at the time of transmission or just beginning to have symptoms within the exposure time frame.

29. Dr. Goldman testified at hearing in this matter. Dr. Goldman noted in his testimony that any employee listed in the sheet in late March or early April could have been the individual who introduced the virus into the occupational environment, but that one could not determine introduced the virus into the environment. Dr. Goldman did confirm there was an "outbreak" at Employer's facility, but that he could not opine that Claimant contracted CoVid at his workplace because of potential community spread. Dr. Goldman testified that one of the four employees who tested positive for CoVid on April 13 or 14, 2020 was likely patient zero who brought the CoVid into the work environment.

30. Dr. Goldman testified that the timeline of patients' exposure to coronavirus and development of symptoms is highly variable and could be between two and fourteen days. Dr. Goldman testified that for CoVid, the time of exposure to the time of symptoms is generally 5 to 7 days and most contagious 1 to 3 days before symptoms start. Dr. Goldman testified that symptoms generally resolve 10 to 14 days after the

initial onset of symptoms. Dr. Goldman testified that Claimant's probable exposure timeline was March 27 through April 10, 2020, and the most probable range was April 4 to April 7, 2020. Dr. Goldman testified that according to the symptom spreadsheet maintained by Employer, between March 27 and April 10, 2020, nine employees reported potential CoVid symptoms to employer. Dr. Goldman also testified that in April 2020, as the pandemic was starting, CoVid testing was difficult to obtain. Dr. Goldman agreed that according to the testimony at hearing, Employer was not requiring symptomatic employees to obtain a negative CoVid test before returning to work. Dr. Goldman further testified that symptom presentation of CoVid could be highly variable, including the possibility of asymptomatic presentation.

31. Dr. Goldman testified it was not possible to know if any of the nine employees who reported symptoms between March 27, and April 10, 2020 had CoVid. Dr. Goldman further testified that it was possible that any one of the nine people who reported symptoms between March 27 and April 10, 2020 who were not tested for COVID could have been CoVid carriers. Dr. Goldman testified that because on April 13 and 14 four employees reported symptoms and were later tested positive for CoVid, it was possible, but not probable, that all four of those employees contracted CoVid from the same person.

32.The ALJ notes Mr. SL[Redacted] ' testimony that approximately 24 employees reported COVID-like symptoms or exposed to someone with symptoms between March 23 and April 14, 2020, and that because COVID testing was in short supply, Employer did not require a negative CoVid test, but only a doctor's note, before an employee was allowed to return to work after reporting symptoms or exposure.

33. The ALJ credits Employer's records that Claimant and another employee were the first two workers to test positive for CoVid, on or about April 13, 2020. The ALJ notes that two more employees tested positive on April 14, 2020. The ALJ notes that one of the employees that tested positive for CoVid on April 14, 2020 had previously left work with CoVid symptoms on March 30, 2020, before returning to work with Employer on April 10, 2020, and ultimately leaving work after his positive test.

34. The ALJ notes that the evidence establishes that two employees on Crew C tested positive for CoVid on April 13, 2020 and two more employees on Crew C tested positive for CoVid on April 14, 2020. The ALJ notes that prior to that time, and during the period of time in which Dr. Goldman testified would likely be in the period of time that Claimant would have been exposed to CoVid, numerous other employees reported CoVid symptoms to Employer.

35. The ALJ further notes that because Employer was not requiring a negative CoVid test prior to having an employee return to work during the period of time in question, Dr. Goldman's testimony with regard to the identity of patient zero being one of the first four who tested positive on April 13 and April 14is not credited. The ALJ

further notes that based on Dr. Goldman's testimony with regard to the period of time between exposure and the onset of symptoms, the ALJ does not credit his testimony that one of the first four positive tests was patient zero. Especially in light of the fact that there is evidence of numerous other employees who reported symptoms, but a lack of evidence of whether they were tested for CoVid.

36. The ALJ finds that Claimant has established through the evidence and his testimony at hearing that it is more likely than not that Claimant suffered a compensable occupational disease arising out of and in the course of his employment with Employer.

37. The ALJ credits Claimant's testimony regarding his activities in the workplace and outside the workplace during his probable exposure period and finds this testimony to be credible. The ALJ notes that the evidence reflects that there were numerous employees with Employer who had symptoms but did not necessarily test for CoVid between March 23 and April 10, 2020. The ALJ further notes that the first positive tests for CoVid came in a cluster of four positive tests over a two day period.

38. The ALJ notes that based on Dr. Goldman's testimony regarding the period between a patient's exposure and the onset of symptoms provides evidence that the cluster of initial positive tests were provide a "reasonable probability" that Claimant's contraction of coronavirus was precipitated by his work activities, namely being around coworkers who carried the virus. The ALJ likewise credits records showing only six COVID-19 cases in Delta County (the place of Claimant's residence) in late March and early April 2020.

39. In this case, the ALJ relies on the testimony of Claimant and the records from the Employer including the spreadsheet maintained by the Employer to track employee's potential symptoms and exposure to CoVid in March and April 2020 and finds that Claimant has demonstrated that it is more likely than not that Claimant was exposed to CoVid through his Employer. The ALJ finds that the Claimant has demonstrated that it is more probable than not that he was exposed to CoVid through his work at the mine. The ALJ relies on the fact that Claimant and three other co-workers all tested positive for CoVid within a 2 day period as evidence that Claimant's exposure in this case came through his work with Employer.

40. The ALJ further notes that in the time period after March 23, 2020, the records from Employer demonstrate that numerous employees were out from work with either CoVid symptoms or due to an exposure to CoVid. The ALJ finds that these records provide credible evidence that it is more likely than not that Claimant was exposed to and contracted CoVid through his work for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. 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 579. 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.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of a particular disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

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

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

6. As found, Claimant has proven by a preponderance of the evidence that he sustained an occupation disease arising out of and in the course of his employment with Employer in contracting CoVid on or about April 13, 2020. As found, Claimant's testimony regarding his actions outside of his employment as opposed to his exposure while in the mine is found to be credible and persuasive with regard to this issue.

7. As found, the records from Employer demonstrating that four employees tested positive for CoVid within a 2 day period is credible evidence that Claimant was exposed to and contracted CoVid through his work with Employer. As found, the records from Employer that show the employees reporting CoVid related symptoms prior to April 13, 2020 is found to be credible evidence that Claimant was exposed to ad contracted CoVid through his employment.

8. As found, Claimant is entitled to medical treatment consistent with the stipulation provided to the Court at the commencement of the hearing.

9. As found, Claimant is entitled to TTD benefits at the AWW set forth in the stipulation of the parties at the commencement of the hearing. Specifically, Claimant is entitled to TTD benefit at an AWW of $1,674.50 for the period of April 13, 2020 through April 12, 2021. Claimant is entitled to TTD benefits based on an AWW of $2,175.00 for the period of April 13, 2021 to ongoing.

10. The issue of offsets is reserved by Respondents.

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 his occupational disease.

2. Respondents shall pay Claimant TTD benefits at an AWW of $1,674.50 for the period of April 13, 2020 through April 12, 2021. Respondents shall pay Cliamant TTD benefits at as AWW of $2,175 for the period of April 13, 2021 and ongoing.

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

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

DATED: March 17, 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

I. Has Claimant shown, by a preponderance of the evidence, that his request for an umbilical surgical consultation is reasonable, necessary, and related to his work injury?

II. Has Claimant shown, by a preponderance of the evidence, that his request for an orthopedic surgical consultation for possible carpal tunnel release is reasonable, necessary, and related to his work injury?

III. Has Claimant shown, by a preponderance of the evidence, that his request for a bilateral upper extremity EMG referral is reasonable, necessary, and related to his work injury?

STIPULATIONS

The parties concurred that Claimant was placed at MMI on 7/6/2021, with a 15% Whole Person Impairment Rating, and that the controlling Final Admission of Liability admitted for Medical Maintenance benefits. Claimant is pursuing this claim on the basis of Medical Benefits, and is not seeking a reopening. The parties further agreed that, pending a decision in this case, the issue of Permanent Total Disability would be preserved and held in abeyance. The ALJ accepted these stipulations.

FINDINGS OF FACT

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

Procedural Background

1. Claimant suffered an admitted injury on February 9, 2018. Following his injury, he returned for a brief time, prior to undergoing surgery on March 23, 2018. Claimant then returned to modified duty on July 22, 2018, until eventually retiring in December, 2019. (*see* Ex. 1). His medical treatment continued.

2. Respondents filed a Final Admission of Liability on January 25, 2021, admitting for, among other items, maintenance medical care for Claimant's upper extremities. (Ex. V). Claimant's ATP, Dr. Finn, has since filed a request for a referral to a general surgeon for a hernia, which was denied by Respondents on May 25, 2021 (Ex. PP). Dr. Finn later filed a request for a referral to an orthopedic surgeon, which was denied on August 2, 2021 (Ex. DDD). Dr. Finn also requested bilateral upper extremity EMGs, which was also denied on August 2, 2021 (Ex. CCC). Respondents have now filed an Application for

Hearing based upon a Rule 16 pre authorization denial for the proposed treatments, *supra.* By agreement of the parties, other issues have been held in abeyance, pending a resolution of this matter.

The Work Injury, and Subsequent Treatment

3. Claimant worked as a fabricator for Employer. His job duties included fabricating and building products to go on Employer's trucks and lawnmowers and the like. On February 9, 2018, Claimant injured his left arm when he was stabbed by a piece of metal that had broken off of a saw.

4. As a result of the injury, Claimant underwent multiple left arm surgeries. He has since been diagnosed with bilateral upper extremity CRPS. Claimant reports pain and other symptoms, including loss of feeling and sensation and tremors, as well as loss of function.

Initial IME by Dr. Polanco

5. Frank Polanco, M.D. performed an independent medical evaluation, dated September 19, 2019 on behalf of Respondents. (Ex. A). He agreed with Claimant's diagnosis of bilateral CRPS, as summarized below:

> Sustained laceration involving left ulnar nerve. Appeared to be a superficial injury but as further symphysical therapyoms developed he was diagnosed with ulnar injury by EMG. Underwent ulnar nerve neuroplasty and then revision with ulnar nerve transposition. Dr. Reinhard suspected complex regional pain syndrome (CRPS) and proceeded with testing that was unequivocal. Symphysical therapyoms persisted with atrophy of left arm, ongoing pain and symphysical therapyoms moving to the right arm. There is little doubt that he has developed CRPS. Initial testing of the right arm is supported via ganglion block to establish the diagnosis. A Bier Block to the left arm may provide a longer period of pain relief. Recommends eliminating work restriction and initiating an active program of strengthening and conditioning to improve and maintain function and muscle strength. 40 hours of work conditioning can be requested within the guidelines to support a more intensive therapy program. Recommends Bier Block two left upper extremity; catapress patch trial; diagnostic right stellate ganglion block, if positive proceed with QSART testing; eliminate work restrictions; physical therapy/work conditioning with focus on left arm; consider peripheral nerve blocks if allowed by the carrier to facilitate rehab, not at MMI. (Ex. A, pp. 5-6).

6. On January 9, 2020, Claimant treated with ATP Robi Baptist, M.D., who noted Claimant's medical history and confirmed his CRPS diagnosis in both arms. Claimant reported severe pain down both arms. Dr. Baptist noted Claimant continued to treat with Dr. Reinhard.

7. On January 21, February 18, and April 28, 2020, Claimant underwent bilateral cervical stellate ganglion injections. (Ex. 7, pp. 215-222). On January 28, 2020, Claimant treated with Dr. Reinhard, who confirmed Claimant's bilateral CRPS diagnosis, and recommended bilateral cervical stellate ganglion blocks. *Id* at 219-220.

8. On May 20, 2020, Dr. Reinhard performed a series of trigger point injections (TPIs). *Id* at 210-211.

9. On July 16, 2020, Dr. Reinhard assigned Claimant an impairment rating of 15% whole person rating for his bilateral upper extremity CRPS condition. *Id* at 208-209.

10. On August 5, 2020, Claimant underwent a FCE, which determined Claimant's functional limitations from the work injury. (Ex. 8, pp. 223-242).

11. On August 21, 2020, Claimant returned to Dr. Reinhard, who noted Claimant was in significant pain, and reported other symptoms from the FCE. Dr. Reinhard performed a series of TPIs. (Ex. 7, pp. 205-207).

12. On September 14, 2020, Claimant returned to Dr. Baptist, who then referred Claimant to Kenneth Finn, M.D., for pain management. (Ex. 5, pp. 73-77).

13. On October 5, 2020, Claimant treated with Kenneth Finn, M.D., to whom he was referred by Dr. Baptist, for pain management. Claimant reported the nature of his injury and the medical treatment he has undergone as a result. Dr. Finn noted:

Examination

Elbow / Arm:

Atrophy and giveway weakness of left hand intrinsics. Allodynia and hyperalgesia in both median and ulnar pattern on the left. Well healed surgical scars without evidence of infection. Tender along the left medial epicondyle. Tinels positive over the median and ulnar nerve at the wrist and ulnar nerve at the elbow bilaterally. DTR 1/4 at biceps, brachioradialis, and triceps symmetrically.

Assessments

1. Carpal tunnel syndrome, left upper limb - G56.02 (Primary)
2. Complex regional pain syndrome I of left upper limb - G90.512
3. Lesion of ulnar nerve, left upper limb - G56.22

Dr. Finn then prescribed pain medications. (Ex.4, pp. 62-63).

14. On December 8, 2020, Claimant underwent a series of TPIs with Dr. Finn. (Ex. 4, pp. 60-61). On December 15, 2021, Claimant underwent more TPI injections. *Id* at 58-59. On December 22, 2020, Dr. Finn performed a series of TPI injections in Claimant's mid and upper back. Claimant reported pain and symptoms relief following the

injections. Dr. Finn referred Claimant for additional physical therapy and TPI injections. *Id* at 56-57.

15. From December 27, 2020, through March 3, 2021, Claimant underwent eight physical therapy sessions. (Ex. 6, pp. 171-204).

16. On December 29, 2020, Claimant treated again with Dr. Baptist, who reviewed his medical history and confirmed his CRPS diagnosis. Dr. Baptist then assigned Claimant permanent work restrictions. (Ex. 5, pp. 64-67).

DIME by Dr. Hall

17. Dr. Timothy Hall, MD performed a DIME exam on Claimant. In his report, dated January 19, 2021, (Ex. T), Dr. Hall concurred with the MMI date of 7/16/2020, and assigned an impairment rating of 15% WP for Claimant's CRPS. He also recommended work restrictions, based upon the FCE, and Claimant's response to performing it.

18. Regarding Medical Maintenance Care, Dr. Hall noted:

> Maintenance care should involve his medications which include cyclobenzaprine and the relatively low dose of oxycodone that he is taking. He should continue with Dr. Finn and *should be provided with just about anything that Dr. Finn feels is necessary* to control and/or improve his present chronic condition. *Id* at 95. (emphasis added).

Treatment Continues

19. On January 26, 2021, Claimant returned to Dr. Finn, who performed a series of TPI injections. (Ex. 4, pp. 52-55). On February 1, 2021, Claimant returned for more TPI injections. *(Ex. 4, pp. 50-51).* On February 8, 2021, Claimant underwent another series of TPI injections with Dr. Finn. Claimant reported right greater than left upper extremity pain. *Id* at 48-49.

20. On April 22, April 30, May 4, May 11, 2021, Claimant underwent an additional series of TPI injections prior to his physical therapy appointment. *Id* at 40-47.

21. From April 27, 2021, through June 15, 2021, Claimant underwent 16 physical therapy sessions. (Ex.6, pp. 107-170). In his May 14, 2021 physical therapy report, physical therapist Anthony Purviance noted that Claimant was "experiencing tenderness in his left upper quadrant with increased pain with Valsalva." On physical examination, PT Anthony noted Claimant had tenderness to palpation over his left upper quadrant. *Id* at 137-139.

22. On May 18, 2021, Claimant treated again with Dr. Finn, and reported that at his last physical therapy appointment, he felt a pop in his umbilicus and feels that he

may have a small hernia. On physical examination, Dr. Finn found a small protrusion around the superior umbilicus. Dr. Finn referred Claimant for a surgical consultation regarding the "umbilical hernia he reports developing during PT for treatment of his work condition." Dr. Finn also performed a series of injections in Claimant's upper extremities. (Ex. 4, pp. 37-39).

23. On May 25, 2021, Respondents denied Dr. Finn's referral to Brock Bordelon, a general surgeon, to address Claimant's hernia. (Ex. PP, p. 233).

24. On May 27, 2021, Claimant returned to Dr. Finn, who performed another series of injections. (Ex. 4, pp. 35-36). On June 1, 2021, Claimant treated with Dr. Finn and reported that physical therapy is helping his pain and other symptoms. Dr. Finn performed another series of injections. *Id* at 33-34. On June 8, 2021, Claimant treated with Dr. Finn, who recommended Claimant undergo a left upper extremity EMG, since Claimant continued to report symptoms post-surgery, yet never had a post-surgery EMG. He noted that Claimant's TPIs were helping temporarily. Dr. Finn performed a series of injections, and otherwise maintained Claimant's treatment plan. *Id* at 31-32.

Subsequent IME by Dr. Polanco

25. In a subsequent IME report, dated June 21, 2021, Dr. Polanco took a medical history from Claimant, and note that his abdominal exam stated that "Palpation reflects a small umbilical hernia." *Id* at 239. Dr. Polanco then noted in his report:

X. RECOMMENDATIONS

Surgical assessment of the umbilical hernia is recommended.

XI. CAUSATION

The findings relating to bilateral upper extremity CRPS are causally related to the work-related injury of February 9, 2018. It appears as well, that in the course of his treatment he sustained an umbilical hernia.

XII. MMI

In regards to his condition of CRPS of his upper extremities, he is at MMI and does not require further active medical treatment and/or diagnostics. Similarly, he is at MMI for his complaints of low back pain.

In regards to his umbilical hernia, after further assessment if he chooses not to proceed with further treatment for this condition, he would be at MMI. Otherwise, if he chooses to undergo surgical repair, he would not be at MMI at this time.

(Ex. AAA). [However, upon Claimant's Motion at the 10/14/2021 prehearing conference, what is now Respondents' Exhibit AAA was stricken and not to be used in this case. That applies to Claimant as well, so the ALJ will not consider the contents of that Exhibit *supra*, despite Claimant referencing it in his Position Statement. Sufficient evidence of the contents of this 6/21/2021 IME report, however, were adduced by hearing testimony of Dr. Polanco. (Be careful what you ask for)].

Dr. Finn Requests Additional Treatment

26. On July 5, 2021, Claimant returned to Dr. Finn, who recommended Claimant undergo bilateral upper extremity EMGs. He also referred Claimant to an orthopedic surgeon. Dr. Finn noted that Claimant had not had an EMG in a couple of years. On physical examination, Dr. Finn noted left, more than right, hand intrinsic atrophy and weakness. (Ex. 4, pp. 27-28). Dr. Finn's *Review of Symptoms* noted, among other things, Numbness/Tingling, Tremor, Weakness, and Decreased Coordination. *Id* at 29.

27. On August 2, 2021, Respondents denied Dr. Finn's referral for bilateral upper extremity EMGs with Dr. Ales. *(Ex. CCC, p. 234)*. Respondents also denied Dr. Finn's referral to Colorado Springs Orthopedic Group. *Id* at 235.

Treatment Continues with Dr. Finn

28. On October 5, 2021, Claimant again treated with Dr. Finn, who maintained Claimant's treatment plan. (Ex. 4, pp. 24-25).

Dr. Polanco Issues a Supplemental Report

29. Also on October 5, 2021, Dr. Polanco issued a supplemental report. (Ex. EEE). Dr. Polanco noted he reviewed additional medical records, specifically Dr. Baptist's December 29, 2020 report, Dr. Hall's Division IME report, and Dr. Finn's July 20, 2021 report. Dr. Polanco then opined:

> e. Thus, while Mr. [Claimant, redacted] has ongoing complaints of pain, there is no clear indication of a substantial change or worsening of his condition, or consideration of surgical intervention and thus bilateral EMG testing is not supported.

30. Dr. Polanco elaborated, in summary:

> The medical treatment guidelines note that MMI should be declared when the patient's condition has plateaued to the point where the authorizing treating physician no longer believes further medical intervention is likely to result in improved function. The guidelines, in general, support retesting (EMG) when an individual's condition and clinical findings have substantially changed and deteriorated, as well as when surgical in the intervention is being considered While both Dr. Baptist and Dr. Hall have indicated that ongoing maintenance care is required, their statements of unlimited care is not consistent with the Colorado medical treatment guidelines. Ongoing medical treatment should meet criteria of the guidelines and should be oriented towards improving the individual's pain and function. In general, pain management should be goal oriented and time-limited. The guidelines do not support routine testing or routine

> bilateral extremity testing. Thus, while Mr. [Claimant, redacted] has ongoing complaints of pain, there is no clear indication of a substantial change or worsening of his condition, or consideration of surgical intervention and thus bilateral EMG testing is not supported.

31. Regarding Claimant's hernia, Dr. Polanco opined, "It is a standard of practice and physical therapy to report any injuries or significant abnormalities that have occurred or reported." Dr. Polanco added, "It would be highly unlikely that tensing up would cause/create a hernia condition. More likely than not Mr. [Claimant, redacted] had a pre-existing hernia that was asymptomatic." *Id* at 242-245.

32. On November 2, 2021, Dr. Polanco issued another supplemental report. This report did not address the hernia or the denied medical treatment. (Ex. GGG, pp.210-215).

Claimant continues his Treatment Plan with Dr. Finn

33. On November 4, 2021, Claimant returned yet again to Dr. Finn, who maintained Claimant's treatment plan and work restrictions. (Ex. 4, pp. 22-23).

Claimant Testifies at Hearing

34. Claimant testified his bilateral upper extremity symptoms have worsened since he was placed at MMI. Claimant testified he is now having issues remembering words and speaking. He stated that he continues to lose strength in his hands, and he is now dropping things. Claimant testified he can't type on a computer because the tremors in his hands are so bad. Claimant testified he started grinding his teeth and now has severe insomnia. He testified some nights he does not sleep at all and then ends up having to take a few naps during the day. He also testified his hands are now getting deformed and that he is losing mass in both hands and arms.

35. Claimant explained he can no longer play the guitar or ride dirt bikes. He lives on a farm, and as a result of the injury, can no longer perform his duties as a farmer. Claimant used to have approximately 50 goats on his farm. He is down to just 10 goats. Claimant stated his wife is now primarily in charge of looking after the goats. Claimant opined that he is about 50% worse since he was placed at MMI.

36. Claimant testified that the CRPS spread to his right arm, and that this arm and hand have worsened since he was placed at MMI. He stated that he relies on his medications to keep his symptoms under control. On one occasion, he had to go 72 hours with no medications, due to an authorization issue. He ended up having severe anxiety, a panic attack, and experienced incredible pain.

37. Since he was placed at MMI, Claimant testified that he underwent physical therapy at Strive with Anthony, a physical therapist. Claimant testified that in May 2021, Anthony 'gave him a hernia'. He described it thusly:

A I was laying on my stomach, and he was applying a lot of force to my lower back. And, as he traveled up the back -- I think he was trying to stretch it would be my best guess. But he was pushing down real hard. And, as he was moving up my spine, as soon as he got to about mid-back is when I felt the pop.
Q Okay. And where -- and where did you feel the pop?
A In my stomach, right where my belly button is. It's on the top side.
Q And is it on the left or right side of your belly button?
A Well, if I'm reaching on it, it's on the right side.
Q Can you feel it?
A Yes, I can….(Transcript, p. 27).

38. Claimant testified he never had a hernia before. Claimant testified he contacted Anthony the next day to report the hernia. Claimant testified Anthony told him that he would put it in his notes that Claimant reported getting a hernia during the last physical therapy session. Claimant testified that subsequently, Dr. Finn told him Anthony did not note the hernia, so Claimant reached out to him again to discuss the hernia and asked him to put it in his notes.

Dr. Polanco Testifies at Hearing

39. Dr. Polanco testified as an expert in occupational medicine. He confirmed that Claimant has bilateral CRPS. He testified that he reviewed Claimant's physical therapy notes, and that he does not see any reference to Claimant sustaining or reporting a hernia. Dr. Polanco testified an umbilical hernia would be mid-line on a person's abdomen, not in the left upper quadrant, which refers to the upper left side of the abdomen. Dr. Polanco testified that it is unlikely Anthony's manipulation on May 14, 2021, caused Claimant's hernia. He opined that is more likely that Claimant had a pre-existing, undiagnosed, non-symptomatic hernia that then became symptomatic.

40. Dr. Polanco opined that while EMGs are commendable diagnostic tools, Claimant shows no clinical findings of progressive neurological changes. He testified that Claimant's symptoms are getting worse. Dr. Polanco testified Claimant does not need the proposed EMGs, because the results will not change the treatment plan. When asked about the worsening of Claimants symptoms, this exchange took place:

Q Okay. And you'd agree with me that between -- from -- June of 2021 to November of 2021, those bilateral upper extremity tremors that he -- that he was experiencing worsened?
A I believe he reported that they worsened, but I -- I don't recall that I clinically noted a worsening of the tremors.
Q Okay. You would agree with me that *lack of sensation* in your upper extremity *<u>that results in</u> you dropping things* is

22 -- has a neurological component, right?
23 A *Dropping things* is usually a *strength* component.
24 Q Okay. So his -- his *inability to grasp or grip* is a
25 *strength* component?

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1 A Yes, more likely than not.
2 Q Okay. And it -- the tremors -- the *neurological*
3 tremors have nothing to do with that?
4 A Unlikely. (Transcript, pp. 86-87) (emphasis added).

41. Dr. Polanco testified that the proposed orthopedic referral is not reasonable or necessary, because Claimant does not have progressive clinical findings to support ongoing diagnostic testing.

42. Dr. Polanco testified regarding the Colorado *Medical Treatment Guidelines*-specifically the section that deals with chronic pain. He stated that the *Guidelines*, under the Maintenance Management section of the chronic pain guidelines, state:

> **3b** b p25. Electrodiagnostic studies *may be useful* in the evaluation of patients with suspected myopathic or neuropathic disease and may include Nerve Conduction Studies (NCS), Standard Needle Electromyography, or Somatosensory Evoked Potential (SSEP). The evaluation of electrical studies is complex and should be performed by specialists who are well trained in the use of this diagnostic procedure. c. Special testing procedures *may be considered* when attempting to confirm the current diagnosis **or** *reveal alternative diagnosis*. *Additional special tests may be performed at the discretion of the physician.* d. Testing for Complex Regional Pain Syndrome (CRPS I) or Sympathetically Maintained Pain (SMP) is described in the Division's Complex Regional Pain. (Ex. III, 252) (emphasis added).

43. Dr. Polanco testified Claimant never had a post-surgery left upper extremity EMG or a right upper extremity EMG. Regarding Claimant's hernia, Dr. Polanco stated that he initially authored a report in which he opined Claimant sustained a work-related hernia. Then, after reviewing additional medical records, he changed his opinion. He admitted that this subsequent report itself, [Ex. EEE, in which he changed his opinion regarding the causal relatedness of the hernia], makes no mention of any medical records, including physical therapy records, regarding the hernia.

44. At hearing, Dr. Polanco also referenced his Supplemental Exhibit III, whereupon he cites certain pertinent portions of the CRPS guidelines from the *Medical Treatment Guidelines,* and placed his analysis underneath each passage in red. The ALJ has read this exhibit in its entirety (along with all Exhibits), and will not repeat its contents here.

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) 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.

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 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 address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their 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 Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 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. 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).

D. In this instance, the ALJ finds that Claimant has experienced a cascade of unexpected complications from what might otherwise be considered a fairly routine injury to treat. All parties agree that he now has bilateral upper extremity CRPS from an injury only to this left arm. Since that time, the ALJ finds that Claimant, who wishes to lead a more active lifestyle, has accurately reported his symptoms to his treating providers, as

well as the IME in this case. The ALJ further finds that Claimant has testified truthfully at hearing.

E. It is further noted that the ALJ takes Dr. Polanco at his word that, were this his patient, he would not proceed as Dr. Finn is recommending. As duly noted, the practice of medicine can often be an inexact science. The mere fact that other practitioners would proceed differently does not make them *wrong.* And as will be noted, *infra*, the ALJ does not find his ultimate conclusions to be sufficiently persuasive.

Medical Benefits, Reasonable and Necessary, Generally

F. Claimant bears the burden of establishing entitlement to any specific medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Medical Benefits, Related to Work Injury, Generally

G. Further, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Preexisting Condition, Generally

H. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation *or medical benefits* if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability

or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Quasi-Course of Employment, Generally

I. 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. Indus Claim Apps. Office*, 860 P.2d 1393 (Colo. App. 1993). The doctrine is restricted to injuries arising out of authorized treatment. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274, 278 (Colo. App. 1993). Nevertheless, the doctrine is not limited to injuries sustained while actually engaged in a particular medical treatment explicitly "prescribed" by the authorized treating physician. To the contrary, the quasi-course of employment doctrine applies to post-injury activities undertaken by the employee, which, although they take place outside the time and space limits of the employment and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *See Excel Corp v. Indus. Claim Apps. Office*, 860 P.2d at 1394; *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

The Referral to a Surgeon for the Hernia, as Applied

J. There can be little dispute that seeing a surgeon for such condition is *reasonable and necessary* to treat a symptomatic hernia. There is also little argument from Respondents that, if this hernia indeed arose during the physical therapy session as alleged, then the quasi-scope doctrine would apply. Dr. Polanco clearly agreed with this at the outset. At a later point, he changed his mind, stating his revised opinion based upon additional medical records he later reviewed. He is really basing his revised opinion upon the *absence* of entries in the *SOAP* notes one might normally expect to see from the physical therapist, had this been reported to the PT in real time by Claimant. There is a certain logic to what Dr. Polanco is saying; however, Claimant has now explained that he later requested that the PT update his notes to reflect the contemporaneous complaint. The ALJ finds this explanation plausible. Additionally, there is every reason to believe that the upper quadrant, without further clarification vis-à-vis 'midline', referenced what could indeed include the situs of the hernia.

K. Additionally, there is an absence of evidence in the record that this could have occurred in any *other* setting around this time period which might involve even more strenuous exertion. Claimant did not have a hernia before he had this PT session; he

did right afterwards. He felt pain during the maneuver. Dr. Polanco might well be correct that Claimant may well have brought a weak abdominal wall with him to PT that day. Maybe the hernia was indeed preexisting all along, but asymptomatic. It was not palpable to Claimant until the PT session, and it was not painful until then, and the ALJ so finds. And if it was preexisting, it became symptomatic, requiring medical treatment, as a result of the PT. The surgical referral for the hernia is reasonable, necessary, and related (via the quasi-scope doctrine) to the original work injury.

Referral to Orthopedist and EMG, as Applied

L. While presented as separate and distinct issues for adjudication, the two are closely related to one another. These two issues were presented for referral at the same time by Dr. Finn, and for essentially the same reason; Claimant was continuing to report pain and potentially neurologic symptoms that have hampered his activities of daily living. He was dropping things when he did not formerly do so. Dr. Polanco at hearing (*see* Finding of Fact # 40, *supra*) seemingly dodged [or did not understand] the question posed about the *lack of sensation*, and appeared to conclude that [merely] *dropping* things [without more] is usually a *strength* component. The ALJ is not convinced that neurological tremors are *unlikely* to 'have anything to do with it.' But if Dr. Polanco is right, and it really is solely a *strength* issue, then it sounds like a job for the orthopedist after all. At this point, no alternative non-work-related explanation for Claimant's symptoms has been put forth. And mind you, this is merely a *referral* to see what the problem is. Once the issue is identified (if it can be), then a treatment modality can be recommended by the orthopedist. The ATP will still be responsible to decide if any proposed treatment is *related* to the work injury, and whether it is *reasonable and necessary*. And Respondents, if they wish, may still challenge those ATP opinions. At this juncture, however, the ALJ finds, by a preponderance of the evidence, that the referral to an orthopedist is *reasonable, necessary, and related* to the work injury.

M. The DIME physician, Dr. Hall, has opined that Dr. Finn should be 'provided with just about anything' he feels necessary to control Claimant's chronic condition. Such opinion is not binding in this case, but it carries some value. More importantly, Dr. Finn thinks that the EMG is reasonable and necessary (and related) to Claimant's condition. He has spent hours with hands-on treatment, and consulted face-to-face on numerous occasions. His obligation is to try to get the best result for his patient, and the ALJ finds that he is fulfilling that obligation in good faith. Dr. Finn has treated Claimant, with incomplete success, for years. And, as was pointed out by Respondents, 'doing more of the same and still no improvement is the definition of insanity'. So now, Dr. Finn wants to try something new, and is now being told 'No'.

N. Dr. Polanco relies heavily on the *Guidelines* for his conclusions. And while the ALJ may countenance a deviation therefrom if the facts warrant it, the *Guidelines* exist for a good reason, and should not be lightly dismissed. However, in this instance, a plain reading of said *Guidelines* (*see* Finding of Fact #42, *supra*) states that: "Special testing procedures *may* be considered when attempting to confirm the current diagnosis **or reveal alternative diagnosis".** Because the usual regimen Dr. Finn has provided has

not yielded totally satisfactory results, he is seeking a possible *alternative diagnosis.* This is not only medically reasonable; it is seeking to avoid the very insanity that Respondents are warning us of. An *alternative diagnosis* does not have to be *mutually exclusive* of the agreed-upon CRPS diagnosis-it might show something *in addition thereto*. And, once again, any actual recommended *treatment* might not be deemed reasonable and necessary by the ATP. Claimant might even turn it down himself. And depending upon the diagnosis, it might not ultimately prove to be *related* to the work injury. Respondents retain their right to challenge specific future treatments. But Claimant is entitled to a thorough diagnosis.

O. A reading of the *Guidelines* appears to show that additional special tests may be performed at the discretion of 'the physician'. The ALJ interprets this to mean the ATP, or his designee. In this case, Dr. Finn has used his discretion to request this EMG test. The ALJ reads the *Guidelines* to permit exactly that. However, to the extent the ALJ might be mistaken in his interpretation, the ALJ finds that moving forward with this EMG is a reasonable deviation therefrom, and for the reasons previously stated. By a preponderance of the evidence, Claimant has shown that the EMG as recommended by Dr. Finn is reasonable, necessary, and related to his industrial injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the surgical consultation for possible hernia repair.

2. Respondents shall pay for the orthopedic consultation as requested by Dr. Finn.

3. Respondents shall pay for the bilateral upper extremity EMG as requested by Dr. Finn.

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

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 17, 2022

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a work related injury on April 9, 2021 within the course and scope of her employment.

II. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that she is entitled to authorized medical benefits that are reasonably necessary and related to the injury.

PROCEDURAL ISSUES

Claimant filed an Application for Hearing on December 21, 2021 listing the issues of compensability and medical benefits. The Certificate of Mailing listed Employer and Employer representative and listed the address on file as well as the email for Employer. Claimant also filed a Case Information Sheet on March 9, 2022.

A Notice of Hearing was sent to Employer on February 18, 2022 by the Office of Administrative Courts, listing Employers' address and email. The notice advised Respondent Employer that the hearing would take place on March 15, 2022 at 1:30 p.m. and stated that Respondent "must be prepared to present your evidence concerning the issues to be heard at that time."

Employer failed to file a Response to Application for Hearing. Employer failed to appear at the hearing. Claimant's counsel indicated that they had provided all documents and pleadings by email and by ground mail and had not received any responses to any inquiries or requests.

This ALJ took administrative notice that the Employer is registered with the Secretary of State and was in good standing. It is also noted that the Notice of Hearing was sent to the same address and individual representative as listed on the business documents from the Secretary of State. Notice was deemed proper and appropriate. The hearing proceeded ahead without the Employer representative.

Counsel for Claimant also indicated he had contact with the Division, who indicated that no insurance policy was registered for this employer, and that a copy of this order should be forwarded to the Colorado Uninsured Employer Fund administrator.

FINDINGS OF FACT

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

1. Claimant was 45 years old at the time of the hearing in this matter. Claimant filed a Workers' Claim for Compensation (WCC) on April 28, 2021 for an injury suffered in the course and scope of her employment with Employer on April 9, 2021. Claimant was a landscaper and would pick up heavy rocks, roll sod, load tree limbs onto trailers, as part of her job. On April 9, 2021 at approximately noon, Claimant was lifting a wheelbarrow loaded with heavy sod when she injured her low back.

2. She noted on the WCC that she was seen at UCHealth/Poudre Valley Hospital for emergency care and reported the work related incident to Edward Binnall, who was also a witness to the incident. She further noted that her average weekly wage was $720.00 and that she did not return to work after the date of the accident.

3. UCHealth EMS noted on April 9, 2021 that Claimant was evaluated by the EMS staff in her home. She was sitting on a couch in obvious distress. Claimant reported that she had an onset of low back pain while pushing a wheelbarrow up a hill and was in severe pain. On exam, EMS noted that she had tenderness in the paraspinal musculature, and provided her with pain medication. She was transported by ambulance to UCHealth/Poudre Valley Hospital.

4. On April 9, 2021 Claimant was attended at the UCHealth emergency department by Mollie Wolf, PA-C. Claimant reported that she was pushing a wheelbarrow up a driveway at work when she felt something pull in her lower back. She developed lower back pain that radiated down to the right foot with right foot numbness. She denied a prior history of lumbar spine conditions. Upon exam, Ms. Wolf noted that Claimant appeared to have weakness with plantar and dorsiflexion. Claimant also reported some inguinal numbness bilaterally. Ms. Wolf noted no history of IV drug use and that Claimant drove herself home and then called EMS who came to her home and transported her to the ED. Claimant was given IV fentanyl in route with some resolution of pain. Ms. Wolf's clinical impressions were of lumbar back pain and lumbosacral disc herniation with a differential diagnosis of lumbar strain, disc herniation, fracture, cauda equina. She provided Claimant with Toradol and dexamethasone and ordered an MRI. Robert Mosiman, M.D. was the supervising physician. Claimant was released with cyclopenzaprine and hydrocodone and was instructed to contact physical therapy and the orthopedic surgeon, providing the contact information.

5. The MRI results were read by Isaac Jones, M.D. as follows: 1) Multilevel neural foraminal narrowing greatest on the right at L5-S1. 2) Facet hypertrophy, disc bulge, and a small disc extrusion contributing to the right L5-S1 neural foraminal stenosis. 3) Mild multilevel spinal canal narrowing in the lumbar spine, greatest at the L3-4 level.

6. While in the ED, Claimant was assessed by Katherine Coonley, P.T. They completed education on the role of emergency PT, providing education on lumbar spine anatomy and disc herniations, and provided reassurance, explaining that lumbar spine problems usually self-resolved. Claimant verbalized that she was quite anxious that she could not use her right leg or feel it properly. She was inconsistently able to demonstrate normal gait with full heel strike bilaterally and normal strides, and did not require an assistive device to walk safely. Ms. Coonley explained that Claimant would have improved outcomes if she was to have outpatient physical therapy.

7. On April 21, 2021 Claimant was seen at the WCHealth Walk-in Clinic/Family Medicine Center for lumbosacral disc herniation, radiculopathy and, foot and leg pain. Family Nurse Practitioner Denah Inzinna examined Claimant and found some weakness with right dorsi flexion, normal dorsi extension, numbness to the top of the right foot that extended to the lateral calf and then to the posterior thigh. She noted that recommendations for lumbosacral radiculopathy was, initially, conservative therapy with NSAIDs and Tylenol, physical therapy, and if she had no improvement in 6 weeks, referral to pain management specialist for epidural steroid injections. If symptoms did not improve or worsened, referral to a specialist for surgical intervention. Ms. Inzinna recommended activity modifications.

8. Claimant was first attended at Colorado in Motion on May 3, 2021 pursuant to Ms. Inzinna's referral. Notes indicate that Claimant was pushing a wheelbarrow full of sod on April 9, 2021 when she felt intense pain and spasms. Mr. John Zapanta, PT, DPT, stated that Claimant presented with a right L4-L5 probable radiculopathy with sensory/motor changes.

9. On July 6, 2021 Pam Showman, PT, DPT, noted Claimant's pain with right lumbar side bend, lateral right lower leg hypersensitivity, hyposensitivity of the right medial lower leg. Subjectively Ms. Showman documented Claimant had recently been through a serious bout of depression and was not feeling up for therapy until recently. Claimant reported that her right leg sensitivity was going up and all of her toes felt number except for the middle toe. Aggravating factors included bending, being on the floor, the mornings were worse, and sitting to long, though massage and hot bath helped.

10. Claimant returned to see Ms. Showman on July 20, 2021 and was still complaining of right lower back and extremity symptoms. She was provided with reeducation and instructions for exercise and down time.

11. As found, Claimant was injured in the course and scope of her employment with Employer on April 9, 2021 while pushing a wheelbarrow, injuring her lumbar spine, causing radicular symptoms down her right lower extremity into her foot.

12. As further found, Claimant has shown that the treatment she sought from UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion were reasonably necessary medical care and related to the April 9, 2021 work related 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 she 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 *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). 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. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee

from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

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

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of her employment with Employer on April 9, 2021 when she was pushing a wheelbarrow full of sod or lawn clippings. Claimant specifically strained her low back, which in turn caused symptoms going down and into her right lower extremity, including pain, weakness and numbness into her right foot. Claimant has proven by a preponderance of the evidence that she sustained a compensable work related injury on April 9, 2021 in the course and scope of her employment working for Employer.

C. Medical benefits:

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury

...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo.App. 1995). 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. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 11 (Colo. App. 2004). A Claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's preexisting condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). An injury, nevertheless, must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability. See *Colorado Fuel & Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). A claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

Here, Claimant was initially seen in the emergency room and diagnosed with lumbar back pain and strain with a differential diagnosis of lumbar strain, disc herniation, or cauda equina. Claimant provided medical providers a history consistent with the one provided on her Workers' Claim for Compensation. Claimant has shown by a preponderance of the evidence that the work related accident of straining her low back while lifting or pushing the wheelbarrow was the direct causal event that precipitated the need for medical care in this matter. Claimant has shown that the medical care that she obtained from UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion were reasonably necessary medical care and related to the April 9, 2021 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for an injury to her low back and right lower extremity on April 9, 2021 is compensable.

2. Employer shall cover reasonably necessary and related medical treatment from authorized providers, including UCHealth/Poudre Valley Hospital, UCHealth EMS, UCHealth Family Medicine Center and Colorado In Motion.

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

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

DATED this 21st day of March, 2022.

Digital Signature

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury on July 24, 2021?

II. If compensable, should Heart Centered Counseling be deemed an Authorized Treating Provider?

III. If compensable, have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for her own termination from employment, and thus not entitled to temporary disability benefits after September 11, 2021?

STIPULATIONS

The parties agreed to an Average Weekly Wage of $632. It was further agreed that UCHealth/Memorial Hospital, Colorado Occupational Medical Partners, Accelerated Recovery Specialists, and Absolute Health Center are authorized providers.

The parties further agreed that, if temporary disability benefits are to be ordered, the calculation of said benefits are reserved for future determination, or by possible agreement of the parties.

FINDINGS OF FACT

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

Background / The Work Incident

1. Claimant was hired by [Employer, Redacted] on July 11, 2021 as a warehouse 'stower'. She attended orientation on July 12, 2021 and worked her first day on or about July 14, 2021. Claimant did not work for several days after July 16, 2021 due to taking both bereavement leave and personal time. (Ex. N, p. 227).

2. On July 24, 2021, at approximately 3:00 a.m., Claimant alleges that she lifted a tote and twisted, which resulted in a "pop" in her low back, and then felt pain in her back, which went down her legs and up to her shoulders. At the time of this reported incident, Claimant had only worked approximately 3 prior shifts for [Employer, Redacted]. (Ex. N, pp. 227-228).

3. Claimant reported her injury immediately to her supervisor, EP[Redacted], who in turn reported the injury to safety member "Chris" from AmCare, which is an in-house medical facility. Because of her reported pain, Claimant remained seated in a

wheelchair at work until the end of her shift. She did not perform any labor for the period from the time of injury to the end of her shift.

Claimant's Initial ER Visit

4. Following her injury, Claimant first went home, but due to her reported pain, Claimant self-reported to the UC Health emergency room the following day. Her intake notes by PAC Kristina Sanfilippo at 16:42 hours state:

> The patient is a 32 y.o. female who presents to the ED today with complaint of back pain onset last night. Pt states she works at [Employer redacted] and was picking up a bin and was turning to put it back down when her sx {symptoms} arose Notes her pain worsened this morning……States that it hurts to ambulate and that the pain is radiating to her BLE. Denies falls, trauma." (Ex. B, pp. 23-25).

5. The reports indicate that Claimant was administered a 30 mg toradol injection, a 700 mg patch of 5% lidocaine, and one 750 mg Robaxin tablet by PAC Sanfilippo at this visit. *Id* at 24.

6. [Respondents have contested liability in this case, but have authorized medical care, to include physical therapy, chiropractic care, imaging, injections, and massage therapy to date].

Claimant's Treatment with an ATP

7. Claimant initially treated with her primary care provider at Peak Vista Community Health Centers; however, she was ultimately referred to Colorado Occupational Medical Partners ("COMP") on July 29, 2021. At that initial visit, she was seen by Erik Ritch, MD. At intake her pain was reported at 10/10, in "right lower legs and left top." (Ex. D, p. 45). Dr. Ritch's intake notes state:

> She reports she was seen by hand care [?] and ended up going back home. She then went to the emergency room due to the severity of her pain, waited about 4 hours, *but was not actually seen by any provider and left.* She subsequently arrange[d] for an appointment with her primary care doctor 2 days ago. …She denies any history of back injuries. Id at 46. (emphasis added).

8. At the time of this initial visit, Claimant reported severe low back pain that radiated into both legs, down the back of her legs and down to her feet. Claimant reported ibuprofen and Flexeril had not been helpful. She also noted that she had been working at [Employer, Redacted] "for some time now." *Id* at 46.

9. Dr. Ritch noted that Claimant had moderate to severe tenderness through her entire low back both midline and off midline. It was also documented that Claimant was "extremely guarded with any movements that involve movement of her low back."

However, Claimant was able to sit and rise without help, her reflexes were normal and her strength was 5/5. *Id* at 47.

10. Dr. Ritch had initially provided work restrictions of sitting for 4 hours per shift. However, Claimant returned the following day (July 30, 2020), and reported that she could not sit for 4 hours, even though [Employer, Redacted] had found a position that would allow her to remain seated. (Ex. D, p. 50). At this visit, Dr. Ritch noted that Claimant had "very little AROM [active range of motion] of her back" and that Claimant "tolerated palpation of her back very poorly," so he was unable to determine the degree of muscle spasm actually present. Dr. Ritch further noted that even palpation in the soft tissue superficial to the muscle caused Claimant to express significant pain. Her restrictions were updated to allow for breaks to stretch. *Id* at 52.

11. Even as of the latest available entry by Dr. Ritch (January 4, 2022), he continues to state that this is a work-related injury. (Ex. D, p. 99).

Imaging

12. Claimant underwent x-rays and MRIs of the lumbar and thoracic spine. The 8/2/2021 x-rays were normal. (Ex. H, p. 168). The 9/10/2021 lumbar MRI's Opinion stated: At L5-S1 there is a tear in the disc margin and there is a *small* associated disc protrusion in the midline and left paramedian location *without nerve impingement or stenosis*. No other significant abnormality. *Id* at 165, (emphasis added). [On 3/2/2021 Claimant had undergone a CT scan performed on her abdomen, which noted, as an incidental finding, "Small disc protrusion L5-S1 centrally". No treatment was prescribed for this finding. (Ex. H, p. 32)].

Concerns Arise with Claimant's Subjective Complaints vs. Physiological Findings

13. Throughout the claim, there have been references by Claimant's providers that Claimant's subjective symptoms do not correlate to objective findings, or that her pain appears to be out-of-proportion to the mechanism of injury. Further, Claimant consistently reported significant pain without any relief from multiple treatment modalities. Some of these references include:

- August 5, 2021 – COMP: Claimant reports no change in her back…still hurting constantly. It is made worse by remaining seated too long…made worse by standing…movement does make it worse as well. She has been taking ibuprofen and using heat and ice without improvement. Claimant was noted to move "extremely gingerly" and was not twisting or bending within a normal range. (Ex. D, p. 54).

- August 11, 2021 – PT: Noted that claimant is vague about her symptoms when pressed for details. Further documented that claimant's possible subjective symptoms greater than objective findings with extreme guarding, which made assessment difficult. While she reported reduction in symptoms, she reported 10/10 pain to the physician directly after treatment. (Ex. E, p. 105).

- August 17, 2021 – PT: The therapist noted that Claimant's subjective complaints of pain were much higher than observed movements. It was further documented that Claimant has poor subjective description of symptoms. (Ex. E, p. 107).

- August 25, 2021 – COMP: Claimant reports her back has been worsening since her last visit. Physical therapy has been no help. She continues to have 10/10 pain all up and down her back and neck, that radiates into her right arm and back of her right leg with numbness and tingling. No medications have been helpful. Claimant reported that she had not gone in to work because she says her back is hurting too badly and she needs to remain lying down with an ice pack on her back. It was noted that Claimant does not tolerate anything other than very light touch without wincing. Claimant was noted to be guarded getting out of a chair, but walked without difficulty. Range of motion was very diminished and claimant reporting pain with most movements.

- Dr. Ritch noted that Claimant's "responses to even fairly light touch in her low back seem to be quite exaggerated based on both her mechanism of injury and the general response of such injuries to conservative care." It was noted that claimant wanted to be taken out of work, however, Dr. Ritch was unable to identify any diagnosis that would be permanently worsened by working. He noted that "the mere presence of reported back pain does not indicate an inability to work." Dr. Ritch further noted that "claimant's new complaints of numbness in her right arm were puzzling… and the evolution of her symptoms to something that has no anatomical/physiologic explanation along with the relatively exaggerated response to light tactile stimulus was a concerning aspect of this case." Dr. Ritch recommended an MRI to rule out a significant disc herniation. (Ex. D, p. 62-63, 65).

- September 1, 2021 – COMP: Claimant reported worsening, 10/10 constant pain. (Ex. D, p. 67).

- September 15, 2021 – COMP: Claimant reported ongoing 10/10 pain. It was noted that Claimant's MRI showed mild disc pathology at the L5-S1 level with reported symptoms significantly more severe than imaging would suggest. (Ex. D, p. 72, 74).

- October 8, 2021 – Accelerated Recovery Specialists: Claimant reported 0% decrease in pain since her injury and reported her pain was 10/10 at all times. It was noted that Claimant reported diffuse thoracic and lumbosacral pain from her upper thoracic region through the belt line. It was noted that Claimant walked with a very slow cautious gait pattern during direct observation; however, Claimant had a normal gait pattern during casual observation. Claimant was noted to be exquisitely tender in the lower lumbar paraspinals, but also diffusely tender throughout the thoracic and lumbar regions. Range of motion was profoundly limited. Dr. Sparr opined that Claimant's diffuse pain was not easily explained by

a 1 level disc tear. Despite this, a lumbar epidural steroid injection was recommended. (Ex. F, p. 115-116).

- October 13, 2021 – COMP: Claimant reported 9-10/10 pain throughout her entire low back with no change from her initial injury state. She had not noticed any improvement with chiropractic care. Dr. Ritch noted that Claimant's "symptoms appear to be out of proportion to actual hard physical findings." He further noted that Claimant was not responding the way he would expect with manual therapy. Dr. Ritch noted that he was concerned that Claimant's symptoms may not be explained by a physical pathological finding. (Ex. D, p. 85-87).

- November 12, 2021 – COMP: Claimant reported a 1/10 improvement on the pain scale based on her lumbar epidural steroid injection. She continued to report 7/10 pain throughout her entire low back. It was noted that there may not be any further treatment to offer. (Ex. D, p. 90, 92).

- November 12, 2021 – COMP: Claimant reported no change since her prior examination and that massage therapy caused "extreme pain." Claimant reported that her pre-injection ESI pain score was 8/10, which increased to 10/10 following the injection for 3 hours and then wavered between 8/10 and 10/10 since that time. Dr. Sparr opined that this was a poor diagnostic and therapeutic response to the injection which indicated the L5-S1 disc level was not the cause of her pain. Claimant continued to be exquisitely tender over left low back. Dr. Sparr noted that she was previously diffusely tender. It was also noted that Claimant now had limited range of motion in the cervical spine due to central back pain. Dr. Sparr noted that Claimant continued to report severe pain without response to physical therapy, chiropractic treatment or massage, along with poor response to lumbar ESI. Dr. Sparr opined that because Claimant's pain had suddenly become less diffuse, a left facet injection at L4-5 and L5-S1 was indicated. (Ex. F, pp. 120-121).

Claimant's Mental Health Issues and Treatment

14. Prior to, and after, her work injury, Claimant had been undergoing psychological counseling with Lifestance Health (aka Heart Centered Counseling) and treatment for personal issues starting on December 9, 2020. Claimant's history was significant for prior psychological issues. Assessment and treatment focused around chronic depressed mood and post-traumatic stress disorder and associated symptoms. (Ex. I).

15. At hearing, Claimant testified that this was her personal provider and that she had not been referred to this provider through the workers' compensation claim.

16. While Claimant did mention her back injury in one visit, Claimant sought treatment with this provider prior to her injury for personal reasons and that treatment continued following the work injury for ongoing treatment related to Claimant's personal mental health care. There is no evidence that any providers from COMP or Accelerated Recovery Specialists referred Claimant to Lifestance Health for treatment.

IME Performed by Dr. Lesnak, and Hearing Testimony

17. An IME was conducted by Dr. Lawrence Lesnak. Dr. Lesnak also testified at hearing as a Level II accredited expert who is board-certified in the field of physical medicine and rehabilitation.

18. Dr. Lesnak performed his IME on December 15, 2021. During his examination, Dr. Lesnak noted that Claimant exhibited numerous and diffuse pain behaviors along with non-physiologic findings, including 2/5 positive *Waddell* signs. Dr. Lesnak did not note any reproducible objective findings on examination. (Resp. Ex. A, p. 11).

19. Dr. Lesnak also documented that Claimant had a flattened affect and somewhat depressed mood. (Resp. Ex. A, p. 11). A Computerized Outcome Assessment was performed as part of the IME and Claimant's testing placed her in the category of "At-Risk" in regard to psychosocial dysfunction. Claimant reported a moderate to high level of somatic pain complaints, which strongly suggest the presence of an underlying symptom somatic disorder/somatoform disorder. Dr. Lesnak noted that patients with these types of diagnoses frequently embellish/exaggerate their symptoms, causing their reported subjective complaints to be unreliable at best. As a result, he opined that healthcare providers must rely primarily, if not solely, on reproducible objective findings in order to provide accurate medical diagnoses and treatment recommendations. (Ex. A, p. 15).

20. Dr. Lesnak noted that, although Claimant reported a "pop" in her low back followed by severe diffuse pain, the medical records evidence that Claimant exhibited diffuse pain behaviors and reported pain levels that were out of proportion to any reproducible objective findings on exam, which were minimal to none. Dr. Lesnak testified that these inconsistencies were documented by both Dr. Rich and Dr. Sparr. Further, the initial emergency room treatment did not include diagnostic imaging studies, which Dr. Lesnak opined indicated that there was not even a low suspicion that there were any structural abnormalities.

21. Lumbar x-rays showed no abnormalities. The thoracic MRI was completely normal. The lumbar MRI showed a small disc protrusion, but this did not correlate to symptoms. Further, Dr. Lesnak testified that Claimant had a pre-injury pelvic CT scan on March 2, 2021, which showed mild disc pathology at the same level. Dr. Lesnak opined that this was similar to what was identified on the post-injury MRI. (Resp. Ex. A, p. 13). He further testified that the most common symptoms for this type of MRI finding are "none". However, symptoms that could be associated with a mild disc bulge include mild low back or leg symptoms. Dr. Lesnak opined that Claimant's subjective reports of severe 10/10 pain would not be expected based on the MRI findings. He agreed with Dr. Sparr that Claimant's symptoms were not explained by a one level disc tear.

Dr. Lesnak's Opinion re: Injections

22. Regarding Claimant's lack of reported benefit with virtually all treatment, Dr. Lesnak opined that this was not surprising because it was evidence that Claimant's subjective complaints were not related to any structural abnormality. Dr. Lesnak also disagreed with Dr. Sparr's recommendation for an epidural steroid injection. He testified that Claimant reported pain through her entire back, which was not specific to the mild disc pathology noted on MRI. Further, Claimant had no specific reproducible objective findings to correlate with radiculitis or radiculopathy. Because of this, Claimant did not meet the criteria in the Medical Treatment Guidelines to proceed with an epidural injection. Further, the fact that Claimant reported no relief from the injection was evidence that the disc pathology at L5-S1 was not causing any of Claimant's symptomatology.

23. Dr. Lesnak also testified that Dr. Sparr's recommendation for a facet injection was also not reasonable, necessary or related. He opined that Dr. Sparr had previously commented that claimant was not a candidate for any facet injections. Additionally, Claimant had never demonstrated any reproducible objective findings to correlate with any symptomatic lumbar facet pathology. Dr. Lesnak further testified that there was no indication for a lumbar medial branch block. While Claimant had reported "a little" relief following her recent injection, under the Medical Treatment Guidelines, there must be at least 80% relief to consider a medial branch block, which was not present in this case.

Dr. Lesnak's Opinion re: Compensable Work Related Injury

24. While Dr. Lesnak opined that Claimant could have sustained a mild lumbar soft tissue strain/sprain as a result of the reported lifting incident at work, he testified that when you add in her examination findings, there was no objective findings to support there was an injury. Additionally, the minor disc pathology was not related to this incident as it was pre-existing and also appeared to be completely asymptomatic. As such, Dr. Lesnak opined that while there may have been an incident at work, it did not appear there was a resulting injury.

25. Assuming, however, that an injury had occurred, Dr. Lesnak opined that, at worst, Claimant could have sustained a soft-tissue injury which would have resolved over the course of several weeks or a couple months. He further testified that most soft-tissue injuries resolve on their own without any need for medical care or interventions.

26. Dr. Lesnak testified that the treatments in this case had been largely, if not entirely, based on Claimant's subjective complaints, despite a lack of documented objective findings on examination. Dr. Lesnak further opined that there was no objective evidence to support the need for work restrictions.

27. Dr. Lesnak opined that Claimant's current diffuse subjective complaints without any reproducible objective findings did not support any current diagnosis which would be related to the July 24, 2021 occupational incident. Dr. Lesnak opined that Claimant has significant psychosocial factors that are currently affecting her symptoms and perceived function, which are not related to the July 24, 2021 work incident. Accordingly, Dr. Lesnak opined that Claimant does not require any further medical

treatment or evaluation. Further he opined that there is no medical evidence to support that Claimant requires any type of temporary or permanent work restrictions related to the work incident. (Resp. Ex. A, p. 14).

28. Dr. Lesnak acknowledged that Dr. Ritch has not placed Claimant at MMI, and had no information that Dr. Ritch had ever opined that Claimant's symptoms were *not* work related.

29. Dr. Lesnak further agreed that according to the Medical Treatment Guidelines, one would generally expect a patient in Claimant's situation to make significant progress within 6 to 12 weeks. However, he also agreed with the Guidelines that 3 to 10% of all industrial injured patients will not recover within those guidelines, despite optimal care. He agreed that such outliers may require treatment beyond the limits otherwise discussed in the Guidelines, so long as the ATP is focused on objective functional gains and impact on their prognosis. He again emphasized that there are no reproducible objective findings to explain Claimant's complaints. He did not think in Claimant's situation that she should have been referred for a WC-related psychological examination.

30. Dr. Lesnak acknowledged that Claimant might have suffered a soft tissue strain/sprain in her back while at work, but there is no evidence of injury to lumbar discs, ligaments, or facet joints. While stopping short of accusing Claimant of consciously manufacturing her symptoms, he did indicate that some degree of somatic disorder might be at play. While repeating that there is no medical evidence of any injury, he acknowledged:

> Did she possibly feel a pop in her back? It's possible. And then all of a sudden her brain just kind of explodes and manifests all this pain throughout her body? Sure. (Transcript, p. 137).

Claimant Testifies at Hearing re: Work Injury

31. Claimant was hired as a 'stower', with a lifting requirement of 25 pounds. She began her shift at 6:00 p.m. on July 23, and was injured at 3:00 a.m. that following morning. She described her injury thusly:

> I picked up the storage bin, I turned to put it down to move all the other bins down, and then when I picked it back up, I heard a pop in my back and it went all the way up my back, all the way down to my legs, and the pain was mostly in my belt line area of my lower back. (Transcript, p. 25).

32. She stated she had never felt pain like that in her life. It was similar to kidney stones, but worse. She had suffered a whiplash-type neck injury in a car accident in 2014, but received chiropractic care, but was not treated for her back.

33. Once she was seen by 'Safety', she understood them to say to go home, but if pain persisted, to go to the ER. She went home initially, but the pain was so bad that she took herself to the ER at Memorial South {aka UC Health}. At the UC Health ER, she was told to see her PCP, but also an Occupational specialist. She was later assigned Dr. Ritch.

34. Once she saw Dr. Ritch, she has undergone injections by Dr. Ford, the first of which did not help, the second of which offered "a little." She has had physical therapy (but none since her injections), massage therapy, and chiropractic care. She has taken all prescribed medications. Treatment to date has provided little to no relief, except as noted. [Claimant apparently referenced two more injections that were recommended, but not provided].

Claimant Testifies re: Termination

35. Following the work injury, Claimant was offered temporary work duty, but only worked sporadically, and for a short period at Respondent-Employer performing light-duty tasks, which included asset tagging. This job involves sitting at a computer and drive squares or circles around objects to help robots identify objects. At one point, she just sat and handed out masks to workers who needed one. The job does not require any lifting.

36. The last shift Clamant worked for [Employer, Redacted] was September 9, 2021. On September 10, she was in such pain that she could not come in to work. However, she did not 'call in sick.' Instead, she assumed that by not showing up, the system would simply automatically deduct 'points' from her personal bank, since she did not badge in that day. She had no intention, however, of abandoning her job.

37. Claimant testified that at around 8:00 p.m. on September 11, 2021, (a regularly schedule day off, so she did not go in that day either) she received a call from an unidentified human resource representative who advised her that she was terminated for alleged timecard theft. She tried to explain that she had discussed a discrepancy in her time records with human resources previously, but the human resources representative told her that she remained terminated. No one from [Employer, Redacted] ever met with her to discuss this. She never received anything in writing explaining the reasons for her termination. She was aware of [Employer, Redacted]'s progressive discipline system {warning, written warning, termination}, but was never provided any warnings.

38. Claimant stated that prior to September 11, she has never been accused of time theft, nor had she been disciplined for alleged time theft. Claimant testified that she noticed in advance of her paycheck that she was going to be paid for August 27, 2021-a day when she had not worked. She stated that she contacted human resources to report that she was not entitled to pay for that day. She does not know why her time records reflected that she worked on August 27. She believes that human resources erroneously noted that she worked that day. She also testified that she believed that human resources received her message about the discrepancy because "they opened the case and then

they closed the case with nothing." She knows this because she would get an alert of such opening and closing activities (presumably to her phone).

39. Claimant unequivocally denied any time theft while working at Respondent-Employer, and she testified that she advised human resources about this discrepancy in her timecards and that the time was not correct and needed to be deleted.

40. Claimant described the clock-in-and out process as having two acceptable options. She could use the company-supplied smartphone app, but had to be within the building to get within range to use it. Alternatively, she could use her work badge to clock in while waiting to enter her work station. She was aware that cameras record the movement of employees, and she would never attempt to abuse the timecard system.

41. On cross-examination, Claimant provided more detail on the clock-in-clock-out process. There is only one way into the facility, and only one different way out, and there is security. Regardless of whether you use the *app* to clock in or clock out, you still must use your *badge* to physically enter and exit the building.

42. Claimant then described what occurred on August 27, which is the date she can only speculate that her termination was based upon:

Q. Okay. So on that date, did you clock in
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1 and clock out on your phone or what happened?

2 A. No. So, I badged in using my badge, I was
3 about to walk in but I didn't walk in at all. I ended up
4 walking back out because my back was in too much pain.
5 So I was going to work, but the way my
6 back was feeling, I didn't go all the way in. I looked
7 at the desk, because you can see the desk from the --
8 before you -- before you badge in, you can see the desk
9 where the people who are hurt sit.
10 So when I looked over, my safety person --
11 my manager -- my safety manager wasn't there and she
12 usually gets there around 6:30. So I badged in and I
13 turned around and went back out the door. I didn't go
14 all the way in the building. (Transcript, pp. 57-58)

43. She explained that once she badged in, she would normally have to badge out at a different location, after entering and walking "all the way around" before badging out and exiting. She later explained that "all the way around" was about half a basketball court. So she just turned around and left before fully entering the building.

44. Claimant explained why the time was not accurate on August 27 as follows:

> At the time I didn't have a schedule, meaning --the reason why I didn't have a schedule is because I was on leave of absence. So when you are on a leave of absence you don't have a schedule. HR has to--- you have to be manually put in-- clocked in by going to AmCare, so they have to write down you being there and then they have to write down when you're leaving…. I don't know what happened." (Hg. Tr., p. 54).

45. Claimant was also asked about Exhibit O, p. 233 ([Employer, Redacted]'s 'Supportive Feedback Document'). She did not have it in her possession, but does not recall having seen it [although it was a listed Respondent's Exhibit]. Claimant explained that she did not work on August 27, but reiterated that she did work on July 16, but left early due to the death of a family member. She did, however, put in her 'PTO time' when this occurred.

46. Claimant did not deny that she clocked in, but did not actually work on August 27, 2021. Nor did she deny that she failed to actually report to anyone *that day* that she had left without working. She did, however, indicate that she tried to report to her safety manager that she was leaving, but that person was not there at the time. She also acknowledged that she worked the day before, and the day after August 27. [The ALJ notes that these were apparently the four-hour shifts permissible under then-extant work restrictions.]

47. After her termination, Claimant went to work for Door Dash for two days per week, from September to November, 2021. She quit working at Door Dash because her back was hurting too much.

48. Claimant then went to work for Kum & Go as a cashier, working between 20 and 30 hours per week at an hourly wage of $14.45. She testified that she worked an average of 23 hours per week.

[Redacted, hereinafter EP] Testifies at Hearing

49. Claimant reported the work injury to her supervisor EP[Redacted], between approximately 3:30 and 3:45 A.M, towards the end of Claimant's shift. Ms. EP[Redacted] is a Level 5 Area Manager who has worked for [Employer redacted] since 2013. Ms. EP[Redacted] was working with Claimant at the time of her reported injury. Ms. EP[Redacted]testified that Claimant reported the injury directly via the "hands-on system" and that Ms. EP[Redacted] reported to Claimant's workstation personally.

50. Ms. EP[Redacted] stated that Claimant reported that she was in pain and unable to walk; because of this, a wheelchair was provided. She testified that a standard investigation was conducted regarding how the injury occurred. Claimant told her that she injured herself while stowing. Ms. EP[Redacted] was able to pull video from the station number, but was unable to identify any event on the footage that showed an injury had occurred, or that matched with the description Claimant had provided.

51. Despite this, Ms. EP[Redacted] testified that basic first aid, including an ice pack, was provided. Due to the time the injury occurred, HR was not on site. Ms. EP[Redacted] testified that Claimant did not have any accrued personal time and that if she left prior to her shift being over, it was possible she would be terminated. As a result, Claimant remained on site until her shift was over.

52. Ms. EP[Redacted] clarified that she has no information about the allegation of time theft lodged against Claimant by [Employer, Redacted]. She had no involvement in her termination. She is unaware of any of the procedures used by HR for termination under these circumstances. She has no knowledge of the various symbols which appear on Claimant's time records.

Employer's Records re: Termination for 'Time Theft' – Exhibit O

53. Claimant was then terminated on September 10, 2021 for 'Time Theft' by allegedly clocking in and out on her personal cellphone, but failing to badge in and out of the building. (Ex. O, p. 233). The 'Details of Concern' outlined in this 'Supportive Feedback Document' state:

> July 16, 2021 and August 27, 2021 you were using your mobile device to clock in and out. During this time you did not use your badge to enter or exit the facility… A seek to understand conversation took place with you where you state that on August 27, 2021 you did not work. *Id.*

54. On the same document, it notes, under 'Areas of Improvement':

> [Employer, Redacted]'s NAFC Standards of Conduct specifically prohibits &quot(sic) *intentionally* making entries on associate's time cardsheet or *falsely altering* a timekeeping document when the associate is not in the [Employer, Redacted] facility &quot(sic). *Id* (emphasis added).

This document then stated that this is a Category 1 security infraction, subjecting the associate to immediate termination. *Id.*

55. Under 'Associate Comments', it notes:

> AA was terminated via phone on 9/10 at approximately 19:40. AA stated she is being wrongfully terminated and will be contacting her lawyer. *Id.*

Under Associate's Signature, it states: Davis Tee (sic) REFUSED TO SIGN. *Id.*

56. Under the multi-page employment agreement that Claimant was subject to, it was noted, under 'Employment at Will':

> If you accept our offer of employment, you will be an employee-at-will, meaning that either you or the Company may terminate our relationship at any time for any reason, *with <u>or without cause.</u>* Any statement to the

contrary that may have been made to you, or that may be made to you, by the Company, its agents, or representatives are superceded by the offer letter. *Id* at 240. (emphasis added).

[Employer, Redacted] Timesheet Records -- Exhibit N

57. [The ALJ notes that no person from [Employer, Redacted] testified about the contents of this Exhibit. No interpretation was provided. There are various symbols accompanying the clock-in-clock-out entries, which plainly bear some meaning, but which would leave the finder of fact to speculate. The only conclusions the ALJ is willing to draw with this limited information is that there is nothing within these records that is inconsistent with Claimant's own testimony and explanations for what occurred.]

CONCLUSIONS OF LAW

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

Generally

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

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

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

1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The 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).

D. In this instance, starting with EP[Redacted], the ALJ finds her to be sincere and credible in her observations and testimony. The ALJ also finds that Dr. Lesnak makes a very sound argument that Claimant's reported symptoms are not supported by objective evidence in the record, and that her reported symptoms are out of proportion to any injuries she may have received. The ALJ finds that Claimant leaves much to be desired as an accurate medical historian, but does not find her to be incredible *per se.* Further, as will be noted, Claimant's explanation for her timecard discrepancies seem plausible enough, and there is nothing in the record, of a testimonial nature, or in the way of discernable records, which contradict her. More on that later.

Compensability, Generally

E. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *See*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). 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,* 197 592 P.2d 792 (Colo. 1979).

F. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

G. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

Compensability, as Applied

H. There is considerable record support that Claimant's reported symptoms are out of proportion to any reproducible objective findings. She has effectively confounded her own ATPs with her lack of progress. However, her ATP, Dr. Ritch has consistently opined that her injuries are work-related. Dr. Lesnak conceded that she may have suffered a soft tissue injury (but no structural damage to the spine, facets, or ligaments). He also stopped short of accusing Claimant of manufacturing the incident or her symptoms. And, as was acknowledged, Claimant may well have felt a pop in her back and then, however objectively unsupported, reported exaggerated symptoms. All quite plausible. However, based upon the entire record, the ALJ does find, by a preponderance of the evidence, that Claimant did suffer a compensable work injury, as defined, which caused the need for medical treatment. And it is noted that Claimant's ATP, despite some apparent misgivings, has yet to place her at MMI. Just how much medical treatment might be reasonably necessary moving forward will wait for another day.

Authorized Medical Treatment, Generally

I. Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010).

Authorized Treatment by Heart Centered Counseling, as Applied

J. As noted, Claimant was not referred to Heart Centered Counseling by any ATP. She had already sought this treatment through her own PCP, and well prior to the work injury at issue herein. Claimant had already experienced a number of personal mental health issues, and the mere fact that during her ongoing mental health treatment she mentioned her ongoing back issues does not bootstrap this condition into an authorized treatment, unless it comes from her ATP. The ALJ declined to designate Heart Centered Counseling as an Authorized Treating Provider.

Claimant's Responsibility for Termination, Generally

K. An award of Temporary Total Disability or Temporary Partial Disability benefits is payable if the following conditions exist: (1) the injury or occupational disease causes disability, (2) the injured employee leaves work as a result of the injury, and (3) the temporary disability is total and lasts more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). TTD continues until the first occurrence of any one of the following: (a) the employee reaches MMI; (b) the employee returns to regular or modified employment; (c) the attending physician gives the employee a written release to return to regular employment; or (d) 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. C.R.S. § 8-42-105(3).

L. However, 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. C.R.S. § 8-42-103(1)(g). Thus, if a Claimant is responsible for her termination, she is not entitled to recover temporary disability benefits for wage loss. *Padilla v. Digital Equip. Corp.*, 902 P.2d 414, 416 (Colo. App. 1994). A Claimant is responsible for her termination where she is "at fault" for causing a separation in her employment. "A finding of fault requires a volitional act or the exercise of a degree of control by a Claimant over the circumstances leading up to the termination." *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008) (citing *Padilla*, 902 P.2d at 416). This is a factual determination for a judge. *Padilla*, 902 P.2d at 416.

M. A Claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

Did [Employer, Redacted] have the Legal Right to Terminate Claimant's Employment?

N. Of course they did. As is made clear in Ex. O, p. 240, *supra*, Colorado is an at-will employer state. So long as they don't run afoul of any anti-discrimination statutes, the ADA, and the like (of which there is no evidence in this record, but which is also beyond the purview of this case), they can quite possibly terminate someone for wearing ugly shoes if they want. [Employer, Redacted] has made it quite clear that they are not even bound by their own due process disciplinary procedures if they don't wish to be. Employees can either accept the terms of employment, or go elsewhere. If anything, [Employer, Redacted] has shown that it is a marvel of efficiency, automation, and information technology. So efficient, it appears, that they have largely eliminated the human element in HR decisions, and now have algorithms that do it all for them. They only use an HR rep-with no apparent discretion-to make that final phone call. Such is [Employer, Redacted]'s business model, and its prerogative. However, such trial-by-algorithm does not, *ipso facto,* serve to terminate temporary disability payments to an injured worker.

Was Claimant Responsible for her own Termination?

O. [Employer, Redacted] - or more precisely, its algorithm - has accused Claimant of 'Timecard Theft', thus subjecting her to termination, without the usual niceties of progressive discipline and the warnings it would entail. Apparently, during some undefined 'seek to understand' process, Claimant acknowledged that she did not work on August 27, but was paid for her services anyway. Game over. Claimant has now offered a plausible explanation for not completing her shift on August 27 (such explanation also implicating her inability to do so *due to the effects of her work injury*). She has also offered a plausible explanation that she called HR upon discovery of her pay stub, but someone on the other end, either: 1) didn't document it, or 2) did document it, but the algorithm didn't get the memo. Also plausible is that 3) none of this happened the way Claimant has alleged; however, the algorithm did not come and testify at the hearing that no such record of this alleged phone call exists. Nor was an intelligible record of [Employer, Redacted] admitted into evidence to this effect. The burden lies on the Employer in such circumstances, and for good reason: The Employer retains access to all the video, payroll records, internal memos, co-workers, etc. - essentially all the data in existence. A fired employee has nothing but their word.

P. [Employer, Redacted] has cameras everywhere, apparently running 24/7. For good reason, lest certain employees find a way to steal them blind. Claimant was aware of that fact. [Employer, Redacted] had access to the film of Claimant's comings and goings on August 27, but there is no evidence that anyone at [Employer, Redacted] ever bothered to look at it-much less bring it into the hearing to refute what Claimant has said. That would detract from the efficiency of the trial-by-algorithm model, and [Employer, Redacted] has long since moved on from Claimant. [The ALJ duly notes that Claimant was hardly a model of productivity, taking bereavement leave only a few days into the job, then getting hurt and being placed on restrictions shortly thereafter. Even thereafter, Claimant had a spotty attendance record. It is unclear whether the algorithm factored all

that in while making its firing decision, versus, say, an otherwise reliable 10-year employee]. No matter. [Employer, Redacted] has accused Claimant of acting *intentionally* or *falsely* regarding her timecard. (*see* Ex. O, p. 233). They have to, since they must show that Claimant acted *volitionally.*

Q. Suffice it to say, the ALJ does not find Claimant's version of events to be *incredible per se.* In fact, there is a certain ring of truth to it, since truth is often stranger than fiction. And, to put it bluntly, Clamant (to her credit) does not appear to have the guile to pull this one off. [Employer, Redacted] has offered essentially nothing in rebuttal, and it was their burden from the get-go. Claimant stated that she had no clue that [Employer, Redacted] even harbored concerns about July 16. From what can be ascertained from the Exhibits, Claimant left early that day-*for the exact reasons that she stated*-and the records appear to reflect exactly that. If [Employer, Redacted]'s algorithm got all confused by this, that hardly makes a case for acting *intentionally* or *falsely.* And we're all still waiting to see how Claimant, by all accounts, was fired via a phone call from HR - yet [Employer, Redacted]'s records reflect that she *REFUSED TO SIGN* her termination letter - *over the phone* (?!). [Employer, Redacted]'s system may work for [Employer, Redacted], but it does not work for the ALJ in this case. Employer has failed to show that Claimant acted **volitionally** in the events leading to her termination.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on July 24, 2021.

2. Heart Centered Counseling is not an authorized Treating Provider for this claim.

3. Respondents have not shown that Claimant was responsible for her own termination of employment; therefore, temporary disability benefits shall be paid in an amount to be determined by future hearing or agreement of the parties.

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

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: March 14, 2022

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove the admitted 13% scheduled lower extremity rating assigned by the DIME should be "converted" to the 5% whole person equivalent?
- Did Claimant prove his condition worsened and he is no longer at MMI?
- Did Claimant prove a left ankle surgery recommended by Dr. Michael Simpson is reasonably necessary?
- If Claimant is no longer at MMI, is he entitled to additional TTD benefits?
- If Claimant remains at MMI, did he prove he is permanently totally disabled?
- Disfigurement.
- Overpayment.

FINDINGS OF FACT

1. Claimant worked for Employer as a concrete truck driver. He suffered an admitted injury to his left ankle on July 5, 2018 when he stepped on a rock while exiting his truck. Claimant was initially diagnosed with an ankle sprain but an MRI later showed an anterior talofibular ligament tear and probable calcaneofibular ligament tear.

2. Claimant had left ankle surgery performed by Dr. Michael Simpson on October 11, 2018. The procedure included an ankle debridement with excision of the os trigonum and modified Brostrom lateral ligament reconstruction.

3. Shortly after the first surgery, Claimant reported back pain related to prolonged alteration of his gait. On January 16, 2019, an ATP documented sciatica-type symptoms because of altered gait. Claimant received some physical therapy for his low back pain.

4. Claimant continued to have problems with the ankle related to scar tissue buildup. Dr. Simpson eventually performed a second procedure on August 8, 2019 consisting of a debridement and scar tissue removal.

5. He saw Dr. Leggett on May 13, 2020 for ongoing ankle issues. Dr. Leggett thought Claimant's continued pain was from injury to the superficial peroneal nerve, in combination with persistent mechanical irritation affecting the ankle joint and adjacent soft tissue. Dr. Leggett recommended hydrodissection of the superficial peroneal nerve, and a compound cream for neuropathic pain. He also suggested PRP injections for the ankle. Additionally, Dr. Leggett observed "significant antalgia" in Claimant's gait and noted

Claimant had been told his back pain was caused by "changes in his walking and limping for such a long time." He opined, "With the substantial nature of his injury, and with the 2 surgeries, I do not believe getting back to 'normal' is realistic."

6. Dr. Leggett performed the hydrodissection injection on June 5, 2020.

7. Claimant started treating with Dr. Robert Graham, a chiropractor, on June 23, 2020. Dr. Graham noted Claimant developed mid- and low back pain with the gait changes following his surgery. PT had not been very helpful. Physical examination showed myofascial tenderness and tightness in the low back, mid back, and over the SI joints. Dr. Graham diagnosed segmental and somatic function of the thoracic and lumbar areas. He recommended chiropractic manipulation and myofascial release techniques. Claimant treated with Dr. Graham through January 2021. He repeatedly reported that his back pain was aggravated by prolonged standing and walking. Dr. Graham observed altered gait mechanics on multiple occasions. Claimant's pain complaints were corroborated by exam findings showing myofascial tenderness, hypertonicity, and reduced lumbar range of motion. Claimant was discharged on January 27, 2021 because he had completed all authorized sessions, although Dr. Graham thought he could benefit from additional chiropractic treatment as maintenance care.

8. Claimant followed up with Dr. Leggett on June 24, 2020. The hydrodissection injection had provided significant pain relief, but only for the duration of the short-acting anesthetic. Claimant's foot and ankle were hypersensitive to touch around the superficial peroneal nerve, but there were no dystrophic changes, mottling, or other signs suggesting CRPS. Dr. Leggett opined the temporary response to the injection provided a "clear diagnostic response," but unfortunately no long-term therapeutic benefit. Dr. Leggett suggested a PRP injection.

9. Dr. Leggett performed the PRP injection on July 16, 2020.

10. Claimant followed up with Dr. Leggett on August 5, 2020. Claimant reported increased limping because of soreness after the injection, which "seemed to have a negative effect on his back."

11. On August 26, 2020, Dr. Leggett documented a recent MR arthrogram of the left ankle had aggravated Claimant's ankle pain. In addition, "with the increased ankle pain, he feels his left buttock and low back pain also intensified." Examination of Claimant's low back showed myofascial tightness throughout the lumbar paraspinals, and pain with deep palpation of the left SI joint. Dr. Leggett opined the SI joint pain was caused by increased limping since the arthrogram. He recommended an SI joint injection.

12. The SI joint injection was performed on September 16, 2020.

13. Claimant returned to Dr. Leggett on September 29, 2020. The injection had been very helpful for approximately five days. Unfortunately, on the fifth day, his ankle gave way and he fell down some stairs. This aggravated the pain in Claimant's back, buttock, and left foot. Claimant told Dr. Leggett he had fallen several times because of "instability" in his left ankle. Examination showed "clear" pain with palpation of Claimant's

back and SI joints. Dr. Leggett encouraged Claimant to continue the chiropractic treatment and pain cream and hoped the exacerbation would settle down in a few weeks.

14. Claimant had a second opinion with Dr. Scott Primack on October 5, 2020. Dr. Primack recommended a lumbar MRI and possibly permanent work restrictions if the MRI showed no acute problems.

15. Dr. Thomas Centi at CCOM put Claimant at MMI on October 8, 2020. Dr. Centi provided an 11% scheduled rating for the left ankle, which converts to 4% whole person. He recommended orthopedic follow-up for the next two years under maintenance care. Dr. Centi assigned permanent work restrictions of sitting 50% of the time, no standing/walking greater than 30 minutes in an hour, minimal stair climbing, and no squatting, kneeling, or climbing ladders.

16. Dr. Simpson re-evaluated Claimant on December 14, 2020. Claimant said he "continued" to struggle with pain and giving way of his ankle. Dr. Simpson wrote, "I do not have a really good explanation for this. It is possible that he has pain-inhibited giving way of his ankle. Clinically his stability seems very good." Dr. Simpson recommended a repeat MRI to see if there was any significant interval change.

17. Respondents filed a Final Admission of Liability based on Dr. Centi's rating and Claimant requested a DIME. The DIME was performed by Dr. Douglas Scott on March 2, 2021. Dr. Scott agreed Claimant had reached MMI on October 8, 2020. He assigned a 13% lower extremity rating for the left ankle/foot, which converts to 5% whole person. Dr. Scott opined Claimant had no ratable lumbar impairment because he suffered no structural injury to his lumbar spine on July 5, 2018 and has no objective lumbar pathology to support a rating. He did not comment on whether Claimant's documented low back symptoms and treatment warranted conversion to whole person. Regarding work restrictions, Dr. Scott agreed with Dr. Centi that Claimant avoid should standing/walking for greater than 30 minutes at a time, minimize stair climbing, and avoid climbing ladders, kneeling, and squatting. He imposed no limitations on sitting.

18. At a March 8, 2021 appointment with Dr. Simpson, Claimant stated his symptoms were "unchanged." He was still having issues with the ankle rolling in and giving way. Examination showed "good stability," negative anterior drawer, only a "trace" of inversion laxity, and "maybe a little hypermobility in the subtalar joint." Dr. Simpson reiterated his request for an updated MRI.

19. The MRI was completed on April 2, 2021. It was "unremarkable" aside from postsurgical changes at the anterior talofibular ligament level.

20. Claimant followed up with Dr. Simpson on April 6, 2021. Dr. Simpson noted Claimant "continues" to struggle with ankle symptoms and limitations. Clinically there was no evidence of gross laxity. Dr. Simpson was not sure why the ankle was giving way and wondered if it was from a ligamentous issue or possibly neurogenic pain. Dr. Simpson discussed Claimant's options with him including simply living with the condition. However, Claimant reported that he could not pass his CDL which was quite "concerning." The other

option would be an arthroscopic exploration and possible lateral ligament reconstruction. Dr. Simpson concluded, “otherwise there is really not much else we can do for him at this time.”

21. Claimant had another appointment with Dr. Simpson on May 13, 2021, at which time he stated his ankle was “feeling the same.”

22. Insurer filed a new FAL on May 17, 2021 admitting for the 13% scheduled rating assigned by Dr. Scott. The FAL also claimed a TTD overpayment of $2,495.08, which was to be credited against the permanency award. Claimant timely objected to the FAL and requested a hearing.

23. On June 11, 2021, Dr. Simpson submitted an authorization request regarding the proposed surgery.

24. Claimant returned to Dr. Simpson on August 23, 2021 to discuss the surgery in more detail. Dr. Simpson wrote, “Again clinically he does not have significant laxity. He seems to have a solid ankle with good subtalar motion. Continues to have episode with his nerve giving out. I really think it is unlikely that revision reconstruction would be necessary or really be of any great benefit to him.” Dr. Simpson also stated arthroscopic exploration of the ankle “may” give some relief and allow him determine if there was any previously unidentified pathology causing the ankle to give way.

25. Dr. Marc Steinmetz performed an IME for Respondents on September 16, 2021. Claimant told Dr. Steinmetz he had had persistent back and left leg and ankle pain since the first surgery. Claimant’s low back was tender to palpation and lumbar range of motion was slightly reduced. The ankle had no instability and minimal swelling. Dr. Steinmetz found no lower extremity atrophy or allodynia. He had good sensation and deep tendon reflexes. Dr. Steinmetz agreed with Dr. Centi and Dr. Scott that Claimant reached MMI as of October 8, 2020. He opined Claimant’s back pain was not related to the work injury because there was no significant mention of any back problems until after the first surgery and no mechanism in the initial accident that would have injured Claimant’s back. For work restrictions, he opined that Claimant should be limited to a maximum of 30 minutes standing or walking and otherwise perform sedentary duties. Dr. Steinmetz also recommended that Claimant minimize stair climbing and avoid ladders, kneeling, and squatting. Dr. Steinmetz assigned a 14% lower extremity rating for the left ankle, which converts to 6% whole person. Dr. Steinmetz did not recommend any maintenance care because he thought no further interventions would be helpful. He considered it unlikely Claimant would need another surgery “within a month of being placed at MMI by the DIME without an intervening incident.”

26. The Respondents obtained surveillance of Claimant the morning of the IME with Dr. Steinmetz. At 8:51 a.m., the video shows Claimant working on his truck. Claimant is shown bending and twisting repeatedly at the waist, laying on his back, using hand tools, walking without a limp, crouching and moving in a fluid manner, using his left ankle to leverage his body weight when changing positions, and twisting and rotating his left ankle, all with no apparent difficulty or pain behaviors. Claimant visited a taco restaurant

approximately one hour later. He was seen walking without a limp, climbing in and out of his truck, and moving in a fluid motion with no pain behaviors. According to the investigator's report, Claimant departed the taco restaurant at 10:09 and drove to his scheduled appointment in Denver. The investigator next observed Claimant's vehicle parked at Midtown Occupational Health at 11:50 a.m., but Claimant had already entered the building. After the appointment with Dr. Steinmetz, the investigator observed Claimant walking in the parking lot with a mild limp.

27. Dr. Steinmetz issued an addendum report on September 27, 2021 after reviewing the surveillance video. Dr. Steinmetz noted Claimant was lying directly on the asphalt while working on his truck. He was twisting and bending his back normally and using his left leg to stabilize his position. Claimant also raised his legs in the air and then flipped himself to an upright position. In Dr. Steinmetz's opinion, the video showed Claimant as fully functional with no limitations in the back or ankle. He noted Claimant had presented to his office that same day complaining of pain and functional limitations that were directly contradicted by the surveillance video. As a result, Dr. Steinmetz concluded Claimant's reported symptoms and associated functional limitations were unreliable. Based on the video, he opined Claimant required no work restrictions. He deferred to the DIME on permanency.

28. Katie Montoya completed a vocational evaluation at the request of Respondents and issued a report dated December 16, 2021. Claimant told Ms. Montoya he had shooting pain in his left ankle up to his hip. He complained there were times that his ankle will swell and he could not move. He reported only being able to sit for 15 to 20 minutes and to stand for no more than 30 minutes. Claimant old Ms. Montoya he spent his days trying not to hurt and looking for jobs. He reported that he might do dishes and laundry if his wife brought it down to him. He would occasionally cook a small meal but did no grocery shopping because he could not push a grocery cart. He reported that he could not sit long to watch TV and reported that he may play on the computer or look online for jobs.

29. Ms. Montoya noted Claimant has a relatively limited education, with no high school diploma or GED. His work history consists primarily of physically demanding jobs in the concrete industry. Claimant told Ms. Montoya he had been looking for work since November of 2020 but "every single job" required more sitting and standing than he could not tolerate. Claimant said he looked for work at AutoZone, O'Reilly's, Big R, and Lowes. He did not actually submit any applications but instead spoke to a friend about the requirements. Claimant did tell say he thought he could work if there was something within his restrictions but did not believe any work fit his restrictions because of "how bad they were".

30. Ms. Montoya described Claimant as a younger worker with limited education, limited work history, and limited transferable skills. Despite those factors, she still identified numerous job opportunities suitable for Claimant. She initially noted that Dr. Steinmetz's updated opinion that Claimant has no work restrictions would allow him to perform any of his past relevant work. But even with the restrictions assigned by Dr. Centi and the DIME, she believes Claimant is employable. She identified suitable occupations

such as driving-related positions, cashier positions, customer service positions, forklift operation, and production work. Ms. Montoya also recommended that Claimant pursue a GED and renewal of his CDL to further improve his options and earning capacity. She also provided him with information regarding the Workforce Center and The Division of Vocational Rehabilitation.

31. At hearing, Claimant described significant pain in both his ankle and low back. He stated he had difficulty being on his feet for prolonged periods because of pain, weakness, and giving out. He also reported having constant pain in his low back that was aggravated by walking and being unable to sit longer than 20 to 30 minutes.

32. Claimant testified he unsuccessfully looked for work in October and/or November of 2020 shortly after being placed at MMI. He has not actively looked for work recently. He did not recall Ms. Montoya advising him to follow up with the Workforce Center or DVR had not contacted either agency. He said he occasionally called potential employers and inquired about their "restrictions" but did not follow through with applications because he "knew [his] restrictions wouldn't allow [him] to work." Claimant conceded he engaged in the activities on the surveillance video but insisted that he performed no activities outside his permanent restrictions.

33. Claimant's testimony is only partially credible. It is reasonable to conclude he still has some ankle and foot pain in light of the significant injury that necessitated two surgeries. Additionally, his complaints of low back pain are supported by records of multiple providers. However, Claimant's testimony is not credible to the extent it suggests he is more limited than the permanent restrictions outlined by Dr. Centi and the DIME.

34. Ms. Montoya testified at hearing consistent with her report. She clarified her interpretation of Claimant's work restrictions is that he is limited to standing no over 50% of the time but has no actual limitations on sitting. Ms. Montoya conducted labor market research using the standing and walking restrictions imposed by Dr. Centi and Dr. Scott, and narrowed her search to automotive/delivery, forklift, and production type work because it was in line with the type of work Claimant had previously performed. But this did not exclude other entry level work such as customer service, cashier work, and counter attendant type work.

35. Ms. Montoya explained that employers are accommodating work restrictions more liberally than in the past because of the persistent labor shortage since the pandemic. She also discussed the changing nature of the labor market and specifically referenced the increasing availability of work-from-home positions. Ms. Montoya gave Claimant information about the Workforce Center and DVR because she thought he would benefit from guidance on how and where to look for work given young age and lack of work experience. While she does not believe he requires formal vocational rehabilitation to be employable, she thought he would benefit from some direction and encouragement since he did not appear to be actively looking on his own. She was disappointed Claimant had not followed through with her recommendations. Ms. Montoya was also "surprised" by the level of functionality Claimant demonstrated on the surveillance video, given the significant limitations he described during their interview.

She explained that obtaining his GED and possibly renewing his CDL would help in his job search particularly with wages. Ultimately, she believes that Claimant will find a job if he diligently looks for work.

36. Ms. Montoya's vocational analysis and opinions are highly credible and persuasive.

37. Dr. Steinmetz testified for Respondents via post-hearing deposition. He opined that Claimant remains at MMI as determined by the DIME. He explained that the recommended surgery was based upon Claimant's subjective reports rather than objective findings. Dr. Steinmetz noted the April 2, 2021 MRI was unremarkable and Dr. Simpson had opined that claimant was not likely to benefit from further reconstruction. As of August 23, 2021, physical examination did not reveal significant laxity and he had a solid ankle and subtalar motion. Claimant had good range of motion and negative anterior drawer. There was no anatomic reason to perform any additional procedure, which was being considered entirely based on Claimant's subjective reports of pain and perception of instability in the ankle.

38. Regarding the surveillance video, Dr. Steinmetz explained that even though it was only a few minutes long, it showed Claimant engaging in activities without apparent limitation or difficulty while moving in a fluid, uninhibited manner. He thought the video shows Claimant has functional capacity greater than he has otherwise described to providers and at hearing. As a result, he does not believe Claimant requires any work restrictions.

39. Dr. Steinmetz's opinions are partially credible. His opinions regarding the proposed surgery are credible and persuasive. However, Dr. Centi and Dr. Scott's opinions are more persuasive regarding Claimant's work restrictions. Dr. Steinmetz's opinions regarding causation of Claimant's low back symptoms are not persuasive.

40. Claimant failed to prove his condition worsened after MMI. Claimant had similar problems with his ankle before and after MMI. The MRI showed no new pathology. There is no persuasive evidence of any significant change to support a determination Claimant is no longer at MMI.

41. Claimant failed to prove the third surgery proposed by Dr. Simpson is reasonably necessary.

42. Because Claimant remains at MMI, there is no basis for additional TTD benefits.

43. Claimant failed to prove he is permanently and totally disabled. Ms. Montoya persuasively opined Claimant can work and earn wages in numerous occupations consistent with the permanent restrictions assigned by Dr. Centi.

44. Claimant proved by a preponderance of the evidence he suffered permanent impairment not listed on the schedule of disabilities.

45. Claimant has injury-related surgical scarring on his left foot and ankle, consisting of: (1) a ½ inch diameter discolored, irregularly shaped, partially indented portal scar on the anteromedial aspect of the left ankle, and (2) a 2-inch by ¼-inch scar on the anterolateral aspect of the left ankle. The ALJ finds Claimant should be awarded $1,000 for disfigurement.

CONCLUSIONS OF LAW

A. Claimant remains at MMI and the proposed surgery is not reasonably necessary.

Claimant was placed at MMI by an ATP and the DIME as of October 8, 2020. A DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III). However, a previous determination of MMI is not given presumptive weight where a claimant is alleging a change of condition after MMI. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The question of whether a claimant's condition has changed after MMI is evaluated under the preponderance of the evidence standard. *Id*.

Here, Claimant does not contest the original MMI date, but argues his condition worsened such that he was no longer at MMI.[1] Claimant's position is predicated on the surgical recommendation submitted by Dr. Simpson on June 11, 2021. Claimant's argument fails for two reasons. First, there is no persuasive evidence of any change in Claimant's condition that would affect his MMI status. Claimant had similar problems with his ankle before and after MMI. The MRI showed no new pathology, nor was there any significant change in Claimant's clinical presentation or findings. Dr. Simpson's records reflect relatively stable symptomology and limitations with notations such as "he continues to struggle," "symptoms are unchanged," "the ankle is feeling the same," and "his ankle still hurts." The current condition of Claimant's ankle is not appreciably different than when he was put at MMI. Accordingly, Claimant failed to prove he was no longer at MMI at any time after October 8, 2020.

Second, Claimant failed to prove the surgery recommended by Dr. Simpson is reasonably necessary. Dr. Steinmetz's opinions regarding the reasonable necessity of additional surgery are persuasive and supported by Dr. Scott's conclusions. Even Dr. Simpson does not seem enthusiastic about the prospects for additional surgery. He opined the surgery is "unlikely" to be of benefit, but "may" help his symptoms or reveal a previously undiscovered problem. Despite the poor prospects of success, he is willing to try it because of the negative impact the ankle is having on Claimant's ability to return to his regular work. While Dr. Simpson's desire to help his patient is commendable, that rationale is insufficient to prove additional surgery is reasonably likely to improve Claimant's condition.

[1] Although Claimant's Application for Hearing couched the issue as one of "reopening," the claim was never closed because Claimant timely objected to the FAL. Accordingly, Claimant need not reopen the claim to obtain additional benefits.

B. TTD benefits

Respondents appropriately terminated Claimant's TTD benefits in October 2020 because he reached MMI. Section 8-42-105(3)(a). To obtain additional TTD benefits after MMI, a claimant must show a worsened condition has caused a greater impact on their earning capacity. *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). Because Claimant failed to prove a change in his MMI status, he is ineligible for additional TTD benefits.

C. Permanent total disability

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

As found, Claimant failed to prove he is permanently and totally disabled. As Ms. Montoya persuasively explained, Claimant can sustain employment in a variety of unskilled and semi-skilled occupations. Although Claimant's permanent restrictions, education, and work experience narrow the range of work he can perform, there are still numerous jobs in the competitive economy consistent with Claimant's limitations.

D. Whole person impairment

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

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000). A DIME's opinions regarding "conversion" to whole person impairment are not entitled to special weight, but are merely another piece of evidence to be considered when evaluating the preponderance of evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Low back pain from an altered gait can functionally impair an individual beyond the leg. *E.g*., *Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (September 16, 2004) (altered gait from claimant's knee injury caused in back pain that resulted in difficulty with sitting, standing, or walking); *Webb v. Circuit City Stores, Inc*., W.C. No. 4-467-005 (August 16, 2002) (upholding conversion of lower extremity impairment to whole person based on back pain resulting from limping). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered permanent impairment not listed on the schedule. Claimant developed low back pain from altered gait shortly after the first surgery. He received multiple types of treatment for back pain including PT, chiropractic, and an SI joint injection. Multiple providers referenced the connection between Claimant's back pain and his gait. This pain caused reduced range of motion and interferes with Claimant's ability to perform activities involving prolonged standing and walking. Additionally, the low back issues were deemed insufficient to support a separate lumbar spine rating, which further supports the determination they are merely an extension of Claimant's ankle injury. *E.g., Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Abeyta v. Wackenhut Services, supra*.

E. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on the DIME's 5% whole person rating.

2. Insurer may take credit for any PPD benefits previously paid to Claimant in this matter.

3. Insurer may also take credit for any overpaid TTD benefits, to the extent not already recouped.

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

5. Claimant remains at MMI.

6. Claimant's request for ankle surgery is denied and dismissed.

7. Claimant's claim for permanent total disability benefits is denied and dismissed.

8. Insurer shall pay Claimant $1,000 for disfigurement.

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: March 22, 2022

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

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Wallace Larson regarding causation and maximum medical improvement (MMI).

II. If Claimant established that Dr. Larson's causality and MMI opinions are clearly erroneous, whether Claimant established, by a preponderance of the evidence, that he is entitled to additional reasonable, necessary, and related medical care.

III. If Claimant overcame Dr. Larson's MMI determination, whether Claimant has established, by a preponderance of the evidence, that he is entitled to Temporary Partial Disability (TPD) benefits beginning February 25, 2021 and ongoing.

IV. Whether Respondents established, by a preponderance of the evidence that Claimant received an overpayment in Temporary Total Disability (TTD) and Permanent Partial Disability (PPD) benefits totaling $17,900.30

FINDINGS OF FACT

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

Background and Claimant's Prior Injury History

1. Claimant is a "roll off" trash truck driver for Employer. He services a route that requires pick up of trash placed in large "roll off" containers. These dumpsters can contain a sundry of materials from construction debris to discarded appliances, which frequently require removal from the container before loading the dumpster onto the truck.

2. Claimant injured his low back while lifting and dropping some discarded tires over the side of a dumpster on September 19, 2018. (Clmt's. Ex. 3, p. 43). Claimant slipped off the container and fell on some rocks below. Claimant experienced severe low back pain and sought treatment through his primary care provider (PCP) who prescribed pain medication and ordered an MRI. MR imaging demonstrated disc pathology at L4 and S1. (Id. at p. 43-44). After some initial confusion regarding the compensable nature of the injuries stemming the this incident, Claimant came under the care of Dr. Cynthia Schafer who referred him to Dr. Paul Stanton who performed an L5 micro-discectomy/laminotomy to address an L4-5 extraforaminal disc protrusion abutting the L4 nerve root on October 15, 2018 (Id. at p. 43).

3. Claimant was placed at MMI for his September 19, 2018, low back injury by Dr. Schafer on May 31, 2019. Dr. Schafer assigned 21% whole person impairment of the lumbar spine based on a Table 53 rating, loss of range of motion, and sensory disturbances. (Resp. Ex., p. 167). At the time of MMI, Claimant reported had ongoing symptoms, including increased pain and numbness in his left foot and toes. (Id. at p. 166).

Claimant's January 17, 2020 Work-Related Injury

4. Approximately eight months after being placed at MMI and returning to work in full duty capacity, Claimant sustained an injury to his left shoulder while working for the Employer on January 17, 2020[1]. Liability for this injury was admitted and Claimant was referred UC Health where he was evaluated initially by Physician Assistant (PA-C), Zoe Call. (Clmt's. Ex. 4, p. 48). PA-C Call documented the mechanism of injury simply as "yanking/pulling cardboard from a compactor earlier this morning . . . with what sounds like poor body mechanics." (Id.). PA-C Call noted that there were "no other symptoms to report at this time." (Id. at p. 49). At this visit, Claimant completed a pain diagram depicting 4/10 hot burning/hammering pain in his left shoulder. (Id. at p. 53). He made no marks to depict pain anywhere in/on the low back or lower extremities. (Id.). Claimant would later assert that in addition to his left shoulder, he injured his low back as a consequence of the January 17, 2020 incident.

5. Concerning his current back symptoms, Claimant testified he developed low back and left leg pain on January 17, 2020 while attempting to loosen and pull compacted cardboard from a commercial trash dumpster equipped with a hydraulic ram that was used to compress cardboard at the end of the container. According to Claimant, he had to bend down to pull and hold a trap door open at the end of the dumpster with his left arm as he reached into the opening with his right hand/arm to forcefully yank the compacted cardboard from the trap door opening. As noted, Claimant asserts that he injured his low back in the process.

6. Claimant was evaluated by Dr. Schafer on January 21, 2020. (Clmt's. Ex. 4, p. 58). She noted that Claimant was "well-known" to her because of his previous low back injury. (Id.). She noted that four days after his January 17, 2020 accident that Claimant was reporting that he was feeling worse. (Id. at p. 59). Nonetheless, Claimant still did not make any markings on his pain chart depicting any symptoms in the low back. (Id. at p. 61). Because she was familiar with Claimant's low back condition, Dr. Schafer made a point to examine his lumbar spine, noting that "[h]is lumbar exam is more consistent with a sprain rather than a new herniated disc which was his fear." (Id. at p. 60). Dr. Schafer assessed Claimant with a lumbar sprain and referred him to physical therapy (Id.).

[1] There is some discrepancy concerning the date of injury. While Dr. Schafer and Dr. Wallace Larson, among others, report the date of injury as January 15, 2020, Respondent's Final Admissions of Liability filed March 18, 2021 and August 12, 2021 reflect that the injury occurred January 17, 2020. For purposes of this order, the ALJ adopts January 17, 2020 as the date of injury in this case.

7. Claimant completed a pain diagram on February 11, 2020 during a follow-up visit to Dr. Schafer. In this diagram, Claimant made markings depicting symptoms in the low back and bilateral legs. He specifically noted that he had right and left thigh cramping. He complained of cramping in the left calf and noted that his left toes were numb. (Clmt's. Ex. 4, p. 67).

8. Claimant returned to Dr. Schafer, earlier than scheduled, on February 20, 2020, due to worsening symptoms in his back. (Clmt's. Ex. 4, p. 71). He had been sick with an upper respiratory infection and had been coughing a lot, which was aggravating his low back symptoms. (Id.). Claimant reported 7/10 pain in the back with spasms. (Id.). Physical examination revealed "very decreased range of motion" in the lumbar spine with "[i]ncreased tone and tenderness [in the] bilateral paraspinous musculature as well as into the left gluteus medius." (Id. at p. 72). Dr. Schafer assessed lumbar sprain and left lumbar radiculitis which had been exacerbated by his upper respiratory illness and coughing (Id.).

9. Respondents challenged the relatedness of Claimant's low back symptoms and need for treatment to the January 17, 2020 incident. Consequently, the matter was scheduled for a hearing, which subsequently took place before ALJ William Edie on September 16, 2020.

10. Prior to hearing, Respondents sought the opinions of Dr. Mark Paz regarding the cause of Claimant's asserted low back pain. Dr. Paz completed an independent medical examination (IME) on May 26, 2020. As part of his IME, Dr. Paz took a history from Claimant, reviewed medical records and completed a physical examination. Following his IME, Dr. Paz issued a report dated June 15, 2020, outlining his opinions. (Resp. Ex. J, pp. 79-99). Dr. Paz concluded that Claimant's "L5-S1 broad-based posterior disc bulge with facet hypertrophy was not likely caused by the January 15, (sic) 2020, incident." Moreover, Dr. Paz concluded that this condition was not aggravated or accelerated by the cardboard pulling incident. Rather, Dr. Paz explained that the initial evaluations following the incident referenced symptomatology reported by Claimant that was limited to the left shoulder. (Resp. Ex. J, p. 87). He also noted that Dr. Schafer documented a familiarity with Claimant when the low back symptoms were first documented, suggesting that she was somehow influenced to conclude that the January 17, 2020 incident aggravated Claimant low back pain. (Id.). Finally, he notes that Dr. Schafer did not document a mechanism of injury that would support a causal link between a new or aggravated pre-existing low back condition and the January 17, 2020 work incident. Indeed, he interpreted Dr. Schafer's report to "confirm" that all of Claimant's post January 17, 2020 symptoms, including his neurological findings were related to the prior 2018 L5-S1 lumbar spine injury.

11. On August 3, 2020, Dr. Jack Rook performed an IME at the Claimant's request. Dr. Rook reviewed medical records related to Claimant's 2018 low back injury and 2020 low back injury to assess causation. Dr. Rook concluded that Claimant developed a new and distinct injury while at work on January 15, 2020, resulting in

worsening low back pain and the onset of radiculopathy symptoms in both lower extremities. (Clmt's. Ex. 15, p. 367).

12. Dr. Rook based his conclusion on the following factors:

- Claimant developed low back pain radiating down his left lower extremity while performing a physically demanding job on January 15, 2020;
- From a pathophysiological perspective, Claimant's body motions associated with pulling forces are known to place significant stress on low back spinal structures including muscles, discs, facet joints, and ligament/joint capsules;
- Claimant was able to perform his regular job duties without the need for physical restrictions before the January 15, 2020 injury;
- Claimant has not been able to return to his regular job since the January 15, 2020 injury;
- The lumbar discectomy surgery in 2018 was a success;
- The physicians that know Claimant best, Dr. Schafer and Dr. Stanton, both opine that Claimant's current increased low back pain that radiates into his lower extremities is related to the January 15, 2020 injury;
- Claimant's clinical objective examination has changed consistent with his complaints that are associated with the January 2020 injury;
- Claimant had an abnormal EMG indicating Claimant had an acute injury to his left L5 and S1 nerve roots;
- Claimant's physical examination demonstrated atrophy in his left calf, left extensor digitorum brevis, and absence of left ankle jerk.

(Clmt's. Ex. 15, p. 368).

13. Dr. Rook opined that Claimant did not demonstrate exaggerated pain behaviors. Rather, Claimant's presentation is consistent with his objective abnormalities (MRI and EMG) and physical examination. Dr. Rook opined that he did not believe Dr. Paz's conclusions are compatible with Claimant's history and review of the medical records. (Clmt's. Ex. 15, p. 368).

14. Dr. Paz performed an additional Rule 16 record review on August 11, 2020 to determine whether a request for prior authorization for an epidural steroid injection at the L5-S1 level was reasonable, necessary, and related to the work injury. (Resp. Ex. J, p. 101). Dr. Paz reiterated his opinion that the L5-S1 broad-based disc bulge and facet hypertrophy was not causally related to the January 17, 2020 incident. (Id. at p. 102). He noted that during the May 26, 2020 IME that Claimant demonstrated non-physiologic physical examination findings that were inconsistent with a lumbar

radiculopathy. (Id.). Accordingly, he concluded that Claimant's low back symptoms were non-organic in nature. (Id.). He recommended against authorization of the L5-S1 epidural steroid injection. (Id.).

The September 16, 2020 Hearing Before ALJ Edie

15. As noted, the question of whether Claimant's low back symptoms and need for treatment was related to the January 17, 2020, cardboard pulling incident was litigated before ALJ Edie on September 16, 2020. At the September 16, 2020 hearing, Claimant testified similarly regarding the mechanism of injury (MOI) and his low back complaints as he did during the instant matter.

16. At the September 16, 2020 hearing, Dr. Schafer testified Claimant was reporting a level one out of ten pain when she placed him at MMI on May 31, 2019 for his 2018 work injury. (Clmt's. Ex. 14, p. 332). She assigned no restrictions or maintenance care, and did not see Claimant again until after his January 2021 work injury. *Id.* at 332-33. When asked if Claimant reported back pain at the initial visit, Dr. Schafer stated, "Yes." (Id. at pp. 333-334). She did not examine Claimant on this date; however, she clearly cited in *her* first report that Claimant reported having back pain at the first visit. (Id. at p. 334).

17. Following the September 16, 2020 hearing, ALJ Edie determined that Claimant had sustained a compensable low back injury. He issued his Findings of Fact and Conclusions of Law on October 28, 2020 and ordered Respondents to pay for all reasonable, necessary, and related medical treatment, to include the lumbar epidural steroid injections recommended by Claimant's authorized treating provider (ATP) to cure and relieve Claimant from the effects of his low back injury. (Clmt's. Ex. 15, p. 373). As part of his order, ALJ Edie found the opinions and analyses of Claimant's ATP, Dr. Cynthia Schafer, Dr. Scott Primack and Claimant's independent medical examiner, Dr. Jack Rook, more persuasive than those of Respondents medical examiner, Dr. Mark Paz. (Id.).

18. In support of his order, ALJ Edie noted:

> Claimant had a good recovery from his 2018 back injury. Dr. Stanton's records reflect that the surgery was a success. This is corroborated by Claimant. Dr. Schafer released Claimant at MMI in May 2019 without permanent restrictions. Although Claimant had residual symptoms at MMI and beyond (hence his 21% impairment rating) Claimant returned to work and was able to perform his job duties without limitation between May of 2019 through January 14, 2020. Claimant's mechanism of injury is consistent with the symptoms he is now experiencing. To the extent that Dr. Paz differs with Dr. Schafer and Dr. Rook in this regard, the ALJ finds Drs. Schafer, Primack, and Rook more persuasive.

> Dr. Paz (and not entirely without reason) relies heavily on the timing of Claimant's belated reporting and documentation of his back symptoms in 2020. However, the ALJ does find Claimant's explanation therefor to be satisfactory – as does Dr. Schafer. The ALJ finds that Claimant did indeed suffer significant pain in his lumber region shortly after the work incident, which was temporarily overshadowed by pain in the shoulder, and confusion about the process of reporting his back issues.
>
> Of great significance is that Claimant has now had an abnormal EMG, indicating that he has an acute injury to his left side L5/S1 nerve roots. His clinically objective examination is now different as noted by Dr. Rook, and the ALJ finds it is due to this new work injury, and not merely from a natural degenerative process. Claimant no doubt went to work with a compromised lumbar region on January 15, 2020. However, he has now shown that, at a minimum, his work activities on that date aggravated his back to the point of becoming symptomatic. He now requires medical treatment to bring him back to (it is hoped) MMI. Hopefully the injections will do the trick, but he has waited long enough to find out. The ALJ finds that Claimant has shown that the need for the proposed injections is *causally related* to his work injury.

19. Following the September 16, 2020 hearing, Claimant underwent additional treatment to include an epidural steroid injection directed to the low back by Dr. Primack. (Clmt's. Ex. 1, pp. 11-12).

20. Dr. Schafer placed Claimant at MMI on February 25, 2021 for his January 17, 2021 injury. (Clmt's. Ex. 4, pp. 165-74). She assigned 12% upper extremity impairment for Claimant's left shoulder injury, which converts to 7% whole person impairment. She also provided an apportioned impairment rating for the lumbar spine. Dr. Schafer's spinal impairment included a 7% rating for Table 53 Specific Disorders, 14% impairment for abnormal range of motion and a total combined whole person impairment of 6% for neurologic dysfunction in the left lower extremity. Claimant's spinal and lower extremity (neurologic) impairments combined to yield a non-apportioned 25% whole person impairment. Dr. Schafer then apportioned Claimant's previous 21% spinal/neurologic impairment due to his 2018 low back injury from the current 25% spinal/neurologic impairment rating to reach an apportioned spinal/neurologic of 7%. Dr. Schafer then combined Claimant's 7% spinal/neurologic rating with the converted 7% whole person impairment for the left shoulder to reach a final rating of 14% whole person impairment. (Clmt's. Ex. 1, p. 12). Other than the need to continue with his home exercise/stretching program, Dr. Schafer did not recommend maintenance treatment. (Id.).

21. Respondents filed a Final Admission of Liability (FAL) admitting to the 14% impairment assigned by Dr. Schafer on March 18, 2021. (Clmt's. Ex. 1, p. 1).

Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

22. Claimant underwent the requested DIME with Dr. Wallace Larson on July 27, 2021. (Clmt's. Ex. 2, p. 32). Dr. Larson took a history, completed review of a "large" number of records and performed a physical examination. He noted that among the issues listed for determination was "whether or not the lumbar spine condition is a work-related disorder relative to the 1/15/2020 work-related injury." (Id. at p. 35). Dr. Larson diagnosed Claimant with a left shoulder strain with subsequent need for left shoulder arthroscopy, subacromial decompression and biceps tenodesis. (Id. at p. 37). Dr. Larson agreed that Claimant had reached MMI on February 25, 2021. (Id.). He then assigned 18% scheduled impairment of the left upper extremity based on loss of range of motion. (Id. at pp. 37-38).

23. Although he indicated that a determination of whether Claimant's low back condition was related to the January 17, 2020 work incident was part of the DIME, Dr. Larson provided scant analysis as to why he determined Claimant's back condition was unrelated to the cardboard pulling incident. Rather, Dr. Larson stated simply, "The opinion from Dr. Paz that the lumbar spine is unrelated to the occupational injury is likely correct." (Clmt's. Ex. 2, p. 37). Under the "Rationale for Your Decision" portion of his DIME report, Dr. Larson is similarly cursory. He simply notes, "[Claimant] did not initially report low back pain" before adding that "[e]ven if the spinal condition where (sic) determined, for administrative purposes, to be [part of the] 1/17/2020 incident at work, no additional impairment would be assigned." Indeed, while he conducted an examination of Claimant's lower extremities and performed range of motion measurements of the lumbar spine for "documentation" purposes, Dr. Larson concluded that Claimant did not have any "ratable impairment relative to the lumbar spine as a result of the 1/17/2020 injury."

24. Based upon the evidence presented, the ALJ is persuaded that Dr. Larson relied solely on the opinion of Dr. Paz to conclude that Claimant's low back condition was not related to the January 17, 2020, cardboard pulling incident.

Respondents' August 12, 2021 Final Admission of Liability and Alleged Overpayment

25. Respondents filed a FAL admitting to Dr. Larson's opinions concerning MMI and impairment on August 12, 2021. (Clmt's. Ex. 2, p. 19). In this FAL, Respondents admitted to $3,579.97 in TTD benefits; $2,679.09 in TPD benefits; and $9,344.61 in PPD benefits. (Id.). Claimant did not challenge these amounts. In total, Respondents admitted to a combined $15,603.67 in indemnity benefits.

26. Based on the indemnity payment log, Claimant cashed checks totaling $33,503.97 in TTD benefits, TPD benefits, and PPD benefits. (Resp. Ex. P, p. 197). Based on the August 12, 2021 FAL, Respondents admitted to a combined total of $15,603.67 ($3,579.97 + $2,679.09 + $9344.61 = $15,603.67) in TTD benefits, TPD benefits, and PPD benefits. (Clmt's. Ex. 2, p. 19). The Third-Party Administrator (TPA),

Gallagher Bassett, stopped payment or voided checks totaling $6,467.04. (Resp. Ex. P, p. 197). Prior to Gallagher Bassett's time as TPA, ESIS was the assigned TPA of the claim. (Hrg.Tr. p. 66, ll. 4-9). Claimant returned checks from ESIS totaling $8,083.80. (Resp. Ex. Q). Accounting for the $33,503.97 in cashed checks minus $15,603.67 in admitted combined benefits prompted Adjuster Anderson to prepare an Amended FAL reflecting an overpayment of $17,900.30 based on TTD benefits that were paid after Claimant returned to work and PPD benefits paid beyond the rating provided by the DIME physician. (Hrg.Tr. p. 71, ll. 13-24).

27. Claimant objected to Respondents' August 12, 2021 FAL. He filed an Application for Hearing on September 9, 2021, notifying Respondents that he intended to challenge the claimed overpayment and overcome the DIME causation, MMI and impairment. As noted, the matter proceeded to hearing before this ALJ on December 28, 2021.

Dr. Paz' Subsequent Records Review

28. Prior to the December 28, 2021 hearing, Respondents requested that Dr. Paz review additional records and provide an updated report supplementing his prior opinions. Dr. Paz issued his supplemental report on November 23, 2021. (Resp. Ex. J, p. 104). In this supplemental report, Dr. Paz is critical of Dr. Schafer's conclusion that Claimant's low back condition is related to the January 17, 2020 cardboard pulling incident. Dr. Paz concluded that Dr. Schafer's "record [did] not document that the mechanism of injury, diagnosis/diagnoses, and need for treatment, [were] causally related to the January 17, 2020 incident", Accordingly, Dr. Paz opined that she did not follow the Level II Accreditation "Causation Analysis method." (Id. at p. 105). Because there is a lack of medical documentation to support low back symptoms at Claimant's initial assessment by PA Call and Dr. Schafer, Dr. Paz opined that both Dr. Schafer and Dr. Rook both erred in concluding that Claimant's low back symptoms were related to the industrial event occurred January 17, 2020. (Id.). Dr. Paz asserted that he applied the Causation Analysis method consistent with the Level II training curriculum and maintained that it was "not medically probably that the lumbar spine L5-S1 broad-based posterior disc bulge with facet hypertrophy is causally related to the January 15, 2020, incident." Nor did he believe the incident aggravated the condition. (Id. at 106).

Dr. Rook's Second IME

29. Dr. Rook performed a second IME of Claimant at the request of his counsel on November 24, 2021, to address whether the DIME had erred in the opinions expressed in his report. (Clmt's. Ex. 13, p. 311). Dr. Rook summarized his previous IME and obtained an updated medical history from Claimant. Of significance is the April 20, 2021 note from Dr. Paul Stanton, Claimant's treating surgeon. (Id. at p. 314; See also, Clmt's. Ex. 7, pp. 219-222). Dr. Stanton stated that Claimant would be a reasonable candidate for an L3 to S1 reconstruction surgery. (Clmt's. Ex. 7, p. 221).

30. After summarizing the content of Dr. Larson's DIME report, Dr. Rook opined it was clear that Dr. Larson erred regarding both causation and MMI. (Clmt's. Ex.

13, p. 317). Dr. Rook explained that, since the date of the injury, Claimant has continued to struggle with severe low back pain and left more than right lower extremity pain, distinctly different from what he experienced prior to the occupational injury. (Id.). Claimant had no problems performing his job prior to this work injury and had no restrictions performing his activities of daily living. The opposite has been true since January 15, 2020. (Id.). Moreover, Dr. Rook points out the objective changes between Claimant's 2018 pre-surgical MRI and his 2020 post-injury MRI. (Id.). The September 20, 2018 lumbar MRI showed L5-S1 disc extrusion resulting in severe left lateral recess stenosis, which would affect the left S1 nerve root. It also revealed L4-5 left extra foraminal disc protrusion abutting the exiting L4 nerve root. (Resp. Ex. N, p. 190). The February 14, 2020 MRI revealed a mild broad-based posterior disc bulge combining with facet hypertrophy to cause mild *right* and marked *left* neural foraminal narrowing and *no* stenosis. (Id.)(Emphasis added). Finally, Dr. Rook noted that Claimant had an "abnormal electrodiagnostic study consistent with [an] acute lumbar radiculopathy in [the] L5 and S1 distributions [of] the left lower extremity. (Id. at p. 318).

31. The results of Claimant's November 24, 2021 physical examination, including visible atrophy of the left calf and an absent left ankle jerk reflex response, combined with his abnormal EMG testing result, lead Dr. Rook to conclude that Claimant was not at MMI. Indeed, Dr. Rook noted, "[p]lacing a patient with an acute radiculopathy at MMI when not allowing him to follow up with his spine surgeon[2] is inappropriate and quite frankly would constitute substandard medical care." (Clmt's. Ex. 13, p. 318). Accordingly, Dr. Rook determined that Claimant was not at MMI because he had not received the "treatment recommended by his orthopedic spine surgeon for a condition that was determined to be work related by an Administrative Law Judge" (ALJ Edie) per his order of October 28, 2020.

Claimant's December 28, 2021 Hearing Testimony

32. Claimant testified at hearing on December 28, 2021 on his own behalf. He explained that his job duties required him to drive his trash truck around town and pick up dumpsters and containers with the hydraulic lift on the truck. However, before the truck could lift the dumpster, Claimant had to ensure it only contained items they were supposed to take. For example, if people had dumped televisions or refrigerators, he would have to physically remove them in order to "level out" the container in preparation for loading it onto the truck. Claimant explained the prior work-related back injury he sustained, the treatment he underwent, and his ultimate recovery. He noted that Dr. Schafer was his ATP for that claim and Dr. Stanton was his surgeon. He noted that following a fall from a dumpster in 2018, he had severe low back pain until undergoing surgery with Dr. Stanton.

33. Claimant testified that following his low back surgery, his symptoms changes dramatically. According to Claimant, he was able to sleep and was substantially more functional following his back surgery. Indeed, he testified that he

[2] Per Dr. Rook, at the time Claimant was placed at MMI, he had not had an opportunity to follow-up with Dr. Stanton regarding the efficacy of his treatment and future treatment options. (Clmt's. Ex. 13, p. 318).

was able to return to full duty work. Nonetheless, Claimant testified that he did have some residual symptoms when he was released from care, including some numbness in his left foot/toes.

34. Claimant testified that while twisting his body in an effort to forcefully yank the compressed cardboard from the dumpster, he injured his low back. According to Claimant, he told PA Call during his initial appointment that he had back pain and she told him to wait to talk to Dr. Schafer about it. Per Claimant, the only reason he did not mark that he had pain in the back on the pain diagram at that time was because he thought it would be considered "pre-existing."

The December 28, 2021 Testimony of Dr. Jack Rook

35. Dr. Rook testified at hearing in his capacity as an expert in the fields of physical medicine and rehabilitation (PM&R), pain management, and electrodiagnostic medicine. He has substantial experience performing DIMEs. Dr. Rook testified that he read the updated report from Dr. Paz and the DIME report from Dr. Larson neither of which changed the opinion he originally formed after completing his first IME on August 30, 2020. Dr. Rook agreed with the determination of ALJ Edie regarding the cause of Claimant's low back pain and the need for low back treatment. In reviewing Dr. Larson's DIME, Dr. Rook noted that Dr. Larson failed to perform a causation analysis. Rather Dr. Rook testified, "[Dr. Larson] relied, basically, on a report that was already used in litigation [that] did not sway the administrative law judge." Regardless of the prior determination, he felt Dr. Larson still did not perform the necessary causation analysis. He also felt Dr. Paz's causation analysis was severely lacking due to his overreliance on the absence of a pain diagram depicting back pain, which absence was reasonably explained by Claimant. (Hrg. Tr. 49:3 – 50:6).

36. Dr. Rook elaborated on how the EMG performed confirmed that Claimant sustained an acute injury and that this injury was not a continuation or natural progression of his prior 2018 injury. (Hrg. Tr. p. 51, ll. 3-17). Dr. Rook noted that Dr. Larson felt that Claimant's current low back symptoms and need for treatment was not related to the January 17, 2020 incident, stating simply that he would agree with the causation opinions expressed by Dr. Paz in his IME report. Accordingly, Dr. Rook opined that Dr. Larson did not perform his own causation analysis. (Hrg. Tr. p. 55, ll. 14-25).

37. Respondents contend that Dr. Rook's testimony was not credible and inconsistent with the principles of the Level II accreditation materials and the AMA Guides to the Evaluation of Permanent Impairment. According to Respondents, Dr. Rook incorrectly testified that when performing DIMEs, if an area of the body is already deemed to be part of the claim, a causation analysis is not performed. In contrast, Dr. Paz testified that when selected as a DIME physician, a causation analysis should be performed on any relevant body parts. (Depo.Tr. Dr. Paz, p. 7, ll. 23-25 and p. 8, ll. 1-15). Respondents also assert that Dr. Rook erroneously declared that Dr. Larson erred

in his causation analysis because the low back condition had already been found by ALJ Edie to be related to the work injury.

The Post-Hearing Deposition Testimony of Dr. Paz

38. Respondents took the post hearing deposition of Dr. Mark Paz who testified as a board eligible, Level II Accredited physician in internal medicine on January 14, 2022. (Depo.Tr. Dr. Paz, p. 5, ll. 13-25). Dr. Paz testified consistently with his previously authored reports on direct examination. He reiterated that "[t]he medical opinion which [he] offered was that based on the mechanism of injury, the diagnosis both preexisting and current, and the need for treatment, it was not medically probable that the lumbar spine condition was causally related to the January 17th, 2020, incident." (Depo. Tr. Dr. Paz, p. 10, ll. 1-6). Dr. Paz was asked to explain the Level II training for performing a causation analysis, to which he responded:

> So the causation analysis is fundamentally based on collecting direct history, determining the mechanism of injury. For -- as an aside, the causation analysis is referenced in each of -- most all but one of the treatment guidelines, and so that's the actual description within the treatment guidelines and in this case for the low back which establishes the approach to determining causation analysis. So it's establishing what -- the mechanism of injury, more often than not based upon the direct history provided by the patient, physical examination findings regarding the focus of discomfort, pain, injury, and then the need for treatment of those -- of that body part or parts.

(Depo. Tr. 14:2-18).

39. Dr. Paz opined that considering the direct history provided by Claimant combined with the physical examination findings and his opinion that there was no load across the lumbar spine which would have aggravated a disc bulge at L5-S1, it was not medically probable that the lumbar spine condition was causally related to or aggravated/accelerated by the work incident. (Depo.Tr. Dr. Paz, p. 9, ll. 9-25, p. 10, ll. 1-6 and p. 11, ll. 4-9).

Additional Findings of Fact

40. Based upon the evidence presented, the ALJ finds that Claimant has overcome the DIME opinions of Dr. Larson with respect to the cause of Claimant's low back pain/symptoms. Here, the totality of the evidence presented persuades the ALJ that Dr. Larson erred in concluding that Claimant's low back condition was unrelated to Claimant's January 17, 2020 industrial accident.

41. While this ALJ finds Claimant's low back pain/symptoms causally related to the January 17, 2020 work-related incident involving the removal of compressed

cardboard from the dumpster in question, the evidence presented supports a finding that Claimant was properly placed at MMI with an apportioned and converted impairment totaling 14% of the whole person and no need for maintenance medical treatment as opined by Dr. Schafer on February 25, 2021. The evidence presented persuades the ALJ that Claimant remains at MMI.

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. 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).

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. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ agrees with the prior decision of ALJ Edie to find and conclude that the medical opinions and analyses of Drs. Rook, Schafer, Stanton, and Primack are credible and more persuasive than those

of Dr. Paz and Dr. Larson. Indeed, substantial evidence was presented to support a conclusion that Dr. Paz erred in concluding that Claimant's low back pain and need for treatment is unrelated to the January 17, 2020 incident. Because the ALJ concludes that Dr. Paz incorrectly concluded that Claimant's low back condition is not related to the January 17, 2020 incident and Dr. Larson simply parroted those opinions, it is highly probable and free from serious doubt that Dr. Larson's causality opinion is similarly erroneous.

Overcoming Dr. Larson's Division IME Regarding Causation and MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. The question of whether the Claimant has overcome the DIME physicians findings regarding causality, MMI or permanent impairment, is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc.,* W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (ICAO, May 20, 2003). Moreover, there is no requirement that the ALJ identify the precise scientific mechanism of causation if the evidence, as a whole, demonstrates causation to a reasonable degree of medical probability. *See Industrial Commission v. Riley,* 165 Colo. 586, 441 P.2d 3 (1968)(court has often sustained finding of causation where medical causes remained "shrouded in mystery.").

F. Based upon the evidence presented, the ALJ finds and concludes that, in addition to his left shoulder injury, Claimant probably aggravated the condition of his previously weakened low back while forcefully twisting from a bent over and crouched position in an effort to yank the compressed cardboard from the dumpster in question. Consistent with the determination of ALJ Edie, this ALJ is persuaded that Claimant's need for treatment, including physical therapy and the injection directed to the low back are related to this MOI. Although Dr. Paz disagrees on the basis that the described MOI

in this case placed no load across the lumbar spine, the ALJ finds this opinion and the suggestion that Claimant's low back pain/symptoms represent the natural and probable progression of a pre-existing condition unconvincing. In this case, the ALJ credits Claimant's testimony to conclude that his need to vigorously twist his entire body in order to yank/jerk material from the dumpster involved sufficient force across the low back to injure and otherwise aggravate his pre-existing lumbar spine condition. Indeed, Dr. Rook testified that the results of Claimant's MRI and electrodiagnostic study supported his conclusion that he sustained an acute and distinct injury as a consequence of the January 17, 2020 incident. (Hrg. Tr. p. 47, ll. 8-22; See also, Clmt's. Ex. 15, p. 373, ¶ 13). Moreover, the evidence presented supports a conclusion that Claimant's 2018 surgery was a success. He enjoyed a good recovery and was placed at MMI by Dr. Schafer without permanent restrictions. He returned to full duty work and was able to perform the full range of his job responsibilities between May 19, 2019 and January 17, 2020 without limitation. While he had persistent numbness in his left foot and toes following his 2018 surgery, the evidence presented is devoid of any persuasive indication that the condition of Claimant's low back was symptomatic and/or deteriorating leading up to the 2020 cardboard pulling incident. Thus, this ALJ concludes that Dr. Paz' suggestion that Claimant's back pain is related to the natural progression of a pre-existing condition is overstated. As noted by ALJ Edie, "Claimant no doubt went to work with a compromised lumbar region on January 15 (sic), 2020. However, he has now shown that, at a minimum, his work activities on that date aggravated his back to the point of becoming symptomatic." As did ALJ Edie, this ALJ has considered the remaining opinions of Dr. Paz regarding causation, including Claimant's belated reporting and documentation of symptoms. This ALJ finds Dr. Paz' concerns regarding the alleged tardy reporting of symptoms to have been addressed by Dr. Schafer and Claimant himself. Similar to ALJ Edie, this ALJ "accepts Claimant's explanation for the delay in reporting his back issues", which were "temporarily overshadowed by pain in the shoulder, and confusion about the process of reporting his back issues." Accordingly, the ALJ finds/concludes that Dr. Paz erred in concluding that Claimant's current low back pain/symptoms along with his need for low back treatment were not causally related to the January 17, 2020 work incident.

G. Based upon the evidence presented, the ALJ agrees with Claimant that regarding the cause of Claimant's back pain, Dr. Larson failed to address the objective differences observed in the multiple MRI reports or account for the acute findings on Claimant's recent electrodiagnostic study that support Dr. Rook's conclusion that Claimant suffered an acute injury to his low back. Rather, Dr. Larson, without any explanation, other than indicating that Claimant did not initially report low back pain, concluded that Dr. Paz's causation opinion was "likely" correct. Because this ALJ concludes that Dr. Paz' opinions concerning the cause of Claimant's low back pain are mistaken and highly probably incorrect and Dr. Larson simply and unmistakably adopted Dr. Paz' causality opinions without performing an independent analysis of his own, his causality opinion is equally errenous. The purpose of a DIME pursuant to § 8-42-107(8)(b) C.R.S. is for the physician to make an *independent* determination as to MMI based on their own analysis. Dr. Larson failed to provide such an analysis and

therefore erred in the completion of his DIME. Accordingly, Claimant has presented clear and convincing evidence to overcome Dr. Larson's opinions concerning causation.

H. While Dr. Larson's opinions regarding the causal relatedness of Claimant's low back pain to the January 17, 2020 incident have been overcome, the ALJ is persuaded that Claimant was properly placed at MMI by Dr. Schafer on February 25, 2021. Moreover, the evidence presented supports a finding that Claimant failed to present clear and convincing evidence that Dr. Larson's date of MMI, as adopted from Dr. Schafer, is highly probably incorrect.

I. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo.App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998).

J. Maximum Medical Improvement is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. In this case, the evidence supports a conclusion that Dr. Schafer placed Claimant at MMI on February 25, 2021. In her MMI report, Dr. Schafer outlined the treatment Claimant completed including left shoulder surgery, physical therapy, an epidural steroid injection and two orthopedic evaluations directed to his low back. Consequently, the ALJ is convinced that Claimant exhausted his treatment options and reached a point of maximum medical improvement. While Claimant alleged that Dr. Schafer placed him at MMI because the insurer would not pay for surgery, this is not documented anywhere in Dr. Schafer's medical records nor was any surgery ever pursued by Claimant or his providers, including Dr. Stanton. In addition, Dr. Schafer was aware of the outcome of the prior hearing and knew Respondents were ordered to pay for treatment of the low back. She noted in her medical records that the judge's order had been reviewed. Thus, the ALJ concludes that Claimant's testimony regarding the reason that Dr. Schafer placed him at MMI is, incredible, unpersuasive and highly probably incorrect.

K. Dr. Rook agreed that Claimant's left shoulder condition had reached MMI; nonetheless, he opined that the ATP and DIME physician erred in determining that the low back condition was at MMI. According to Dr. Rook, Dr. Schafer erred in placing Claimant at MMI before he returned to Dr. Stanton for follow-up. Given that, Claimant had an acute radiculopathy; Dr. Rook concluded that Dr. Schafer erred because Claimant had not been afforded the treatment, i.e. the surgery recommended by Dr. Stanton. Careful review of the record fails to support that Dr. Stanton actually requested authorization to proceed with an L3-S1 surgery as referenced by Dr. Rook as the basis for his opinion that Claimant is not at MMI. Rather, the records indicate that on April 20, 2021, Dr. Stanton sought authorization for bilateral L4-5 transforaminal

epidural steroid injection. (Clmt's. Ex. 7, p. 219). Although Dr. Stanton indicated that Claimant "would be a reasonable candidate for an L3-S1 reconstruction", he did not, contrary to Dr. Rook's suggestion, request authorization for surgery. After considering the totality of the evidence presented, including the reports of Dr. Schafer, the DIME report of Dr. Larson and the IME reports of Dr. Rook, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that Dr. Larson's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented supports a conclusion that by February 25, 2021, Claimant had exhausted the treatment options to cure and relieve him of the effects of his low back injury. The record submitted supports a conclusion that Claimant's medical progress had plateaued and that no further treatment was reasonably expected to improve his condition. Accordingly, Dr. Schafer placed Claimant at MMI and Dr. Larson agreed with this date. To the extent that Dr. Rook disagrees, this ALJ concludes that his deductions constitute a difference of opinion which does not rise to the level of clear and convincing evidence that is required to overcome Dr. Larson's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado,* W.C. No. 4-350-356 (ICAO, March 22, 2000). In this regard, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). Based upon the evidence presented, Claimant has failed to meet his required legal burden to set Dr. Larson's MMI determination aside. Because Claimant failed to overcome Dr. Larson's DIME opinion regarding MMI, this order does not address his entitlement to additional medical treatment or temporary partial disability benefits. Nonetheless, Claimant's entitlement to additional impairment must be determined because Dr. Larson's causality determination concerning the relatedness of Claimant's low back condition to the January 17, 2020 incident has been overcome.

Claimant's Entitlement to Additional Impairment

L. Where, as in this case, the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome. Rather, when the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct impairment rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAO, Sept. 16, 2002); *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). Because the evidence presented supports a conclusion that Claimant's low back condition is related to the January 17, 2020 work incident, the ALJ concludes that Dr. Larson erred in failing to rate Claimant's lumbar spine. Consequently, Dr. Larson's impairment rating has similarly been overcome.

M. Careful review of Dr. Schafer's impairment rating supports a conclusion that she properly considered and correctly apportioned Claimant's spinal impairment in this case. Indeed, the results of Claimant's imaging (MRI) and electrodiagnostic study support Dr. Schafer's conclusions that Claimant suffered impairment for specific disorders of the lumbar spine and neurologic disturbance of the left lower extremity related to the January 17, 2020 incident above that he had sustained as a consequence of his 2018 work-related injury. (Clmt's. Ex. 1, p. 12). The ALJ adopts Dr. Schafer's impairment rating to find and conclude that Claimant's overall permanent impairment related to his January 17, 2020, left shoulder and low back injuries is 12% upper extremity impairment or 7% whole person impairment combined with 2% whole person impairment for specific disorders of the lumbar spine and 15% left lower extremity, which equals 6% whole person impairment pre-apportionment. Apportioning 1% whole person impairment due to Claimant 2018 work injury from the 6% impairment for neurologic disturbance related to the January 17, 2020 work injury leaves 5% whole person impairment. Combining the various apportioned whole person impairment components of Claimant's rating related to the January 17, 2020 injuries equals a combined whole person impairment of 14% (7% whole person impairment for the left upper extremity + 2% whole person impairment for specific disorders of the lumbar spine + 5% whole person impairment for left lower sensory and motor nerve disturbance = 14% whole person impairment).

Respondents' Claimed Overpayment

N. For claims arising before January 1, 2022, "overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. Section 8-40-201(15.5), C.R.S. *See also Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo.App. 2009). Respondent has the burden to prove that Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo.App. 2002).

O. As noted, Respondents filed a FAL admitting to the 14% whole person impairment assigned by Dr. Schafer on March 18, 2021. (Clmt's. Ex. 1, p. 1). At the time this admission was filed, Claimant an overpayment of TTD existed in the amount of $1,270.31. (Id.). After his left shoulder surgery, Claimant was unable to return to work and Respondents began paying TTD benefits as of August 24, 2020 at a rate of $808.38 per week. (Id.; See also, Resp. Ex. P).

P. The claim was initially administered by ESIS but halfway through the claim it transferred to Gallagher Bassett. After the transfer, Gallagher Bassett was unable to stop payment on checks issued by ESIS. Thus, on the indemnity payment log, all checks issued by ESIS are marked as "cleared." There were three ESIS/CHUBB TTD checks returned to Respondents by Claimant and marked "void" that totaled $8,083.80. Though these three checks are noted as "cleared," they were not cashed by Claimant.

Q. Once Claimant returned to work, Respondents terminated TTD benefits and initiated Temporary Partial Disability (TPD) benefits. Respondents paid Claimant $2,679.09 in TPD benefits from September 24, 2020 through February 24, 2021 because Claimant was placed at MMI on February 25, 2021. (Clmt's. Ex. 1, p. 1; See also, Clmt's. Ex. P).

R. As noted above, Respondents admitted to Dr. Schafer's MMI and 14% whole person impairment rating determinations and began paying PPD benefits. After the DIME with Dr. Larson, Respondents admitted to the lower rating of 14% scheduled impairment and $9,344.61 in PPD benefits calculated as 14% x 208 x $320.90. After consideration of the checks that were returned by Claimant and stopped/voided by Respondents, Claimant was paid a total amount of $33,503.97 in combined TTD benefits, TPD benefits, and PPD benefits. *See* RHE P and Q. Based on the August 12, 2021 FAL, Respondents admitted to $15,603.67 in TTD benefits, TPD benefits, and PPD benefits. (Clmt's. Ex. 2, p. 19). Accordingly, Respondents contend that they have proven that Claimant has been overpaid in the amount of $17,900.30 ($33,503.97 paid - $15,603.67 owed equals an overpayment of $17,900.30).

S. Because Dr. Larson erred in failing to calculate Claimant's lumbar spine impairment based upon his erroneous conclusion that Claimant's low back condition was unrelated to the January 17, 2020 incident and the ALJ has adopted Dr. Schafer's February 25, 2021 apportioned impairment rating, the ALJ concludes that Respondents asserted $17,900.30 overpayment is incorrect. Based upon the evidence presented, the ALJ concludes that Respondents have proven that Claimant was overpaid $1,270.31 in TTD benefits at the time he was placed at MMI on February 25, 2021 by Dr. Schafer. (Clmt's. Ex. P). Respondents are entitled to recoup this and may offset $1,270.31 against the remaining PPD award based on Dr. Schafer's 14% whole person impairment rating as previously reflected in the March 18, 2021 FAL. (Clmt's. Ex. 1, p. 1).

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinions of Dr. Larson regarding causation is GRANTED. Claimant has proven, by clear and convincing evidence that Dr. Larson erred when he concluded that Claimant's low back condition was unrelated to Claimant's January 17, 2020 industrial accident.

2. Respondents shall pay PPD benefits consistent with the rating calculated by Dr. Schafer as part of her February 25, 2021 report of MMI and impairment.

3. Claimant's request to set aside the MMI determination of Dr. Larson is denied and dismissed.

4. Claimant's request for additional medical treatment, including the request for surgery is denied and dismissed. Claimant has failed to establish that he needs additional treatment to reach maximum medical improvement.

5. Claimant was properly placed at MMI by Dr. Schafer on February 25, 2021. Consequently, his request for additional TTD beginning February 25, 2021 and ongoing is denied and dismissed.

6. Respondents request to recoup the asserted overpayment in this case is amended from $17,900.30 to $1,270.31 as Dr. Larson erred in failing to rate the impairment associated with the January 17, 2020 injury to Claimant's lumbar spine. Respondents may offset the overpayment of $1,270.31 against the remaining PPD award as calculated from Dr. Schafer's February 25, 2021 impairment rating.

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

DATED: March 22, 2022

/s/ Richard M. Lamphere

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he was an employee of the putative Employer as defined by the Workers' Compensation Act at the time of his injury, and

II. Whether Respondents proved by a preponderance of the evidence that Claimant was an independent contractor.

IF CLAIMANT WAS AN EMPLOYEE, THEN:

III. Whether Claimant proved by a preponderance of the evidence that he suffered compensable injuries on July 8, 2021 while in the course and scope of his employment for Employer.

IV. Whether Claimant proved by a preponderance of the evidence that he is entitled to select his medical provider.

V. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the injury.

VI. What is Claimant's average weekly wage?

VII. Whether Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability benefits.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on October 25, 2021 on issues that included compensability, medical benefits, authorized provider, average weekly wage and temporary disability benefits.

Respondents' filed a Response to Application for Hearing on November 3, 2021 listing additional issues of independent contractor, not an employee, causation and denial of authorized treating physician.

Respondents conceded that Respondents failed to issue a designated physician list in this matter.

FINDINGS OF FACT

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

1. Claimant was 35 years of age at the time of the hearing, born on January 21, 1987. Claimant has been employed as a sheet rock/dry wall and frame worker for the past nine to ten years, and was knowledgeable and experienced in performing the job. Prior to working for Employer, Claimant was an employee of two other framing and dry wall companies performing the same kind of work he performed for Employer. Claimant did not need training when he started the job with Employer.

2. Claimant stated that he was hired to work for Employer by the foreman, who lived in the same apartment complex. However, Claimant knew the owner of the Employer business from working with him while they both worked for a prior employer.

3. When he was hired in March 2021, he was advised to show up to work at the site of a hospital by the foreman. Claimant did not meet up with the employer until a few days after he started working under the foreman's direction, who instructed him when to show up for work (at around 6:00 a.m.) and when the day was over. If they required Claimant to show up at a different time, the foreman would call him the prior evening, and would give him instructions about the change in time. The foreman would also instruct him which rooms or areas needed to be done and Claimant was not free to choose the sequence of the work or which projects to start on first. He was advised he would be paid $23.00 per hour and would work a minimum of 40 hours a week. Claimant did request from the owner an increase in wages and his hourly pay was raised to $24.00 per hour.

4. Claimant brought some of his own tools to perform the work but Employer also provided tools such as saws, sawzalls and robo saws. Employer had a tool chest where they could get the tools they needed to perform the job.

5. Claimant never owned his own company, had his own business cards and always worked for an employer who paid him hourly. He was never responsible to solicit jobs or obtain contracts. That was always Employer's responsibility. He also remembered that when he was hired, Employer asked him to fill out some paperwork, which he never did and his Employer never followed up to obtain the completed paperwork. Claimant never worked for any other employer while he was working for Employer but knew he could go work for another employer if he wished.

6. On July 8, 2021 Claimant was working on a hospital project for Employer when he was placing a corner piece in the room where he was working. He fell off a ladder, on his left side, hurting his left shoulder, arm, elbow and wrist, as well as hit his head. Claimant stated that the foreman saw him fall. He spoke with the foreman about the accident, and later that day, he spoke with the owner. Claimant advised that he was not feeling well. The owner advised him to go seek some chiropractic care or go to the hospital to seek medical attention and that Employer would pay for the costs of the medical care. Claimant was never able to communicate with Employer again as his calls went unanswered. Claimant has continued with problems with his left shoulder, elbow and wrist that have gone untreated.

7. Claimant was attended at Denver Health Medical Center/Federico Pena Family Health Center Urgent Care on July 8, 2021 by Mi Tran, M.D. with shoulder and arm pain as well as neck pain, since he hit the back of his head. Claimant reported was having pain on the later neck and left distal arm with some numbness and tingling. Dr. Tran documented that Claimant fell from a ladder at work from the height of 2.5 feet at

approximately 8:00 a.m. Upon exam, Dr. Tran found mild bony prominence of the left clavicle without dislocation or scapular winging, diffuse tenderness to palpation of left clavicle without step off, left upper extremity weakness, likely secondary to pain and limited abduction and internal rotation of left shoulder with pain elicited during both passive and active ROM. Claimant was neurovascularly intact with sensation symmetric. However he was positive for empty can test[1] and Neer's test.[2] X-ray of the left shoulder showed no fracture or dislocation. Dr. Tran stated that clinical history and exam were most likely consistent with left shoulder sprain. Dr. Tran recommended use of ice, tylenol/ibuprofen as needed and twice daily range of motion exercises. He advised that if Claimant had no improvement after 4-6 weeks, he should consider additional imaging studies such as MRI and a PT referral.

8. Dr. Tran issued a July 8, 2021 letter stating that Claimant could return to work modified duty with no lifting or vigorous activities to avoid re-injury to the left shoulder.

9. Claimant returned to DHMC Urgent Care on July 9, 2021 as a result of developing left wrist pain due to the fall the prior day. Claimant reported that he heard a crack/pop when he fell onto his left wrist when he fell. Examination by Nurse Ashley Randall showed no focal deficits but tenderness of the left ulnar wrist though no effusion or swelling and full range of motion. The x-rays showed moderate positive ulnar variance with the ulnar styloid nearly abutting the pisiform, with carpal joint spaces maintained.

10. On July 23, 2021 Claimant completed a Workers' Claim for Compensation, which stated that Claimant sustained injuries to his left elbow, wrist, shoulder, and left ankle on July 8, 2021 when he fell off a ladder, falling on his left side.

11. Claimant returned to Urgent Care on August 13, 2021 and was attended by Angela Smith, PA-C for his shoulder and left wrist injuries as Claimant reported he was not feeling better. Claimant reported he had a fall approximately one month ago from approximately two and half foot height while he was on a ladder at work. He stated since being see he had continued to wear his wrist splint without relief of his pain. He also had some type pain in his shoulder and some crepitus. He stated that his boss offered to help him with the bills for his evaluations but has not helped financially to that point. He stated he was trying to find help with Workers' Compensation. He denied any new injuries. He stated he had not had any numbness or tingling in his left upper extremity. He stated that it hurt to lift his shoulder. He stated he only periodically takes off the wrist splint. Ms. Smith obtained further wrist x-rays which did not change the prior assessment.

12. On August 16, 2021 Respondents filed an Employers' First Report of Injury noting that Claimant reported falling off a ladder and injuring his elbow, wrist, shoulder and ankle. They noted Claimant's date of hire as February 1, 2021 as a construction worker for Employer. The time of injury was 7:50 a.m. on July 8, 2021 and stated that Claimant's last day of employment was July 8, 2021. Finally, it disclosed that owner was advised of the accident on the date of the accident.

[1] Empty can test assesses the integrity of the supraspinatus muscle and tendon.
[2] Neer's test identifies possible subacromial impingement syndrome in the shoulder.

13. Respondents sent a Notice of Contest to Division and to Claimant on October 21, 2021, denying liability.

14. Claimant was evaluated by Dr. Tashof Bernton on January 6, 2022 at Respondents' request. Dr. Bernton reviewed the available medical records, took a history and performed a physical exam. On exam he found no evidence of pain behavior, tenderness over the anterior left shoulder, and limited range of motion. He had a negative empty beer can test, good strength within the range of motion demonstrated with intact sensation. With regard to the left wrist, Dr. Bernton found limitations of range of motion and pain with extension as well as over the ulnar aspect of the wrist. With regard to the left elbow,[3] Dr. Bernton stated that there was a palpable subluxation in the ulnar groove with flexion and extension of the elbow. He noted that Claimant had some diffuse tenderness to palpation of the left ankle but otherwise had a normal exam. Dr. Bernton stated that based on exam of the left shoulder, the differential diagnosis could possibly be rotator cuff tear as evidenced by the tenderness and loss of range of motion. He recommended an MRI to better assess the diagnosis. He also stated that further diagnostic testing was needed for the left wrist as TFCC or ligamentous tear were also possible but could not be detected upon exam or x-rays. He related both the left wrist and left shoulder injuries to the July 8, 2021 work related accident. He opined that the left elbow and ankle conditions were not related. He specifically cited to lack of documentation in the urgent care records for the latter mentioned conditions.

15. Employer's owner testified that he owned the business including in July 2021. Employer was a construction company specifically contracting work dry walling and framing, specifically involving commercial projects. He stated that he obtained contracts and obtained workers to perform the work that was required, but that he did not have any employees. Owner further testified that he had owned the business for four years and had always had workers' compensation insurance because the businesses that contracted with his company required the insurance despite not having any employees.

16. Owner testified that he contracted multiple workers on his project at the hospital. They were all paid though a 1099. He testified that he provided Claimant with a W-9 as he intended to send Claimant a 1099 as an independent contractor but he never received the form back from Claimant and he did not follow up to obtain the form. He stated that he never gave Claimant an employment application or an employment agreement and did not sign an exclusivity agreement. He stated that each individual was responsible to bring their own personal tools but that he provided the more expensive tools, especially the kinds of saws that cut hard materials, and hand saws. He stated that he only had experienced workers on his jobs so he did not have to provide any specific training as the workers knew their jobs.

17. Employer paid Claimant with Employer account checks in Claimant's own name but did not withdraw taxes. Owner did not know if Claimant had his own company. He did several favors for Claimant. He confirmed that he wrote the letter dated April 23, 2021 at Claimant's request, stating that Claimant was employed by Employer. He finally

[3] It is inferred that Dr. Bernton misstated the shoulder, but since he references the ulnar groove, which is at the elbow, it is assumed he simply made a clerical error, especially in light of the fact that he addressed the left shoulder first in his report.

stated that he had other workers that worked for the company and he paid them in the same manner that he paid Claimant, and all were responsible for paying their own taxes. During the period of March through July 2021 he had eight workers on his team and would tell them when to show up to work, would give them a schedule from 6 a.m. to 2:30 p.m., though sometimes would have to go in earlier. He oversaw the work being performed because he wanted his company to produce a good product but he was not concerned as he only had skilled workers that knew what they were doing. Owner agreed that he would direct workers where to show up and when, what job had to be done, in what order and the workers were not free to come and go as they pleased.

18. From the paychecks provided it is determined that the first two pay periods ending March 26, 2021 and April 2, 2021, Claimant was earning $23.00 per hour. Beginning April 3, 2021 Claimant started to earn $24.00 per hour. In calculating the fair approximation of Claimant's average weekly wage, wages from April 3, 2021 through July 2, 2021 were considered for a period of thirteen weeks and total wages earned of $12,272.00. By dividing the total earned by 13 weeks provides an average weekly wage of $944.00. As found, the fair approximation of Claimant's average weekly wage is $944.00 per week.

19. Claimant was able to return to modified work in October and November 2021 installing Christmas lights. Claimant testified that he worked with approximately 20 other workers. He was only obliged to pass the lights to his coworkers and the job did not involve any overhead activity.

20. Dr. Bernton testified by deposition regarding causation and his opinions based on his understanding of the *AMA Guides* as well as the accreditation materials. He stated that he presumed, if you have a traumatic injury like a fracture, that the ulnar nerve injury could change the structure of the ulnar nerve in the groove at the elbow, and that a subluxing ulnar nerve is generally caused by repetitive motion problems. He further testified that he saw no evidence in the record that Claimant had injured his left ankle but that Claimant has a probable Morton's neuroma of the left foot.

21. Claimant was an employee of employer, despite owner's understanding regarding his employees' employment. Claimant performed services for Employer. Claimant was under Employer's control, who determined his hours and wages, which work he was to be performed, when and where, and Employer was specifically required to hold insurance that covered his employees. As found, Claimant has shown that Claimant was an employee.

22. The totality of the evidence shows that Claimant was called in by Employers' foreman, and was hired to perform work at Employer's discretion. Hours were changed at the whim of Employer, who set the terms of the employment contract, as evidenced by Employer's determining Claimant's hourly pay rate and had the discretion to change that rate, upon Claimant's request. Claimant did not set his pay rate. Employer operated a drywall business, obtained contracts and employees to carry out the contracts. Claimant did not hold himself out as an independent contractor nor did he sign an independent contractor agreement. Claimant did not have cards or a business name or company and had always worked for other employers for the last nine to ten year prior to the injury. There was no evidence that Claimant had his own liability insurance nor that he took on

any particular risk in acquiring the work. He was not responsible for the work and Employer acknowledged that Claimant was supervised, could not come and go as he pleased and that Claimant was assigned the work he performed. While there are some factors that might tend to indicate that Claimant could be an independent contractor, such as his ability to seek other work or limited training, they were not persuasive. As found, Respondents have failed to show that Claimant was an independent contractor.

23. On July 8, 2021 Claimant fell off a ladder onto his left side, injuring himself. Claimant reported the injury to his employer and Employer recommended Claimant seek medical attention and Employer would take care of the costs of the medical care. As found, Claimant has shown by a preponderance of the evidence that Claimant was injured within the course and scope of his employment with Employer on July 8, 2021 when he fell off a ladder onto his left side.

24. Claimant reported to the Denver Health Medical Center/Federico Pena Family Health Center Urgent Care staff on July 8, 2021 with complaints of shoulder, arm and neck pain. While the urgent care staff concentrated on only the shoulder symptoms, the records note that Claimant made the complaints and the DHMC staff differentiated the shoulder from the arm. Claimant was immediately placed in a wrist brace the following day, which he continued to utilize for over a month subsequent to the work related injury. It is found that Claimant has shown that the neck, left shoulder, left arm, elbow and wrist conditions are proximately caused by the July 8, 2021 fall from the ladder while at work. Further, Claimant has failed to show that the left ankle was injured during the fall. As found, Claimant has shown by a preponderance of the evidence that the July 8, 2021 fall caused Claimant's injuries to his neck and left upper extremity including his shoulder, elbow and wrist.

25. Claimant stated that his employer designated no provider. As found, the right to select an authorized treating physician has passed to Claimant.

26. As found, Dr. Tran released Claimant to modified work on July 8, 2021 with restrictions of no lifting or vigorous activities. Nothing in the records indicates that Claimant has been released to full duty. In fact, Dr. Bernton stated that he would not know what restrictions, if any, were appropriate until the diagnostic testing took place to assess the extent of the injuries.

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. Employee or Independent Contractor Status

Pursuant to Sec. 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for

performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Whether a worker is an independent contractor "is a factual determination for resolution by the ALJ." *Nelson v. Indus. Claim Appeals Office,* 981 P.2d 210, 213 (Colo. App. 1998). If a claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant has established by a preponderance of the evidence that he provided services to Employer working as a framer and drywall worker as hired by Employer and was paid hourly for his services. Thus, Claimant is presumed to be an employee of Employer under Sec. 8-40-202 (2)(a), C.R.S.

Nonetheless, a putative employer may establish a presumed employee is an independent contractor by proving the presence of some or all of the nine criteria enumerated in Sec. 8-40-202(2)(b)(II), C.R.S. *See* Nelson *v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in Sec. 8-40-202(2)(a), C.R.S.; see *Indus. Claim Apps. Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2014). Section 8-40-202 (2)(b)(II), identifies the following nine criteria that must be shown "to prove independence." These nine criteria are that the putative employer must not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
>
> (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
>
> (H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession, or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

As found, the evidence at hearing established that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed." Claimant's testimony credibly established he had no prior experience in obtaining contracts, working for himself or performing any business related matters. Claimant persuasively testified that he was called in by Employer's foreman, was told where to show up, the time and how much he would be paid. Employer supervised Claimant's work and oversaw the actual work and instructed Claimant as to how the work should be performed, including in what order. While, as an experience dry wall worker, he may have required no training, Claimant was still advised where to begin, what work would be performed any given day and what the quality of the work he was required to accomplish. Employer established "quality standards" for Claimant. Claimant did not set the quality standards.

Employer maintained the right to terminate Claimant's work at any time, without a violation and without cause or liability. Employer paid Claimant personally instead of making checks payable to a trade or business name. Although Employer did not require Claimant to work exclusively for Employer and provided only some of the tools needed to accomplish the job, the ALJ finds that these factors are significantly outweighed by the existence of other factors enumerated in § 8-40-202(2)(b)(II), C.R.S.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed" and was not ""free from control and direction in the performance of the services, both under the contract for performance of service and in fact" as required by § 8-40-202 (2)(a), C.R.S. As found, Employer dictated the time and location of performance, the type of performance, the quality of the work, and work hours. The evidence established Claimant's work hours were not negotiated. Instead, Employer dictated the days and hours Claimant worked, and Employer was at liberty to change them at a moment's notice. Respondents have failed to prove by a preponderance of the evidence that Claimant was not an "employee" within the meaning of the Colorado Workers' Compensation Act. The ALJ finds that the above facts indicate that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed" and was not ""free from control

and direction in the performance of the services, both under the contract for performance of service and in fact" as set by § 8-40-202 (2)(a), C.R.S.

The analysis in *Softrock* reflects that the ALJ must look not only at the nine factors to discern customary engagement in an independent business but must also examine other factors involving "the nature of the working relationship." *Id*. Also see *Pella Windows & Doors, Inc. v. Indus. Claim Apps. Office*, 458 P.3d 128 (Colo. App. 2020). The above factors were expanded in *Industrial Claim Appeals Office v. Softrock Geological Services, Inc., supra*, to include whether the individual had an independent business card, listing, address, or telephone; whether there was a financial investment at risk of suffering a loss on the project; whether the individual used his or her own equipment; whether the individual set the price for performing the project; whether the individual employed others to complete the project; and whether the individual carried liability insurance. These factors, along with any other information relevant to the nature of the work and the relationship between the alleged employer and the individual, expand the ways to consider whether an individual is an employee or an independent contractor. As found, a significant number (but not all) of these factors existed in the relationship between Employer and Claimant. Specifically, Claimant did not own a business, nor did Claimant have a financial investment at risk, he did not set the price for performing the work, nor employed others to complete the work, and he did not carry liability insurance. To the contrary, it was employer that had the business, carried insurance, had control over the negotiated price of the project and controlled how much Claimant would be paid for the hourly work performed and Employer paid Claimant under his own name by company checks. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business. As found, Respondents failed to show that Claimant was an independent contractor by a preponderance of the evidence and Claimant is found to be an employee of Employer. Therefore, Respondents are liable for any compensable work related injuries flowing as a consequent of the employment.

C. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is

narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of his employment with Employer on July 8, 2021 when he was installing a metal corner piece while standing on a ladder, and fell off, landing on his left side, hitting his head, proximately causing neck, left shoulder, left arm/elbow and left wrist injuries. While there is evidence to the contrary, this ALJ finds persuasive that both Claimant and Employer reported in the initial claim reports that Claimant injured his left elbow. Further, there is no credible evidence that Claimant had a preexisting left elbow injury. Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on July 8, 2021 in the course and scope of his employment working for Employer.

D. Right to select a treating physician

Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Since Claimant was not provide a list of providers, he was seen only by DHMC Urgent care. As found, Employer never referred Claimant to a medical

provider to treat the injuries. Accordingly, the right of selection passed to Claimant. Because Claimant has not yet designated a physician regarding his injuries, he may now see a doctor of his choice.

E. Medical Benefits

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc*., W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). As found, Claimant has proven by a preponderance of the evidence that Claimant had no access to medical care other than through DHMC Urgent Care. Claimant was attended by the urgent care staff with regard to the multiple injuries but no continuing treatment was established. Claimant has shown that DHMC providers were authorized as emergent care in his matter. Further, Dr. Bernton recommended MRIs of the shoulder and wrist, both of which are shown to be reasonably necessary and related to the July 8, 2021 work related injury. Finally, Dr. Tran stated if Claimant had no improvement after 4-6 weeks, he should consider additional imaging studies such as MRI and a PT referral. As found, Claimant has continued with complaints regarding the upper extremity and is entitled to ongoing medical care. Claimant has shown by a preponderance of the evidence that he is entitled to a general award of reasonably necessary medical care flowing a natural consequence from the compensable injuries of July 8, 2021.

F. Average Weekly Wage

Section 8-42-102(2), C.R.S. 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 § 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. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from April 3, 2021 through July 2, 2021, a period of thirteen weeks, giving total wages earned of $12,272.00. By

dividing the total earned by the 13 weeks provides an average weekly wage of $944.00. As found, the fair approximation of Claimant's average weekly wage is $944.00 per week.

G. Temporary disability benefits

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. *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 claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. If a work-related injury contributes "to some degree" to a claimant's wage loss, the claimant is entitled to temporary total disability benefits. *Id*. at 548. "Temporary disability benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. Therefore, if the injury contributed in part to the wage loss, temporary total disability benefits can be denied, suspended, or terminated only if one of the four statutory factors in § 8-42-105(3) is satisfied." *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210-11 (Colo. App. 1996). Returning to work is one criteria for terminating TTD benefits. Section 8-42-105(3)(b), C.R.S. The persuasive evidence shows Claimant was disabled by the injury because he could not use his left upper extremity without work limitations for work tasks pursuant to Dr. Tran's restriction letter. As found, Claimant is entitled to TTD benefits beginning July 9, 2021.

However, there was credible evidence that Claimant performed some level of work in October and November, 2021. Therefore, Claimant may only be entitled to temporary partial disability benefits for those periods of time he worked. The record is incomplete and the wages for this period were not in evidence. Therefore, for those time periods Claimant worked, he would not be entitled to TTD.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is an employee of Employer.

2. Claimant sustained compensable work related injuries on July 8, 2021 in the course and scope of his employment with Employer.

3. Claimant sustained injuries to his neck and left upper extremity including his shoulder, elbow and wrist on July 8, 2021 or as a sequelae of the injuries.

4. Selection of the authorized treating provider passed to the Claimant. Within 30 days of this order Claimant shall provide notice to Respondents of Claimant's choice of physician.

5. Respondents are liable for authorized, reasonably necessary and related medical care for Claimant's neck and upper extremity injuries to cure and relieve Claimant from the effects of his July 8, 2021 work related injury, including the DHMC Urgent Care visits.

6. Claimant's average weekly wage is $944.00 per week, providing a temporary total disability benefits rate of $629.33.

7. Respondents shall file an admission of liability paying Claimant temporary total disability benefits beginning as of July 9, 2021 until terminated by law. Respondents may take credit for any periods of time when Claimant was working a modified job.

8. Within 20 days of the date of this order, Claimant shall provide wage records detailing his wages for any time periods worked, if any exist, or an affidavit summarizing earned wages for any periods subsequent to July, 2021 to the present.

9. Respondents shall pay interests at the statutory rate of eight percent on all benefits that were not paid when due.

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

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

DATED this 23rd day of March, 2022.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-170-976-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Dr. Eric Young is an authorized treating physician.

II. Whether Claimant has proven by a preponderance of the evidence that the right knee surgery underwent by Claimant on October 15, 2021, is medically reasonable, necessary, and causally related to the work injury on April 12, 2021.

FINDINGS OF FACT

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

1. On April 12, 2021, Claimant was kneeling or squatting down to work on a screen door. When he rose from that position to stand up, he felt two pops in his right knee. Claimant's knee continued to be painful, and the issues did not go away.
2. Respondents ultimately admitted liability for the claim.
3. Claimant had prior knee surgery on his right knee in 2007. *Tr*. at 20, ¶10-13. But Claimant has had no discomfort or problems involving his right knee from 2007 up until his work injury. *Id*., ¶19-21.
4. Claimant was referred to Concentra by Respondents. *Id*., ¶7-8.
5. On April 13, 2021, Claimant was seen at Concentra by Keith Meier, NP. NP Meier checked 'yes,' that his objective findings were consistent with history and/or work-related mechanism of injury/illness. Exhibit 1, page 159. Claimant reported that he was squatting to fix a screen at work, and when he stood up, he felt a pop in his right knee accompanied by pain. NP Meier noted Claimant was limping and had positive findings to a lateral Apley's Grind test and lateral McMurray test. Claimant was assessed with a strain of his right knee, and an MRI was ordered.
6. On April 16, 2021, Claimant was seen at Concentra by Linda Young, M.D. Dr. Young noted that 'yes,' her objective findings were consistent with history and/or work-related mechanism of injury/illness. Exhibit 1, page 148. Claimant had not yet had an MRI and was still complaining of tightness and pain in his right knee. Dr. Young's physical examination noted tenderness, pain, decreased range of motion, and positive lateral Apley's grind test and lateral McMurray test. Claimant was to be seen after his MRI.
7. On April 23, 2021, Claimant was seen at Concentra by NP Meier who continued to believe that Claimant's injury was work related. Exhibit 1, page 136. It was noted that NP Meier was requesting an MRI of the right knee after Respondents had

denied his first request for a right knee MRI. Claimant was continuing to complain of pain and stiffness in his right knee, with an increase in swelling.

8. On May 3, 2021, Claimant was seen at Concentra by NP Meier. No MRI had occurred yet, and Claimant was referred for physical therapy. Exhibit 1, page 126.

9. On May 13, 2021, Claimant was seen at Concentra by Dr. Jeffrey Baker. Dr. Baker believed that Claimant's injury was work related. Exhibit 1, page 103. Claimant reported no improvement in his knee. Claimant's MRI continued to be denied.

10. On June 3, 2021, after failing conservative care, Claimant underwent an MRI of his right knee. The impression of the MRI was: Complex medial and lateral meniscal tears and tricompartmental partial-thickness chondral loss. Exhibit 1, page 92-93.

11. On June 3, 2021, Claimant was seen at Concentra by Dr. Baker. Dr. Baker continued to believe Claimant's injury was work related. Exhibit 1, page 90. It would seem Dr. Baker did not yet have the MRI results from that day.

12. On June 4, 2021, Claimant was seen at Concentra by PA Toth, who also concluded that Claimant's injury was work related. Exhibit 1, page 76. Claimant's MRI results were reviewed, and Claimant was referred to an orthopedic specialist, Dr. Schnell.

13. On June 7, 2021, Claimant was seen at Concentra by Dr. Lucas Schnell. Dr. Schnell noted that it was his opinion that Claimant's injury was work related. Exhibit 1, page 71. Claimant noted his history of past knee injuries, but that he had been doing well before this work injury. Dr. Schnell reviewed Claimant's recent MRI results, and Dr. Schnell noted Claimant's complex multidirectional posterior horn medial meniscus tear, and undersurface tear of the lateral meniscus body with lateral extrusion. It was Dr. Schnell's recommendation that Claimant undergo right knee arthroscopic partial medial and lateral meniscectomies and chondroplasty.

14. On June 15, 2021, Aaron Morgenstein, M.D., reviewed the surgery recommendation made by Dr. Schnell. Dr. Morgenstein concluded that the surgery was not reasonable and necessary because in his opinion, surgery was not indicated under the Colorado Medical Treatment Guidelines. Dr. Morgenstein concluded that the surgery was not reasonable and necessary because Claimant had not undergone any injections and Claimant had significant degeneration and no clear mechanical symptoms. As a result, Dr. Morgenstein concluded the surgery was not reasonable and necessary for medical reasons. See Exhibit G, pages 76-77.

15. On June 30, 2021, Claimant was seen by Dr. Baker at Concentra. Dr. Baker continued to believe that Claimant's injury was work related. Exhibit 1, page 60. Claimant noted that the surgery recommended by Dr. Schnell was denied by Respondents and continued to complain of right knee symptoms. It was suggested that Claimant go back to Dr. Schnell for consideration of a right knee injection.

16. On July 19, 2021, Claimant was again evaluated by Dr. Schnell. Dr. Schnell noted that "I discussed with [Claimant] that I think it is unfortunate that this surgery has been denied. He has failed all conservative measures and I think he would benefit from arthroscopic partial medial and lateral meniscectomies with chondroplasty." Since surgery was denied, Dr. Schell did not provide the surgery, but did provide an intra-articular steroid injection. Exhibit 1, page 42 and Exhibit M, page 249.

17. On July 26, 2021, Claimant was seen at Concentra by Dr. Baker. Dr. Baker continued to believe that Claimant's injury was work-related. Exhibit 1, page 32. Claimant complained that his right knee was getting worse. It was noted that it was recommended Claimant undergo surgery, but the surgery was denied. Claimant was released from care by Dr. Schnell because the surgery continued to be denied. Claimant was referred for additional physical therapy, but Dr. Baker noted that Claimant continued to need surgery for his knee. Exhibit 1, pages 32-36.

18. On August 17, 2021, Claimant was seen by Dr. Baker at Concentra. Dr. Baker referred Claimant for an impairment rating and case closure but noted "the patient does need surgery but it has been denied." Exhibit 1, page 23.

19. On August 24, 2021, Claimant was seen at Concentra by Dr. Baker. It was noted that since the surgery was denied, there was nothing further that could be done for Claimant. Therefore, he placed Claimant at MMI and provided him an impairment rating. Exhibit 1, pages 3-7.

20. Because of the denial of surgery, Drs. Baker and Schnell refused to continue treating Claimant based on non-medical reasons.

21. On September 28, 2021, and because Dr. Schnell refused to operate on Claimant and provide additional medical treatment for non-medical reasons – the denial of surgery - Claimant chose to treat with Dr. Eric Young – a surgeon. Claimant was seen by Dr. Young and he obtained a history, performed a physical examination, and reviewed Claimant's MRI. Dr. Young concluded that Claimant would benefit from a right knee arthroscopy anticipating medial and lateral meniscectomy. He also indicated that evaluation of the joint surfaces could also be made at that time. Exhibit 2, page 173. As a result, surgery was scheduled.

22. On October 11, 2021, Claimant requested to change his authorized treating physician to Dr. Eric Young and Dr. Young requested the proposed knee surgery be authorized. *Resp. Ex.* N at 0001.

23. On October 15, 2021, before Claimant or Dr. Young received the denial of changing physicians and the denial of the proposed knee surgery from Respondents, Claimant underwent the surgery without prior authorization by Respondents. *Tr*. at 17, ¶9.

24. On October 19, 2021, Respondents denied the request for surgery and Claimant's request to change physicians to Dr. Young. The request for surgery was denied for non-medical reasons because Dr. Young was not an authorized provider. Exhibit N, pages 296-299.

25. Since the knee surgery, Claimant's pain and disability have abated and Claimant has been able to return to work and perform his regular job duties. Thus, the October 15, 2021, knee surgery cured and relieved Claimant from the effects of his work injury.

26. On December 14, 2021, Respondents had Dr. O'Brien perform a medical records review. *Resp. Ex*. D at 0001

27. In his report, he concluded that there was no mechanism of injury substantial enough to cause new tissue breakage or yielding, i.e., an injury, to Claimant's

meniscus. *Id*. at 0004. Instead, he concluded that Claimant's knee pain is due to Claimant's underlying arthritis that just happened to start hurting while Claimant was at work. Despite such conclusion, he fails to adequately and persuasively explain why Claimant did not have disabling pain before the accident and after the accident had disabling pain that did not abate until Claimant had surgery. Overall, the ALJ does not find Dr. O'Brien's opinion that Claimant did not suffer a compensable injury to be persuasive.

28. Dr. O'Brien also stated that the MRI was overinterpreted by Dr. Young and Dr. Schnell and that there was no evidence of an acute injury to the medial or lateral meniscus. *Id*. at 0005. The ALJ finds that Dr. O'Brien's attempt to negate the MRI findings - which shows a meniscal injury – is an attempt to disregard evidence that does not support his conclusions. As a result, the ALJ finds that Dr. O'Brien's rejection of the MRI findings shows a genuine bias against finding Claimant suffered a compensable injury for which Claimant requires medical treatment.

29. Dr. O'Brien also concluded that the surgery recommended by Dr. Young would fail because the meniscal findings on which they are basing their recommendation to proceed with surgery is not the pain generator. Thus, according to Dr. O'Brien, removing a portion of the damaged meniscal tissue will not relive Claimant's pain. However, despite Dr. O'Brien's opinion that the meniscus was not the pain generator, Claimant underwent the surgery to repair his meniscus and such surgery did relieve Claimant's pain. As result, the ALJ finds that Dr. O'Brien's premise that Claimant did not suffer a meniscal injury during the accident is negated by the positive outcome of Claimant's surgery.

30. Dr. O'Brien discussed several sources of orthopedic literature that show that osteoarthritic knee pain should not be treated with arthroscopic intervention. *Id*. at 0007. He did not, however, provide copies of the literature on which he based his opinion. Plus, despite the citation of such literature, the ALJ finds that Claimant had the surgery to relieve him from the effects of an acute injury to his meniscus and not to treat his arthritis.

31. Through his testimony, Dr. O'Brien also elaborated on his expert medical opinions. He stated that in his practice, he would not recommend a knee arthroscopy in patients 45-years-old or older with underlying arthritis as the surgery would likely be more harmful than beneficial. *Tr*. at 25, ¶19-23. He explained that in this group of patients, he would recommend other modalities while waiting on a total knee replacement. *Tr*. at 26, ¶1. Despite this testimony, Claimant had the surgery in October of 2021, and such surgery has provided pain relief thus showing that at least at this time, the surgery was reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

32. Dr. O'Brien also testified that he understood the mechanism of injury in this claim to be the act of kneeling and arising with associated pain and popping. *Tr*. at 27, ¶18-20. He then testified that arthritis is a preexisting condition and that it was clearly evident that Claimant had arthritis in his knees in his initial x-rays. *Tr.* at 29, ¶3-6. The arthritis caused diseased cartilage which resulted in bone approaching bone. *Id.*, ¶12-15. Despite Claimant having arthritis in his knee, Claimant's underlying

condition was asymptomatic before the accident and symptomatic and in need of treatment after the accident which caused Claimant's symptoms to develop at that time and necessitated the need for medical treatment.

33. Dr. O'Brien also testified that Claimant's injury was a natural progression of his preexisting degenerative arthritic condition. *Tr*. at 30, ¶5-10. He stated that this is the way arthritic knees act when a simple activity such as kneeling and arising is associated with noises like popping or symptoms of pain. *Id*., ¶10-12. He said that these activities are simply not traumatic enough to result in new tearing of tissue, and it just the way an arthritic knee expresses itself. *Id*., ¶14-18. The ALJ, however, also does not find this conclusion to be persuasive. Again, Claimant was asymptomatic before the work incident and became symptomatic immediately after the work incident – and the symptoms never abated until he had the surgery recommend and performed by Dr. Young.

34. Dr. O'Brien also testified that the noise of popping by itself does not signify that an injury occurred. *Id*., ¶22-23. He stated that arthritic joints have irregular surfaces that rub against each other that can cause a popping noise as an expression of the arthritis itself. *Tr*. at 31, ¶2-11. He added that arthritic joints, in almost all cases, make noise. *Id*., ¶13 and that its absence would be unusual. *Id*., ¶13, ¶16. Again, as for this conclusion, Dr. O'Brien appears to dismiss the fact that Claimant did not just experience popping due to the work accident, he experienced popping with the immediate onset of disabling pain which did not stop until he had surgery.

35. Based on the findings above, the ALJ does not find the opinions of Dr. O'Brien to be persuasive.

36. The ALJ does, however, find the opinions of Claimant's treating providers that his condition is work related and that he needs surgery to be persuasive because their opinions are supported by Claimant's statements to his providers, their physical findings, Claimant's medical records, and his improvement after the surgery.

Ultimate Findings

37. Claimant suffered an acute injury to his meniscus that is causally related to his work duties.

38. Due to his work injury – a torn meniscus - Claimant underwent conservative medical treatment that failed to relieve him from the effects of his work injury.

39. Dr. Schnell recommended surgery that was reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

40. The surgery recommended by Dr. Schnell, an authorized treating physician, was denied based on the medical reasons outlined by Dr. Morgenstein. Based on the denial, Dr. Schnell refused to perform the surgery. Thus, he refused to provide additional medical treatment for non-medical reasons.

41. Because Dr. Schnell refused to provide additional medical treatment for non-medical reasons, the right of selection passed to Claimant and Claimant selected Dr. Young to treat him for his work-related injury. As a result, Dr. Young is an authorized provider. After Claimant selected to treat with Dr. Young, Claimant underwent knee

surgery with Dr. Young.

42. The surgery recommended and performed by Dr. Young was reasonably necessary and causally related to treat Claimant from the effects of his work injury.

43. The surgery performed by Dr. Young cured and relieved Claimant from the effects of his work injury.

44. Because the surgery was reasonably necessary and causally related to the industrial injury, and performed by an authorized provider, Respondents are liable for the surgery and associated medical treatment.

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 Dr. Eric Young is an authorized treating physician.

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

If the designated physician refuses to treat for non-medical reasons, such as compensability has not been established, the right of selection passes to Claimant. Section 8-43-404(5)(a)(I)(A) implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. See *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). If Respondents timely designate a physician and the physician provides medical treatment in a timely manner in the first instance, the right of selection passes to the Claimant if the physician refuses to treat the Claimant for non-medical reasons. Whether an authorized physician has refused to provide treatment for non-medical reasons is a question of fact for the ALJ. *Ruybal v. University of Colorado Health Sciences Ctr*., 768 P.2d 1259 (Colo. App. 1988); *Lesso v. McDonalds*, W.C. No. 4-915-708-01 (ICAO, Apr. 21, 2014).

Drs. Baker and Schnell refused to continue treating Claimant because authorization for the knee surgery was denied. Therefore, they refused to treat Claimant for non-medical reasons. As a result, the right to select a treating physician passed to Claimant and Claimant chose Dr. Young.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the right of selection passed to Claimant and that he had the right to select Dr. Young as an authorized treating physician and did so. As a result, Dr. Young is an authorized treating physician.

II. Whether Claimant has proven by a preponderance of the evidence that the right knee surgery underwent by Claimant on October 15, 2021, is medically reasonable, necessary, and causally related to the work injury on April 12, 2021.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

Immediately prior to squatting down to work on a screen, Claimant's knee was asymptomatic. He was having no problems with his knee, and it was pain free. Claimant, however, bent over to perform a work function, and when standing up felt two

pops in his knee and then had the immediate onset of pain and disability. Thereafter, an MRI demonstrated a torn meniscus.

Every treating provider that issued an opinion on relatedness all said the same thing- they believed the injury was work related. Dr. Baker, Dr. Schnell, PA Toth, and NP Meier all believed and affirmatively stated that the injury was work related. No treating doctor in this claim contested that Claimant's knee symptoms and need for treatment was work related. The only doctor that had a negative opinion or issue with the injury and proposed surgery was Respondents' expert, Dr. O'Brien. However, as found, the ALJ did not find Dr. O'Brien's opinions to be persuasive. The ALJ does, however, credit the opinions of the other medical providers who concluded that Claimant's torn meniscus was work related. As a result, the ALJ finds that Claimant's torn meniscus was caused by his work activities.

As found, the onset of Claimant's knee pain and need for medical treatment was his work incident when he suffered a torn meniscus. Drs. Schnell and Young recommended knee surgery to repair Claimant's torn meniscus to decrease his pain and increase his function. Claimant ultimately had the surgery. The surgery decreased Claimant's pain and allowed Claimant to return to full duty. At no point until after the knee surgery did Claimant's knee pain and disability go away. While Claimant did have preexisting arthritis in his right knee, it was the work accident that caused Claimant to tear his meniscus and develop knee pain and necessitated the need for medical treatment in the form of surgery – which successfully reduced his pain and allowed Claimant to return to work. As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the knee surgery performed by Dr. Young was reasonable, necessary, and causally related to his industrial injury.

ORDER

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

1. Dr. Young is an authorized treating provider.
2. The surgery performed by Dr. Young is reasonably necessary and causally related to Claimant's work injury. Therefore, Respondents shall pay for the surgery performed by Dr. Young – subject to the Colorado medical fee schedule.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 25, 2022.

/s/ Glen Goldman

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

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, an entitlement to temporary disability benefits.

2. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of his employment on September 2, 2021, and the wage loss resulting from his termination.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 39-year-old man who was employed by Employer as a night fleet fueler. Claimant's job duties included driving a fuel truck to various job sites and fueling vehicles at those sites. Claimant's job required him to carry a fueling hose from the fuel truck to other vehicles, climb ladders while carrying a fueling hose to reach the other vehicle's fuel tank. The fuel hose weighs more than ten pounds, and in performing his job, Claimant was required to drag or carry the hose up a ladder, and reach overhead with the hose, and reach his arm away from his body. Claimant's regular work hours were Tuesday through Saturday, from approximately 3:00 to 4:00 p.m. until after midnight.

2. During the night of August 24, 2021, Claimant sustained a compensable injury arising out of the course of his employment with Employer when he fell from a ladder while working to refuel a vehicle.

3. Claimant reported his injury to Employer that night and was advised to contact his supervisor, [Redacted, hereinafter RB]. Claimant contacted Mr. RB[Redacted] the following morning and was advised to go to Concentra for evaluation.

4. On August 25, 2021, at approximately 9:50 a.m., Claimant was evaluated at Concentra by Barry Nelson, D.O. Claimant reported a mild headache, jaw pain, neck pain and upper back pain. Dr. Nelson examined Claimant and diagnosed him with an acute neck strain and contusion of the jaw. Dr. Nelson assigned written work restrictions of ten pounds for lifting, repetitive lifting, and carrying, pushing/pulling of twenty pounds, no reaching overhead, and no reaching away from the body. Dr. Nelson indicated Claimant could return to modified duty on August 26, 2021, and that the restrictions would remain in place until Claimant's scheduled follow-up visit on August 30, 2021. (Ex. A). Claimant's restrictions remained unchanged until December 2, 2021. On December 2, 2021, Dr. Nelson changed Claimant's restrictions to include lifting, repetitive lifting, and carrying limits of twenty pounds, pushing/pulling of forty pounds, and no overhead reaching. These work restrictions remained in place through Claimant's last documented visit with Dr.

Nelson on December 23, 2021. No medical records were admitted demonstrating that Claimant's restrictions have been lifted. (Ex. A).

5. On August 25, 2021, Claimant provided his supervisor, RB[Redacted], with a copy of the written work restrictions via text message. The work restrictions imposed by Dr. Nelson were such that Claimant could not fully perform his job duties, which required lifting, carrying, pulling, and pushing in excess of the assigned weights, and required Claimant to reach away from his body and above his head. (Ex. C).

6. Claimant testified that during their phone call on August 25, 2021, Mr. RB[Redacted] indicated that another employee would take over Claimant's route, and that Claimant should be available by telephone to provide the replacement driver with information and assistance. Claimant testified that he was available and did speak with his replacement sometime during the week.

7. Claimant further testified that Mr. RB[Redacted] did not instruct Claimant to return to work, and Claimant's impression was that he was to keep Mr. RB[Redacted] updated with his medical restrictions. Claimant testified that he spoke to Mr. RB[Redacted] two to three times following his injury, which is consistent with Mr. RB[Redacted] 's testimony.

8. In internal emails on Friday, August 27, 2021, Mr. RB[Redacted] and others discussed assigning Claimant a limited duty position, including having Claimant ride with his replacement driver and provide instructions. No credible evidence was admitted indicating that this limited duty position was communicated to Claimant in writing or otherwise. Moreover, after receiving Claimant's written work restrictions on August 25, 2021, Employer did not provide Claimant with a written offer of modified employment pursuant to §8-42-105(3), C.R.S

9. Mr. RB[Redacted] testified that he texted and called Claimant several times on August 25, 2021, to ask Claimant to complete an "incident report" for Employer. Both Mr. RB[Redacted] and Claimant testified they exchanged text messages between August 25, 2021 and Friday, August 27, 2021. The text messages were not offered into evidence. Mr. RB[Redacted] characterized his messages to Claimant as instruction Claimant to "call me, and we still need to fill out the accident report, so we know what happened." Claimant testified that Mr. RB[Redacted] did request the incident report be completed. Although Claimant was aware that Employer was requesting the Incident Report, no credible evidence was submitted to indicate that Employer advised Claimant of the timeframe for returning the Incident Report, that Employer placed any urgency on returning the report, or that the failure to return it within any specific timeframe could result in termination or other disciplinary action.

10. On the morning of Monday, August 30, 2021, Claimant spoke with Mr. RB[Redacted] on the phone and also sent Mr. RB[Redacted] a copy of the doctor's report. In an email dated August 30, 2021 at 10:41 a.m., Mr. RB[Redacted] wrote: "[Claimant] just now contacted me, he was under the impression is not able to work at all. [Claimant] thought the light duty didn't start until 8/30. I told [Claimant] we had training

courses we could have had him doing and he was on light duty since he was seen by Concentra. He is currently filling out injury report." (Ex. C).

11. Mr. RB[Redacted] testified that he sent Claimant an email to permit Claimant to perform light duty work in the form of online "Safety Training," on August 30, 2021. He further testified that Claimant completed one night of safety training on August 30, 2021, and that Claimant performed the training for "one night and then he stopped doing it." Mr. [Redacted, hereinafter EB] testified that after August 30, 2021, the Claimant was "unreachable" and did not communicate with Employer until Wednesday, September 1, 2021, when Mr. B[Redacted] contacted Claimant by phone.

12. Mr. RB[Redacted]'s testimony on this issue is inconsistent with the documentary evidence. Exhibit C, p. 70, is an email from [Redacted, hereinafter TS], Employer's HSSE Manager, which shows Claimant was not set up to do online "Safety Training" until August 31, 2021 at 4:33 p.m. At that time, Mr. TS[Redacted] sent Claimant information to access the online training. (Ex. C). On the evening of August 31, 2021, Claimant performed on-line training as requested by Employer. (Ex. C). The email to Claimant communicating the online Safety Training instructions was not admitted into evidence, and no credible evidence was admitted regarding the specific instructions Employer provided to Claimant with respect to the online "Safety Training." Other than the August 31, 2021 email from Mr. TS[Redacted], no credible evidence was admitted demonstrating Employer attempted to contact Claimant on August 31, 2021.

13. On September 1, 2021, Employer's EB[Redacted] emailed Mr. RB[Redacted] asking if Claimant had performed light duty work. Mr. RB[Redacted] responded that Claimant was doing "a light duty course." (Ex. C).

14. At approximately 4:00 p.m., on September 1, 2021, Ms. EB[Redacted] indicated in an email that she had called Claimant and requested that Claimant return the "incident report" "ASAP." (Ex. C). Mr. RB[Redacted] testified that Claimant did return Ms. EB[Redacted] 's call and returned the incident report. The report contained in Exhibit C is undated. Mr. RB[Redacted] testified he did not know when Claimant returned the incident report, but also that Claimant returned the incident report on September 1, 2021.

15. Mr. RB[Redacted] testified that Employer made the decision to terminate Claimant on September 1, 2021, because Claimant had returned the incident report, was non-communicative and had stopped doing online training. On September 2, 2021, Employer's terminated Claimant's employment. (Ex. C). The termination letter authored by EB[Redacted] (Senior HR Manager), identified the reasons for termination as: "no call no shows, poor communication with your manager and not completing assigned work." (Ex. C). The termination letter does not reference the incident report.

16. On October 19, 2021, Respondents filed a General Admission of Liability, admitted for an average weekly wage of $100.00. (Ex. D).

17. Claimant began working for Employer in April 2021, at an initial pay rate of $21.00 per hour. After June 13, 2021, Claimant earned $27.50 per hour, and received a "shift

premium" of $2.50 per hour. Claimant also received overtime pay at the rate of $41.25 per hour, and a shift premium of $1.25, during this time. During the five full pay periods before his injury and after Claimant's raise to $27/50 per hour, (i.e., June 13, 2021 – August 21, 2021), Claimant worked an average of 95 hours per two-week period and earned an average of $1,451.35 per week, which included overtime pay and shift premiums. (Ex. B). The ALJ finds Claimant's average weekly wage at the time of injury was $1,451.35.

18. Claimant testified that he applied for and received unemployment benefits for approximately two months following his injury, ending in November 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 Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). 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.

Claimant suffered admitted injuries on August 24, 2021, and was under work restrictions through at least December 23, 2021. Notwithstanding that the Employer did not provide Claimant with a written offer of modified employment, Claimant returned to modified employment on August 31, 2021, when he performed online safety training. Accordingly, Claimant's right to TTD benefits terminated on August 31, 2021. However, upon termination of his employment on September 2, 2021, Claimant sustained actual wage loss due to his industrial injury and resulting disability. On and after September 2, 2021, Claimant remained under work restrictions that prevented him from resuming his pre-injury employment. Through at least December 23, 2021, Claimant was medically incapacitated with restrictions of bodily function that caused him to have work restrictions and impairment of his wage-earning capacity. His wage-earning capacity is thus impaired due to his industrial injury and resulting disability. No evidence was presented that Claimant has reached MMI or that his ATP has provided a written release to return to regular employment after September 2, 2021. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from August 25, 2021 to August 30, 2021, and beginning again on September 2, 2021.

Responsibility For Termination

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that 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). "Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011).

Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for his termination. Employer's stated reason for terminating Claimant's employment was "due to no call no shows, poor communication with your manager and not completing assigned work."

No credible evidence was admitted that Employer had a specific "no call/no show" policy or that Claimant violated any such policy even if one existed. Claimant was assigned work restrictions on the morning August 25, 2021, which did not permit Claimant to perform his regular job duties, and Employer was aware of these restrictions. Nonetheless, Employer did not provide Claimant a written offer of modified employment. It was not until 4:33 p.m., on August 31, 2021, that Employer provided Claimant with access to the online training program. Thus, between August 25, 2021 and August 31, 2021, Employer did not assign Claimant work, and Claimant was under no obligation to contact Employer to advise he would be a "no show." Respondents have failed to establish by a preponderance of the evidence that Claimant violated any purported "no call/no show" policy.

Respondents have also failed to establish that Claimant volitionally failed to complete assigned work. Employer did not provide Claimant access to the online training until the late afternoon of August 31, 2021, and Claimant performed the work that evening. The evidence indicates that Employer's expectation was that Claimant would complete the online training during his normal shift, during the evenings. As found, Employer decided to terminate Claimant on September 1, 2021, before Claimant would have had the opportunity to continue with the online training that evening. Thus, Employer decided to terminate after Claimant had completed the only work Employer assigned following his injury, and before he had the opportunity to complete the training on a second day. Although Claimant did not perform the online training on September 1, 2021, this was after Employer's termination decision and was not the reason for termination. Other than the online training assignment on August 31, 2021, no credible evidence was presented

that Employer "assigned" any other work that Claimant could have completed prior Employer deciding to terminate him on September 1, 2021. Accordingly, the ALJ finds that Claimant did not volitionally fail to complete "assigned work," prior to his termination.

With respect to the alleged "poor communication," the evidence was insufficient to establish by a preponderance of the evidence that Claimant's alleged poor communication was volitional. Claimant immediately reported his injury to Employer. Although Mr. RB[Redacted] testified that he left voice and text messages for Claimant, the evidence was insufficient to establish the content of those messages, other than Mr. RB[Redacted] testifying that he left messages to "call me" and to return an incident report. Thus, the ALJ is unable to determine whether Mr. RB[Redacted]'s communications to Claimant informed Claimant of the apparent urgency Employer placed on returning the incident report or returning Mr. RB[Redacted]'s calls within any set period of time. Nor was Claimant informed his failure to immediately return the incident report would result in termination. Mr. RB[Redacted]'s testimony that Claimant refused to communicate with Employer from August 30, 2021 to September 1, 2021, is not persuasive. The only evidence that Employer attempted to communicate with Claimant during that timeframe was Mr. ST[Redacted] sending Claimant the online training at the end of the day on August 31, 2021. The ALJ finds that Respondents have failed to meet their burden of establishing that Claimant's communication issues with Mr. RB[Redacted], were volitional acts rendering the Claimant responsible for his termination.

Although Claimant was capable of the modified work that Employer assigned to him post-injury (i.e., the online training), Claimant was not "responsible" for his termination by Employer during his period of temporary disability. As such, a causal link between Claimant's industrial injury and his post-termination wage loss is established, and Claimant is entitled to temporary total disability benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, continuing until one of the criteria of § 8-42-105(3)(a)-(d), C.R.S, is met.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's average weekly wage at the time of injury was $1,451.35.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from August 25, 2021 to August 30, 2021, and from September 2, 2021, 2020, until terminated by law is GRANTED. Insurer shall pay Claimant TTD benefit during the relevant time period, until terminated by law, subject to any applicable offsets.

2. Claimant's average weekly wage at the time of injury was $1,451.35

3. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due

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: March 25, 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 he suffered a compensable industrial injury on December 18, 2020.

II. If Claimant sustained a compensable industrial injury, whether the medical treatment by Dr. Higgins and Dr. Zublin was reasonable, necessary and causally related to the injury.

III. Whether Claimant proved Insurer is subject to penalties under Section 8-43-304(1), C.R.S. for an alleged violation of Section 8-43-203(4), C.R.S.

The parties agreed to hold the issues of Average Weekly Wage, Temporary Total Disability, and Temporary Partial Disability benefits in abeyance.

FINDINGS OF FACT

1. Claimant is the owner-operator of Employer, a granite installation company. Claimant personally obtained workers' compensation insurance for Employer. Claimant performed work for Employer installing and repairing granite countertops at various commercial and residential locations throughout Colorado, Wyoming and Nebraska. Claimant's regular job duties included carrying heavy granite slabs from his work truck into the locations of installation.

2. On December 17, 2020 Claimant performed two installation jobs in Grand Junction, Colorado. Claimant spent the night of December 17, 2020 in nearby Montrose, Colorado, where he was scheduled to perform additional installation and repair jobs the following day. Claimant was in Montrose, Colorado for the specific purpose of performing his regular granite installation and repair duties.

3. On December 18, 2020 Claimant completed his first granite installation job of the day in Montrose, Colorado. While en route to the location of his next granite installation, Claimant was involved in a motor vehicle accident ("MVA"). As Claimant was driving through an intersection, a truck T-boned Claimant's vehicle, striking his work truck on the driver's side. Claimant was restrained by a seatbelt at the time of the MVA and the airbags did not deploy. Police subsequently arrived at the scene and filed an accident report. Claimant did not report any injury to the police.

4. Claimant testified he experienced pain in his neck, upper back and left wrist as a result of the MVA. Claimant testified did not seek medical attention at the time because he thought he could handle the pain and hoped the pain would soon subside. Claimant completed his remaining installation and repair jobs on December 18, 2020. He testified he had difficulties carrying the granite slabs. Claimant drove back to Denver, Colorado in

pain that same evening and experienced trouble sleeping. The following morning Claimant experienced worsened pain in his neck and upper back.

5. Claimant subsequently called the insurance carrier of the driver that struck his vehicle. Claimant's understanding was that no further action could take place until that insurance company received a copy of the police report. Claimant testified he continued to attempt to follow up with that insurance company to no avail.

6. Claimant ultimately sought chiropractic treatment on his own accord on January 5, 2021 with Christopher Higgins, D.C. at Metro Denver Accident & Injury Centers. Claimant reported being involved in a MVA in December 2020 with complaints of pain in his neck, upper back, shoulder, mid back, left lateral hip, left wrist and left elbow. Dr. Higgins noted cervical and thoracic x-rays did not show any pathology. Lipping/spurring degeneration of the joint was noted at T7-8 and T8-9, as well as spinal instability at C4, and retrolisthesis at C4-5. Dr. Higgins diagnosed Claimant with acute post-traumatic cervical acceleration/deceleration injury Grade III, cervical and thoracic vertebral segmental dysfunction, acute post-traumatic cervical and thoracic reflexogenic muscle spasm, and acute post-traumatic cervicogenic headache. He recommended Claimant undergo chiropractic adjustments, interferential/electrotherapy, and massage therapy.

7. Claimant testified he sought treatment with Dr. Higgins because he could no longer withstand his worsening pain and he was having difficulty sleeping and performing his regular job duties.

8. Claimant attended follow-up appointments with Dr. Higgins on January 6, 19, and 20, 2021. Claimant reported working long hours as a co-worker had recently contracted COVID-19.

9. Claimant filed an Employer's First Report of Injury on January 20, 2021, noting the December 18, 2020 MVA. Claimant testified he did not file the form or contact Insurer prior to such time because he was unaware he had a potential claim for worker's compensation.

10. Insurer filed a Claim Acknowledgment on January 20, 2021, documenting receipt of Claimant's notice of injury.

11. Insurer did not provide Claimant a list of designated physicians or send Claimant to any physician for medical evaluation and treatment.

12. Claimant subsequently sought treatment on his own with Guy Zublin, M.D. at HR Pain Management, Inc. Claimant first presented to Dr. Zublin on January 21, 2021 at a virtual appointment with complaints of neck, low back, and left wrist pain after a December 2020 MVA. Claimant reported that he had continued working his regular job duties up until three days prior, at which time he took time off due to pain and inability to lift the heavy granite slabs. Dr. Zublin observed restricted cervical range of motion. Dr. Zublin opined Claimant sustained a cervical spine and lumbar spine strain/sprain and left wrist

strain status post motor vehicle accident. He prescribed Claimant Flexeril and recommended physical therapy and spinal manipulation.

13. On February 16, 2021, Claimant's counsel submitted a letter to Insurer requesting a copy of Claimant's claim file. Claimant's counsel cited Section 8-43-203(4), C.R.S. in the request, and specifically noting Insurer had 15 days to provide Claimant the adjuster file. Claimant's counsel received a fax confirmation indicating the fax had been successfully transmitted.

14. Insurer did argue nor produce any evidence suggesting it did not receive Claimant's February 16, 2021 written request.

15. Insurer filed a Notice of Contest on February 24, 2021.

16. Due to an inability to perform his regular work duties of lifting and carrying heavy granite slabs, Claimant began working as a commercial truck driver for an unspecified period of time. Claimant subsequently returned to working for Employer in a different capacity. Claimant performed fabrication duties in a shop which required operating a forklift and using a small tool to polish granite.

17. Claimant continued to treat with Dr. Higgins on February 25, 2021 and March 2, 5, 9, 11 and 17, 2021. Claimant last saw Dr. Higgins on March 30, 2021. Claimant testified that he ceased treatment with Dr. Higgins as he felt the treatment worsened his condition.

18. Claimant did not seek or undergo any further medical treatment from March 30, 2021 to October 4, 2021. Claimant testified that the gaps in treatment were because he felt the treatment had not improved his condition.

19. On October 4, 2021 Claimant saw Dr. Zublin for an in-person evaluation. Dr. Zublin noted Claimant had not attended any follow-up appointments with his office since his initial evaluation. Claimant complained of continued neck pain and dysfunction and thoracic pain. Claimant reported to Dr. Zublin that he ceased chiropractic treatment as it made him worse. Dr. Zublin referred Claimant for a cervical MRI.

20. Claimant underwent a cervical spine MRI on October 15, 2021. Radiologist Michael Seymour, M.D.'s impression was: "Multilevel degenerative disc disease and facet arthrosis. Mild spinal canal stenosis at C4-C5 and C6-C7. Mild left foraminal narrowing at C3-C4 and C4-C5." (Cl. Ex. 15, p. 75).

21. Claimant filed an Application for Hearing on August 4, 2021 endorsing, *inter alia*, compensability and penalties for Insurer's failure to produce the adjuster file requested by Claimant on February 16, 2021.

22. On August 17, 2021 Insurer produced a privilege log and copy of the claim file to Claimant. Insurer did not offer any explanation or evidence regarding its delay in producing the claim file.

23. Respondents filed a Response to Application for Hearing on September 3, 2021.

24. On October 25, 2021, J. Tashof Bernton, M.D. performed an Independent Medical Examination ("IME") at the request of Insurer. Dr. Bernton noted Claimant reported to him that he did not experience any pain from the MVA until a few days after the accident. Claimant reported to Dr. Bernton being able to do pretty much everything with respect to activities. Claimant complained of 5-6/10 pain in his neck and upper back. On examination, Dr. Bernton noted Claimant had decreased cervical range of motion on a "voluntary basis." He opined that his review of Claimant's medical records noted no clearly objective abnormalities, including examinations and the cervical MRI, which demonstrated multilevel degenerative changes unrelated to the MVA. Dr. Bernton concluded Claimant did not have any objective abnormalities correlating with his subjective complaints. Dr. Bernton further noted Claimant had not been working under any restrictions and did not seek medical care for several months.

25. Dr. Bernton opined that, at the most, the MVA resulted in minor and self-limited muscular strains. Dr. Bernton concluded that the initial four chiropractic visits and one telemedicine visits was sufficient care for Claimant. He found Claimant to be at maximum medical improvement ("MMI") as of January 21, 2021. He noted an injury that did not cause symptoms until days later would not be expected to cause symptomatology that persists for 10 months. Dr. Bernton subsequently reviewed Dr. Higgins' February and March 2021 records. Dr. Bernton continued to opine Claimant reached MMI on January 21, 2021, and that his subsequent chiropractic treatment could be considered medical maintenance care.

26. Claimant testified he does not have issues lifting items, but that he continues to experience 6/10 neck and upper back pain. Claimant testified that his wrist pain resolved four or five months prior to the hearing. Claimant testified that he is still treating with Dr. Zublin and that he would like to continue his care with HR Pain Management.

27. The ALJ credits Claimant's testimony, as supported by the medical records and opinions of Drs. Higgins, Zublin and Bernton, and finds that Claimant proved it is more probable than not he sustained a compensable industrial injury as a result of the MVA on December 18, 2021.

28. Claimant proved it is more probable than not the medical treatment provided by Dr. Higgins and Dr. Zublin is reasonably necessary and causally related to his work injury.

29. The right of selection of an ATP passed to Claimant. Claimant selected Dr. Higgins as his treating physician. Dr. Higgins is an authorized provider.

30. Claimant made a proper showing to support his request to change physicians from Dr. Higgins to Dr. Zublin.

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).

Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See Id.* at 865.

Claimant's injury arose out of the course and scope of employment with Employer. Travel was a substantial part of service to Employer and a requirement of Claimant's work duties. At the time the MVA occurred, Claimant was performing his regular work duties, which required driving from one job site to another job site to perform installations. It is not alleged, nor is there any evidence, Claimant was on a substantial personal deviation at the time of the MVA such that he was removed from the course and scope of employment.

Respondents note Claimant's delay in seeking medical treatment, delay in filing a claim, and his inconsistent pursuit of medical treatment as evidence that Claimant did not sustain a work injury. Such factors, in light of the totality of the evidence, do not convince the ALJ Claimant did not sustain a compensable work injury.

Claimant credibly testified he did not initially seek medical treatment because he hoped his symptoms would subside and that he subsequently sought medical treatment when his symptoms progressively worsened. Upon seeking medical treatment, Claimant consistently reported back and neck symptoms in connection with the December 2020 MVA. There is no evidence Claimant was experiencing similar symptoms or undergoing

treatment leading up to the work injury. Claimant's physicians opined that Claimant sustained injuries as a result of the MVA. Dr. Higgins credibly opined Claimant sustained acute post-traumatic cervical and thoracic conditions, while Dr. Zublin credibly opined Claimant suffered cervical and lumbar strains. Respondents' IME physician, Dr. Bernton, credibly concluded that, while minor, Claimant did sustain a muscular strain as a result of the MVA and that certain treatment was reasonably necessary and related. As a result of the work injury, Claimant was no longer able to perform his regular job duties. Here, the preponderant evidence establishes that Claimant sustained a work injury as a result of the MVA that caused disability and the need for medical treatment.

Medical Treatment

A claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. See § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury, or suggest a course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000); *Walker v. Life Care Centers of America*, W.C. No. 4-953-561-02 (March 30, 2017); *Jacobson v. American Industrial Service/Steiner Corp.,* W.C. No. 4-487-349 (April 24, 2007).

As Claimant proved he sustained a compensable industrial injury, Claimant is entitled to reasonably necessary treatment to cure and relieve the effects related to the injury. As evidenced by the medical records, Claimant sought treatment with Dr. Higgins and Dr. Zublin for neck and back symptoms as a result of the work injury. The preponderant evidence establishes that such treatment was reasonably necessary to identify Claimant's condition and to relieve his symptoms.

Respondents argue that any additional treatment Claimant may require for his back and neck are not due to any work incident. Respondents contend that Claimant's current complaints cannot be related to the MVA as he has no objective findings and he personally caused a significant period of non-treatment. It is noted that Dr. Bernton opined Claimant's symptomatology would not be expected to persist for several months, and that Claimant reached MMI on January 21, 2021.

A finding here that no future medical treatment is reasonably necessary or related to the work injury would effectively constitute a determination by the ALJ that Claimant has reached MMI. The ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, WC's 4-947-316-01 & 4-935-813-03 (ICAO, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had

reached MMI and was thus erroneous). While Respondents' IME physician opined Claimant has reached MMI, neither an ATP or DIME has done so. Respondents' obligation to provide related medical benefits to cure or relieve the effects of Claimant's industrial injury continues until Claimant reaches MMI. Respondents retain the right to contest the reasonableness and necessity of specific treatment.

Authorized Treating Physician

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

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

If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

It is undisputed Claimant sought treatment on his own accord with Dr. Higgins prior to notifying Insurer of his industrial injury. Claimant subsequently notified Insurer of his injury by filing Employer's First Report of Injury on January 20, 2021. Insurer received such notice, as indicated by their acknowledgment on January 20, 2021. At that time it

became Insurer's obligation to appoint an ATP. Claimant credibly testified, and no evidence was offered to the contrary, that Insurer did not subsequently provide Claimant with list of designated treatment providers or otherwise designate an ATP. Accordingly, the right of selection of an ATP passed to Claimant. Claimant selected Dr. Higgins as his ATP by undergoing evaluation and treatment with Dr. Higgins from January 2021 through March 2021. Dr. Higgins is thus an authorized provider in this claim.

Change of Physician

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

Claimant subsequently ceased treatment with Dr. Higgins and underwent evaluation and treatment with Dr. Zublin. Claimant requests a change of ATP from Dr. Higgins to Dr. Zublin. Insurer made no argument regarding Claimant's request to select Dr. Zublin as his treating physician. Dr. Zublin has been treating Claimant and is familiar with his condition. The ALJ has considered Claimant's need for medical treatment while protecting Respondents' interest under the circumstances. Claimant has made a proper showing to support his request to change his ATP from Dr. Higgins to Dr. Zublin.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo.

App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Claimant alleges Insurer is subject to penalties for its' failure to timely produce the claim file in violation of §8-43-203(4), C.R.S.

Section 8-43-203(4), C.R.S. provides,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

Claimant's counsel submitted a written request to Insurer for a copy of Claimant's claim file on February 16, 2021. Insurer does not contend, nor is there any evidence indicating, Insurer did not receive Claimant's written request. Pursuant to Section 8-43-203(4), Insurer was required to provide the claim file to Claimant by March 3, 2021. It is undisputed Insurer did not provide a copy of the claim file to Claimant until August 17, 2021, a period of 166 days. Insurer's failure to provide the claim file to Claimant within the required time frame constitutes a violation of Section 8-43-203(4), C.R.S.

As Claimant established Insurer violated the Act, it is Insurer's burden to prove its conduct was reasonable. Insurer provided no rational argument justifying its violation of Section 8-43-203(4), C.R.S. As found, Insurer provided no explanation or evidence at all regarding its failure to provide the claim file to Claimant within the time period required. There is no evidence nor does Insurer contend that it did not receive Claimant's request, that there was some miscommunication, or that Insurer did, in fact, make an attempt to send the claim file to Claimant prior to August 17, 2021. Without explanation, Insurer's failure to timely provide the claim file to Claimant does not constitute the action of an objectively reasonable insurance carrier.

As Insurer committed a violation of the Act and its inaction was objectively unreasonable, imposition of penalties is appropriate.

Curing a Violation

Section 8-43-304(4), C.R.S. permits an alleged violator 20 days from the date of mailing of an Application for Hearing that asserts penalties to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716 (ICAO, May 16, 2007).

Insurer argues that no penalty should be assessed because Insurer cured the violation within the 20 days permitted under Section 8-43-304(4), C.R.S. It is undisputed Insurer provided the claim file and privilege log to Claimant on August 17, 2021, within 20 days of Claimant's August 4, 2021 Application for Hearing. As Insurer cured the violation, Claimant is required to prove by clear and convincing evidence Insurer knew or reasonably should have known Insurer was in violation.

Claimant submitted a written request to Insurer on February 16, 2021 requesting the claim file. The written request specifically cited Section 8-43-203(4), C.R.S., noting the 15-day time frame for producing the file. As discussed, Insurer provided no explanation or evidence regarding their failure to provide the claim file to Claimant prior to August 17, 2021. The evidence indicates Insurer did receive Claimant's written request at the time it was submitted. While Insurer filed a Notice of Contest on February 24, 2021, there is no evidence Insurer made any attempt to produce the requested claim file prior to August 2020. Here, Respondents reasonably should have known they were in violation of Section 8-43-203(4), C.R.S. when they received a written request from Claimant citing the applicable statute and time period and took no action to comply until several months later. As Insurer had constructive knowledge of its violation, assessment of penalties is appropriate in this case.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the

ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

The evidence does not establish more than minimal harm to Claimant resulting from Insurer's violation. Despite Insurer's delay in producing the claim file, Claimant continued to undergo medical treatment. No evidence was presented as to any financial strain caused to Claimant due to Insurer's violation. Claimant did not file an Application for Hearing on compensability and penalties until approximately six months after the Notice of Contest was filed. There is no evidence Claimant repeatedly followed-up with Insurer regarding the written request or that there was any pattern of misconduct on behalf of Insurer. Absent evidence of the Insurer's ability to pay a fine, considering the de minimis amount of the fine imposed herein, the ALJ determines that a penalty of $5.00/day for 166, totaling $830.00, is appropriate. *See In re Claim of Lange*, WC 4-907-620-002 (ICAO, January 18, 2019) (the ALJ's assessment of a $2.00/day penalty was a reasonable exercise of discretion aimed at penalizing the claimant's disobedient conduct while acknowledging the minimal harm to the respondents).

ORDER

1. Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury on December 18, 2020.

2. The medical treatment provided by Dr. Higgins and Dr. Zublin was reasonably, necessary and related to Claimant's December 18, 2020 industrial injury. Respondents are liable for the treatment Claimant has received from Dr. Higgins and Dr. Zublin, as well as other reasonably necessary and causally related medical treatment.

3. The right of selection of an ATP passed to Claimant. Dr. Higgins is an authorized provider.

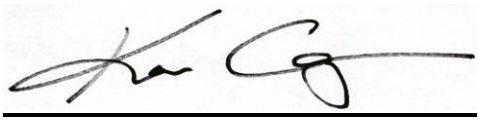
4. Claimant's request to change treating physicians from Dr. Higgins to Dr. Zublin is granted.

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: March 25, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits as a result of his August 17, 2020 work injury.

II. Determination of Claimant's average weekly wage ("AWW").

STIPULATIONS

The parties stipulated to the compensability of the claim and Respondents' liability for reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a machine operator. Claimant's job involves frequent walking, climbing stairs and ladders, and cleaning.

2. On September 11, 2015 Claimant sustained a work injury to multiple body parts, including his left lower extremity, which resulted in complaints of pain and instability in his left knee. Claimant continued to work without restrictions and was able to perform his regular job duties leading up to the work injury at issue.

3. Claimant sustained an industrial injury while working for Employer on August 17, 2020.

4. Claimant presented to Employer's health service clinic on August 17, 2020 reporting left knee and right shoulder pain. Claimant reported he slipped and fell forward, striking his knee and elbow. No objective findings were noted for the knee, other than tenderness on the anterior aspect of the knee. Redness, swelling and an abrasion was noted on the right shoulder. Claimant continued to report right shoulder and left knee symptoms at a follow-up evaluation at Employer's clinic on August 18, 2020. Employer subsequently sent Claimant for evaluation at UCHealth.

5. Claimant presented to Oscar Sanders, M.D. at UCHealth on August 19, 2020 with right shoulder and left knee pain. Claimant reported that he slipped and fell at work, striking his right shoulder on the base of the machine and striking his left knee on the floor. Claimant reported he also hit his head during the incident but did not lose consciousness. Claimant further reported a history of a prior left knee injury in 2006, managed with physical therapy and injections. On examination, Dr. Sanders noted ecchymosis diffusely about the proximal aspect of the right upper extremity with no effusion or ecchymosis in the left knee. Dr. Sanders diagnosed Claimant with a contusion

of multiple sites of the right shoulder as well as a left knee contusion. He placed Claimant on modified duty with work restrictions of: lifting a maximum of 1-2 pounds right extremity; no repetitive lifting; carrying a maximum of 1-2 pounds; pushing/pulling a maximum of 5 pounds; no reaching overhead, reaching away from the body, or repetitive motion with the right arm; and no crawling, kneeling, squatting, or climbing. Dr. Sanders recommended Claimant perform seated duties only.

6. On August 19, 2020, Claimant underwent x-rays of the right shoulder and left knee, which were normal.

7. Dr. Sanders continued Claimant's same restrictions on August 25, 2020.

8. On August 26, 2020, Claimant presented to Kurt Dallow, M.D. at Orthopaedic & Spine Center of the Rockies. Claimant reported slipping and falling from a machine and striking his right shoulder on the edge of the machine and hitting his left knee, head and neck. The record contains no documentation of a prior left knee injury or left knee complaints. Dr. Dallow diagnosed Claimant with a right shoulder hematoma, right shoulder contusion, likely concussion, and left knee pain.

9. On August 31, 2020, Claimant underwent a left knee MRI which produced the following impression: (1) medial meniscal tear; (2) chondral irregularity and evidence of prominent marrow edema within the underlying medial tibial plateau; and (3) high-grade fissuring involving the median ridge patella cartilage with underlying subchondral edema.

10. Dr. Sanders reexamined Claimant on September 2, 2020. Dr. Sanders noted Claimant's MRI evidenced medial meniscus tearing as well as chondral damage that was likely secondary to his fall at work. Claimant reported experiencing recurrent headaches and dizziness and now indicated he likely had a brief period of loss of consciousness during the August 17, 2020 incident. Dr. Sanders noted a normal neurological examination. He opined Claimant' right shoulder hematoma had markedly improved. Dr. Sanders recommended a CT scan of the spine and referred Claimant to Dr. Snyder for an orthopedic surgery evaluation of his left knee. Dr. Sanders continued to restrict Claimant from crawling, kneeling, squatting and climbing. He no longer restricted Claimant to performing only seated duties. Claimant was to be allowed to transition from sitting to standing as needed, was restricted from high impact activities, and advised to avoid stair climbing or work on uneven surfaces.

11. On September 9, 2020, Claimant presented to Dr. Dallow for a follow-up evaluation. Dr. Dallow noted Claimant's right shoulder hematoma had markedly reduced in size. Dr. Dallow released Claimant from further treatment for his right shoulder.

12. Claimant underwent a CT scan of his brain on September 15, 2020, which was unremarkable.

13. Claimant presented to Joshua Snyder, M.D. on September 17, 2020. Claimant reported a previous injury to his left knee that occurred about five years prior. Claimant reported that on August 17, 2020 he slipped and fell, twisting his knee and hitting the

floor. Dr. Snyder reviewed the left knee MRI and opined that no meniscal tear was present. He noted there was severe body edema along the medial tibial plateau, some chondromalacia patella, and opined that Claimant appeared to have a potentially chronic MCL strain or acute on chronic MCL strain. Claimant also underwent an x-ray of his bilateral knees, of which Dr. Snyder opined Claimant had good overall alignment, no significant joint space narrowing, and some squaring of the femoral condyles and a small osteophyte medially.

14. On October 7, 2020, Dr. Sanders referred Claimant for a physiatry consultation and recommended Claimant start physical therapy and vestibular rehabilitation. He continued Claimant's restrictions. Dr. Sanders again continued Claimant's restrictions on November 16, 2020.

15. On November 16, 2020, Claimant returned to Dr. Snyder for a follow-up evaluation. Dr. Snyder noted Claimant continued to experience left knee pain. He thought the medial collateral ligament improved considerably, but that Claimant was having more arthritic-type discomfort and bony edema discomfort. Dr. Snyder performed a cortisone injection in the left knee and recommended physical therapy.

16. Claimant returned to Dr. Sanders on December 15, 2020. Dr. Sanders noted that it appeared Claimant's right shoulder, neck/back pain, and post-concussion symptoms had resolved. Dr. Sanders noted Claimant was counseled regarding continued physical therapy, but that Claimant felt comfortable with only his home exercise program. Dr. Sanders began Claimant on an anti-inflammatory medication and advised Claimant to use his knee brace as needed. He recommended Claimant follow-up with Dr. Snyder for reconsideration of surgical options in the event his symptoms did not improve with continued conservative measures. Dr. Sanders continued Claimant on his current restrictions, which were: crawling/kneeling/squatting/climbing as tolerated; and "Allow transition from sit to stand as needed by employee. No high impact activities (i.e. running, jumping). Avoid work on uneven surfaces, terrain." (R. Ex. E, p. 98). Dr. Sanders opined Claimant would be approaching maximum medical improvement and would be ready for a trial of full duty work.

17. On February 4, 2021, Lawrence Lesnak, D.O. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported having chronic diffuse left leg symptoms dating back to an injury sustained in September 2015 and that his symptoms had been constant in nature since such time. Claimant reported that his pre-existing left leg symptoms had worsened since the August 2020 work injury. Regarding the mechanism of injury, Dr. Lesnak noted that Claimant reported he must have fallen backwards when he slipped and fell but somehow struck his knee. Dr. Lesnak concluded there is no evidence supporting Claimant's claim that he sustained a left knee injury on August 17, 2020, noting Claimant's chronic pre-existing diffuse left leg symptoms. Dr. Lesnak opined that no acute injury or trauma-related pathology of the left knee or left leg was identified on Dr. Sanders' August 17, 2020 evaluation or imaging. He remarked that Claimant's reported mechanism of injury changed over time, and that the mechanism of injury reported at his evaluation was inconsistent with any left knee injury.

18. Dr. Lesnak opined that Claimant possibly sustained a mild posterior scalp contusion as a result of the August 17, 2020, with no evidence of mild closed head injury. He concluded that there was no reproducible objective findings on clinical examination supporting any type of symptomatic cervical spine pathology. Dr. Lesnak ultimately opined that Claimant most likely sustained a contusion injury to his right scapular/shoulder girdle region and possibly to the posterior occiput and neck soft tissues as a result of the August 17, 2020 work incident. He concluded that these potential injuries would have completely resolved within several days to several weeks following the incident. Dr. Lesnak opined that Claimant's current subjective complaints were without any reproducible objective findings. He noted that he administered a psychosocial screening test to Claimant that found a high level of somatic pain complaints. Dr. Lesnak opined that there appeared to be significant psychosocial/psychologic factors influencing Claimant's symptoms, recovery and perceived function. He opined that Claimant had reached maximum medical improvement ("MMI") without permanent impairment, and did not require any further medical care or restrictions.

19. At Claimant's request, Sander Orent, M.D. was present via video during Dr. Lesnak's IME and virtually observed the examination. Dr. Orent issued a report dated February 18, 2021, noting what he believed to be various omissions and issues in Dr. Lesnak's IME report and performance of the IME.

20. On February 18, 2021, Employer placed Claimant on a medical leave of absence. Employer's letter to Claimant dated February 19, 2021 noted Claimant was subject to the following restrictions: "Crawling, kneeling, squatting, and climbing as tolerated. Allow transition from sit to stand as needed by employee. No high impact activities (i.e. running, jumping). Avoid work on uneven surfaces, terrain." (Cl. Ex. 1, p. 2).

21. Employer was unable to accommodate Claimant's work restrictions. Claimant has not worked since February 19, 2021 due to his work restrictions and continued left knee symptoms.

22. Dr. Lesnak testified by prehearing deposition on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report. He explained that, per his review of the medical records, Claimant's reported medical history appeared inconsistent. He opined that many of Claimant's subjective complaints were not supported by reproducible, objective findings, noting pain behaviors and nonphysiologic responses on his examination. Dr. Lesnak testified that Claimant reported experiencing left leg and left knee symptoms in the same areas as his chronic, pre-existing symptoms, only worsened. Dr. Lesnak reiterated that Dr. Sanders' initial exam and the imaging showed no evidence acute trauma to Claimant's left lower extremity. He explained that nothing on his examination showed any evidence of specific symptomatic pathology related to the August 17, 2020 incident. Dr. Lesnak testified that the medical records or imaging studies did not reveal any evidence of acute trauma to Claimant's left knee or left leg, neck or brain.

23. Dr. Lesnak testified that it appears Claimant may have sustained a contusion of his right scapula and that he had bruising on his upper right arm, which he noted would

typically resolve within several days to two weeks. He testified that no work restrictions would be related to bruising of the upper right extremity. Dr. Lesnak testified that, without any reproducible objective findings on exam, Claimant does not require any type of permanent or even temporary work restrictions related to the reported occupational injury. Dr. Lesnak addressed Dr. Orent's report, disagreeing with Dr. Orent's characterization of his examination and his IME report.

24. Dr. Orent testified at hearing as a Level II accredited expert in occupational medicine. Dr. Orent reviewed Dr. Lesnak's deposition testimony and the audio recording of Dr. Lesnak's IME. Dr. Orent testified to his belief that Dr. Lesnak did not accurately document Claimant's reports of the mechanism of injury and his symptomatology. Dr. Lesnak testified to his belief that there were discrepancies in Dr. Lesnak's documentation regarding the physical exam findings and what Dr. Orent observed.

25. Claimant credibly testified at hearing that he has not worked since February 19, 2021 due to Employer's inability to accommodate his restrictions, as well as due to his continued left knee symptoms.

26. The ALJ credits the opinion of Dr. Sanders, as supported by Claimant's testimony and the medical records, over the opinion of Dr. Lesnak.

27. Claimant proved it is more probable than not he is entitled to TTD from February 19, 2021 and ongoing. Due to the August 17, 2020 work injury, Claimant was no longer able to perform his regular work duties. As a result, Claimant has not worked or earned wages since February 19, 2021.

28. Claimant earns an hourly wage. Claimant wage records reflect Claimant's weekly earnings varied on hours worked and if he earned any overtime pay, penalty pay or specialty COVID pay. From August 12, 2019 to August 16, 2020, Claimant earned a total of $66,316.27 in wages, averaging $1,251,25 weekly. For the week-long pay period ending August 16, 2020, Claimant earned $1,215.48. Considering the variation in Claimant's wages, the ALJ finds that an AWW of $1,215.48 is a fair approximation of the claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case

must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release

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

As found, Claimant proved it is more likely than not he is entitled to TTD benefits for the requested time period. Claimant has consistently reported left knee symptoms since his August 17, 2020 work injury. Despite a prior left knee injury and pre-existing left knee complaints there is no evidence that, leading up to the August 17, 2020 work injury, Claimant's symptoms necessitated treatment or rendered him unable to perform his regular job duties. While Dr. Lesnak noted Claimant did not complain of any different or new left leg symptoms after the August 2020 injury, Dr. Lesnak did acknowledge Claimant's report of worsened symptoms after the August 17, 2020 work injury. Claimant's pre-existing knee condition does not preclude a determination that the August 17, 2020 work incident aggravated his condition.

Claimant has been on medical restrictions since sustaining the August 17, 2020 work injury. Claimant's restrictions initially applied to both his upper and lower extremities (i.e. lifting restrictions and seated duties only). While Dr. Sanders noted that it appeared Claimant's neck, back and head issues had resolved, he noted ongoing left knee issues and continued restrictions of no crawling, kneeling, squatting, or climbing. These restrictions impaired Claimant's ability to effectively perform his regular work duties. As Respondents were unable to accommodate these restrictions as of February 19, 2021, Claimant missed work and suffered actual wage loss. Claimant credibly testified he has not work since February 19, 2021 due to his restrictions and ongoing left knee problems. The preponderant evidence establishes the work injury produced a disability that resulted in Claimant leaving work for more than three work shifts and suffering actual wage loss. Accordingly, Claimant is entitled to TTD benefits from February 19, 2021 and ongoing, until terminable by law.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given

period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, Claimant's weekly earnings varied. Based on review of the wage records, an average weekly wage of $1,215.48 is a fair approximately of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant sustained a compensable industrial injury on August 17, 2020.

2. Respondents shall pay Claimant TTD benefits from February 19, 2021 and ongoing, until terminated by statute.

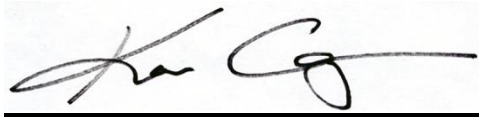
3. Claimant's AWW is $1,215.48.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation 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: March 28, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-491-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD from the date of his termination of employment on September 9, 2021.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits following his right shoulder surgery on February 15, 2022 until terminated by law.

III. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination warranting a denial of TTD benefits.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on the issue of compensability, medical benefits that were authorized, reasonably necessary and related to the injury, average weekly wage and temporary disability benefits on November 5, 2021.

Respondents filed a General Admission of Liability on December 3, 2021 for medical benefits only. No average weekly wage is declared.

Respondents filed a Response to Claimant's November 15, 2021 Application for Hearing on December 17, 2021 on issues of "Offsets. Wages. Whether Claimant left work because of the injury."

STIPULATIONS

The parties stipulated to an AWW of $840.00 per week at time of the hearing.

Respondents also stipulated that Respondents never denied the surgery recommended by Dr. Marc Failinger on August 26, 2021 or formally requested on September 2, 2021 and the surgery and medical care regarding Claimant's right shoulder surgery is reasonably necessary and related to the July 21, 2021 work related injury.

FINDINGS OF FACT

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

a. The injury and report

1. Claimant was 51 years of age at the time of the hearing. He was hired by Employer as of February 11, 2020 and was promoted to Warehouse and Delivery Associate on September 7, 2020, earning $20.50 per hour and employed full time.

Claimant's Workers' Claim for Compensation noted he earned $21.00 per hour for a total wage of $840.00 per week.

2. Claimant was injured in the course and scope of his employment on July 21, 2021 while lifting steel pipes from a broken shipment.

3. The Employer's First Report of Injury was completed by Claimant on July 22, 2021 stating that Claimant notified William Klumb of the work related injury to his right arm, shoulder and wrist. He stated that there were onsite cameras to witness his accident.

b. Medical records

4. Claimant was first seen at Concentra on July 28, 2021 by Tanya Manning. Claimant was referred to physical therapy (PT), provided medications and hot/cold compresses for home use as well as restricted from use of the right upper extremity. Claimant started PT on the same day.

5. On August 9, 2021 physician assistant Nathan Adams of Concentra continued the order of therapy, stated that Claimant's objective findings were consistent with Claimant's report of his work related mechanism of injury, and continued to limit Claimant's work to no use of the right upper extremity.

6. Claimant underwent an MRI of the right shoulder on August 19, 2021 on referral from Mr. Adams. Dr. Brian Cox read the diagnostic testing as showing a complete supraspinatus tendon tear with retraction of the tendon stump to the medial humeral heard (3 cm), tendonitis of the infraspinatus (moderate) and of the subscapularis (mild) as well as no evidence of cuff muscle atrophy or edema and mild to moderate acromioclavicular degenerative joint disease.

7. On August 20, 2021 Mr. Adams changed Claimant's work restrictions to lifting 5 lbs. to chest or shoulder level with the right arm, no use of the right hand above the shoulder level, which were repeated on September 17, 2021 and October 1, 2021.

8. Claimant was evaluated by Dr. Mark Failinger on August 26, 2021 pursuant to a referral from Mr. Adams and was seen in the Concentra Medical Center office. Dr. Failinger noted that Claimant was working for Employer as a warehouse worker since February 2020. He documented Claimant was picking up 24 foot pipes, weighing up to 100 lbs. Claimant attempted to lift them up to his shoulder level, tried to stack them and then tried to push them and as he was doing so Claimant noted pain in his right shoulder. Dr. Failinger stated that Claimant reported the incident and was sent to Concentra. He documented Claimant had some improvement with physical therapy but not significantly with either pain or range of motion. Claimant reported to Dr. Failinger weakness and loss of strength with loss of range of motion. Claimant reported right sided neck discomfort that migrated down to the right elbow. On exam of the right shoulder, Dr. Failinger found discomfort in the AC joint, greater tuberosity with palpation but no swelling, warmth or redness. He found loss of range of motion with discomfort, though no instability, and 4/5 strength with external rotation and abduction. He reviewed the MRI films and noted that there was a large supraspinatus tear with maceration and moderate infraspinatus tendinosis and AC joint arthritis. He also noted some mild irregularity of the labrum. Dr. Failinger recommended surgical repair and for Claimant to quit smoking in order to have

any chance of healing following surgical repair as the repair would be difficult and the odds of healing were not great. Dr. Failinger also stated that Claimant would have to remain without active range of motion of the right shoulder, other than passive range of motion, for at least six weeks following surgery.

9. On September 2, 2021 Dr. Failinger's office sent the request for prior authorization for right shoulder scope, rotator cuff repair, decompression and possible biceps tenodesis vs. tenolysis to the Insurer's adjuster.

10. Claimant was seen by Dr. Scott Richardson (Concentra) on November 19, 2021. He noted that they still did not have approval of the right, dominant, shoulder surgery, explaining that Claimant's pain came on suddenly with lifting pipes at work on July 21, 2021. Dr. Richardson noted Claimant was seen by Dr. Mark Failinger on August 26, 2021, who recommended surgery of the right shoulder and requested approval. On exam, Dr. Richardson noted diffuse glenohumeral joint tenderness and limited range of motion with tenderness in the right paraspinal and right trapezius muscle. He assessed traumatic complete tear of the right rotator cuff with right shoulder strain and tendinosis of the shoulder. He dispensed medications and ordered further therapy for reduction of pain, inflammation, swelling and spasm. He insisted that there was a need to obtain approval for the surgery and scheduling. He stated that the objective findings were consistent with the history and mechanism of injury. He provided Claimant with modified duty restrictions of lifting to 5 lbs. to mid chest level with the right arm, and no reaching above shoulder height with the right arm. Dr. Richardson stated that MMI and impairment were unknown at that time.

11. Claimant had a preoperative evaluation on February 4, 2022 with Dr. Failinger. Claimant reported he had moderate to severe pain of the right shoulder, including throbbing that was frequent, exacerbated by elevation of the arm and lifting. Dr. Failinger noted moderated tenderness of the supraspinatus, positive Hawkins-Kennedy and impingement tests and that Claimant was ready to proceed with surgery.

c. Termination

12. On September 3, 2021 the Director of Operations and HR Manager (hereinafter the HR Manager or MS) authored Personnel Documentation, from an oral report by the Office Manager (LP). The Office Manager stated that Claimant had left the worksite for approximately one hour without advising where he was going. She also advised that the day before, claimant had smelled and had left early as he was not feeling well. She also reported that Claimant had hit her behind with his hat, then exclaimed that "[I]t wasn't my hand!" The Director asked Claimant if he had done this and Claimant denied it. The Director advised in the Personnel Documentation that

> *[h]e had a long talk with [Claimant] and it's becoming increasingly difficult to reason with him while he's so emotionally frustrated with his lame arm.* I was not able to accomplish much during our conversation other than to tell him that I am helping him through this WC injury as swiftly as possible. I have emailed Trevor from [Insurer] and will follow-up with [Claimant] when I have answers. (*Emphasis added.)*

13. The end of the Personnel Documentation indicated an addendum with the Office Manager's email which stated that Claimant had previously made an inappropriate comment about her body to her, and that Claimant had apologized for the comment.

14. On September 9, 2021 at 9:00 a.m. the HR Manager sent Claimant an email terminating his employment with Employer due to allegations of sexual harassment and Insubordination. The notice provided no other explanation and requested the keys and uniforms be returned and that his final paycheck would be handed over if the uniforms were returned. It further advised not to access the building as the alarm code had been changed.

15. Claimant responded to the email the following morning questioning the termination. He stated that he had never sexually harassed anyone in his life. He also advised he did not know what insubordination employer was alleging. He was under the impression that Employer was finally going to adjust his work to comply with the work restrictions imposed by his providers. He advised that unloading the trucks was continuing to injure his right shoulder. He advised that he struggled to lift chemicals that he struggled to squeeze into the chemical warehouse. He requested that the Director reconsider his decision. He recognized he had not been very easy to work with as he was in pain and trying to cope with his injury and loss of strength in his arm. Claimant stated that ["T]hat's why I was asking if you had heard anything back from Workers' Comp." Claimant further stated:

> *Friday you mentioned that you honestly shouldn't have me there if you were following the doctor's restrictions*. …
>
> So, I am asking pleadingly, Please reconsider. After my shoulder recovers, I promise that I will not disappoint. I am sorry that I got injured and that everyone was having to do a lot of my duties. Just having these few days have helped me realize that I haven't been very pleasant to be around, and for that, I'm very sorry to everyone. (*Emphasis added*).

d. Claimant's testimony

16. Claimant testified that the providers taking care of his right shoulder attempted multiple times to obtain authorization for the surgery without success. It was not until approximately February 2022 when he finally received confirmation from his attorney's office that the surgery could proceed. He immediately scheduled the pre-op and surgery, which was performed on February 15, 2022 by Dr. Failinger.

17. Claimant testified that he continued to work full duty after the work injury as there was no modified duty work. He was still required to perform his regular job unloading semis, moving 50 to 500 lb. containers, despite his restrictions. He further testified that he advised both his supervisors (WK and MS) that he had trouble with the unloading of the chemicals and did not think he was capable of performing the job. He was under a 5 lbs. restriction at the time and every job he performed required him to lift in excess of that amount. He stated his employer advised that since he was using a forklift to move the chemicals, his restrictions did not matter. Claimant interpreted this to mean he had to continue doing the job despite his restrictions.

18. Claimant stated that the Install Manager (JS) texted Claimant multiple times requiring Claimant to load chemicals on another truck that did not have a tailgate lift, so he had to lift the 150 lb. chemical containers with a pallet jack and from the wooden pallet to the bed of the truck as well as lift the wooden pallets which weighed over 10 lbs. Claimant complied with the request that he continue to perform his job. He stated that

90% of the job was not in the warehouse itself, but delivering the chemicals throughout the state. He stated he engaged with female customers frequently.

19. Claimant stated that the Office Manager (LP) was the one giving him instructions about what he was to do during the day. She never stated that Claimant had sexually harassed her at any time, that he had been insubordinate, or that he was not doing his job correctly.

20. Claimant stated that he received the September 9, 2021 email but that he did not know anything about a claim of sexual harassment or insubordination. Nor did Claimant have any discussions with the Office Manager (LP) or the HR Manager regarding the claims of sexual misconduct or insubordination. At no time did Claimant receive any warnings regarding either type of conduct.

21. Claimant stated that his termination really had to do with his workers' compensation claim, his work restrictions, his complaints that he was unable to do the work without hurting himself, the request for surgery and nothing to do with any inappropriate behavior on his behalf. He stated that if any such conduct was happening, that his employer had multiple video recorders working in all areas of the warehouse that would have caught any inappropriate conduct, and none had been produced. (No videos were submitted as exhibits to the hearing.)

22. Claimant was not released from medical care or placed at maximum medical improvement by his providers from Concentra by the time of the hearing.

23. Lastly, while Employer requested multiple items be returned following the formal termination, Claimant stated that he returned all items except the phone as it contained multiple pictures and texts of his family members, which he was not able to erase because the company turned off the phone before he was able to delete them. The Office Manager (LP) showed up to Claimant's home, approximately one month after the termination, to retrieve the items.

e. Testimony of Office Manager (LP)

24. The Office Manager reported that she had worked for employer for approximately two years as the Office Manager. The Office Manager alleged that Claimant had sexually harassed her in at least one event which had occurred a little after she started, well prior to the Claimant's termination. The last time was when Claimant hit her with his hat on the behind. She stated that Claimant apologized to her and that he immediately stated it was not his hand but his hat.

25. She orally reported the last incident about Claimant touching her with his hat to the Human Resource Manager (MS). On September 3, 2021 she emailed the HR Manager about another incident. She asked the HR Manager to request that Claimant stop any inappropriate behavior. She also stated that statements in the HR Manager's Personnel Document were incorrect, specifically the fact about the timing of the incident and the amount of times it had occurred. September 3, 2021 was the first instance when she reported any untoward behavior to the HR Manager.

26. The Office Manager stated that Claimant was a good employee that worked well with her initially but later his behaviour towards her changed. She also stated that,

to her knowledge, Claimant was terminated for sexual harassment as well as insubordination but she was not aware of all the incidents of insubordination.

27. The Office Manager stated that she was frequently bantering with Claimant either in the warehouse or in her personal office, as Claimant would have to pick up his work orders from a basket in her office. She stated that there were video cameras both in her office as well as the warehouse but she was not aware of any recordings of any of the incidents.

28. She also testified that Claimant was no terminated until September 9, 2021, almost a week after she reported the incident to the HR Manager.

f. Testimony of Director of Operations/HR Manager

29. The Director of Operations/HR Manager stated that he first heard of any incidents with regard to Claimant and the Office Manager from the Office Manager on September 3, 2021, which he documented in the Personnel Documentation of the same date.

30. He was aware of the hat incident on September 3, 2021 and asked that any incidents prior be documented by the Office Manager. The first part of the document was the HR Manager's interpretation after the oral report by the Office Manager on September 3, 2021. The second part is the Office Manager's email of the same date documenting a second incident. He stated that he had not received any prior reports before September 3, 2021. A third incident was not documented by either the Office Manager or the HR Manager.

31. The HR Manager was initially concerned about the veracity of the report of the Office Manager but now believed her. He failed to establish any reason for a change in his opinion.

32. The HR Manager stated that despite receiving the information on September 3, 2021 that he did not take steps to terminate Claimant until September 9, 2021. He stated that the only incident he had witnessed was when Claimant left for one hour without telling anyone. He confirmed he received Claimant's denial of the incidents on September 10, 2021.

g. Credibility Determinations

33. At hearing Claimant was shown to wear a right shoulder immobilizer sling that limited his right shoulder movement of his arm and was appropriately masked as he was in his attorney's office testifying at the time of the hearing.

34. As found, Mr. Adam, Dr. Failinger and Dr. Richardson are authorized treating physicians. As further found, the August 9, 2021, August 20, 2021, September 17, 2021,October 1, 2021 and November 16, 2021 work restrictions by Mr. Adams and Dr. Richardson are credible and persuasive. It is further persuasive that Dr. Failinger formally requested prior authorization to proceed with the right shoulder surgery on September 2, 2021 and this had been communicated to Insurer.

35. Claimant's testimony is found credible. As found, Claimant was terminated because of the work related injury and because Claimant could no longer perform the assigned duties within his limitations.

36. The HR Manager is found not to be persuasive regarding his reasons for terminating Claimant. He specifically documented on September 3, 2021 that he had a long conversation with Claimant about his work, yet, at no time did he document that it was his intention to terminated Claimant. It is clear, and it is so found, that the HR Manager knew or should have known that Claimant was proceeding with right shoulder surgery as he specifically disclosed that he had been communicating with the insurer and would be following up. He specifically mentioned the adjuster by name, which is the same name as is found on the request for prior authorization.

37. The HR Manager is also found to not be credible with regard to whether he knew that Claimant's work restrictions were being violated. It is clear from the response email sent by Claimant that the HR Manager had actually acknowledged that the prior Friday he had mentioned that Claimant should not honestly be at work if they were following the doctor's restrictions. He did not deny that Claimant's statements were true.

38. The HR Manager is specifically found not credible in regard to his denial of the status of Claimant's workers' compensation claim when he formally terminated Claimant or that Employer was violating Claimant's work restrictions.

39. Lastly, as found, if Respondent Employer truly believed that Claimant acted inappropriately, they would not have sent the Office Manager, who was alleging the inappropriate acts, to Claimant's personal abode to retrieve the Employer's property, including the uniforms and keys. This fact alone, has great weight in the mind of this ALJ and is found persuasive and compelling as to the veracity of the Office Manager and the HR Manager's statements during the hearing, whom are 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. Termination for Cause and Temporary Disability Benefits

Entitlement to temporary disability benefits is conditioned on whether Claimant is entitled to benefits or has been terminated for cause so these issues are interlinked and must be addressed together.

A disabled claimant is entitled to temporary total disability (TTD) benefits if they miss more than three days of work. Sec. 8-43-105, C.R.S.; *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 claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J.*

Murphy & Co., 964 P.2d 595 (Colo. App. 1998). Claimant alleges temporary total disability benefits from September 10, 2022 through the present. Here, there is no doubt or question that Claimant was under work restrictions as provided by his authorized treating physician. On August 9, 2021 Nathan Adams, PAC of Concentra limited Claimant's work to no use of the right upper extremity. On August 20, 2021 Mr. Adams changed Claimant's work restrictions to lifting 5 lbs. to chest or shoulder level with the right arm, no use of the right hand above the shoulder level on, which were repeated on September 17, 2021 and October 1, 2021. Dr. Richardson also echoed the same restrictions on November 16, 2021. By this action, this ALJ infers that Dr. Richardson was the supervising physician and agreed with the physician assistant's prior work restrictions.

However, Claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. If a work-related injury contributes "to some degree" to a claimant's wage loss, the claimant is entitled to temporary total disability benefits. *Id*. at 548. "Temporary disability benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. Therefore, if the injury contributed in part to the wage loss, temporary total disability benefits can be denied, suspended, or terminated only if one of the four statutory factors in Sec. 8-42-105(3) is satisfied." *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210-11 (Colo. App. 1996). Returning to work is one criteria for terminating TTD benefits. Section 8-42-105(3)(b), C.R.S. The persuasive evidence shows that Claimant did return to work though he was under restrictions. The persuasive evidence is that Claimant was exceeding those restrictions in order to comply with order from his supervisors to continue working loading and unloading chemicals. While the majority of loading and unloading was accomplished with forklifts and pallet jacks, this ALJ finds that there were some duties Claimant had to perform without the assistance of the forklifts and jacks, such as following the Install Manager (JS) instructions that Claimant load chemicals on another truck that did not have a tailgate lift, so he had to lift the 150 lb. chemical containers with a pallet jack and from the wooden pallet to the bed of the truck as well as lift the wooden pallets which weighed over 10 lbs., all outside of Claimant's restrictions. Here, Claimant clearly had a wage loss due to his work restrictions and would normally be entitled to temporary total disability benefits upon termination, if Claimant was not found responsible for the termination.

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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." The burden shifts to the employer, who bears the burden of establishing by a preponderance of the evidence that a 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). However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, *supra.*

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*, I.C.A.O., W.C. No. 4-608-836 (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). 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 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 the termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over the 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).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

While Claimant was purportedly terminated for other issues as reflected in the HR Manager's email to Claimant, notifying Claimant of the termination, including "sexual harassment and insobordination", no credible evidence was presented at hearing to establish an evidentiary foundation of the behavioral issues and whether those behavioral issues constituted a volitional act on the part of Claimant. Here, it is clear from the HR Manager's September 3, 2021 Personnel Documentation that the HR Manager documented that he had had a long conversation with Claimant and that Claimant was *"emotionally frustrated with his lame arm*." Nowhere in the document does the HR Manager comment that it was his intention to terminated Claimant based on the reported behavioral issues. This ALJ finds and concludes that, from the totality of the evidence Claimant did not commit any volitional act that resulted in his termination of employment. Claimant's testimony is found persuasive over the contrary evidence tendered by the HR

Manager and the Office Manager. As further found, Claimant was experiencing extreme pressure to perform a job which clearly exceeded his limitation and he was emotionally frustrated by Employer's failure to accommodate those restrictions. In this ALJ's estimation, even the job of forklift operator would require Claimant to utilize his arm above the shoulder to reach up and get on the forklift, thereby violating his work restrictions. As found, from the totality of the evidence, Claimant is credible in his denial that he was neither insubordinate nor that he acted in any way inappropriately with the Office Manager. This is supported by Employer's decision to send said Office Manager to speak with Claimant at his own home and retrieve Employer's properly. As found and concluded, Employer's decision to terminate Claimant on September 9, 2021, was based on Claimant's work related injury and surgery, and the decision to terminate cannot be attributed to the Claimant or any volitional act of Claimant. Respondents have failed to show that Claimant was responsible for his termination.

Claimant has shown, by a preponderance of the evidence that Claimant is entitled to temporary total disability benefits as his provider restricted Claimant and those restrictions were not complied with. From the totality of the evidence, Claimant is entitled to temporary total disability benefits from September 10, 2021 through the date of surgery. It is further found that Claimant has proven by a preponderance of the evidence he proceeded with surgery, Claimant's right shoulder was immobilized following the February 15, 2022 surgery by Dr. Failinger and was not to do any active range of motion of the shoulder after surgery for at least six weeks. It is found that there is a direct causal link between the work related injury and the Claimant's inability to return to work following surgery. Therefore, the ALJ orders Respondents to provide Claimant with temporary total disability benefits beginning September 10, 2021 and continuing until terminated by law or statute.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by a preponderance of the evidence Claimant is responsible for his termination.

2. Respondents shall pay Claimant temporary total disability benefits from September 10, 2021 at the rate of $560.00 per week. For the period of September 10, 2021 through the date of the hearing on March 3, 2022, Claimant shall be paid $14,000.00. Respondents shall continue to pay temporary disability benefits until terminated by law.

3. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

4. 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 29th day of March, 2022.

Digital Signature

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

ISSUES

- Did Claimant prove she suffered a compensable injury to her left ankle on March 5, 2021?

- If Claimant proved a compensable injury, did she prove the November 23, 2021 surgery by Dr. Eric Lewis was causally related to the work injury?

- The parties stipulated that Dr. Lewis and Arkansas Valley Family Practice are authorized providers.

FINDINGS OF FACT

1. Claimant works for Employer as a Life Skills Facilitator, Child Welfare Case Aide, and Visitation Supervisor.

2. Claimant injured her left ankle on March 9, 2021 while exiting Employer's building. She had a misstep on an uneven surface and rolled her left ankle. She experienced severe pain in the posterolateral aspect of her left ankle.

3. Claimant continued working for a short time but could not continue because of the severe ankle pain. She reported the injury to her supervisor, but at that time she was "not planning of filing workman's comp."

4. Claimant saw her existing podiatrist, Dr. Eric Lewis at Pueblo Ankle & Foot Care, on March 11, 2021. Dr. Lewis wrote that Claimant was having "most pain along the outside aspect of her left ankle going up to her knee." He noted edema around the lateral ankle, crepitus, and painful range of motion. X-rays showed osteophyte formation localized to the anterior distal tibia but no fracture. Dr. Lewis diagnosed an ankle sprain. He advised Claimant to immobilize the ankle and follow the "RICE" protocol. He also ordered an MRI.

5. The MRI was completed on May 3, 2021. It showed capsular thickening and edema over the posterior tibiotalar and subtalar joint, an ununited os trigonum with associated bone marrow edema and interosseous cysts, and edema in the posterior capsule and pericapsular soft tissues overlying the os trigonum and extending to the distal fibula. The radiologist indicated os trigonum syndrome should be considered, if correlated clinically.

6. Claimant had a telemedicine follow-up with Dr. Lewis on May 20, 2021. She stated she "still has pain mainly located along the back and outer aspect of her ankle." Although Claimant specifically reported posterolateral ankle pain, another section of the report simply refers to "lateral" ankle pain. Dr. Lewis reviewed the MRI images, and noted avulsed bone fragments off the posterior tibia and increased update of the os trigonum.

He prescribed a Medrol Dosepak and 800mg ibuprofen TID. He stated he would recommend surgery if the symptoms did not resolve.

7. After the appointment with Dr. Lewis, Claimant realized the injury was more serious than she originally thought, so she notified her supervisor "I was going to need to pursue workers' comp at that point." Employer gave Claimant a designated provider list, from which she selected Arkansas Valley Family Practice.

8. Claimant saw Dr. Richard Book at Arkansas Valley Family Practice on May 27, 2021. Her ankle remained severely symptomatic despite immobilization, the steroid taper, and ibuprofen. Examination showed tenderness to palpation and swelling in the posterior ankle. Dr. Book advised Claimant to continue follow up with Dr. Lewis.

9. Claimant called Dr. Lewis' office on June 29, 2021 to report nothing had changed and she still could not put any weight on the left ankle without the boot.

10. Claimant saw Dr. Lewis on July 1, 2021. The report indicates she was continuing to have aching and burning pain "along the outer aspect of her left ankle." Dr. Lewis noted the MRI showed "separated os trigonum with increased uptake to posterior talar body and os trigonum consistent with acute trauma." He recommended surgery to remove the os trigonum.

11. Dr. Lewis performed os trigonum excision surgery on November 23, 2021. Later records show Claimant had a good result, with significant reduction in pain and improvement in function. By the time of the hearing, Claimant testified to approximately 75% improvement since the surgery.

12. Claimant proved she suffered a compensable injury to her left ankle on March 9, 2021. Claimant's credible description of the accident is supported by records from multiple medical providers and the Employer's First Report. The injury interfered with her ability to continue working and reasonably prompted her to seek treatment. These facts are sufficient to establish a compensable injury.

13. The more difficult question is whether the November 23, 2021 surgery was causally related to the work accident.

14. Claimant first had problems with her left ankle in 2019. The pain was localized to the anteromedial aspect of the left ankle. She saw a chiropractor, who treated her for a presumed stress fracture of the distal fibula. She was advised to stay off the foot or use a walking boot for 3-4 weeks. When the symptoms failed to respond, she was referred for an MRI.

15. An MRI on August 30, 2019 showed an os trigonum with edema in the os, mild arthritis and effusion in the posterior subtalar joint, and mild tendinopathy in the posterior tibialis tendon. The radiologist "suspected" os trigonum syndrome.

16. Claimant saw Dr. Sarah Thompson, a podiatrist, at Pueblo Ankle and Foot Care on September 20, 2019. She reported anterior ankle pain for several months. On

examination, pain was localized to the anteromedial aspect of the ankle. Dr. Thompson gave Claimant a steroid injection. If the ankle did not improve, she would consider a CT scan because the MRI and previous x-rays showed “no findings” to explain the source of her pain.

17. Claimant followed up with Dr. Thompson on October 4, 2019. The injection had not helped and she was still having pain in the anteromedial ankle. Dr. Thompson obtained weightbearing “charger view” x-rays, which showed a tibial osteophyte contacting the talus with dorsiflexion. Dr. Thompson noted, “This is exactly where she is having all her pain. I advised her it is ankle impingement and I will have her follow up with Dr. Pfau for possible surgery discussions. Pt is very relieved that we now know what is causing her pain.”

18. Dr. Zeno Pfau performed arthroscopic surgery on December 27, 2019. He performed a tibial osteotomy and debridement of impinging soft tissue.

19. Claimant recovered from surgery relatively quickly. By February 10, 2020, she reported “minimal pain.” Dr. Pfau released her from regular follow up and advised her to return “as needed.” Claimant returned to regular duty at work.

20. Claimant sought no further treatment for the ankle for almost a year. On January 19, 2021, she saw Dr. Eric Lewis Pueblo Ankle and Foot.[1] She reported a deep ache in the ankle. Examination showed pain with dorsiflexion of the left ankle. Dr. Lewis diagnosed osteoarthritis and ordered an MRI.

21. At hearing, Claimant explained she had returned to the podiatrist in January 2021 because she started having recurrent impingement symptoms in her left ankle. This occurred over a three-month period before the appointment. Claimant testified the symptoms were in the exact same location—over the anteromedial ankle—as in 2019. She was not having any pain or other symptoms in the posterior ankle.

22. As noted above, the work accident that gave rise to the current claim occurred on March 9, 2019. When asked at hearing where she experienced pain the accident, Claimant pointed to the posterolateral aspect of her left ankle. She testified she never had pain or other symptoms in this location before March 9, 2021.

23. Dr. Nicholas Olsen performed an IME for Respondents on September 12, 2021. He issued an initial report after the IME, and an addendum report dated October 7, 2021. Dr. Olsen opined Claimant suffered a work-related ankle sprain on March 9, 2021, which was appropriately treated conservatively with rest, ice, and immobilization. He opined the surgery recommended by Dr. Lewis was related to Claimant’s documented pre-existing history of left ankle problems rather than the work accident.

24. Dr. Lewis authored a report regarding causation of the os trigonum surgery on October 14, 2021. He stated,

[1] Dr. Pfau had left the practice since Claimant’s last post-op appointment.

> I have reviewed all medical records not only from Pueblo Ankle & Foot Care, but that as well of Dr. Olsen's (IME) visit and findings and all additional medical records which are scanned into the patient's chart. [Claimant] initially presented to Dr. Thompson and had surgery by Dr. Pfau for anterior ankle impingement syndrome. She never had symptoms of posterior ankle pain exacerbated with plantar flexion of her big toe prior to her work injury. The MRI after injury also showed increased T2 signal at the os trigonum, which showed a recent trauma. It is my opinion that the misstep at work on two uneven ground with a decline is consistent with her symptoms currently.

25. Dr. Olsen testified at hearing consistent with his reports. He explained that an os trigonum is a congenital malformation at the back of the ankle. It is not necessarily painful, but if it becomes symptomatic, it is referred to as os trigonum syndrome. He opined both the 2019 and 2021 MRIs showed edema around the os trigonum. As a result, he considers Claimant's os trigonum syndrome to be a chronic condition. Dr. Olsen agreed Claimant sprained her ankle on March 9, 2021, but opined the injury did not cause, aggravate, or accelerate the os trigonum syndrome. He emphasized that Dr. Lewis' March 11, 2021 report only references "lateral" ankle pain, whereas posterior ankle pain was noted in the May 20, 2021 report. Dr. Olsen opined Claimant was a candidate for os trigonum removal before the work accident because she had persistent pain in her ankle that did not resolve after the 2019 surgery.

26. Claimant's testimony was credible and persuasive.

27. Dr. Lewis' opinions regarding causation of the os trigonum removal surgery are credible and more persuasive than the contrary opinions offered by Dr. Olsen.

28. Claimant proved by a preponderance of the evidence the November 23, 2021 surgery performed by Dr. Lewis was reasonably necessary and causally related to the March 9, 2021 work accident.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved she suffered a compensable injury to her left ankle on March 9, 2021. Claimant's description of the accident is credible and supported by records from multiple medical providers and the Employer's First Report. The injury interfered with her ability to continue working and reasonably prompted her to seek treatment. These facts are sufficient to establish a compensable injury.

B. Causation of the os trigonum removal surgery

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Claimant proved the November 23, 2021 surgery performed by Dr. Lewis was reasonably necessary and causally related to the March 9, 2021 work accident. Claimant's testimony she experienced posterior ankle pain immediately after the accident is credible. Admittedly, Dr. Lewis' March 11 report does not explicitly mention posterior ankle pain. But the statement that "most" of her pain was on the outside of the left ankle supports an inference that "some" of her pain was posterior, consistent with her credible testimony. This inference buttressed by the May 20 notation that Claimant was "still" having pain in the "back and outer" aspect of her left ankle. Dr. Olson's opinion that Claimant was already candidate for os trigonum surgery before the work accident is not persuasive. Claimant had no posterior ankle symptoms before the work accident. The edema shown on the 2019 MRI was probably an incidental finding given the lack of corresponding symptoms. Aside from the radiologist's "suspicion" of os trigonum syndrome, none of Claimant's treating providers thought the finding was pertinent to the issues for which she was being treated. Dr. Thompson previously commented there were "no findings" on 2019 MRI to account for Claimant's symptoms. Charger view x-rays subsequently pinpointed the "exact" source of her pain, which was addressed surgically by Dr. Pfau in December 2019. The surgery relieved the symptoms with no attention being directed to the os trigonum. Claimant sought further treatment in January 2021 for recurrent *anterior* ankle pain. The os trigonum only became symptomatic after the work accident, and there is no persuasive evidence of any alternate cause or trigger. Crediting Claimant's testimony regarding the onset, progression, nature, and location of her symptoms, coupled with Dr. Lewis' persuasive opinions, the ALJ concludes the os trigonum removal surgery was causally related to the March 9, 2021 work accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left ankle injury on March 9, 2021 is compensable.

2. Insurer shall cover the November 23, 2021 os trigonum excision surgery performed by Dr. Eric Lewis.

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

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

DATED: March 29, 2022

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained an injury arising out of and in the course and scope of his employment with the employer on August 3, 2021.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left shoulder (including surgery recommended by Dr. Mitch Copeland) is reasonable, necessary, and related to the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning August 4, 2021 and ongoing.

4. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

5. If the claim is found compensable, and the claimant is entitled to TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant willfully misled the employer regarding his ability to perform the job and pursuant to Section 8-42-112(1)(d) C.R.S., the claimant's TTD benefits are subject to a reduction of 50 percent.

FINDINGS OF FACT

1. The claimant began working for the employer on February 25, 2019 as a mechanic. As part of the employment process, the claimant was required to submit to a medical evaluation. The claimant "passed" that evaluation in the sense that he was deemed to be physically able to perform his job duties.

2. The claimant's job duties involved diagnosing, repairing, reconditioning, and maintaining heavy equipment. As a result, the claimant's job duties included heavy lifting. Specifically, the claimant's written job description identified lifting and moving objects weighing up to 96 pounds. The claimant was able to perform all of these job duties.

3. On August 3, 2021, the claimant was working to disassemble and inspect a large engine. This process involved removing cylinder heads from the engine. To do this, six cylinder heads are connected to a bar, and lifted together using a chain and crane. Each cylinder head weighs approximately 90 pounds. This specific engine was quite rusty, and the claimant used both a pry bar and the lifting crane to remove the

cylinder heads. When the connected cylinder heads broke free, the suspended cylinder heads began to rotate. The claimant estimates that the entire suspended unit weighed between 650 and 750 pounds. The claimant was concerned that a coworker would be struck by the rotating load, and reached out with his left hand to stop the rotation. In doing so, the claimant felt a pull and then a pop in his left shoulder.

4. After the pop in his left shoulder, the claimant had shooting pain down into his left armpit and burning pain across his shoulder. In addition, he felt tingling into his left fourth and fifth fingers.

5. The claimant reported this incident to his supervisor, [Redacted, hereinafter AO], Branch Service Manager. Mr. AO[Redacted] assisted the claimant in completing paperwork regarding the incident. Mr. AO[Redacted] testified that when the claimant reported the August 3, 2021 incident to him, the claimant stated that he had prior left shoulder issues, including possible surgery.

6. The claimant has not returned to work for the employer since the August 3, 2021 incident.

7. On August 4, 2021, the employer attempted to recreate the August 3, 2021 incident. Mr. AO[Redacted] was involved in the reenactment. Mr. AO[Redacted] testified that he and other employees attempted to recreate the incident as closely as they could. Mr. AO[Redacted] further testified that during the reenactment, the rotation of the suspended materials was "not very fast" and he did not have to use much force to stop the materials from rotating.

Medical Treatment Prior to August 3, 2021

8. Prior to August 3, 2021, the claimant reported left shoulder issues to his medical providers. The claimant's left upper extremity issues seem to have started after he suffered a fall in February 2009 and injured his back, neck, left shoulder, and left arm. Thereafter, the claimant suffered a left arm injury on January 25, 2018 while employed in California.

9. On May 24, 2019, the claimant underwent an Panel Qualified Medical Examination related to the January 25, 2018 California injury with Dr. Paul Sandu. In his June 21, 2019 report[1], Dr. Sandu noted that on examination the claimant had normal range of motion for his left shoulder in flexion, extension, abduction, and adduction. Dr. Sandu opined that the claimant could continue to work without any reactions.

10. In 2019, the claimant relocated from California to Colorado. At that time, he established care with Plateau Valley Medical Clinic. The claimant was first seen at that practice on June 30, 2018 by Dr. Erin Arthur. On that date, the claimant reported

[1] Dr. Sandu authored an extensive report and the ALJ does not recite all observations and opinions he expressed. The ALJ includes only information that is relevant to the present matter.

that he had undergone treatment with a pain specialist in California due to prior injuries. The claimant also reported that his left elbow was his primary concern.

11. Thereafter, the claimant's primary provider at Plateau Valley Medical Clinic was Dr. Scott Rollins. During his treatment with Dr. Rollins, the claimant reported various issues, including back pain and bilateral shoulder pain. In early 2020, Dr. Rollins ordered magnetic resonance imaging (MRI) of the claimant's left shoulder. On February 7, 2020, a left shoulder MRI showed severe acromioclavicular degenerative joint disease with inflammation and vacuum phenomenon in the joint, a chronic appearing SLAP[2] tear, and a moderate paralabral cyst.

12. After review of the February 2020 MRI, Dr. Rollins referred the claimant to Dr. Mitch Copeland for an orthopedic evaluation. The claimant was seen by Dr. Copeland on March 6, 2020. At that time, Dr. Copeland recommended surgical intervention. Specifically, Dr. Copeland recommended a left shoulder arthroscopy with rotator cuff repair, a Mumford procedure, and biceps tenotomy.

13. The claimant testified that he did not pursue the surgery recommended by Dr. Copeland in 2020 because he was still able to work. He did not want to be off of work for a lengthy recovery period if he was able to work full duty. The claimant credibly testified that prior to the August 3, 2021 incident, his left shoulder did not cause him any difficulties at work.

14. The claimant further testified that prior to the August 3, 2021 incident he was able to engage in a number of physically demanding activities. These activities included snowboarding, restoring classic cars, chopping wood, and maintaining his 30 acre residential property. Since the August 3, 2021 incident, he is unable to engage in these activities. The claimant also testified that since August 3, 2021, he has experienced new left shoulder symptoms including a constant aching, burning and shooting pain, and an increase in numbness in his left hand and fingers.

Medical Treatment After August 3, 2021

15. The claimant's authorized threatening provider (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on August 4, 2021. At that time, the claimant described his mechanism of injury as "had a load on a crane, the crane started to rotate, [the claimant] reached up to grab the load so it would not hit a coworker". The claimant also reported significant pain and a pop in his left shoulder. Dr. Stagg restricted the claimant from use of his left upper extremity and made a referral for an orthopedic consultation.

16. The claimant was seen by Dr. Copeland on August 23, 2021. At that time, the claimant described the mechanism of injury as "his arm was pulled forward by a suspended load". Dr. Copeland opined that the claimant had a torn rotator cuff and ordered an MRI.

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[2] Superior labrum anterior posterior tear.

17. An MRI of the claimant's left shoulder was performed on September 8, 2021. The MRI showed a small labrum tear, grade 2 chondral change in the glenohumeral joint, and moderate acromioclavicular arthrosis.

18. On September 8, 2021, Dr. Copeland reviewed the MRI and opined that the claimant could benefit from six weeks of physical therapy. Dr. Copeland also noted that if the claimant did not improve with therapy, surgical options would be addressed.

19. The claimant returned to Dr. Copeland on October 18, 2021. At that time, the claimant reported some improvement with physical therapy. Dr Copeland reviewed the claimant's 2020 MRI and noted that it was "largely similar" to the recent September 2021 MRI. Dr. Copeland recommended the claimant undergo left shoulder surgery, which would include arthroscopy with glenoid labrum debridement, distal clavicle resection, biceps tenotomy, and possible lysis of the paralabral cyst.

20. In early 2022, the claimant attended an independent medical examination (IME) with Dr. Kathleen D'Angelo. In connection with the IME, D'Angelo reviewed the claimant's medical records, obtained a history from the claimant, and performed a physician examination. In her February 4, 2022 IME report, Dr. D'Angelo opined that the claimant did not suffer an injury to his left shoulder on August 3, 2021. It is also Dr. D'Angelo's opinion that the events of August 3, 2021 did not aggravate, or worsen the claimant's pre-existing left shoulder condition. In support of her opinions, Dr. D'Angelo noted that the claimant has a history of chronic left shoulder pain. Dr. D'Angelo further noted that this issue began in 2007 as a result of a work injury that was then exacerbated by an additional injury in 2015. In addition, Dr. D'Angelo noted that the February 7, 2020 and September 8, 2021 MRI results do not differ. Dr. D'Angelo further notes that in 2020, the claimant was complaining of moderate to severe left shoulder pain that was constant and throbbing. Dr. D'Angelo further opined that the claimant's need for surgery is not work related and he reached MMI on August 4, 2021.

21. Dr. D'Angelo's deposition testimony was consistent with her written report. During her testimony, Dr. D'Angelo reiterated her opinion that the claimant did not suffer a left shoulder injury at work on August 3, 2021. Dr. D'Angelo noted in her testimony that when Dr. Rollins reviewed the March 2020 MRI, he noted that the claimant had a chronic SLAP tear in the left shoulder. Dr. D'Angelo further testified that Dr. Copeland's surgical recommendations in 2020 and 2021 are the same. Dr. D'Angelo explained that individuals with chronic degenerative injuries will experience a waxing and waning of their symptoms. It is Dr. D'Angelo's opinion that the medical records indicate that the claimant has this waxing and waning of his symptoms. Dr. D'Angelo further testified that while the recommended left shoulder surgery may be reasonable and necessary to treat the condition of the claimant's left shoulder, the need for surgery is not related to the claimant's work.

22. [Redacted, hereinafter SH] , Claim and Risk Management Supervisor for the employer testified by deposition. Ms. SH[Redacted] testified that she learned about the claimant's August 3, 2021 incident on that same date. Ms. SH[Redacted] also testified that the claimant

has not returned to work for the employer. She confirmed that at this time, the employer is not able to accommodate the claimant's work restrictions.

23. Dr. Stagg testified that it is his opinion that the August 3, 2021 work incident exacerbated the chronic condition in the claimant's left shoulder. In support of this opinion, Dr. Stagg noted that prior to the August 3, 2021 incident, the claimant was working full duty in a physically demanding job. Dr. Stagg also testified that the claimant's mechanism of injury is consistent with a shoulder injury.

24. The payroll records entered into evidence demonstrate that the claimant was paid $27.81 per hour while employed with the employer. However, the claimant's hours varied throughout his employment. The payroll records further demonstrate that between the work week ending August 15, 2020 and the work week ending August 7, 2021[3], the claimant had gross earnings of $61,998.46. When this amount is divided by 51 weeks it results in an average of $1,215.66.

25. The ALJ credits the medical records and the claimant's testimony regarding the nature and onset of his left shoulder symptoms. The ALJ specifically finds as true that prior to the Augusts 3, 2021 incident, the claimant was able to fully perform his job duties, despite having sought prior treatment of his left shoulder. The ALJ also credits the opinions of Dr. Stagg over the contrary opinions of Dr. D'Angelo. The ALJ specifically credits the opinion of Dr. Stagg that the August 3, 2021 incident exacerbated the claimant's chronic left shoulder condition.

26. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on August 3, 2021, he suffered an injury to his left shoulder while in the course and scope of his employment with the employer. In addition, the ALJ finds that the claimant's act of reaching with his left arm to stop the suspended load from rotating resulted in an aggravation and acceleration of his pre-existing left shoulder condition. This aggravation and acceleration of the claimant's pre-existing left shoulder condition resulted in the need for medical treatment.

27. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that treatment of his left shoulder is reasonable, necessary, and related to the August 3, 2021 work injury. In addition, the claimant has successfully demonstrated that it is more likely than not that the recommended left shoulder surgery is reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

28. The ALJ credits the testimony of the claimant and Ms. SH[Redacted] and finds that the claimant has not returned to work for the employer because of his work restrictions. The ALJ further finds that the claimant has successfully demonstrated that it is more likely than not that his inability to return to work is the result of the August 3, 2021 injury.

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[3] This was a 51 week period.

29. The respondents assert that the claimant's TTD benefits should be reduced by 50 percent because the respondents believe that the claimant willfully misled the employer regarding his physical ability to perform his job duties. The ALJ is not persuaded by this argument. As found, prior to his August 3, 2021 injury, the claimant was able to fully perform his job duties. The ALJ declines to apply any reduction to the claimant's TTD benefits in this case.

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 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*.

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on August 3, 2021 he sustained an injury arising out of and in the course

and scope of his employment with the employer. As found, the claimant has demonstrated, by a preponderance of the evidence, that the pre-existing condition in this left shoulder was aggravated and accelerated by the August 3, 2021 incident. As found, the medical records, the claimant's testimony, and the opinions of Dr. Stagg are credible and persuasive.

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

7. As found, the claimant has demonstrated by a preponderance of the evidence, that treatment of his left shoulder, including the surgery recommended by Dr. Copeland, is reasonable, necessary, and related to the August 3, 2021 work injury. As found, the medical records, the claimant's testimony, and the opinions of Dr. Stagg are credible and persuasive.

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

9. As found, the claimant has demonstrated by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning August 3, 2021 and ongoing until terminated by law. As found, the testimony of Ms. SH[Redacted] and the claimant is credible and persuasive on this issue.

10. 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).

11. As found, the claimant's average weekly wage (AWW) is $1,215.66.

ORDER

It is therefore ordered:

1. The respondents shall pay for reasonable and necessary treatment of the claimant's left shoulder, including the surgery recommended by Dr. Copeland, pursuant to the Colorado Medical Fee Schedule.

2. The claimant is entitled to temporary total disability (TTD) benefits beginning August 3, 2021 and ongoing until terminated by law.

3. The claimant's average weekly wage (AWW) is $1,215.66.

Dated this 30th day of March 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
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ISSUES

I. Whether Claimant overcame Dr. Stephen Lindenbaum's DIME opinions on causation and MMI regarding his right shoulder by clear and convincing evidence.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonable and necessary medical benefits for his right shoulder.

Whether Claimant overcame Dr. Lindenbaum's causation and MMI opinion on Claimant's cervical/thoracic spine was initially identified as an issue; however Claimant subsequently withdrew the issue in his position statement.

STIPULATIONS

The parties agreed that if Claimant overcomes the DIME opinions of Dr. Lindenbaum regarding causation and MMI, then Claimant is entitled to $1 of temporary partial disability benefits for May 21, 2019. The parties further agreed that the issue of temporary partial and/or temporary total disability benefits after May 21, 2019 are reserved, as are the issues of overpayment, offsets, and applicable defenses. The parties further stipulated that if Claimant fails to overcome the DIME opinion of Dr. Lindenbaum regarding causation and MMI, Claimant accepts Dr. Lindenbaum's opinions regarding permanent impairment for his right elbow and low back as admitted to by Respondents, as well as Respondents' denial of maintenance care for causally related body parts.

FINDINGS OF FACT

1. Claimant is the owner-operator of Employer, an HVAC company.

2. Claimant sustained an admitted industrial injury on Friday, August 17, 2018. While climbing a ladder to a 12-foot high roof, the ladder slipped, causing Claimant to begin to fall. Claimant caught himself by grabbing the gutter of the home with his right arm. His body swung sideways in the air to an almost horizontal position. Claimant then lost his grip and fell approximately five to eight feet to the ground. Claimant testified he landed on the ladder across his right side and back of his right lower torso.

3. Claimant testified he was dazed and shocked at the time and noticed right arm numbness and pain. Claimant testified he decided to see if his condition would improve over the weekend. Claimant testified that, by the following Monday, he had difficulty walking, and noticed his right biceps looked abnormal.

4. On August 21, 2018, Employer filed a First Report of Injury form indicating Claimant "[f]ell off a ladder, hurt arm trying to hold on and hurt back on impact." (Resp. Ex. C, p. 9). No right shoulder or neck injuries were identified.

5. Claimant presented to authorized treating provider Charles Wenzel, D.O. on August 22, 2018 with complaints of pain in his right arm, right forearm, and low back, as well as bilateral knee pain that had resolved. The pain diagram completed by Claimant denotes lumbar and thoracic spine pain, bilateral knee pain, right elbow pain, and neck pain. Dr. Wenzel noted tenderness, decreased strength, and decreased range of motion of the right arm, as well as ecchymosis and erythema. No right shoulder complaints or examination were documented. Dr. Wenzel assessed Claimant with strains of the right long head biceps, unspecific injury of the right forearm, and muscle strain of the low back. He referred Claimant for physical therapy.

6. Claimant returned to Dr. Wenzel on August 27, 2018 with complaints of worsening pain, primarily in his low back, as well as ongoing apprehension regarding use of his right upper extremity. Claimant's pain diagram does not indicate any shoulder pain. The medical note does not document any right shoulder complaints or shoulder examination. Dr. Wenzel recommended Claimant undergo occupational therapy.

7. Between August 29, 2018 and September 11, 2018, Claimant underwent six therapy sessions. Claimant's therapists did not document any right shoulder, neck, or mid-back/upper thoracic issues during those sessions.

8. On August 31, 2018, Claimant presented to Monica Fanning Schubert, APN. Claimant's pain diagram identified right elbow, right bicep, thoracic and lumbar pain, without indication of right shoulder or neck issues. APN Fanning Schubert noted complaints of pain in the low back and right distal and mid biceps. No shoulder complaints or examination is documented at this evaluation. APN Fanning Schubert referred Claimant for MRIs of his lumbar spine and right elbow.

9. Claimant underwent a right elbow MRI on September 10, 2018, which revealed a ruptured biceps tendon.

10. APN Fanning Schubert reexamined Claimant on September 11, 2018. Claimant's pain diagram and the medical note from this examination do not document any right shoulder, neck or mid-back issues. APN Fanning Schubert diagnosed Claimant with a full-thickness tear of his distal bicep tendon and progression of L4-5 foraminal stenosis. She referred Claimant to Dr. Nicholas Olsen, D.O. for pain management, and to Sameer Lodha, M.D. for surgical evaluation of the right distal bicep rupture.

11. Claimant first presented to Dr. Olsen on September 13, 2018. Claimant completed a patient questionnaire and pain diagram in which he described his injury as falling off of a ladder causing back and right arm problems. His pain diagram identified issues at the right elbow, mid-back, and low back, but not his right shoulder or neck. Dr.

Olsen's evaluation made no mention of right shoulder, neck or mid-back issues, focusing on the lumbar spine.

12. Dr. Lodha first evaluated Claimant on September 18, 2018. No right shoulder complaints or right shoulder evaluation was documented. Dr. Lodha recommended Claimant undergo right distal bicep surgical repair, which she performed on September 24, 2018.

13. Claimant attended a follow-up evaluation with APN Fanning Schubert on September 28, 2018. Claimant did not identify right shoulder or neck issues on his pain diagram, but he circled his mid-back region that day. APN Fanning Schubert did not identify right shoulder or neck issues or complaints, and Claimant's thoracic spine exam was negative. APN Fanning Schubert referred Claimant to orthopedic surgeon Bryan Andrew Castro, M.D. for his low back pain.

14. Claimant returned to APN Fanning Schubert on October 9, 2018. He completed a pain diagram indicating pain in his right shoulder, right elbow, low back and left leg. APN Fanning Schubert did not document any right shoulder, neck or mid-back complaints.

15. Claimant presented to Dr. Castro on October 24, 2018 for examination of his low back. Claimant reported right elbow and biceps tendon pain, as well as low back and left leg pain. On examination of upper extremities, Dr. Castro noted "good function and strength to all motions of the shoulders, elbows, wrists and hand intrinsics." (R. Ex. K, p. 113). Claimant's pain diagram did not identify right shoulder issues, nor is there mention of right shoulder issues in the medical note. Dr. Castro assessed Claimant with lumbar spine pain.

16. On October 31, 2018, APN Fanning Schubert noted that Dr. Castro had referred Claimant to Dr. Olsen for consideration of lumbar injections. Claimant's pain diagram did not identify issues with his right shoulder, nor did the medical note. Similarly, on November 1, 2018, Dr. Olsen did not identify right shoulder, neck, or mid-back complaints and Claimant's pain diagram did not identify issues in those regions.

17. On November 16, 2018, APN Fanning-Schubert noted that Claimant's lumbar injections were canceled due to non-work related medical issues. Claimant had recently sought evaluation and treatment with his personal physicians for unrelated chest pains and several other unrelated medical complaints. Claimant did not report right shoulder, neck or mid-back issues and his pain diagram did not identify issues in those areas.

18. On December 10, 2018, Claimant told Dr. Olsen that he had a "host of new medical problems" resulting in multiple emergency department visits, a possible infection, a tooth being pulled, throat swelling, and a loss of 25 pounds. Dr. Olsen did not document right shoulder or mid-back issues and Claimant's pain diagram did not identify issues in those areas.

19. On December 14, 2018, APN Fanning Schubert noted Claimant had weight loss, abdominal pain, chest pain, neck and headache pain, all of which were being worked up by his primary care physician. She did not document right shoulder or mid-back complaints, and she did not relate the neck pain to the work injury. Claimant's pain diagram did not identify right shoulder, neck or mid-back issues.

20. On January 9, 2019, Dr. Olsen noted Claimant's right arm was doing better. Claimant's pain diagram identified pain in the mid-back region for the first time in more than two months, but no issues in the right shoulder or neck regions.

21. On January 15, 2019, Dr. Lohda noted Claimant was having other medical issues, including back pain, trouble swallowing, weight loss and shoulder girdle pain. Dr. Lodha opined that Claimant had healed from the standpoint of his distal biceps, but recommended Claimant undergo evaluation for his other conditions, including a rheumatology consultation, before releasing Claimant to work without restrictions. Dr. Lodha did not address any potential causal connection between Claimant's shoulder complaints and his biceps repair.

22. On January 16, 2019, APN Fanning Schubert noted Claimant's report of right shoulder pain and neck pain. She noted that Claimant's original pain diagram noted neck pain and referred Claimant for a cervical MRI. The pain diagram completed for this examination indicated right shoulder pain. APN did not address Claimant's right shoulder at this evaluation.

23. Claimant underwent the cervical MRI on January 21, 2019, which identified degenerative issues at multiple levels.

24. On February 6, 2019, Dr. Olsen reviewed the cervical MRI, noting C5 radiculopathy could explain Claimant's right arm weakness. Dr. Olsen subsequently administered an EMG on February 25, 2019, which he interpreted as normal, without any evidence of cervical radiculopathy.

25. On March 18, 2019, Dr. Olsen discussed options to treat Claimant's ongoing neck complaints. On April 4, 2019, Dr. Olsen noted Insurer had denied all neck-related care as not work-related. No right shoulder complaints or issues were addressed. Dr. Olsen further indicated that when Claimant next returned he would likely move towards MMI.

26. On March 26, 2019, Matthew Lugliani, M.D. opined Claimant was not at MMI pending cervical injections.

27. On April 30, 2019, Dr. Lugliani noted Claimant continued to report ongoing mid and low back pain. Right shoulder complaints or issues are not documented in the medical note. Claimant's pain diagram from this date does indicate right shoulder pain. Dr. Lugliani noted he reviewed Claimant's medical record and discussed Claimant's case with pain management. He opined Claimant reached MMI with permanent

restrictions of lifting 20 pounds. He recommended one-year of medical maintenance care for medication adjustment and/or injections.

28. Dr. Olsen reexamined Claimant on June 26, 2019. Claimant reported that his right arm was doing well but continued to voice complaints about his cervical spine. Right shoulder complaints are not documented nor is the right shoulder otherwise addressed in this medical note. Dr. Olsen placed Claimant at MMI. He assigned a 12% whole person lumbar rating, which he apportioned to 0% due to a prior rating. Dr. Olsen explained that he did not include a cervical impairment rating because, despite Claimant's continued cervical complaints, Insurer had denied treatment for Claimant's cervical condition. He opined Claimant did not require maintenance care.

29. On September 11, 2019, Insurer filed a Final Admission of Liability ("FAL") consistent with Dr. Olsen's opinions regarding MMI, impairment, and maintenance care. Claimant subsequently requested a DIME.

30. Dr. Lindenbaum performed the DIME on December 13, 2019, noting he was asked to address Claimant's right shoulder, cervical spine and lumbar spine. Claimant reported his belief that his providers overlooked his shoulder and neck complaints. Dr. Lindenbaum remarked,

> It should be noted that I have not been provided with any diagrams with which the claimant states were found in the chart review by Dr. Olsen. Furthermore, there was no mention of any neck and shoulder discomfort until the claimant was seen in early January 2019, roughly 5 months after the injury.

(R. Ex. W, p. 280)

31. Dr. Lindenbaum opined that Claimant reached MMI for his lumbar spine and right elbow injuries, but that he was not at MMI because of "issues concerning his right shoulder and neck." (Id. at 282). He explained,

> Although, there are some discrepancies in what the patient has stated to me and what is found in the chart notes, these issues have to be addressed. Therefore, I think that this claimant will probably need to be referred back to the OccMed doctors so they can clarify if he truly had issues with his neck and shoulder based on the notes that they have. It should be noted that the first mention of his right shoulder was by Dr. Lodha on the day that he discharged the patient from his care which was several months after the accident and the first mention of neck discomfort that I see is actually from the nurse practitioner in early January 2019. This is the reason the question comes up concerning whether or not these two areas should be considered with the original injury as part of the injury of 2018.

(Id.)

32. Dr. Lindenbaum then provided the following provisional impairment ratings: 19% whole person impairment for Claimant's cervical spine (6% impairment under Table 53(II)(C) of the AMA Guides and 14% for range of motion deficits); 12% whole person impairment for Claimant's lumbar spine (5% impairment under Table 53(II)(C) of the AMA Guides and 7% for range of motion deficits); and 8% upper extremity impairment for the right shoulder. He noted that, due to a prior 12% lumbar impairment from a previous work injury; the lumbar impairment would be apportioned to 0%. Dr. Lindenbaum opined that there was no reason for maintenance care unless the right shoulder and neck were included in the claim.

33. Regarding the rationale for his decision, Dr. Lindenbaum wrote,

> There is a lot of controversy concerning whether or not the right shoulder and neck should be included in his rating. The reasons for this statement is that this patient states that on examining him today that he told the physicians all along that he was having neck and shoulder pain and they did not work this up. However, on evaluation of the chart notes and with lack of any type of diagrams from the initial evaluation, I see no evidence that this patient complained of shoulder or neck pain up until being seen by Dr. Lodha in December of 2018 when he complained of shoulder pain for the first time on the right and also not until January of 2019 when he saw the nurse practitioner that he complained of neck pain. He himself states that he talked to Dr. Olsen about this and Dr. Olsen said he did see these notes although I have not seen them. For that reason, I do not think he is at maximum medical improvement until we can justify if there was a reason to include his right shoulder and neck in this injury. I would strongly recommend this claimant be referred back to the work comp doctors that he was seeing so that they can supply information concerning the alleged right shoulder and neck problems.

(Id. at 282-283)

34. On April 20, 2020, Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. D'Angelo examined Claimant and reviewed Claimant's medical records, including pain diagrams. Claimant reported that, when he initially sought medical treatment after the work injury, the most obvious issue was his bicep, but that at that time he explained to his provider that there were other issues all over his body. Claimant reported that he explained to the provider the areas hurting the most at the time and that his arm was the biggest focus. Dr. D'Angelo noted her examination of Claimant's right shoulder, neck and thoracic spine were normal. She provided claim-related diagnoses of (1) aggravation of preexisting lumbar degenerative spine disease, and (2) right distal bicep tendon rupture. She opined that Claimant's right shoulder and neck conditions are not work-related.

35. Dr. D'Angelo noted concerns regarding Claimant's reporting of symptoms. She opined that, although Claimant purported he informed his treating physicians of his neck and right shoulder complaints from the outset, it was improbable that his physicians ignored such complaints. She explained that her review of Claimant's intake forms did not corroborate his claim of persistent neck and/or right shoulder complaints. Dr. D'Angelo noted that, in her records review, Claimant did mark right shoulder pain in certain diagrams, but also had no complaints of right shoulder pain for several months after his injury. She further noted that Claimant's shoulder was examined by his providers and had no significant abnormalities. Dr. D'Angelo opined that Claimant reached MMI as of May 2, 2019 for his claim-related diagnoses. She agreed with the impairment ratings assigned by Dr. Olsen, noting the ratings included all of the body parts that were causally-related to Claimant's work injury. Dr. D'Angelo opined Claimant did not require maintenance medical care.

36. On May 22, 2020, Dr. Lindenbaum attended a Samms Conference with counsel for both parties. In preparation for the conference, Dr. Lindenbaum reviewed additional documentation, including several pain diagrams and Dr. D'Angelo's IME report. Dr. Lindenbaum issued an addendum DIME report updating his opinion. Dr. Lindenbaum addressed the reasoning behind his original opinion that Claimant was not at MMI, stating,

> The questions arose concerning compensability for the shoulder and neck, which I had noted there was no specific mention of these things until several months after the accident. I specifically stated that I do not have any information except from what Dr. Lodha as well as Dr. Olsen had stated and that the patient started complaining of pain in his shoulder around the 1st of January, 2019. There was also some issues about whether this patient had actually discussed his complaints with his shoulder and neck with the OccMed doctors. Apparently, there had been a change in the OccMed physicians and the original physician, Dr. Wenzel, was no longer treating the patient and with his follow-up physician, there was no mentioned (*sic*) regarding work comp compensability for the right shoulder and neck until January of 2019. It was for these reasons that I stated he was not at maximum medical improvement until I could receive some documentation that would support his claims that he was having shoulder and neck pain from the beginning of the accident and were documented.

(R. Ex. AA, p. 439)

37. Dr. Lindenbaum noted that Claimant's 8/22/18 pain diagram only showed complaints of pain in his right elbow, knees, low back and neck, and that the 8/27/18 and 8/31/18 diagrams only denoted back and right elbow pain. Dr. Lindenbaum remarked that the first mention of shoulder discomfort was on 10/9/18, two months after the work injury. He noted there was "still no evidence of any complaints." (Id.) Dr.

Lindenbaum noted the 10/28/18, 10/31/18 and 11/16/18 diagrams did not indicate shoulder or neck complaints and that,

> [u]p to this time it should be noted there was no mention on diagrams of neck discomfort and only that he had some neck discomfort initially on the first visit. I would assume that because of the paucity of findings in his neck and his lack of diagram mentioning of neck pain that there were probably myofascial type of discomforts that were experienced at the initial injury.

(Id.)

38. He further referenced diagrams dated 12/14/18, 1/16/19, 2/1/19, 2/19/19, and 3/26/19, noting that only the 1/16/19 and 2/19/19 diagrams denoted right shoulder complaints.

39. Dr. Lindenbaum concluded that Claimant's right shoulder and neck conditions are not causally-related to Claimant's work injury, specifically reasoning that there were several months that passed without any specific complaints of discomfort related to the neck or shoulder. He opined that Claimant reached MMI for his work-related conditions on May 2, 2019, which included the lumbar spine and right elbow/bicep. Dr. Lindenbaum assigned 12% whole person lumbar impairment, apportioned out to 0% for Claimant's prior injury, and a 2% upper extremity rating for Claimant's right elbow/biceps.

40. On December 7, 2020, John Hughes, M.D. conducted an IME at the request of Claimant. Dr. Hughes performed a physical examination and reviewed Claimant's medical records, including the reports of Drs. D'Angelo and Lindenbaum. His diagnoses included cervicothoracic spine sprain/strain with persistence of non-radicular cervical spine pain and progressive right shoulder pain that merited further evaluation. Dr. Hughes disagreed with Drs. D'Angelo and Lindenbaum regarding the lack of relatedness of Claimant's right shoulder and cervicothoracic conditions. He explained,

> Although right shoulder and cervicothoracic spine symptoms were secondary to the acute symptoms stemming from his right biceps tear and aggravation of his lumbar spine, I disagree that 'there were months that went by without any specific complaints of discomfort related to the neck or the shoulder' as summarized by Dr. Lindenbaum in his Samms conference report.

(R. Ex. EE, p. 455)

41. Dr. Hughes agreed with Dr. D'Angelo and Dr. Lindenbaum that Claimant did not sustain primary injuries to his right shoulder, but opined that Claimant's ruptured right biceps and subsequent surgical repair ultimately resulted in his shoulder condition. Dr. Hughes explained that the surgical repair involved traction and pulling distally on the

biceps, which put new stresses on the right biceps long head tendon that extends proximally through the shoulder. He noted that right shoulder pain was documented two weeks after the procedure, and that such pain has persisted. Dr. Hughes opined that Claimant requires diagnostic evaluation for the right shoulder and, as such, had not reached MMI for such condition.

42. Dr. Hughes further opined that there was no clear-cut evidence of a medically documented injury to Claimant's cervical spine; but that thoracic spine pain was mentioned in August 27 and August 31 reports. He concluded that the diagnosis and source of pain generation remained unclear with respect to Claimant's cervicothoracic spine. Dr. Hughes recommended that Claimant undergo further assessment of the cervicothoracic spine and right upper extremity, including an EMG to assess for cervical radiculopathy, a possible trial of osteopathic manipulative treatment to include the upper thoracic spine, and possible spinal surgical intervention.

43. On June 15, 2020, Insurer filed a FAL consistent with Dr. Lindenbaum's updated DIME opinion regarding causation, impairment and maintenance care.

44. Dr. Hughes testified at hearing on behalf of Claimant as a Level II accredited expert in occupational medicine. Dr. Hughes testified consistent with his IME report. Dr. Hughes testified that Claimant's right shoulder condition was caused by the surgical shortening of his biceps on the right side. Dr. Hughes explained that the biceps extend up into the shoulder and that Claimant's emergence of shoulder symptoms is consistent with that particular pathology. He noted Claimant's shoulder condition was not realized until a number of weeks after his surgery was completed. Referring to Dr. Lodha's operative report, Dr. Hughes described the surgical procedure which entailed extensive tenolysis and pulling on the muscle tendon that extends up into the shoulder. He explained that, based on the operative report, considerable tension was required to reapproximate the distal biceps muscle. Dr. Hughes did not identify the right shoulder problem as arising from the original injury, but from the surgical repair that was delayed for a month and a week following the original injury. He testified that the delay was significant as it allowed more atrophy and shortening of the torn segment of the biceps tendon, requiring more traction during the surgical procedure.

45. Dr. Hughes anticipates diagnostic testing to reveal internal derangement of the right shoulder, including biceps longhead tendinosis or a partial tear in the shoulder. He recommends an evaluation and workup of the right shoulder with an orthopedic surgical evaluation and a non-contrast MRI. He testified that the MTG require a diagnosis before completing a causation analysis and that his recommendations are part of that requirement from the MTG. On cross-examination, Dr. Hughes testified that his only positive right shoulder exam finding regarding the right shoulder was limitation of active motion. Dr. Hughes acknowledged that he did not include his report, that after the October 9, 2018 pain diagram, Claimant's next seven pain diagrams did not identify right shoulder issues, nor that Dr. Castro's October 24, 2018 right shoulder exam was normal. Dr. Hughes did not provide an explanation for the absence of right shoulder

complaints or findings in the reports issued by the medical providers who saw Claimant between the date of surgery and January 15, 2019.

46. Dr. Hughes testified that there is no evidence of a medically documented injury to Claimant's cervical spine such that he can relate that condition to this claim. He further opined that Claimant's thoracic spine issues are related to Claimant's work injury and necessitated osteopathic manipulation.

47. Dr. D'Angelo testified at hearing on behalf of Respondents as a Level II physician who specializes in occupational medicine and forensic causation evaluations. Since issuing her April 20, 2020 report, Dr. D'Angelo reviewed Dr. Lindenbaum's amended DIME report, Dr. Hughes' IME report, and listened to the hearing testimony of Claimant and Dr. Hughes. Dr. D'Angelo testified consistent with her IME report. She testified that Claimant reported to her that his right shoulder condition was an immediate effect of the work accident. Dr. D'Angelo testified that her review of the medical records, including pain diagrams, contained no evidence of a right shoulder injury. Dr. D'Angelo strongly disagreed with Dr. Hughes' theory that Claimant's right shoulder condition was a consequence of the bicep tendon repair, noting that in her 30-plus years of experience as a doctor, she has never seen such phenomenon. She further testified that Dr. Hughes' theory does not comport with the medical records.

48. Dr. D'Angelo agreed with Dr. Hughes and Dr. Lindenbaum that Claimant did not sustain a work-related cervical injury. Dr. D'Angelo confirmed that Dr. Lindenbaum did not relate Claimant's thoracic spine condition to this claim, and that no treating physician related that condition to this claim. She opined that Claimant does not require osteopathic manipulation of his thoracic spine. In support of these opinions, Dr. D'Angelo pointed to Claimant's intermittent identification of thoracic region issues on his pain diagrams, she explained that aching in the intrascapular region is a common complaint that without other findings or complaints means nothing, and she further explained that in this case Claimant's early complaints of upper thoracic tenderness certainly means nothing given Claimant's lack of complaints later on, and given that her own thoracic spine exam revealed no tenderness or pathology. Dr. D'Angelo testified that she agrees with Dr. Lindenbaum's ultimate DIME opinion regarding causation and MMI.

49. Claimant testified he began to notice right shoulder issues after initially recovering from the surgery. He testified that he could not fully raise his arm and that his arm would cramp if raised for an extended period. Claimant testified that, immediately following the surgery, he was not moving his arm much because it was in a sling. He stated that within a couple weeks of the surgery he began to notice problems with the shoulder once it again became usable. Claimant testified he did not suffer any outside injuries to his right shoulder after the work injury. Claimant wishes to undergo evaluation and treatment for his right shoulder.

50. Regarding Claimant's right shoulder condition, the ALJ credits the opinions of Drs. Lindenbaum and D'Angelo, as supported by the medical records, over the opinion of Dr. Hughes and Claimant's testimony.

51. Claimant failed to prove that it is highly probable Dr. Lindenbaum's DIME opinion on causation and MMI is incorrect.

52. Claimant failed to prove it is more likely than not he is entitled to an award for medical treatment for his right shoulder condition.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to

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

Overcoming the DIME

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Claimant contends that Dr. Lindenbaum committed clear error when he determined Claimant's right shoulder condition is not causally-related to the work injury, thus placing Claimant at MMI. Claimant argues that Dr. Lindenbaum's focus on whether

Claimant made specific complaints regarding shoulder issues in the early medical records "misses the point" regarding the causality of Claimant's condition. Claimant relies on Dr. Hughes' opinion and purports there is a reasonable explanation for any delay in reported shoulder symptoms, as the surgical biceps tendon repair ultimately caused Claimant's shoulder condition.

Considering the totality of the evidence, Claimant failed to meet the higher evidentiary burden of proving that it is highly probable Dr. Lindenbaum's DIME opinion on causation and MMI is incorrect. Dr. Lindenbaum reviewed Claimant's medical records and performed a physical examination as part of his initial evaluation. He thoroughly discussed his concerns regarding the causality of Claimant's right shoulder condition. Based on Claimant's reports that he had initially reported shoulder and neck complaints that were overlooked, Dr. Lindenbaum initially opined that Claimant had not reached MMI for certain body parts because he required additional information to make such determination. Upon reviewing additional documentation, Dr. Lindenbaum ultimately concluded that Claimant's right shoulder condition is not related to his work injury, again explaining his rationale in a report. Nothing in the record indicates that, at the time Dr. Lindenbaum reached his ultimate opinion, he did not consider, or otherwise misread or misapplied, relevant records or information necessary to make his determination.

Dr. Hughes' opinion that any delay in reporting shoulder complaints was reasonable, as such complaints were related to Claimant's surgery, is controverted by Dr. D'Angelo's opinion. Dr. D'Angelo performed a thorough review of Claimant's records and a physical examination and agrees with Dr. Lindenbaum's ultimate opinions. To the extent Dr. Hughes disagrees with Dr. Lindenbaum and Dr. D'Angelo regarding the causality of Claimant's right shoulder condition and MMI, this is merely a difference of medical opinion that does not rise to the level of clear convincing evidence to overcome Dr. Lindenbaum's DIME opinion.

Medical Treatment

Respondents are liable for medical treatment that is casually-related and reasonably necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

The employer's obligation to provide medical treatment continues until the claimant reaches MMI. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988).

Claimant contends his right shoulder condition is causally related to his industrial injury, thus entitling him to medical treatment for his right shoulder. As discussed, DIME

physician Dr. Lindenbaum opined Claimant's right shoulder condition is not causally related to his industrial injury and Claimant failed to overcome this opinion by clear and convincing evidence. Accordingly, Respondents are not liable for medical treatment for Claimant's unrelated right shoulder condition.

ORDER

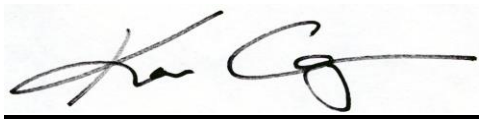
1. Claimant failed to establish by clear and convincing evidence that DIME physician Dr. Lindenbaum's opinion on MMI and causation is incorrect.

2. Claimant failed to establish by a preponderance of the evidence entitlement to medical treatment for the right shoulder.

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: March 30, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-163-840-001

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant's average weekly wage (AWW) is $720.00 per week rather than the admitted AWW of $2,483.34 reflected on Respondents' March 8, 2021 General Admission of Liability (GAL).

II. If Claimant's AWW is determined to equal $720.00 per week, whether Respondents established, by a preponderance of the evidence, that Claimant has been overpaid in Temporary Total Disability (TTD) benefits.

III. If Respondents established that Claimant's TTD benefits have been overpaid, whether they are entitled to recoup this overpayment.

FINDINGS OF FACT

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

1. Claimant worked for Employer, an elevator installation/maintenance company, as a mechanic's helper/apprentice. Claimant's job duties included assisting a mechanic, usually [Redacted, hereinafter BJ], with installing, servicing, modernizing, and/or repairing elevators.

2. Claimant began working for Employer on October 14, 2019. His base rate of pay at the time of hire was $18 per hour. (Resp. Ex. B, bns. 066-067; Resp. Ex. A, bn. 045) Claimant was eligible for overtime pay in his position, which would be paid at 1.7x his hourly rate ($27 per hour); unless that overtime occurred on weekends or holidays, then it would be paid at 2.0x his hourly rate ($36 per hour). Claimant's hours per week would fluctuate depending on the project he was assigned to work although [Redacted, hereinafter RM], Owner and President of Employer, testified that over the approximately 15 months Claimant worked for Employer his average was 40 hours per week.

3. Shortly after beginning work for Employer, Claimant was assigned to work a project at the United States Air Force Academy ("USAFA"), in Colorado Springs. Employer had previously contracted with the USAFA to modernize 29 elevators at their facility and sent several people, including Claimant, to assist with the project.

4. When Claimant worked at the USAFA, his hourly wage increased to $28 per hour, with identical overtime increases in applicable situations (1.7x his hourly rate, 2.0x for weekends/holidays; to $47.60 per hour and $56 per hour respectively). (*See, e.g.* Resp. Ex. A, bn. 046)

5. Mr. RM[Redacted] testified at hearing. Mr. RM[Redacted] testified that Claimant, and other mechanic helpers/apprentices assigned to the USAFA project, received the aforementioned increased wages while working that project because Employer believed it was required by the Davis Bacon Act to provide this pay as the local prevailing wage.

6. The majority of Claimant's work for Employer from the time of his hire through mid-January 2021 was spent on the USAFA project. However, Claimant did not work exclusively on this project. When Claimant worked on non-federal government projects, his hourly wage would revert to his base pay of $18 per hour. (*See, e.g.* Resp. Ex. A, bn. 050) Mr. RM[Redacted] testified that Claimant was never promoted nor provided a raise by Employer. (Clmt's. Ex. 7)

7. Claimant last spent time on the USAFA project during the week of January 11-17, 2021. Mr. RM[Redacted] testified that Claimant and Mr. BJ[Redacted] had finished their portion of the USAFA project during this week and were both transferred to a non-federal government project, which was not governed by the Davis Bacon Act. Upon his transfer off the USAFA job, Claimant's base pay reverted to $18 per hour. (Resp. Ex. A, bns. 022, 023, & 005) Mr. RM[Redacted] testified that Employer had no plans to return Claimant to the USAFA project.

8. Twelve days after being transferred from the USAFA job, Claimant suffered an admitted industrial injury to his right hand on January 29, 2021, while adjusting the width of some forks on a forklift used to move elevator equipment on a job site. (Resp. Ex. C & D) This injury caused Claimant to miss work; thus, warranting the payment of ongoing TTD by Insurer beginning February 2, 2021. (Resp. Ex. D, bn. 071) As noted, Claimant's rate of pay at the time of his January 29, 2021 injury had reverted to $18 per hour. (Resp. Ex. A, bn. 022)

9. In order to file a General Admission of Liability (GAL) reflecting Claimant's lost wages, Insurer requested payroll records from Employer to calculate his AWW. Employer provided Insurer with 13 weeks of Claimant's wage records, which records included pay stubs for some of the time Claimant spent while working on the USAFA job prior to January 29, 2021. (*See* Resp. Ex. D, bns. 074-092) Mr. RM[Redacted] testified that at the time Claimant's wage records were produced, Employer was not certain how Insurer would be using the information. Moreover, Employer did not notify Insurer that Claimant had finished his portion of the work on the USAFA project and that his pay had returned to $18 per hour, for 40 hours per week.

10. Insurer averaged Claimant's wage records for his prior 13 weeks of employment to calculate an AWW of $2,483.34. This made Claimant's TTD rate $1,074.22 per week (the statutory maximum) for his date of injury. (Resp. Ex. D, bn. 073) Insurer has paid Claimant this ongoing TTD benefit since February 2, 2022. (Resp. Ex. D, bn. 071) By the time the matter proceeded to hearing, 55 weeks had past, making the total benefit paid to Claimant $59,082.10 ($1,074.22 x 55 weeks).

11. Mr. RM[Redacted] testified that in June 2021, Employer was reevaluating its employees' benefits under a new insurance plan. Because any changes in the value of employee benefits could potentially change the prevailing wages for workers on the USAFA job, Employer recalculated the prevailing wage for those mechanic helpers/apprentices still working that project. With the redetermination, Employer discovered that the prevailing wage being paid on the USAFA project for mechanic helpers/apprentices was inaccurate. Mr. RM[Redacted] testified that the wage determination under the Davis Bacon Act for elevator mechanic helpers/apprentices required a prevailing wage of $14 per hour rather than the base rate of $28 per hour it was paying. Mr. RM[Redacted] testified that five employees, including Claimant, were erroneously paid elevated wages on the USAFA project for many weeks. Employer did not attempt to recoup the overpaid wages from these employees, but the wages for those mechanic helpers/apprentices still on the USAFA project were adjusted down to base pay. The wage adjustment did not affect elevator mechanics, including Mr. BJ[Redacted] . Mr. RM[Redacted] also testified that this wage adjustment did not affect Claimant because he had already transitioned to a non-government project where he was making his base pay of $18 per hour.

12. Mr. BJ[Redacted] testified that he eventually returned to the project in September 2021. Claimant did not accompany him back to the jobsite.

13. In July 2021, Employer notified Insurer that Claimant's AWW had been inaccurately calculated.

14. Mr. RM[Redacted] testified that Claimant returned to work for Employer from August 30, 2021 through September 19, 2021. His rate of pay for this period was $18 per hour. (Resp. Ex. A, bn. 003, 004, & 009)

15. Claimant testified that he thought he would be returned to the USAFA job when the bonding process for the next two elevators in the cue had been completed and expected to be transitioned to a job at Peterson Field to complete a federal project there. While working the job at the USAFA, Claimant testified that he and Mr. BJ[Redacted] put in long hours and received substantial overtime pay. (Resp. Ex. A; Clmt's. Ex. 2)

16. BJ[Redacted] testified that Claimant was his "helper" while they worked to modernize the elevators at the USAFA. While he could not remember working 92 hours a week, Mr. BJ[Redacted] acknowledged that he and Claimant worked a significant amount of overtime and maybe put in as many as 85 hours a week while working at the USAFA.

17. Review of the wage records following Claimant's transfer from the USAFA job supports a finding that Claimant's wages dropped precipitously after January 17, 2021. In addition to the reduction in his hourly rate, the evidence presented supports a finding that the loss of the significant amount of overtime paid on the USAFA job played a key role in the reduction of Claimant's wages when he was transferred from the job.

Indeed, the average weekly wage Claimant was paid for his work on the USAFA job from December 28, 2020 through January 17, 2021 was $3,344.62 compared to $731.39 in the two weeks after his transfer and lead up to his January 29, 2021 injury.

18. The evidence presented persuades the ALJ that but for the erroneous wages paid under the Davis Bacon Act on the USAFA job and the fact that the injury occurred so close the finish of his work on the USAFA project, Claimant would have been making $18 per hour, plus limited overtime as reflected on his January 18-24 and January 25-31, 2021 pay stubs at the time he was injured.

19. Based on the above findings of fact, the ALJ finds that Respondents have proven, by a preponderance of the evidence, that they erroneously admitted to an AWW that was substantially higher than Claimant's actual earnings at the time of his injury. Clearly, at the time of Claimant's injury, he had moved to a project, which for the foreseeable future would pay him $18 per hour for approximately 40 hours per week. While it is difficult to predict the amount of overtime Claimant may have received in this new position, the evidence presented, including the payroll records supports a finding that in the week leading up to and the week of his industrial injury, Claimant was paid a limited amount of overtime, i.e. .45 and 1.20 hours respectively. Because the wage records following Claimant's transition from the USAFA job are limited and because they support a finding that overtime was paid for these two weeks, the ALJ finds that the fairest approximation of Claimant's wage loss due to his industrial injury is the total amount of wages earned, including overtime pay, for this two week period.

20. The evidence presented persuades the ALJ that Claimant's AWW at the time of his industrial injury was $731.39 (4730.89 + $731.89 = $1,462.78 ÷ 2 weeks = $731.89).

21. Based on this AWW, the ALJ finds Claimant's proper TTD rate to be $487.93 ($731.89 x .66667 = $487.93). The total benefit owed to Claimant from the start of his TTD payments (February 2, 2021) through hearing (55 weeks) is $26,836.15. Accordingly, the ALJ finds that the evidence supports a finding that Claimant has been overpaid $32,245.95 by Insurer ($59,082.10 - $26,836.15 = $32,245.95). To the extent that Claimant's TTD benefits have been ongoing since the hearing and the pendency of this order, he has continues to be overpaid by Insurer.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising

out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

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 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).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (*Colo. App. 1993*); National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997). Further, the average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation benefits. Section 8-42-102(1), C.R.S.

D. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(d) provides that "[w]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from the daily wage in a manner set forth in paragraph (C) of subsection (2). Nonetheless, section 8-42-102(3), gives the ALJ wide discretion to "fairly" calculate the employee's AWW where the methods of computing AWW outlined in the statute will not fairly compute the AWW of an injured worker.

E. As found, the evidence in this case supports a conclusion that Claimant was transferred from the USAFA job two weeks before his admitted industrial injury. As part of his transfer to a non-government job site, Claimant's hourly wage reverted to $18 per hour for a roughly 40-hour workweek. Indeed, he earned wages consistent with this hourly rate and number of hours for approximately two weeks before his industrial injury. Further, the evidence supports a finding that Claimant probably would have made this amount for the foreseeable future as he was generally assigned to work with BJ[Redacted] , who did not return to the USAFA project until September 2021, *after* Employer had reduced wages to $18 per hour for mechanic helpers' on that project. Indeed, there a dearth of persuasive evidence in the record to support a conclusion that Claimant would have made wages above $18 per hour at any point after his work-related injury. Nonetheless, Claimant did work limited overtime after his transfer from the USAFA job, a fact that the ALJ finds/concludes would have likely continued, albeit on a limited basis, as supported by payroll records after Claimant's transfer from the USAFA job.

Because the wage records following Claimant's transfer from the USAFA job are limited and support that he worked some overtime, the ALJ concludes that simply calculating Claimant's AWW on a 40 hour work week is not a fair approximation of his wage loss and diminished earning capacity resulting from his industrial injury. Based upon the evidence presented, the ALJ concludes that totaling Claimant's actual earnings, including his overtime pay, for the two full weeks following his transfer from the USAFA job is the closest approximation of his actual wage loss and diminished earning capacity at the time of his work-related injury. As found, the ALJ concludes that Claimant's AWW is $731.89. The fact that he made elevated wages, at a previous project, does not affect this finding.

Overpayments & Respondents' Burden of Proof

F. When respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. Section 8-43-201(1), *C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> . . . 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. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

G. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents seek to modify and withdraw the previously admitted AWW reflected in the March 8, 2021 GAL. Accordingly, they carry the burden of proof, by a preponderance of the evidence, to justify the modification/withdrawal.

H. At the time of Claimant's injury, and the filing of the general admission that Respondents are seeking to modify in this case, C.R.S. § 8-40-201(15.5)(2021) defined an overpayment as "money received by a claimant that exceeds the amount that should

have been paid, or which the claimant was not entitled to receive[.]"[1] Citing *HLJ Management Group, Inc. v. Won Il Kim, 804 P.2d 250 (Colo. App. 1990),* Claimant contends that Respondents are not entitled to recoup any overpayment in TTD benefits paid in the event that Claimant's AWW is modified. Claimant urges the ALJ to deny such recoupment on the grounds that if the March 8, 2021 GAL is withdrawn and the AWW modified, Respondents would not entitled to a retroactive modification unless the employer was found to have been fraudulently induced by the employee's false representations. See, *HLJ Management Group, Inc. v. Kim*, supra; see also, *Rocky Mountain Cardiology v. Industrial Claim Appeals Office*, 94 P.3d 1182, 1185 (Colo. App. 2004); *Pacesetter Corp. v. Collett,* supra. Because the evidence presented in the instant case supports a conclusion that the TTD in this case was paid pursuant to a GAL and fails to support a conclusion that the mistake with regard to Claimant's average weekly wage was fraudulently induced, Claimant argues that he was entitled to receive those payments and recoupment of any overpayment caused by the Respondents' miscalculation of his AWW should be denied. The ALJ is not persuaded, concluding instead that Claimant's reliance on the holding announced in *HLJ Management Group, Inc.* is misplaced.

I. Contrary to Claimant's suggestion, erroneous payment of TTD benefits under an admission of liability may constitute an overpayment, which an insurer may retroactively recover. See, generally, *Simpson v. ICAO*, 219 P.3d 354, 358 & 361 (Colo. App. 2009) (*overruling HLM Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990)), (*rev'd in part, vacated in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010)). In *Simpson*, the Colorado Court of Appeals explained that part of the holding in *HLJ Management*, which the ALJ finds is at the heart of the dispute in the instant case, is no longer good law. The portion of the holding overruled in *HLJ Management* by *Simpson* involved the conclusion that when an employer's mistake in an admission results from its own erroneous calculation, it could not retroactively withdraw or modify the admission and is bound thereby, at least until an ALJ enters an order as to prospective payments. The Court explained in 1997, that the General Assembly amended § 8-43-303(1) & (2)(a), C.R.S. 2008, to permit reopening of an award on grounds of "overpayment," and specified that the reopening would not affect an earlier award as to money already paid "except in cases of overpayment." Accordingly, the ALJ concludes that Claimant's reliance on the holding of *HLJ Management* for the proposition that Respondents cannot retroactively recover TTD benefits erroneously paid under an admission of liability is misplaced. Contrary to Claimant's suggestion, the holding announced in *HLJ Management* is not the prevailing state of the law concerning the issue before the undersigned ALJ.

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[1] Effective January 1, 2022, the definition of overpayment was changed in section 8-40-201(15.5). This change affects an insurer/employer's ability to recoup monies paid to a claimant, and as such eliminates a right existing prior to the change. This makes the statute change substantive. *Specialty Restaurant Corp. v. Nelson*, 231 P.3d 393, 399 (Colo. 2010) (*citing In re Estate of Dewitt*, 54 P.3d 849 (Colo. 2002)). "Substantive rights and liabilities of the parties to a workers' compensation case are determined by the statute in effect at the time of an employee's injury . . . " *Specialty Restaurant Corp.*, 231 P.3d at 400 (*citing City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006), and *American Compensation Ins. Co. v. McBride*, 107 P.3d 973 (Colo. App. 2004)).

J. In concluding that Respondents are entitled to retroactively recover the asserted overpayment of TTD benefits paid in this case, the ALJ also finds the claim of *Josue v. Anheuser-Busch, Inc.,* W.C. 4-954-271-04 (ICAO, June 17, 2016), instructive. Similar to the instant case, the respondents in *Josue* sought to recover an overpayment in TTD benefits paid to claimant. Also similar to the instant case, claimant, Mr. Josue argued that there was no overpayment is his case "because the payment of temporary disability was made pursuant to a general admission of liability, [that he] was entitled to receive those payment when they were received and [could not] be characterized as an overpayment as described by § 8-40-201(15). The Panel noted that the Court in *Simpson* was faced with both a question of whether benefits erroneously paid under an admission could constitute an "overpayment" and if so, whether respondents could retroactively recoup that overpayment. Noting that the 1997 amendments to § 8-43-203 (1) & (2)(a) which allowed for the "reopening of an award, regardless of whether the award is through an admission or an order, and provides that money 'already paid' through such an award may be affected if that payment qualifies as an 'overpayment' would be rendered useless, the Panel affirmed the determination that Mr. Josue had "received an overpayment in the amount of $16,222.32 and was required to repay that sum."

K. As found, Respondents have proven that Claimant received an overpayment in TTD benefits based on an erroneously calculated AWW. See Finding of Fact, ¶ 21. As noted, Claimant's AWW in this claim is $731.89, making his TTD benefit rate $487.93 Based on this finding, Claimant's total owed TTD benefit from the date of issuance (February 2, 2021) through the date of hearing (55 weeks) is $26,836.15. Per the findings above, Claimant has received $59,082.10 in TTD benefits from insurer over this applicable 55 weeks period, creating a $32,245.95 overpayment to Claimant at the time of hearing. To the extent that Claimant's benefits are ongoing at the erroneous TTD rate, as found in this order, the ALJ finds a continuing overpayment to Claimant. Respondents may recoup, offset and/or credit against future benefits, all overpayments of TTD made to Claimant, pursuant to applicable law.

ORDER

It is therefore ordered that:

1. Claimant's AWW in this claim is $731.89, making his TTD benefit rate $487.93.

2. Claimant has received an overpayment of TTD benefits from Respondents in the amount of $32,245.95. Respondents may recoup, offset and/or credit against future benefits, all overpayments of TTD made to Claimant, pursuant to applicable law.

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

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

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

DATED: March 30, 2022

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant has demonstrated, by a preponderance of the evidence, that he is entitled to an award of temporary total disability benefits for the additional time period of June 13, 2020 through July 27, 2021.

II. Whether Respondents have demonstrated, by a preponderance of the evidence, that a statutory penalty should be assessed against under Section 8-43-102, C.R.S. for the late reporting of his claim.

III. Whether Claimant has demonstrated, by a preponderance of the evidence, that medical services with Clinica Family Health, Health Images Radiology, St. Anthony North (Westminster), St. Anthony Hospital (Lakewood), and Critical Care, Pulmonary & Sleep Associates that were covered by Medicaid were reasonably necessary and related to this occupational disease claim, and whether Respondent Insurer must reimburse Medicaid for those services.

FINDINGS OF FACT

1. Claimant worked for Employer as a stone fabricator.

2. Claimant suffered an admitted occupational disease of silicosis as a result of inhalation of silica dust at work.

3. Claimant last worked for Employer on Friday, June 12, 2020. Claimant informed his supervisor, [Redacted, hereinafter ML], that he was not feeling well and that he was having trouble with his feet and hands, as well as experiencing shortness of breath.

4. Claimant left a voicemail for Mr. ML[Redacted] on the office phone on Sunday, June 14, 2020. Claimant testified he stated on the voicemail that he felt very bad, was not going to make it into the office, and that he had possibly been exposed to COVID-19. Claimant disputes that he said he would be quarantining for two weeks.

5. Claimant went into the office on Friday, June 19, 2020 to pick up his paycheck. Claimant was intoxicated and became involved in a verbal altercation with Mr. ML[Redacted] . Claimant left after Mr. ML[Redacted] threatened to call the police. A co-worker subsequently provided Claimant his paycheck on Saturday, June 20th or Sunday, June 21st.

6. Claimant did not return to work for Employer. Claimant testified he assumed he had been terminated by Mr. ML[Redacted] due to their verbal altercation on June 19, 2021. Claimant acknowledged, however, that Mr. ML[Redacted] had not terminated his employment nor did he advise Mr. ML[Redacted] that he was quitting. Claimant

confirmed that there were prior lapses in his employment with Employer due to personal issues during which Claimant would not notify Employer of his absence.

7. Claimant testified that he has not been able to physically perform his job duties as a stone fabricator since leaving work on June 12, 2020.

8. Claimant testified that at the time he did not associate his breathing problems with his work for Employer. Claimant testified he initially was unsure of what was causing his symptoms, but attributed his issues to age, being out of shape, smoking, and COVID. Claimant did not seek medical evaluation at the time because he did not have medical insurance. Claimant later applied and qualified for Medicaid and subsequently sought evaluation at Clinica Campesina ("Clinica").

9. Claimant presented to Clinica on December 3, 2020 with complaints of knee, back and joint pain. The medical record from this date contains no mention of any respiratory complaints or findings. Claimant reported that he physically could not stand and that he had not been able to work.

10. Claimant returned to Clinica on December 16, 2020, at which time Claimant's substance abuse with severe alcohol disorder was discussed. The medical record from this date contains no mention of any respiratory complaints or findings.

11. Clinica subsequently referred Claimant for a chest x-ray due to chronic cough and congestion. The chest x-ray was performed at Health Images on December 17, 2020. The x-ray revealed significant bilateral perihilar pneumonia or pulmonary edema. Clinica then referred Claimant for evaluation and treatment at the emergency department.

12. On December 18, 2020, Claimant presented to the emergency department at St. Anthony North in Westminster with complaints of shortness of breath over the last several months with acute worsening over the last four days. Claimant initially presented with tachycardia and HTN, both of which were initially attributed to concern of alcohol withdrawal.

13. Claimant was then transported by ambulance on December 18, 2020 to the Main Campus of St. Anthony Hospital. Claimant was admitted for undifferentiated pulmonology pathology. Due to concerning findings on chest x-ray and CT scan, Claimant was admitted for monitoring and a biopsy. He was discharged on December 19, 2020.

14. On December 19, 2020, Claimant presented to Critical Care, Pulmonary & Sleep Associates upon referral from the emergency department. Claimant reported that he stopped working several months ago because of difficulties breathing. It was noted Claimant's condition was highly suspicious for silicosis due to his stone dust exposure at work.

15. A diagnostic bronchoscopy was performed at St. Anthony's Central on December 23, 2020. The biopsies were compatible with silicosis in the appropriate occupational setting.

16. On December 27, 2020 Claimant was diagnosed with silicosis in the setting of occupational exposure.

17. On January 6, 2021 Claimant returned to Clinica for a follow-up evaluation. He was advised that he was diagnosed with silicosis and that he was scheduled to see a pulmonology specialist on January 14, 2021. Claimant requested that his provider complete a medical disability form in order for him to obtain financial assistance. Clinica completed paperwork indicating Claimant was "unable to work at all" right now, secondary to pulmonary disease associated with shortness of breath and weakness (R. Ex. G, p. 30). Claimant was prescribed albuterol and Advair inhalers along with prednisone.

18. Claimant presented to pulmonologist Dominic John Titone, M.D. at Critical Care, Pulmonary & Sleep Associates on January 14, 2021. Claimant reported that he began developing dyspnea, fatigue and weakness six months prior. Dr. Titone diagnosed Claimant with chronic hypoxic respiratory failure secondary to silicosis and COPD. Claimant did not currently require supplementary oxygen at rest but did require two liters of oxygen with walking. Dr. Titone restricted Claimant from any further exposure to silica, stone dust or cigarette smoke. Dr. Titone also diagnosed with COPD with mild obstruction, which he noted could be due to silicosis or smoking.

19. Claimant continued to follow up with Clinica on January 25, February 9, and May 20, 2021. Claimant's silicosis diagnosis is referenced in these records, but solely in the context of treating with other providers for that condition. The records from Claimant's treatment at Clinica from January 25, 2021 – May 20, 2021 primarily concern Claimant's substance abuse of both alcohol and tobacco. The May 20, 2021 report noted Claimant had been in detox and was planning to move to Texas to be near family.

20. Claimant filed a Worker's Claim for Compensation on May 4, 2021 alleging the occupational disease of silicosis as a result of the inhalation of silica dust while fabricating stone. Claimant reported a date of onset of May 4, 2021. It is undisputed the first written notice Claimant provided to Employer of a work-related injury or condition was the claim filed on May 4, 2021.

21. Employer's First Report of Injury indicates Employer was notified of Claimant's injury on May 7, 2021.

22. Insurer filed a Notice of Contest on May 13, 2021, denying liability for the claim as no injury was reported.

23. On July 6, 2021, Claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, and TTD.

24. Claimant presented to authorized treating physician David W. Yamamoto, M.D. on July 28, 2021. Dr. Yamamoto diagnosed Claimant with occupationally acquired silicosis. He noted that Claimant was unable to work in his regular field of work and that Claimant required oxygen when not sedentary. Dr. Yamamoto referred Claimant to a pulmonologist in Austin, Texas, where Claimant had relocated, and removed Claimant from work effective that day to October 13, 2021.

25. On August 5, 2021, Respondents filed a Response to Application for Hearing endorsing, *inter alia*, penalties against Claimant for late reporting under §8-43-102, C.R.S.

26. On September 14, 2021 pulmonologist Jeffrey Schwartz, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. Schwartz issued an IME report on October 4, 2021 in which he concurred with the diagnosis of occupational silicosis. He noted Claimant's cigarette smoking may also partly contribute to his diffusion capacity, but opined that the majority of Claimant's respiratory impairment is likely due to his silicosis. Dr. Schwartz concluded that there is no impairment from the silicosis that would prevent Claimant from work requiring sitting or walking at least 90-120 yards.

27. Insurer filed a General Admission of Liability on October 13, 2021 admitting for medical benefits and TTD beginning July 28, 2021 and ongoing at $381.81 per week. Under the "Remarks" section, it states,

> Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not. Insurer reserves the right to seek reimbursement from any other insurance carrier or self-insured employer.

(R. Ex. F, p. 12)

Further remarks included in the GAL state, "All benefits and/or penalties not admitted are specifically denied. [Insurer] accepts liability for this lost time claim. AWW per attached wages from the [Employer]." (Id. at p. 14). Respondents do not assert any penalties against Claimant in the GAL.

28. Claimant testified he did not know he had silicosis as a result of his work until he was advised of the diagnosis around Christmas 2020. Claimant confirmed that he never notified Mr. ML[Redacted] that he had been hospitalized in December 2020 or that he had been diagnosed with silicosis. Claimant contacted Employer in March 2021 to inquire about his W-2 form but did not notify Employer at that time of his work-related diagnosis. Claimant testified he did not tell Employer about his diagnosis because he figured Mr. ML[Redacted] would disregard it. Claimant testified he determined that his

best course of action would be to retain a lawyer to help him with the claim, and that it took some time to find a lawyer for assistance.

29. The ALJ finds that Claimant recognized the nature, seriousness and probable compensable nature of his occupational disease on December 27, 2020, when Claimant was made aware of his diagnosis of occupationally related silicosis.

30. Claimant acknowledged that there was a poster hanging by the time clock at work that advised employees of their responsibilities in reporting a work-related injury. Claimant used the time clock to punch in and out of work every day that he worked.

31. ML[Redacted], owner of Employer, testified that he was aware Claimant had breathing problems that Claimant associated with smoking. Prior to Claimant's filing a claim, Mr. ML[Redacted] was unaware Claimant had a potentially work-related condition. Mr. ML[Redacted] testified that no other employees had previously been diagnosed with silicosis and that he himself has never had any respiratory symptoms after performing fabrication work. Mr. ML[Redacted] told employees that if they were injured at work they should provide him with a written statement within three days. He testified that if Claimant had previously notified him about a work-related condition he would have reported the claim to Insurer.

32. Claimant proved it is more probable than not he is entitled to TTD benefits. Claimant's occupational disease caused Claimant a disability for which Claimant missed more than three work shifts, resulting in actual wage loss.

33. Claimant proved it is more probable than not the medical services provided by Clinica (from December 3, 2020 to January 6, 2021), Health Images Radiology, St. Anthony's Hospital and Critical Care, Pulmonary & Sleep Associates were reasonably necessary and related to this occupational disease.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge.

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

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

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written

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

Respondents argue that, due to Claimant's "abandonment" of his employment in June 2020, lack of work restrictions until late December 2020, and late notice and reporting of a worker's compensation claim on May 4, 2021, Claimant has not successfully demonstrated entitlement to TTD benefits from June 13, 2020 through July 27, 2021.

The ALJ disagrees. It undisputed Claimant and Mr. ML[Redacted] were involved in a verbal altercation in June 2020, after which Clamant did not return to his employment. However, Claimant credibly testified, and the record supports, that he left work due to not feeling well, including shortness of breath. Although, at the time, Claimant was unaware of the cause of his symptoms, it was later confirmed that Claimant's the respiratory symptoms are were the result of occupationally acquired silicosis. Claimant credibly testified that his respiratory symptoms have prevented him from performing his regular job duties and that he has not earned actual wages since leaving his employment with Employer. Claimant's testimony alone is sufficient to establish disability. Once Claimant obtained medical evaluation and treatment, he was placed on medical restrictions preventing him from performing his regular job duties due to his occupational disease. Respondents have admitted liability for TTD beginning July 28, 2021 and ongoing. The preponderant evidence establishes Claimant is entitled to TTD benefits from June 13, 2020 through July 27, 2021.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020) (concluding that respondents are liable for the cost of prescriptions, as long as the cost complies with the Fee Schedule, regardless of where the claimant fills them).

When there is an occupational disease claim, the courts have routinely rejected arguments that respondents are not responsible for medical care and treatment even if it arose prior to Claimant's employment with the employer. In *Royal Globe Insurance Co. Collins*, 723 P.2d 731 (Colo. 1986), the Court held that in a claim based upon an occupational disease, the insurance carrier "on the risk" at the time medical expenses are incurred is liable for payment of those medical expenses. Further, the court later explained that "on the risk" means the employer in whose employment the need for treatment was caused. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo App. 2001).

Claimant sought medical evaluation and treatment at Clinica for multiple medical issues, including his respiratory problems. His providers at Clinica ultimately referred Claimant to Health Images for a chest x-ray, and to St. Anthony's emergency department. Claimant was subsequently admitted to the hospital, where a lung mass was visualized and a differential diagnosis of silicosis was provided. Claimant was provided with oxygen upon discharge and advised of the need for additional testing. Claimant then underwent a diagnostic bronchoscopy on December 23, 2020 at St. Anthony's Central for a determination the cause of Claimant's lung mass and respiratory issues. Claimant was also referred to Critical Care, Pulmonary and Sleep Associates for evaluation of his respiratory issues.

All of the aforementioned medical care was reasonably necessary and related to diagnosing and treating Claimant's medical condition, which was ultimately determined to be occupationally related. Respondents are liable for such treatment.

Respondents are not liable for the medical treatment Claimant received at Clinica from January 25, 2021 to May 20, 2021, as there is insufficient evidence Clinica was treating Claimant for his respiratory issues. The Clinica medical records from January 25, 2021 to May 20, 2021 indicate Claimant was being seen for management of substance abuse during that time period.

Penalties

Respondents contend Claimant should be subject to penalties for late reporting of his occupational disease pursuant to Section 8-43-102(2), C.R.S. Section 8-43-102(2) provides:

> Written notice of the contraction of an occupational disease shall be given to the employer by the affected employee or by someone on behalf of the affected employee within thirty days after the first distinct manifestation thereof. In the event of death from such occupational disease, written notice thereof shall be given to the employer within thirty days after such death. **Failure to give either of such notices shall be deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon.** Actual knowledge by an employer in whose employment an employee was last injuriously exposed to an occupational disease of the contraction of such disease by such employee and of exposure to the conditions causing it shall be deemed notice of its contraction. If the notice required in this section is not given as provided and within the time fixed, the director may reduce the compensation that would otherwise have been payable in such manner and to such extent as the director deems just, reasonable, and proper under the existing circumstances. (*Emphasis added*).

The determination of the "first distinct manifestation" is subject to the general principle that time for providing notice of an injury does not begin to run until the claimant, "as a reasonable person recognizes the nature, seriousness, and probable compensable nature of the injury. *See City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d (1967). To recognize the "probable compensable character" of any injury, the claimant must know that the injury is somewhat disabling and must appreciate a causal relationship between the employment and the condition. *City of Colorado Springs v. Industrial Claims Appeals Office*, 89 P. 3d 504 (Colo. App. 2004).

Claimant argues that Respondents waived the right to request a reduction in Claimant's compensation under Section 8-43-102(2) because Respondents filed a GAL in this matter before proceeding to hearing.

ICAO addressed waiver of penalties under Section 8-43-102(2) in *Victor Meza v. BMC West Corp.*, WC 4-651-065 (Jan. 3, 2007). In *Meza*, the matter proceeded to hearing on the respondents' April 13, 2006 petition to suspend compensation based on the claimant's alleged failure to report his injury within the time constraints of § 8-43-102(1), C.R.S. The ALJ determined that the claimant sustained an occupational disease and analyzed the matter of the suspension of benefits under subsection (2) of § 8-43-102, C.R.S. The ALJ also found that the claimant did not give notice of his occupational disease within 30 days, as required by § 8-43-102(2). Nonetheless, the ALJ found that the respondents filed a GAL for TTD benefits on April 19, 2006, which did not assert any penalty for late reporting. He also found that the respondents subsequently filed another GAL seeking to reduce the claimant's TTD rate and noting that the respondents did not waive any defenses under section 8-43-102(1). The ALJ concluded that the respondents were barred from seeking a late reporting penalty because they failed to include such a claim in the GAL filed on April 19, 2006. The ALJ construed the GAL to be an award for purposes of § 8-43-102(2), which expressly deems the claimant's failure to timely notify the employer of an occupational disease to be waived unless an objection is made prior to any corresponding award or decision.

The respondents in Meza appealed the ALJ's decision, arguing that, since they filed their petition to suspend compensation prior to filing the general admission of liability, the ALJ erred in concluding that an award was made before the respondents raised the late reporting penalty. The respondents argued that they could not be deemed to have waived their claim for a late reporting penalty in such circumstances. ICAO disagreed and affirmed the ALJ's decision, determining that the ALJ did not err in finding a waiver under the express language of the Act. ICAO reasoned that the respondents' GAL constituted an award prior to a hearing. *Id*.; *Burke v. Industrial Claim Appeals Office*, 905 P.2d 1, 2 (Colo. App. 1994). Considering the plain language of Section 8-43-102(2), which states that a claimant's failure to give employer timely notice of his or her occupation is disease is "deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon", ICAO reasoned that the respondents' filing of a GAL before proceeding to hearing on the matter prohibited the imposition of any late reporting penalty under Section 8-43-102(2).

A similar analysis applies in the case at bench. As found, Claimant recognized the nature, seriousness and probable compensable nature of his occupational disease on December 27, 2020, the time when Claimant was made aware of his diagnosis of occupationally related silicosis. Claimant did not provide written notice to Employer of his occupational disease until filing a claim for worker's compensation on May 4, 2021, thus failing to provide timely notice to Employer pursuant to Section 8-43-102(2).

Nonetheless, Respondents in this matter waived the issue of Claimant's failure to give timely notice by filing a GAL. Although Respondents endorsed the issue of penalties under Section 8-43-102 for Claimant's late reporting in their Response to Application for Hearing filed on August 5, 2021, prior to proceeding to a hearing, Respondents filed a GAL on October 13, 2021. The GAL constitutes an award. *See Burke*, supra. The GAL did not assert penalties against Claimant. As Respondents' objection was not made at a hearing on the claim prior to any award or decision thereon, Respondents' waived its' right to reduction in penalties under Section 8-43-102, C.R.S.

ORDER

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from June 13, 2020 to July 27, 2021.

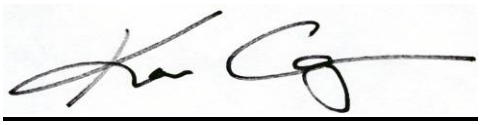
2. Respondents are liable for the medical services provided by Clinica (from December 3, 2020 to January 6, 2021), Health Images Radiology, St. Anthony's Hospital and Critical Care, Pulmonary & Sleep Associates were reasonably necessary and related to this occupational disease. Respondents are not liable for Clinica's evaluations from January 25, 2021 to May 20, 2021.

3. Respondents failed to prove Claimant is subject to a late reporting penalty pursuant to Section 8-43-102(2), C.R.S.

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: March 30, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on June 19, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that reasonable medical treatment of his back is necessary to cure and relieve him from the effects of the work injury.

FINDINGS OF FACT

1. The claimant worked as a houseman in the housekeeping department at the employer's hotel in Aspen, Colorado. The claimant's job duties included removing all laundry/linens from the hotel rooms.

2. The claimant testified that at approximately 4:30 p.m. on Saturday, June 19, 2021 he injured his back while pulling a cart full of linen. The claimant also testified that it felt like he hit the back of his leg and he felt pain in his back and leg. The claimant further testified that he attempted to report this incident to his supervisor and Loss Prevention, but no one was available at that time. The claimant testified that the pain in his back and leg was so severe that he could not continue working and he went home. The claimant testified that due to his pain and his scheduled days off, he did not return to work until June 22, 2021.

3. The claimant testified that on June 22, 2021 he reported his back injury to [Redacted, hereinafter MM], Director of Human Resources. The claimant further testified that Ms. MM[Redacted] sent him home early on that date.

4. Payroll records entered into evidence demonstrate that although the claimant was scheduled to work until 5:30 p.m. on June 19, 2021, he worked beyond his scheduled hours until 7:19 p.m. The payroll records also demonstrate that the claimant reported for his shift on June 20, 2021 at 7:50 a.m. and worked 8.87 hours. The claimant was scheduled to be off on June 21, 2021. He returned to work on June 22, 2021 and worked from 8:50 a.m. to 5:25 p.m. On June 23, 2021, the claimant worked from 8:48 a.m. to 5:49 p.m. On June 24, 2021, the claimant worked from 8:48 a.m. to 5:30 p.m.

5. [Redacted, hereinafter DO], Housekeeper/Office Coordinator, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

6. [Redacted, hereinafter AC], Housekeeping Coordinator, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

7. [Redacted, hereinafter FP], Director of Housekeeping, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter.

8. The claimant was aware that the employer's procedure for reporting a work injury is to speak with Loss Prevention. The claimant properly reported a prior right shoulder injury to Loss Prevention on October 14, 2019.[1]

9. MM[Redacted], Director of Human Resources, testified that the claimant did not report a back injury to her on June 19, 2021, or on any date thereafter. Ms. MM[Redacted] testified that on June 22, 2021, she learned that the claimant had been placed at maximum medical improvement (MMI) for his right shoulder on June 14, 2021. Ms. MM[Redacted] was also informed that the claimant had permanent work restrictions related to his right shoulder. As the Director of Human Resources, Ms. MM[Redacted] was tasked with determining if the employer could accommodate the claimant's permanent work restrictions.

10. The claimant's permanent work restrictions for his right shoulder include: no lifting, carrying, pushing, or pulling over 30 pounds; minimal overhead reaching; and minimal reaching away from the body.

11. Ms. MM[Redacted] testified that the claimant was sent home before the end of his scheduled shift on June 24, 2021 because he was observed working outside of his work restrictions related to his right shoulder.

12. Ms. MM[Redacted] and Ms. FP[Redacted] reviewed all available positions to determine if the claimant's permanent work restrictions could be accommodated. Due to the nature of the claimant's right shoulder-related work restrictions, the employer was unable to accommodate the claimant. At a meeting with Ms. MM[Redacted] and Ms. FP[Redacted] on June 30, 2021, the claimant was informed that his work restrictions could not be accommodated and his employment was terminated. The claimant did not report a back injury at that meeting.

13. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the testimony of Ms. DO[Redacted], Ms. AC[Redacted], Ms. FP[Redacted], and Ms. MM[Redacted]. The ALJ is not persuaded that the claimant suffered an injury on June 19, 2021. The claimant did not report a back injury to the employer, despite opportunities to do so. The claimant continued to work between June 19, 2021 and June 24, 2021 without issue. The claimant was sent home on July 24, 2021, because he was working outside of his shoulder-related work restrictions. The ALJ finds that the claimant has

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[1] The claimant's October 14, 2020 right shoulder injury is not currently at issue. However, the ALJ includes information regarding work restrictions for that injury as it is pertinent to the timeline regarding the present case.

failed to demonstrate that it is more likely than not that he suffered an injury to his back at work on June 19, 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." *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on June 19, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the testimony of the respondents' witnesses are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an alleged June 19, 2021 injury is denied and dismissed.

Dated this 31st day of March 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

- Whether Claimant has proven by a preponderance of the evidence that her workers' compensation claim should be reopened based on a worsening of condition?

- If Claimant has proven a reopening should occur, whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits beginning June 29, 2020 and continuing?

FINDINGS OF FACT

1. Claimant sustained admitted injuries to her low back while employed with Employer on July 29, 2019 while lifting a box. Claimant initially sought medical treatment for her low back injury after she woke up with severe back pain on July 31, 2019 and was transported to St. Mary's Medical Center by ambulance.

2. Claimant began treating with nurse practitioner ("NP") James Harkreader at St. Mary's Occupational Health on August 1, 2019. Claimant was initially diagnosed with acute lumbosacral back strain and placed on full restrictions. On August 5, 2019, Claimant was evaluated by Dr. Craig Stagg. Dr. Stagg recorded that claimant still had a significant amount of back pain. Dr. Stagg recommended physical therapy.

3. Claimant reported to NP Harkreader that she had an aggravation of her pain on October 1, 2019 which resulted in radiating pain into the left buttocks. NP Harkreader referred Claimant for a magnetic resonance image ("MRI") of the lumbar spine which was performed on October 9, 2019. The MRI showed broad based disc extrusions at L3 – L4 and L4 – L5 causing moderate to several canal stenosis. There was also a disc protrusion at L5 – S1 and degenerative facet changes.

4. NP Harkreader referred claimant to Western Colorado Spine.

5. Claimant returned to NP Harkreader On November 12, 2019 with complaints of pain was now radiating into the left buttocks and left thigh to the knee. Claimant was tender on the left SI joint and left sciatic notch. NP Harkreader diagnosed claimant with lumbago with left leg radiculopathy. NP Harkreader noted that claimant underwent epidural steroid injections at L4 – L5 and L5 – S1 the week prior.

6. Claimant reported some improvement following the injection. Claimant continued to note she had tenderness in the left SI and left sciatic notch area. On December 31, 2019, NP Harkreader noted that injections were repeated by Dr. Clifford on December 19, 2019. Claimant reported that she was doing well following the injections with only had a slight backache.

7. By January 28, 2020, Claimant reported to NP Harkreader that she was pain free. NP Harkreader discussed releasing Claimant to return to work full duty. NP Harkreader noted that claimant did not want a functional capacity evaluation because she was not interested in permanent restrictions.

8. Dr. Stagg ultimately placed Claimant at maximum medical improvement on February 14, 2020. Claimant noted that she was doing well with full duty and that her pain had improved with only some residual stiffness. Dr. Stagg's diagnosed Claimant with andL5 – S1 disc herniation that had improved symptomatology post-injection. Claimant's gait was normal. Dr. Stagg assigned claimant a 11% whole person impairment rating for the lumbar spine, which included a 7% table 53 rating and a 4% rating for range of motion deficits. Dr. Stagg recommended maintenance medical care in the form of two to three maintenance care visits over the next year as needed. Dr. Stagg released Claimant to work without restrictions.

9. Claimant testified at hearing that after being placed at MMI, she was 75% better, but still had pain all the time. Claimant testified that on June 27, 2020, she was bent over in the shower to shave her legs when she felt a twinge in her back and stood up. Claimant denied twisting when she was shaving her legs. Claimant testified she had another incident which resulted in back spasms in September 2020. Claimant testified she has not returned to work since the shaving incident.

10. Claimant was treated at the St. Mary's Hospital Emergency Room on June 27, 2020. Dr. Christopher Bazzoli noted that Claimant was presenting with sudden onset back pain after bending over while shaving this morning. Claimant reported she had severe pain in her low back that radiated down her right leg and was worse whenever she tried to move. Claimant reported she had twinges of pain in the past, but never this severe.

11. Claimant returned to NP Harkreader on June 29, 2020. Claimant reported to NP Harkreader that she had been doing well and was working full duty, until this past Saturday morning when she bent over in the shower to shave her leg and felt some pain in her low back. NP Harkreader noted Claimant's prior MRI had shown broad based disk extrusion at L3-4 and L4-5 causing moderate to severe spinal canal and mild bilateral foraminal stenosis, with an L5-S1 broad based disk extrusion casing mass effect upon the descending S1 nerve roots. Claimant reported that she had some pain into her right hip but none down into her lower extremity. NP Harkreader noted Claimant had a positive straight leg raise test on the right along with decreased range of motion and difficulty getting up from a seated position. NP Harkreader opined that this was an aggravation of her underlying prior work-related injury and took Claimant off of work completely.

12. Claimant returned to Dr. Stagg on July 7, 2020. Dr. Stagg noted that Claimant had done fairly well until she was bending over shaving her legs several weeks ago when she had acute onset of low back pain. Dr. Stagg noted that Claimant reported

having pain radiating into both thighs with difficulty standing because of the pain. Dr. Stagg diagnosed Claimant with lumbar stenosis with aggravation with some bending at home in the shower. Dr. Stagg recommended Claimant get repeat x-rays and another MRI of the lumbar spine.

13. Respondents obtained a physicians advisory report from Dr. Brian Mathwich on July 8, 2020. Dr. Mathwich reviewed Claimant's medical records and opined that claimant's pain was not secondary to her original injury. Dr. Mathwich noted that bending over in the shower would place minimal stress on the back and opined that the minor mechanism of injury would not aggravate or exacerbate a previously healed disc protrusion.

14. Claimant returned to Dr. Clifford's office where she was evaluated by Jason Bell, PA – C on July 15, 2020. PA Bell noted that Claimant had received good relief from the prior injections and that her pain had recently returned after recurrent strain injury, sustained while shaving her legs. PA Bell noted that pain was radiating into both the left and right buttocks with a positive straight leg test bilaterally. PA Bell further noted that he had reviewed an updated MRI which showed no significant changes when compared to the MRI from October of 2019. PA Bell recommended repeat injections at L4 – L5 and L5 – S1.

15. Claimant followed up with Primary Care Partners on July 20, 2020. Dr. Welsh wrote that Claimant had been improving until 3 weeks ago when she bent over and reinjured her back. Claimant noted that the workers' compensation insurer was denying coverage for her current treatment. Dr. Welsh further noted pain which was worse on the right side on physical examination with straight leg raising test positive on the right side.

16. Respondents obtained another physicans' advisory report from Dr. Mathwich on July 22, 2020 after receiving a request for injections Dr. Mathwich again recommended denial of the treatment based on his opinion that Claimant's back complaints were the result of her bending over in the shower, are not directly and causally related to her work injury.

17. Claimant was evaluated by NP Sara Windsor on October 13, 2020. NP Windsor noted that Claimant was presenting with a re-exacerbation of lumbar back pain and radiculopathy June 2020 after a bending twisting incident. NP Windsor noted that Claimant had a bilateral positive straight leg raise test and recommended conservative and diagnostic therapies rather than urgent surgery. NP Windsor referred claimant to Dr. Lawrence Frazho.

18. Dr. Frazho evaluated claimant on November 10, 2020. Dr. Frazho noted that Claimant's back pain had been present for years without definite known inciting event. Dr. Frazho recommended bilateral L3 – L4, L4 – L5 and L5 – S1 facet injections.

19. Claimant underwent a functional capacity evaluation ("FCE") on November 17, 2020 at Colorado Canyons Hospital. Paula Falcao, PT, CFCE found that claimant demonstrated the ability to perform 31.1% of the physical demands of her regular job. Claimant was cleared to perform sedentary work for approximately two and a half hours per day.

20. Claimant underwent facet injections recommended by Dr. Frazho on December 15, 2020.

21. Claimant was subsequently evaluated by Dr. Eric Momin on December 29, 2020. Dr. Momin recorded that Claimant had oringially had a workplace accident and then in June of 2020 the pain started again after a bending – twisting incident. Dr. Momin noted that the injections performed by Dr. Frazho did not help to a significant amount and Dr. Momin recommended against surgical intervention at this time. Dr. Momin recommended that claimant continue to follow up with Dr. Frazho NP Windsor.

22. Claimant underwent medical branch blocks under the auspices of Dr. Frazho on February 1, 2021.

23. Dr. Albert Hattem performed a records review independent medical examination ("IME") on April 20, 2021. Dr. Hattem's reviewed Claimant's medical records and diagnosed Claimant with an aggravation of preexisting lumbar degenerative disc disease. Dr. Hattem opined that Claimant did not need additional treatment for her workplace injury, based on the opinion that the incident of June 27, 2020 represented and intervening accident and claimant would not have needed further care for her low back and would have continued to work full duty, if not for the intervening incident. In coming to the conclusion that Claimant sustained an intervening injury, Dr. Hattem stated that Claimant likely twisted her low back or applied a torqueing stress on the lumbar spine during this shaving activity.

24. Dr. Hattem noted in this report that several factors which supported the conclusion of an intervening injury, including the fact that claimant had a full recovery and returned to work after the initial workplace injury; Claimant had a significant increase in pain requiring EMS transport to the hospital after the intervening incident; PA Bell's records documented a new strain; Claimant's work capacity changed after the incident with Claimant shaving in the shower; and Claimant necessitated significant treatment after the shaving incident whereas she did not seek treatment for her back after MMI but prior to the intervening event.

25. Dr. Hattem testified at hearing consistent with his report. Dr. Hattem testified that Claimant's incident in the shower on July 27, 2020 constituted a new intervening injury that was caused Claimant's current condition. Dr. Hattem testified that Claimant only reported back stiffness at the time of MMI and that Claimant had been released to return to work full duty prior to being placed at MMI. Dr. Hattem testified that the records of Claimant's primary care physician, who did not document any complaint of

back pain in April of 2020, supported his conclusion that Claimant had made a full recovery from her original injury. Dr. Hattem opined that the need for EMS transport to the hospital in June of 2020 spoke to the significant nature of the bending and twisting incident. Dr. Hattem testified that Claimant told multiple providers that she was doing very well up until the intervening incident, and relayed to at least six providers that her symptoms were secondary to the shaving event. Dr. Hattem explained that claimant's functional status changed after the intervening incident, going from a full duty release to being taken completely off of work.

26. Dr. Hattem testified that claimant's MRI displayed degenerative changes that were not caused by either the original work injury or the intervening incident, and that she likely sustained an aggravation of her pre-existing degenerative back condition. Dr. Hattem opined that but for the shower incident, Claimant would have continued to do well and that the treatment that she has received since June of 2020 is related to the intervening event. Dr. Hattem further testified that but for the shower incident, Claimant would have continued to work for employer as she had prior to June of 2020. Dr. Hattem testified that Claimant would have continued to have pain to some degree due to her degenerative findings, but that the shower incident was the cause of the recurrent need for medical treatment and restrictions.

27. Dr. Hattem explained that claimant's MRI findings after the original workplace injury did not show any acute changes related to the workplace incident. Dr. Hattem further testified that the MRI obtained in July 2020 likewise showed no evidence of an acute injury and was objectively the same as her prior MRI. Dr. Hattem explained that claimant's spine was compromised due to her degenerative conditions and it was possible that neither the workplace event nor the intervening event would have caused symptoms except for claimant's pre-existing spinal and foraminal stenosis. Dr. Hattem remarked that if claimant is susceptible to injury, it is because of her pre-existing degenerative changes, not the workplace injury. Dr. Hattem testified that the vast majority of workers who sustain back injuries do not display acute findings of imaging studies. Dr. Hattem remarked that the force of a twisting or torque incident would place increased force to the spine relative to simply bending, which would increase the likelihood of injury.

28. The ALJ notes that the records from Dr. Momin and PA Windsor document Claimant twisting while in the shower. However, the ALJ finds that Claimant credibly testified at hearing that she was not twisting when she experienced the onset of back pain. The ALJ notes that the medical records from the emergency room and PA Harkreader along with the records from Dr. Stagg note that Claimant was simply bending down and not twisting at the time of the onset of pain.

29. The ALJ further notes that the MRI in this case showed no acute changes to Claimant's lumbar spine as a result of the shower incident. The ALJ notes that the onset of back pain occurred when Claimant was performing a normal activity of daily living, bending down, which resulted in the onset of low back pain. The ALJ further notes that there is no credible evidence of Claimant having ongoing back complaints prior to

her work injury, and finds that the worsening of Claimant's condition in this case is, more likely than not, related to Claimant's July 29, 2019 work injury.

30. The ALJ credits the opinions expressed by NP Harkreader in his June 29, 2020 report that Claimant's condition was related to an exacerbation of her work injury along with the medical reports of Dr. Stagg dated July 7, 2020 and finds that Claimant has established that it is more probable than not that the worsening of her low back condition on June 27, 2020 was causally related to her July 29, 2020 work injury.

31. The ALJ further finds that as a result of the worsening of condition, Claimant was unable to continue her work with Employer and is therefore entitled to an award of TTD benefits beginning June 29, 2020 and ongoing.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Section 8-43-303(1), C.R.S., provides that a workers' compensation claim may be reopened on the ground of change in condition. Claimant shoulders the burden of proving her condition has changed and her entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim*

Appeals Office, 197 P.3d 220 (Colo. App. 2008). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in her work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

4. In order to reopen a claim based on a worsened condition a claimant must prove the worsened condition is causally connected to the original industrial injury. *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). "If the worsening is the result of an intervening cause, including an intervening industrial injury, the worsened condition is not a compensable consequence of the original industrial injury, but a new injury." *Edwards v. Wal-Mart Stores, Inc.*, W.C. No. 4-478-405 (ICAO, December 13, 2002). Determination of whether a worsening of condition was proximately caused by a prior industrial injury or an intervening injury is ordinarily one of fact for the ALJ. *See, Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002) (whether condition is result of independent intervening cause is one of fact).

5. In this case, there appears to be no issue as to Claimant having a worsening of her condition on June 27, 2020. The only issue is whether the worsening of her condition is related to the July 29, 2019 work injury.

6. As found, Claimant's testimony that she experienced an acute onset of low back pain that occurred as she was bending down on June 27, 2020 is found to be credible and persuasive. Claimant's testimony that the onset of pain resulted in her needing medical treatment is also found to be credible and persuasive.

7. To prove entitlement to TTD the claimant must prove the industrial injury caused a "disability." § 8-42-103(1), C.R.S. 2007; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the claimant's inability to perform his or her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). This element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions, which impair the claimant's ability effectively to perform the duties of his or her regular job. S*ee Ortiz v. Charles J. Murphy and Co*., 964 P.2d 595 (Colo. App. 1998).

8. As found, as a result of the worsening of her condition, Claimant was taken off of work by NP Harkreader. As found, Claimant has proven by a preponderance of the evidence that as a result of the worsening of her condition, Claimant had a medical incapacity which resulted in a temporary loss of wage earning capacity as evidenced by the work restrictions set forth by NP Harkreader. As found, Claimant is entitled to an award to TTD benefits as a result of the worsening of her condition beginning June 29, 2020 when NP Harkreader took Claimant off of work due to her worsened condition.

9. Based on the foregoing, the ALJ hereby GRANTS Claimant's Petition to Reopen her workers' compensation claim based on a worsening of her condition.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is reopened based on a change of condition.

2. Respondents' are liable for TTD benefit beginning June 29, 2020 and continuing until terminated by law.

3. Respondents are entitled to an offset Claimant's unemployment benefits against any TTD benefits owed.

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DATED: March 31, 2022

Keith E. Mottram

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the sacroiliac injection recommended by Dr. Marshall Emig is reasonable, necessary and related to her April 15, 2018 industrial injury.

II. Whether the blood test ordered by Donald Corenman M.D., at Steadman Hawkins Clinic was reasonable, necessary and related to Claimant's admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as an attorney. Claimant suffered an admitted industrial injury during a motor vehicle accident ("MVA") on April 15, 2018. Claimant was the passenger in a rideshare vehicle that spun out on the highway, causing the passenger rear-side panel of the vehicle to strike an adjacent concrete barrier. Claimant was wearing a seatbelt at the time and the side airbag of her compartment deployed.

2. Paramedics transported Claimant to the emergency department at Saint Thomas Midtown Hospital with complaints of right shoulder pain, low back pain, and right-sided neck pain. Examination of the lumbar spine demonstrated normal range of motion with no tenderness to palpation. X-rays of the lumbar spine revealed a lumbarized S1 and transitional segment with no acute abnormality. Claimant was assessed with acute low back pain and lumbar strain and discharged with instructions to follow up with her primary care physician.

3. Claimant presented to her primary care physician, Lisa Corbin, M.D. at U.C. Health on April 17, 2018. Claimant complained of right low back and right shoulder pain. Dr. Corbin diagnosed Claimant with acute back pain. Claimant subsequently underwent multiple sessions of physical therapy and chiropractic treatment upon Dr. Corbin's referral.

4. On August 8, 2018, Claimant presented to Marshall Emig, M.D. at U.C. Health. Claimant reported that her low back pain persisted despite treatment. Dr. Emig noted on examination Claimant's pain was primarily at the lumbosacral junction. He diagnosed Claimant with L5-S1 spondylolisthesis, lumbar degenerative disc disease, and lumbar facet arthropathy. Dr. Emig referred Claimant for a lumbar MRI to evaluate acute changes resulting in low back pain on the right greater than left. He noted there may be a component of facet versus discogenic pain with overlying myofascial pain. Dr. Emig discussed the possibility of a steroid injection if Claimant's pain persisted and was indicated by the MRI.

5. Claimant underwent lumbar spine x-rays on August 8, 2018, which revealed "6 apparent lumbar-type vertebrae…likely reflecting complete lumbarization of S1." (R. Ex. E, p. 58).

6. A lumbar spine MRI was obtained on August 14, 2018. The radiologist's impression was:

> Transitional lumbosacral anatomy with six lumbar type vertebral bodies, representing complete lumbarization of the S1 vertebral body and fully formed disc at the S1-S2 disc space.
>
> Mild posterior disc bulge with annular fissure at L5-S1 without spinal canal or neuroforaminal stenosis.
>
> Edema interspersed between the spinous processes from L3-S1, which can be seen in the setting of interspinous ligament injury or spinous process impingement in the appropriate clinical settings.

(Cl. Ex. 7, p. 46).

7. Dr. Emig reviewed Claimant's MRI results at a follow-up evaluation on September 6, 2018. He noted Claimant has six lumbar type vertebrae with L5-L6 degenerative disc disease and suspected facet mediated pain on the right at L5-L6 and L6-S1. Claimant reported mild low back pain. Her plan was to discontinue the use of Celebrex and monitor for increased pain. In the event Claimant's pain increased, Dr. Emig discussed Claimant undergoing a right L5-L6 and L6-S1 facet steroid and lidocaine injection, possible medial branch blocks, and possible radiofrequency neurotomy. He remarked that if Claimant had no relief of pain, there likely was a component of discogenic pain contributing to her low back pain that would not improve with an injection.

8. Claimant subsequently sought treatment on her own accord with Donald Corenman, M.D., at Steadman Hawkins Clinic. Claimant knew Dr. Corenman from his time as an expert witness in a claim she defended while working for Employer. Claimant first presented to ATP Corenman and Eric Strauch, PA-C on January 24, 2019. PA-C Strauch noted Claimant was involved in a MVA in April 15, 2018 that caused immediate pain to her right shoulder, right lower back and neck, with persistent and worsening right low back pain localized to the superior SI region. PA-C Strauch noted Claimant had seen Dr. Emig, a spine specialized physiatrist, who performed right L5-S1 facet injections on October 22, 2018 that were not diagnostic.

9. Dr. Corenman's impression was that Claimant had right lower back/SI pain, with differential diagnoses including Bertolotti's syndrome right versus right SI syndrome versus right L5-S1 facet disease. He opined that Claimant's main pain was 80% attributed to right SI pain and 20% generalized low back pain. Dr. Corenman remarked,

> Her lowest level, at what I am calling L5-S1, has large transverse-alar articulations bilaterally, right greater than left so certainly this could be a Bertolotti's type syndrome. It would be less likely to be a facet syndrome on the right, because of the standard articulation that stabilizes this level but we cannot rule that out and finally this could be a right SI syndrome.
>
> The MRI does show some mild degeneration at L4-L5 with a normal L5-S1 disc. This is a pattern I would expect, the L4-L5 level is probably not causing her pain as typically discs do not radiate only unilaterally.

(Cl. Ex. 8, p. 66)

Dr. Corenman discussed his plan moving forward, stating,

> The next thing we need to do, once we find out she is no longer potentially pregnant, is to first do an MRI of the sacrum including coronal and sagittal reconstruction and stir images. We can determine if there is any hot articulations between the L5 and the S1 articulation. Then we need to do serial blocks, first of right L5-S1 articulation, then right L5-S1 SI, and finally right L5-S1 facet. She would have to aggravate the symptoms before, she says that is not difficult, in the office today after exam she is at 6/10 so that should be enough to make sure we have a flare-up before the injection. I told her depending upon the results, she might be a candidate for radiofrequency ablation and possibly at the very end, if nothing else works, we could consider surgery but that is currently not on the table and she understands.
>
> We will wait on her pregnancy test and start her on a program once we find out her status of MRI and injections.

(Id.)

10. Claimant returned to Dr. Emig on April 11, 2019. Dr. Emig noted Claimant underwent right L5-6 and L6-S1 intra-articular facet injections with fluoroscopic guidance on October 22, 2018. Claimant reported 20-30% improvement immediately after the procedure and 50-60% improvement overall at one week after. Claimant reported a complete return of pain at the April 11, 2019 evaluation. Dr. Emig discussed modification of activities as well as a medial branch block. He noted,

> We also discussed a right L5-L6 and L6-S1 joint medial branch block for diagnostic purposes. If she has adequate pain relief I suspect she will have similar relief with radiofrequency neurotomy of these nerves. If she has no pain relief with this procedure we discussed considering an injection of the articulation between the right L6 transverse process and ilium. She plans to proceed with 1-2 months of activity modification. If her

> pain persists she is considering proceeding with further imaging with Dr. Corenman versus medial branch blocks.

(Cl. Ex. 7, p. 55).

11. On May 20, 2019, Timothy O'Brien, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. O'Brien opined that Claimant sustained a minor lumbosacral spine strain/sprain as a result of the MVA and reached maximum medical improvement ("MMI") as of April 25, 2018. He opined that there was no objective evidence Claimant sustained a substantial injury as a result of the MVA, noting Claimant was wearing her seatbelt and the airbags deployed at the time of the accident, which minimized her exposure to coup/contrecoup forces. Dr. O'Brien noted Claimant's initial imaging studies and initial evaluation were normal. He further noted that his examination and subsequent imaging studies were also normal. Dr. O'Brien opined that Claimant's ongoing pain was not generated by an identifiable organic source. He concluded that the injections Claimant had received were contraindicated. He further concluded that the treatment Claimant received after April 25, 2018 was causally related to her pre-existing multilevel lumbosacral spondylosis, lumbar spondylolisthesis and transitional spine, and not the work-related MVA.

12. Claimant returned to Dr. Emig on June 26, 2019. He noted Claimant was currently pregnant and thus could not undergo fluoroscopic guided procedures at that time. Dr. Emig discussed proceeding with medial branch blocks at L5-L6 and L6-S1. He recommended radiofrequency neurotomy if Claimant experienced 80% pain relief. He noted that if Claimant did not experience pain relief from the medial branch blocks there was the possibility of injecting the pseudoarticulation between the right L6 transverse process and the ileum and possible removal of the pseudoarticulation.

13. Respondents filed a General Admission of Liability on June 3, 2020 admitting for medical benefits.

14. Claimant attended a telephone evaluation with Dr. Corenman on September 1, 2020. He noted further workup had been postponed due Claimant's pregnancy, but that Claimant had since given birth 8 months prior. Claimant continued to report right SI pain without pain radiating to the lower extremities. Dr. Corenman noted Claimant's pain was "[a]ll localized right at the SI joint as they say the Fortin fingertip test." (Cl. Ex. 8, p. 67). Dr. Corenman remarked,

> Since she is finally delivered and has continued pain we need to do a workup to try and figure out the source. Again, she does have transverse alar articulations at L5-S1 so the source could be the L4-L5 degenerative disc, the L5-S1 right facet, or the Bertolotti Syndrome or the SI joint. In order to deduce this, we will need new imaging. The last imaging is over 2 years old. With new imaging, we will get a pelvis MRI that hopefully will go up to the body of L4 so we can look at the L4-L5 disc. I will follow her back after the imaging is available for the recommendation.

(Id.)

15. On September 15, 2020 John Burris, M.D. performed a 24-month Division Independent Medical Examination ("DIME"). Claimant reported 4/10 pain in her right low back region without numbness or weakness in the lower extremities. She reported experiencing temporary relief with prior physical therapy and facet injections. Dr. Burris opined that Claimant had not reached MMI, noting recommendations for injections and a repeat MRI by Dr. Emig and Dr. Corenman to clarify Claimant's diagnosis. Dr. Burris recommended proceeding with a repeat MRI and six sessions of osteopathic manipulation. He noted that further treatment may be directed by the MRI and may include injections such as medial branch blocks at L5-6 and L6-S1 and articulation between the right L6 transverse process and ileum for diagnostic clarity.

16. Claimant attended a follow-up telephone evaluation with Dr. Corenman on December 28, 2020. Dr. Corenman recommended proceeding with some blood work, noting,

> The workup so far has not been as absolutely definitive as to what her pain source is. We need to get a pelvic MRI focused on the SI joints. I was reading this with Dr. Betsy Holland who agrees that there is some sacroiliitis right greater than left so this could be an inflammatory disorder triggered by a motor vehicle accident. What we have to do is to get some basic lab tests to make sure she does not have anything obvious like an HLA-27 inflammatory factor in the blood, SLE, or anything else. We will get some basic rheumatologic panels to look for that. If the next step is negative is to consider a SI joint injection.

(Cl. Ex. 8, p. 69).

17. On December 29, 2020, Dr. Corenman referred Claimant for rheumatology labs, which Claimant underwent on February 25, 2021.

18. Claimant is requesting reimbursement for the labs performed on February 25, 2021 in the amount of $366. Claimant testified that such cost was incurred due to ATP Corenman's recommendation as needed to rule out other causes for her low back pain. Claimant testified that the lab tests came back negative.

19. On May 18, 2021, John Raschbacher, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Raschbacher assessed Claimant with low back pain and opined that Claimant had reached MMI. He concluded that there was not a clear reason why Claimant continued to experience lumbar complaints as presumed related to a MVA during which Claimant was restrained and the airbags deployed. He noted that Claimant has pre-existing nonwork-related congenital lumbar findings in the form of lumbarized sacral vertebra. Dr. Raschbacher explained that Claimant already had facet injections in October 2018, which did not

resolve her pain. Dr. Raschbacher noted Claimant did undergo an August 26, 2018 lumbar MRI and a pelvis MRI on November 24, 2020. Dr. Raschbacher explained that the November 24, 2020 MRI noted that Claimant's SI joints were normal and symmetric [with] no evidence of posttraumatic osteoarthritis or sacroiliitis and no evidence of acute or subacute osseous or myotendinous injury. He opined that it was unclear why another MRI would be ordered, as Claimant did not and does not have radicular symptomatology or potentially surgical disease. He further opined it was unclear why further treatment was ordered. Dr. Raschbacher explained that Dr. Corenman's recommendation is to perform a medial branch block to the SI joint, which is a different area. He remarked that Dr. Corenman's recommendation presumes that numerous physicians failed to delineate the SI joint as a pain generator. He further noted that the DIME physician recommended considering medial branch blocks, not SI joint injections Dr. Raschbacher opined that Claimant reached MMI as of May 18, 2021, if not prior.

20. Claimant credibly testified at hearing that she have any low back or SI issues prior to the work injury. She testified that her pain has primarily been at the SI level. Claimant testified that the SI injection she received on July 12, 2021, provided her 70-75% relief. She explained that the SI injection did not resolve her pain, but rather improved the degree and frequency of the pain. Claimant personally paid the costs of the SI injection ($1,604) and the blood test ($366).

21. Dr. Raschbacher testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Raschbacher testified that he reviewed Claimant's November 24, 2020 MRI report and saw no changes. He testified that Claimant had no benefit from the facet injections performed in 2018. He explained that, according the Medical Treatment Guidelines ("MTG"), injections have very limited uses and should not be repeated to the same anatomical structure if there was no prior benefit. Dr. Raschbacher further explained that, per the MTG, 80% improvement is required for injections, and that Level II accreditation literature and the MTG also noted the need for functional improvement. Dr. Raschbacher also testified that Dr. Burris recommended more facet injections, not SI joint injections. He explained that SI joint injections can be diagnostic or therapeutic. He stated that he was not provided the medical records from the July 2021 injections documenting Claimant's response. Dr. Raschbacher opined that while it may have been reasonable and necessary to perform the injections in July 2021, they were not related to the work incident. He testified that it would be "quite unusual to somehow discover this particular diagnosis this late in the game, even with a year off for her pregnancy. It is now over three years out from injury claim date."

22. Dr. Raschbacher further testified that there was no indication of a pain generator, including at the SI joint. He explained that provocative tests performed at the emergency room shortly after the MVA were negative at the SI joint, as were they on his examination. He opined it does not make medical sense to inject the SI joint when it is not the pain generator. Dr. Raschbacher testified it is not clear, given the missing records from the most recent injections, what Claimant's actual relief was from the July

2021 injections. He acknowledged that 75% improvement would be considered significant.

23. With regard to the blood testing lab results, Dr. Raschbacher testified that previous bloodwork was recommended by Dr. Corenman to attempt to address non-work related problems including, gout, rheumatoid arthritis and lupus. Dr. Raschbacher testified that rheumatoid arthritis and lupus are auto-immune conditions and would not be exacerbated by a MVA.

24. Dr. Raschbacher testified that the SI joint was not the pain generator because Claimant did not have the appropriate responses to physical examinations which coincided with Claimant's physical examinations at UC Health. Dr. Raschbacher opined that the SI joint injections that took place in July 2021 were not related to the work incident. He also opined that claimant is at MMI at least by May 18, 2021, if not sooner, since claimant's functional status plateaued some time ago.

25. The ALJ credits the opinions of Drs. Emig and Corenman, as supported by the medical records and Claimant's testimony, over the opinion and testimony of Dr. Raschbacher.

26. Claimant proved it is more probable than not the July 2021 injection and the blood work ordered by Dr. Corenman are reasonably, necessary and related to cure and relieve Claimant from the effects of her April 15, 2018 industrial injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

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). For a service to be considered a “medical benefit” it must be provided as medical or nursing treatment or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). 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. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., WC 4-517-537 (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* WC 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020) (concluding that respondents are liable for the cost of prescriptions, as long as the cost complies with the Fee Schedule, regardless of where the claimant fills them).

As found, Claimant proved it is more likely than not the July 12, 2021 SI injection performed by Dr. Emig was reasonable, necessary and related to her April 15, 2018 industrial injury. Despite evidence of a pre-existing condition of lumbarization of the S1, Claimant credibly testified that she was not experiencing any low back or SI issues prior to the work injury. No evidence was offered refuting Claimant’s testimony. Since sustaining the work injury, Claimant has consistently complained of low back symptoms. Claimant’s treatment has been aimed at identifying her pain generator. Dr. Emig initially suspected Claimant was suffering from facet mediated pain, however, October 2018

facet injections proved nondiagnostic. Dr. Corenman initially opined Claimant had right lower back/SI pain with differential diagnoses, including Bertolotti's syndrome, L5-S1 facet disease, and right SI syndrome. Dr. Corenman and Dr. Emig discussed ordering a MRI and performing medial branch blocks at L5-6 and L6-S1 medial branch blocks for diagnostic purposes. Claimant's pregnancy resulted in the postponement of her treatment. Subsequent to having her child, Claimant continued to report SI pain, which Dr. Corenman credibly opined was localized to her SI joint.

Claimant's providers continued to recommend evaluation aimed at identifying her pain source. DIME physician Dr. Burris agreed with such approach, noting that Claimant was not at MMI due to the need for additional diagnostic procedures to clarify Claimant's diagnosis. Dr. Burris noted that further treatment "may" include injections such as medial branch blocks. That Dr. Burris did not specifically recommend a SI injection is inconsequential considering the context of his determination. Dr. Corenman continued to note the need for additional workup to identify Claimant's pain source, including a MRI and blood work to rule out an inflammatory disorder. He specifically noted that if such results were negative, the next step would be to consider an SI injection. Claimant credibly testified the lab results were negative per her understanding. Dr. Emig subsequently performed the SI joint injection, which Claimant credibly testified provided her some relief. The medical records indicate the SI joint injection was performed for diagnostic purposes to assist Claimant's providers in clarifying Claimant's diagnosis and pain generator. Based on a totality of the evidence, the SI injection performed by Dr. Emig in July 2012 was reasonably necessary and related to Claimant's industrial injury.

As also found, Claimant proved it is more probable than not the blood test requested by Dr. Corenman was reasonable, necessary and related to her April 15, 2018 work injury. Dr. Corenman's December 28, 2020 note explains that the workup thus far had not been absolutely definitive as to Claimant's pain source, and that there were concerns Claimant's condition could be due to an inflammatory disorder triggered by the MVA. Dr. Corenman ordered the blood tests to eliminate other potential causes for Claimant's low back pain in an attempt to further clarify Claimant's condition. The preponderant evidence establishes that the blood tests were reasonable, necessary and related to the work injury.

ORDER

1. Claimant proved by a preponderance of the evidence the SI injection performed by Dr. Emig on July 12, 2021 was reasonably necessary and causally related to Claimant's work injury. Respondents shall reimburse Claimant $1,604 for the cost of the injection.

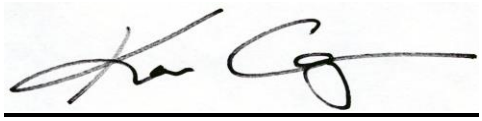
2. Claimant proved by a preponderance of the evidence the blood test ordered by Dr. Corenman was reasonably necessary and causally related to Claimant's work injury. Respondents shall reimburse Claimant $366 for the cost of the blood test.

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

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: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant overcame Dr. Ginsburg's DIME opinion on MMI and permanent impairment by clear and convincing evidence.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to a change of physician.

FINDINGS OF FACT

1. Claimant is a 56-year-old male born on May 19, 1965. Claimant has worked for Employer since June 5, 2019 as a full-time supervising journeyman electrical lineman.

2. Claimant sustained an admitted industrial injury during a motor vehicle accident ("MVA") on November 19, 2019. While stopped in traffic on I-70 in Denver, Claimant's company truck was rear-ended by another vehicle. Claimant initially declined medical care, but on Employer's recommendation was taken to Midtown Occupational to be evaluated by Kirk Holmboe, D.O.

3. Employer provided Claimant with a "Designation of Medical Providers" on the date of the accident. The document lists only two providers: Midtown Occupational and Concentra.

4. Upon presenting to Dr. Holmboe on November 19, 2019, Claimant reported low-grade pain in the lower thoracic portion of his back with no neck pain or headache. On examination, Dr. Holmboe noted full cervical motion without pain or radiating symptoms as well as full lumbar flexion with slight pain in the right lower parathoracic area. There was minor tenderness to palpation to the right of the midline in the lower thoracic region and some pain with side bending to the left. Dr. Holmboe diagnosed Claimant with a mild thoracic strain and recommended Claimant ice the area and take over-the-counter ibuprofen. Claimant was released to return to work without restrictions.

5. Claimant next saw Dr. Holmboe on November 21, 2019, reporting much improvement in his symptoms with only very minor soreness. Dr. Holmboe noted Claimant felt he did not require any formal treatment and felt fully capable of performing his normal job duties. On examination, Dr. Holmboe again noted full cervical range of motion without pain. There was no pain in the area of complaint with rotational movement or with scapular protraction and retraction. Dr. Holmboe opined Claimant did not require any specific treatment measures at that time, although it may take several weeks for his symptoms to completely resolve.

6. Claimant returned to Dr. Holmboe on December 2, 2019 reporting that he experienced increased pain in the right mid thoracic area radiating up to the neck and a

brief episode of left-sided pain in the forehead and eye. Claimant also reported some pain and sharp sensation in the right intrascapular area. On examination, Dr. Holmboe noted some limitation and discomfort with cervical range of motion but no radiating pain into his extremities. There was tenderness to palpation in the paracervical musculature and crepitus with cervical range of motion and tenderness to palpation in the right intrascapular area. Dr. Holmboe diagnosed Claimant with thoracic and cervical strains. He continued to recommend that Claimant ice the areas and referred Claimant for massage therapy.

7. On December 12, 2019, Dr. Holmboe noted Claimant was having some pain in right intrascapular area with persistence of a knot in the area, with pain radiating up into his neck and a right-sided headache. On examination, Dr. Holmboe noted nearly full cervical range of motion with some discomfort in the intrascapular area and some pain with lumbar flexion. Claimant had minor cervical tenderness. Dr. Holmboe recommended that Claimant continue massage therapy and, if no improvement, begin physical therapy and chiropractic treatment.

8. On December 12 and December 19, 2019, Claimant's physical therapist documented thoracic and neck pain.

9. On January 10, 2020, Dr. Holmboe noted Claimant had some limitation of cervical motion due to pain in right upper thoracic area with side bending to the left. He also noted: pain with cervical flexion and extension; some pain with scapular protraction but more pain with scapular retraction; pain in right upper thoracic area with extremes of rotation of truck area; tenderness to palpation in right parathoracic musculature particularly around T5-T7; and tenderness in right suboccipital area when touched – elicits some symptoms around right eye. Dr. Holmboe continued to diagnose Claimant with thoracic and cervical strains related to the MVA. He ordered physical therapy twice a week for three weeks and referral for chiropractic/dry needling sessions.

10. On January 20, 2020, Dr. Holmboe noted Claimant reported at times having severe pain in the right mid thoracic area as well as some stiffness and soreness in the neck and pain around right eye. On examination he noted some limitation of cervical range of motion due to pain in the right upper thoracic area. There was pain with cervical flexion and extension. Dr. Holmboe ordered physical therapy and chiropractic/dry needling sessions.

11. From January 14, 2020 to February 20, 2020 Claimant underwent 10 chiropractic sessions with Alexa Sheppard for right sided neck, mid-back, and shoulder neck pain. At the conclusion of chiropractic care her closing diagnosis was neck and shoulder pain resolved, and thoracic sprain.

12. From January 14, 2020 to March 3, 2020 Claimant also underwent 12 sessions of physical therapy at Midtown Physical therapy for thoracic and neck pain. At the conclusion of PT care the closing diagnosis was thoracic strain.

13. At a follow-up evaluation with Dr. Holmboe on February 28, 2020, Claimant continued to complain of right-sided neck pain and pain in the right mid scapular area. Dr. Holmboe noted that Claimant's increased symptoms over the past two weeks may correspond to completion of chiropractic treatment. Claimant complained of more pain with rotational movements of his trunk than of his neck. On examination, Dr. Holmboe noted relatively normal neck range of motion with complaints of tightness with extremes of motion. There was some discomfort with cervical protraction and retraction, as well as tenderness to palpation in the upper and mid parathoracic musculature on the right. Dr. Holmboe ordered additional chiropractic treatment and referred Claimant for evaluation and treatment by physiatry.

14. From March 4, 2020 to March 25, 2020 Claimant underwent an additional six sessions of chiropractic care with Dr. Sheppard for right-sided shoulder, mid-back, and neck pain. At the conclusion of chiropractic care the closing diagnosis was thoracic sprain.

15. On March 26, 2020, Dr. Holmboe noted Claimant continued to report pain primarily in his mid-back but some also in the lower cervical area. Painful range of motion of the thoracic and limited cervical range of motion was noted on examination.

16. On March 27, 2020 Claimant attended a telemedicine visit with Samuel Chan, M.D. Claimant reported pain in his right intrascapular region. Dr. Chan noted cervical range of motion within normal limits with no tenderness with flexion or extension or rotation. There was tenderness with extension and rotation of cervical spine Dr. Chan diagnosed Claimant with thoracic spine pain and thoracic facet joint syndrome. Based on a review of Claimant's medical records, mechanism of injury, and response to treatment, he agreed with Dr. Holmboe that Claimant sustained a thoracic strain with myofascial complaints, also possibly facetogenic in origin. He recommended Claimant undergo an MRI of the thoracic spine to rule out underlying discogenic issues and prescribed Claimant Celebrex.

17. Claimant underwent a MRI of the thoracic spine on April 3, 2020, which revealed thoracic spine disc desiccation with exaggerated kyphosis of the thoracic spine. There were no contusions or fractures.

18. Dr. Chan reevaluated Claimant at a telemedicine visit on April 16, 2020. Dr. Chan noted that an April 3, 2020 thoracic MRI revealed disc dessication with exaggerated kyphosis but no other discogenic issues, no neural foraminal narrowing, and no neural element compression. Claimant reported some improvement in his symptoms since last seeing Dr. Chan. Dr. Chan noted cervical range of motion with functional limits and no tenderness, as well as tenderness with extension and rotation of the thoracic spine. He opined that Claimant was a candidate for facet injections.

19. On examination at an April 21, 2020 evaluation, Dr. Holmboe noted full neck motion without particular pain or difficulty but some pulling in the right upper and mid

thoracic area with extremes of cervical motion. Dr. Holmboe's diagnosis remained MVA with cervical/thoracic strain.

20. On April 30, 2020, Haley Burke, M.D. performed the recommended thoracic facet injections on the right at T6-7 and T-7-8.

21. On May 7, 2020, Claimant reported to Dr. Holmboe experiencing initial relief from the facet thoracic injections with increasing pain two days later.

22. Claimant also saw Dr. Chan on May 7, 2020, who noted Claimant reported reduction in pain from 3-4/10 to 2-3/10 immediately after the injections, but that four days later his pain was 6-7/10 with spasms. Dr. Chan remarked that it was unclear if Claimant had any type of diagnostic response to the injections at the time. He recommended Claimant return for follow-up in two to three weeks. If opined that if there was no diagnostic or therapeutic benefit from the facet injection, then Claimant's pain was not facetogenic. He further opined that in such event, since the MRI did not show any significant discogenic issues, he may conclude a majority of Claimant's symptoms are myofascial in origin.

23. Claimant underwent an additional six session of chiropractic care from May 5, 2020 to May 21, 2020. At the conclusion of chiropractic care, the closing diagnosis was neck and shoulder normal, and thoracic sprain. Dr. Sheppard, who is Level I Accredited also opined that, "Patient is responding slower than anticipated. At this time in the recovery process soft tissue injuries sustained in a motor vehicle accident should have improved more significantly. The mechanism of injury in my opinion does not correspond with subjective complaints." (C. Exh. 5 , p. 133).

24. Claimant returned to Dr. Chan on May 26, 2020 rating his pain at 3-8/10. He reported pain over the right-sided intrascapular region. On examination, Dr. Chan noted that Claimant's cervical range of motion was within functional limits with no tenderness with extension or rotation of the cervical spine. Shoulder and lumbar exams were normal. There was tenderness to palpation over the right intrascapular region and slight hypertonicity. Dr. Chan concluded that the thoracic facet injections provided no diagnostic or therapeutic benefit. He opined that Claimant's pain complaints were likely myofascial in origin. Dr. Chan remarked Claimant may be a good candidate for 1-month rental of a stimulator.

25. On May 28, 2020, Dr. Holmboe noted Claimant was approaching MMI. His diagnosis remained MVA with thoracic and cervical strains.

26. On July 24, 2020, Claimant reported to Dr. Chan intermittent pain and some numbness of the bilateral lower extremities and weakness of right lower extremity. Examination revealed cervical range of motion within functional limits with no tenderness with extension and rotation; normal shoulder findings; and no tenderness with extension and rotation of lumbar spine. Dr. Chan's diagnosis was thoracic spine pain and thoracic facet joint syndrome. He again opined that Claimant's pain complaints

are most likely not facetogenic in nature and are most likely myofascial in origin based on mechanism of injury and ongoing symptoms. He opined that Claimant had most likely reached MMI without impairment, restrictions or the need for maintenance care.

27. Dr. Holmboe placed Claimant at MMI on July 28, 2020. At the evaluation, Claimant reported waxing and waning symptoms with pain especially noted in the right mid thoracic area. Dr. Holmboe noted he did not perform a formal examination as Claimant's was examined by Dr. Chan on July 24, 2020. He released Claimant from care with recommendations for maintenance follow-up with Dr. Chan for six months, refills of Celebrex, and an IFC unit. Dr. Holmboe opined Claimant did not require permanent restrictions. He did not address permanent impairment.

28. Stanley Ginsburg, M.D. performed a DIME on December 3, 2020, evaluating Claimant's cervical, thoracic and lumbar spine, as well as his right hand, wrist, elbow and shoulder. Claimant reported mid-to-low back pain, numbness in his left leg, and right shoulder symptoms. Claimant asked for his spine, neck and right shoulder pain to be evaluated. Dr. Ginsburg reviewed Claimant's medical records dated November 19, 2019 through July 28, 2020. On physical examination, Dr. Ginsburg reported, "Neck movements were not measured but observed spontaneously and with requests from me and appeared normal." (Cl. Ex. B, p. 22). He noted there was no tenderness in the paracervical area, with some tenderness in the periscapular areas particularly on the right but on the left as well, and mild tenderness without spasm in the midthoracic area. He included thoracic range of motion measurements on the applicable DIME worksheet.

29. Dr. Ginsburg diagnosed Claimant with a thoracic sprain/strain with some radicular symptomatology but not myelopathic or radicular signs. He opined Claimant reached MMI on July 28, 2020 with 4% whole person impairment of the thoracic spine (2% for range of motion deficits and 2% under specific disorders of Table 53(II)(B)). Dr. Ginsburg noted there was no documentation or clinical evidence for impairment of the right hand, wrist, elbow, and shoulder, as well as no documentation or clinical evidence of cervical or lumbar impairment. He opined Claimant did not require any permanent work restrictions, and should be allowed to see Dr. Holmboe twice in next year for medication adjustments and monitoring of the stimulation device.

30. Respondents filed a Final Admission consistent with Dr. Ginsburg's opinions on January 25, 2021.

31. On May 4, 2021, Sander Orent, M.D. performed an independent medical examination ("IME") at the request of Claimant. Claimant reported continued pain in the right side of his back just below his shoulders extending into the scapular area. Dr. Orent noted that Claimant had also been complaining of cervical spine pain since his injury and that such complaints had not been addressed or examined. Dr. Orent reviewed Dr. Ginsburg's DIME report as part of his review. On examination, Dr. Orent noted tenderness in the parathoracic musculature around T12 to T6 on the right. He further noted reduced cervical range of motion and thoracic range of motion. There was no motor weakness in the upper extremities. Dr. Orent opined that Claimant was not

MMI, as he continued to experience ongoing thoracic and cervical spine symptoms. He opined that the cervical spine has not been addressed although there was an adequate mechanism of injury. Dr. Orent recommended Claimant undergo physical therapy for the cervical spine and chiropractic treatment for the cervical and thoracic spine.

32. Dr. Orent testified by pre-hearing deposition as a Level II accredited expert in occupational, environmental, and internal medicine. Dr. Orent testified consistent with his IME report and continued to opine that Claimant has not reached MMI. He explained that Claimant has ongoing symptoms and that other treatment modalities may have been helpful to treat Claimant's thoracic spine. Dr. Orent testified that Claimant sustained a significant cervical strain that had never been addressed, other than to be mentioned in the medical records. Dr. Orent testified that Claimant's records show consistent complaints of neck pain. He recommended Claimant continue chiropractic manipulation and physical therapy and, if that did not work, obtain a cervical MRI.

33. Dr. Orent explained that his provisional impairment rating was based on the assumption that there are minor or minimal degenerative changes of the cervical spine. He opined that, at minimum Claimant qualified for 4% cervical impairment under Table (53)(II)(B) and 11% impairment for range of motion deficits. He opined that Claimant has medically documented pain and rigidity with or without muscle spasm. Dr. Orent testified that Dr. Ginsburg clearly erred in not taking cervical range of motion measurements and not assigning any cervical impairment, as there was a major mechanism of injury and clear cervical complaints that have not been addressed. He opined that you are required to perform an impairment rating even if you believe the Claimant is at MMI. Dr. Orent agreed that the AMA Guides mandate that the evaluating physician is to use their independent judgment, first as to whether a particular body part or condition merits a permanent impairment rating, and second if a rating is merited then using the AMA Guides to calculate the rating.

34. The ALJ finds the opinions of the DIME physician Dr. Ginsburg and of treating physicians Drs. Holmboe and Chan, and Dr. Sheppard to be more credible and persuasive than the opinion of Dr. Orent.

35. The ALJ finds Claimant failed to provide clear and convincing evidence to show Dr. Ginsburg erred in his opinion as to MMI and impairment.

36. The ALJ finds that the right of selection of a physician passed to Claimant due to Respondents' failure to provide Claimant a list of four designated physicians as required under §8-43-404(5), C.R.S.

37. The ALJ finds that Claimant selected Dr. Holmboe as his treating physician. Claimant failed to make a proper showing justifying a change of physician to Dr. Orent.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017).

A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI and whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Claimant failed to prove it is highly probable DIME physician Ginsburg erred in his determination of MMI and permanent impairment. Claimant relies on Dr. Orent's opinion that Claimant's cervical complaints were not addressed and that Claimant continues to experience symptoms in his thoracic and cervical spine that require additional treatment.

Claimant's medical records include the history of Claimant's reported cervical and thoracic complaints, as well as treatment to those areas. Contrary to Dr. Orent's opinion that Claimant has not received any cervical treatment, the medical records indicate Claimant received treatment for both his neck and back. Around the time Claimant was placed at MMI, Dr. Chan noted that Claimant's cervical motion was within functional limits. His closing diagnosis was thoracic pain and thoracic pain syndrome. Dr. Holmboe agreed with Dr. Chan's determinations. Claimant's treating physicians and providers identified his thoracic and scapular pain as his primary conditions. Claimant's treating physician did not opine Claimant warranted any impairment rating of the cervical spine.

Dr. Ginsburg reviewed the medical records, examined Claimant and applied the AMA Guides, concluding that Claimant sustained a thoracic sprain/strain that warranted 4% whole person impairment of the thoracic spine. Dr. Ginsburg explained that the records did not support any cervical impairment, which is in line with the opinions Drs. Chan, Holmboe and Sheppard. Dr. Ginsburg's failure to take measurements of the cervical spine is not clear error considering he did not attribute any ongoing neck condition to Claimant's work injury. There is insufficient evidence Dr. Ginsburg failed to properly apply the AMA Guides and clearly erred in his DIME determinations.

Based on the totality of the evidence, Claimant failed to prove it is highly probable Dr. Ginsburg's opinion on MMI and impairment are incorrect. Dr. Orent's conflicting opinion with those of Drs. Ginsburg, Holmboe and Chan represents a mere difference of opinion that does not rise to the level of clear and convincing evidence.

Change of Physician

Claimant contends that he is entitled to a change of physician because the right of selection passed when Respondents failed to provide Claimant a list with at least four designated treatment providers.

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

Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific

definition of a “proper showing,” the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

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

The right to select a physician passed to Claimant when Employer failed to provide Claimant with a list of four designated providers as specified under §8-43-404(5)(a)(I)(A), C.R.S. Nonetheless, Claimant has already exercised his right to select a physician in his decision to treat with Dr. Holmboe over the course of two years. There is no evidence or allegation Claimant made any prior request to change physicians. As Claimant selected Dr. Holmboe as his treating physician, a request to change physicians would require a proper showing. Here, Claimant has not made a proper showing justifying a change in physician.

ORDER

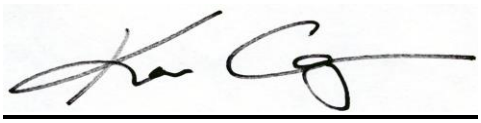
1. Claimant failed overcome Dr. Ginsburg’s DIME opinion on MMI by clear and convincing evidence. Claimant is at MMI as of July 28, 2020 with a 4% whole person impairment of the thoracic spine.

2. Claimant’s request for a change of physician is denied and dismissed.

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

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

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Appeal of a May 20, 2021 Prehearing Order ("PHO") that denied an uncontested motion to add body parts to a follow-up Division Independent Medical Examination ("DIME").

FINDINGS OF FACT

1. Claimant sustained an industrial injury on May 16, 2017 and underwent medical treatment for an injury to his right knee. After requests for a knee replacement surgery were denied, Claimant was placed at maximum medical improvement ("MMI") on August 22, 2018.

2. Claimant sought a DIME, which was performed by Robert Kawasaki, M.D. at Lakewood Outpatient Clinic on May 21, 2019. Dr. Kawasaki opined Claimant was not at MMI and recommended Claimant undergo knee replacement surgery as related to the work injury.

3. Claimant underwent the recommended knee replacement surgery on January 22, 2021.

4. Authorized treating physician ("ATP") Alison Fall, M.D. placed Claimant at MMI on July 28, 2021.

5. The parties attempted to send Claimant back to Dr. Kawasaki for a follow-up DIME. Dr. Kawasaki was unable to perform the follow-up DIME due to a conflict of interest. Hearings subsequently took place before ALJ Edwin Felter to address the concerns of the parties regarding the follow-up DIME. ALJ Felter issued an order on March 22, 2021 ordering the DIME process to commence "de novo."

6. The parties selected Robert P. Mack, M.D. to perform the follow-up DIME. Dr. Mack's DIME was scheduled to take place on May 12, 2021.

7. Claimant contends that he developed additional medical conditions as a result of the knee surgery, including the neurological condition of Lewy Body dementia. Respondents deny any relationship between said neurological condition and Claimant's work injury.

8. On May 5, 2021, Claimant's counsel emailed Respondents' counsel to ask if Respondents would agree to add the following body parts to be addressed at the follow-up DIME: (1) Psychological; (2) Traumatic Brain Injury – onset of dementia; and (3) Cardiovascular – stroke.

9. Respondents' counsel was on vacation and did not see the email from Claimant's counsel at the time.

10. Records of Claimant's alleged neurological problems were in the possession of Respondents and were included in the overall medical packet sent to Dr. Mack.

11. Dr. Mack performed the follow-up DIME on May 12, 2021. He issued his DIME report on May 15, 2021.

12. In his May 15, 2021 DIME report, Dr. Mack stated that the purpose of his exam was to evaluate Claimant's knee injury. He noted that at the evaluation, Claimant, Claimant's wife, and Claimant's son,

> [b]rought up the question of [Claimant's] mental capabilities, and the question of whether he suffered a neurological injury as a consequence of his right total knee joint replacement. I explained to them at the outset that I am an orthopaedic surgeon and not qualified to pass judgment on the neurological or psychological issues. The family understood my area of expertise, and that I am not qualified to assess the neurological situation.

(Cl. Ex. 7, p.1)

13. Counsel for Respondents confirmed to the Court that Dr. Mack's accreditation is limited to orthopedic evaluations.

14. Dr. Mack ultimately assigned Claimant a 24% extremity rating converting to a 10% whole person impairment rating for the knee replacement.

15. Respondents' counsel ultimately responded to Claimant's counsel's request to add body parts to the follow-up DIME on May 17, 2021, five days after Dr. Mack conducted the follow-up DIME, and two days after Dr. Mack issued his DIME report. Respondents' counsel agreed to add the requested body parts a follow-up DIME.

16. On May 19, 2021, a prehearing conference ("PHC") took place before Prehearing ALJ ("PALJ") Susan D. Phillips to address Claimant's motion to add additional body parts for consideration at the follow-up DIME. PALJ issued an order on May 20, 2021. In the PHO order, PALJ referred to Claimant's motion as "unopposed", "agreed upon" and a "joint motion." PALJ Phillips noted that the parties reached an agreement to add body parts to be addressed in the follow-up DIME, and that the parties agreed that causality and relatedness of those conditions should be addressed in the follow-up DIME report.

17. PALJ Phillips determined that the parties did not establish good cause for their motion, and denied Claimant's unopposed motion to add body parts for the follow-up DIME. She noted that the parties have had a dispute over the addition of the body parts for some time, including at a PHC held before her on December 1, 2020, at which she urged the parties to work out an agreement or request another PHC. PALJ Phillips further

noted that the parties did not cite any rule or appellate precedence to provide guidance in the matter. She concluded that WCRP Rule 11 does not allow for body parts to be added after a follow-up DIME has taken place. PALJ Phillips reasoned that the rules concerning DIMEs are structured so that deadlines establish when each party is required to undertake specified steps before the DIME appointment, not after. PALJ Phillips determined that the parties were asking for relief that is not provided in the Act or WCRP.

18. On July 14, 2021, Claimant filed an Application for Hearing endorsing overcoming the DIME. The hearing was scheduled to take place on January 31, 2022.

19. Prior to the hearing, counsel for both parties conferred and agreed that a review/appeal of PALJ Phillip's order should be addressed at hearing. On January 20, 2022, Respondents filed a Case Information Sheet endorsing review/appeal of PALJ's Phillip's PHO. On January 25, 2022, Claimant filed a Case Information Sheet also endorsing PALJ's Phillip's PHO.

20. On January 27, 2022, Claimant submitted a brief to the Court identifying "Whether the pre-hearing ALJ erred in denying the uncontested motion to add body parts to the follow-up DIME in the Prehearing Order for Prehearing Conference Held on May 19, 2021."

21. At the onset of the hearing before ALJ Cayce on January 31, 2022, the parties requested that the ALJ address Claimant's appeal of PALJ Phillip's May 21, 2021 PHO. ALJ Cayce entered Claimant's Exhibits and heard arguments from both parties. Respondents do not object to adding the previously agreed upon body parts to a follow-up DIME.

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. 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).

Review of PALJ Order

A PALJ's order is properly reviewable by an ALJ pursuant to an application for hearing rather than a petition to review to the Industrial Claim Appeals Office. *Brownson-Rausin v. Valley View Hospital,* WC 3-101-431 (ICAO, Oct. 3, 2006); *Hernandez v. Safeway*, W. C. 4-630-249 (October 21, 2005).Section 8-43-207.5(2) grants the PALJs the authority to "issue interlocutory orders" and "make evidentiary rulings". Section 8-43-207.5(3) states that orders entered by PALJs are "binding on the parties," but the provision also states that "such an order shall be interlocutory." In *Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998), the Court held that a PALJ's order approving a settlement agreement is final and subject to review. However, the court also stated that orders "relating to a prehearing conference" entered by a PALJ are interlocutory and not subject to appeal. The basis for the court's holding was that orders relating to a prehearing conference are reviewable at a full hearing before the director or an ALJ. In this regard the court stated that "the propriety of the PALJ's prehearing order may be addressed at the subsequent hearing." *Orth, 965 P.2d* at 1264; *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, (Colo. App. 2003) (ALJ has authority to override the ruling of a PALJ); *Brownson-Rausin v. Valley View Hospital,* supra.

WCRP Rule 11 addresses the procedures and requirements applicable to DIMEs. WCRP Rule 11 discusses the process for agreeing upon body parts to be addressed by the DIME physician, and providing the DIME physician the requisite medical records, all prior to completion of the DIME. WCRP nor the Act specifically addresses adding body parts for consideration after a follow-up DIME has taken place. The ALJ is unaware of any provision in the Act, WCRP, or legal precedent specifically prohibiting the parties from doing in circumstances such as those in the case at bench.

The ALJ acknowledges the parties' delay in timely agreeing to and notifying the DIME of the agreed upon additional body parts for consideration. Both parties were responsible for conferring about the issue earlier to allow the requisite time to follow proper procedures for adding body parts for the DIME's consideration. Nonetheless, Claimant's counsel did make an attempt prior to the follow-up DIME to confirm that

Respondents agreed to adding certain body parts. The communication was inadvertently deleted or unseen by Respondents' counsel until a later date. The DIME physician and Respondents had been provided with the medical records addressing the additional parts.

Importantly, the parties agree that the body parts should be added for consideration by the follow-up DIME. The parties stipulated as such at the PHC. While a PALJ or ALJ is not required to grant all unopposed motions, and the efficiency of the DIME process, is important, so is allowing Claimant to undergo a complete DIME evaluation of all potentially-related conditions. Additionally, it is noted that DIME physician Dr. Mack made it clear in his report he was not qualified to opine on the alleged neurological/psychological problems of Claimant. Thus, even if the additional body parts were properly added prior to his evaluation, such conditions would require further evaluation by an another physician.

Based on the unique facts and chronology of this case the ALJ determines the parties established good cause to grant the unopposed motion and reverse PALJ Phillip's May 20, 2021 PHO.

ORDER

1. PALJ Phillip's PHO dated May 20, 2021 is reversed.

2. The parties shall reschedule a repeat follow-up DIME examination pursuant to WCRP.

3. Dr. Mack's name on the current DIME Physician Panel shall be replaced with a physician with full accreditation. Any other physician on the current DIME Physician Panel, not having full accreditation, shall be replaced with a physician with full accreditation.

4. The selected DIME physician shall address causality and relatedness of the agreed upon body parts: (1) Psychological; (2) Traumatic Brain Injury – onset of dementia; and (3) Cardiovascular – stroke.

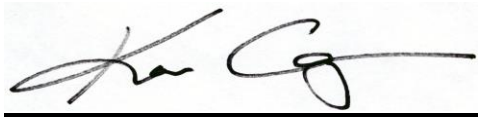
5. Upon receipt of the repeat DIME evaluation report, the parties shall proceed pursuant to WCRP.

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

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

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved he is entitled to temporary total disability (TTD) benefits beginning October 23, 2020 and ongoing.

II. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for termination of his employment and thus not entitled to TTD benefits.

III. Whether Claimant proved Respondents are subjection to penalties for failure to timely admit or deny Claimant's claims.

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $1,002.95 with a TTD rate of $668.63.

FINDINGS OF FACT

1. Claimant worked for Employer as an office furniture installer from February 16, 2020 to October 23, 2020. Claimant's job involved lifting and moving heavy furniture.

2. At the time of his hire, Claimant was provided with a copy of an Employee Handbook which included a General Safety Rules Handbook. Claimant acknowledged in writing that he received, read, and agreed to abide by the handbook and that he understood the policies and procedures set forth in the handbook including that his employment could be terminated at any time. The handbook provides, *inter alia*, employment is at will; employees could be disciplined according to the nature of the offence; using common sense most accidents could be avoided and that safety was a full-time job; and failure to perform job assignments satisfactorily and efficiently or failing to report unsafe actions or conditions could be grounds for discharge.

3. Claimant testified he received but did not read the Employee Handbook.

4. Claimant previously owned a company and employed approximately 15 workers. Claimant's company carried workers' compensation insurance. Claimant testified he was unaware of the specifics of the workers' compensation system because none of his prior employees filed any workers' compensation claims.

5. Claimant was involved in a January 2020 motor vehicle accident ("MVA") that resulted in neck, back and knee complaints. Claimant underwent treatment through April

2020. Claimant testified his symptoms from the MVA had resolved by the time of his August 2020 injury.

6. On August 10, 2020 Claimant sustained an industrial injury when he twisted his back while unloading panels for Employer.

7. Claimant notified his supervisor, [Redacted, hereinafter SM], of the injury on the morning of August 11, 2020. Claimant sought treatment for his back that same day with a personal chiropractor, Dr. Matthew Romo at Chiro Now. Dr. Romo removed Claimant from work August 11-12, 2020. Claimant then called [Redacted, hereinafter GN], Project Coordinator, on August 11, 2020 informing her of his injury and that he needed to file a workers' compensation claim.

8. [Redacted, hereinafter KM], Director of Internal Operations, subsequently contacted Claimant to discuss what occurred on August 10, 2020. Ms. KM[Redacted] asked Claimant if he wanted to see a workers' compensation doctor and Claimant declined. She testified Claimant told her he had injured himself in a January 2020 MVA; that his neck and back injuries from that accident had flared up at times and that he just needed a couple of days off to rest his back.

9. On August 13, 2020, Ms. KM[Redacted] emailed Claimant a form to sign to decline workers' compensation treatment ("Declination of Treatment Form"). The form stated Claimant understood he had been offered "the service of being treated at the company's workers compensation physician; however, I am declining by these physicians. I also understand if I seek treatment by an outside physician, [Employer] takes no responsibility financially or otherwise for the injury that occurred" on August 10, 2020. (Cl. Ex. 28, p. 130). The form further stated, "I also understand, if there is further treatment needed for this injury, I am solely responsible for all treatment, financial or otherwise." (Id.) Ms. KM[Redacted] testified that Employer presents this form to all employees who decline workers' compensation treatment.

10. Claimant signed and returned the form to Ms. KM[Redacted] on August 14, 2020. Claimant testified he signed the Declination of Treatment Form because Ms. KM[Redacted] offered to pay his wages for the week and he needed the money.

11. Claimant did not work August 11-14, 2020. Employer paid Claimant his full wages for that time period. Ms. KM[Redacted] testified Employer paid Claimant's wages for those days off because times were tough due to the COVID-19 pandemic and she did not want Claimant to endure any hardship.

12. Claimant returned to full duty work on August 17, 2020 and continued to work in such capacity through October 23, 2020. Claimant testified he continued to experience pain in his back for which he saw a chiropractor and his primary care physician, Luke Beckman, M.D., at Kaiser.

13. On October 1, 2020, Claimant saw Luke Beckman, M.D. at Kaiser for chronic low back and neck pain, greater than three months, with a date of onset of August 10, 2020. Dr. Beckman placed Claimant on modified activity from October 5 through October 30, 2020. Dr. Beckman imposed the following restrictions: standing and walking, intermittently—up to 50% of shift; bending at the waist and torso/spine twisting, occasionally—up to 25% of shift; climbing ladders and use of scaffolds/working at height—not at all; and lifting/carrying/pushing/pulling no more than 20 pounds.

14. On October 20, 2020 at 7:34 a.m. Claimant emailed Ms. KM[Redacted] a copy of the Kaiser Work Status Report from October 1, 2020 detailing his work restrictions.

15. Claimant testified that he continued to work full duty despite his restrictions because he needed the money. He testified that he sent the restrictions to Employer when he did because he anticipated performing a lot of heavy lifting that day and did not want to reinjure his back.

16. At approximately 10:00 a.m. on October 20, 2020 Claimant injured his back while lifting a hutch at work. Claimant immediately notified his supervisor, [Redacted, hereinafter DN], of the incident. Claimant completed the remainder of his work shift.

17. At 10:59 a.m. on October 20, 2020, Ms. KM[Redacted] replied to Claimant's earlier email that attached his work restrictions. Ms. KM[Redacted] was unaware of Claimant's October 20, 2020 injury at the time she sent her reply. Ms. KM[Redacted] wrote,

> Thank you for sending this over however I am confused as to why you are presenting something to me on 10/20 that you received on 10/1 for something that is not work comp related. You mention that this is from when you 'got hurt on the job' (strained your back) back in August however you were offered and declined medical treatment and chose to see your own doctor resulting in this no longer being a work comp or [Employer] issue.

(Cl's Ex. 30, p.138)

18. Claimant performed his regular work duties October 21 and October 22, 2020.

19. On October 22, 2020, Mr. S[Redacted] completed a supervisor statement regarding the October 20, 2020 injury, stating Claimant's injury occurred while lifting a piece of furniture. Under a section titled "Employee Performance" Mr. S[Redacted] checked "physically not capable" "improper risk taken and/or poor judgment" and "other-improper lifting technique." (Cl. Ex. 33, p. 150). Mr. S[Redacted] wrote "pay attention to how you lift" under the preventative action plan section. (Id.)

20. On October 23, 2020, Ms. KM[Redacted] and Mr. M[Redacted] called Claimant into Employer's warehouse for a meeting. Ms. KM[Redacted] recorded the meeting without Claimant's knowledge.

21. The recording of the meeting was admitted into evidence as Claimant's Exhibit 34. During the meeting, Ms. KM[Redacted] and Mr. Miller inquired about the October 20, 2020 incident. They asked Claimant if he wanted to continue seeing his personal doctor or if he wanted to see a physician through workers' compensation. Claimant indicated he did not know what he wanted to do, and asked for time to make his decision. Ms. KM[Redacted] informed Claimant that they needed his decision at that time. Claimant inquired what would happen if he sought treatment for the injury through Employer's workers' compensation insurance. Ms. KM[Redacted] informed Claimant he would be required to see a workers' compensation doctor who would determine, along with an investigation, if Claimant's injury was work-related or if it was the result of a previous condition.

22. Claimant then indicated he continued to experience symptoms from the August 10, 2020 injury. Ms. KM[Redacted] admonished Claimant for continuing to work with a preexisting condition and failing to inform Employer of his restrictions. Claimant stated he needed to work to make money. Ms. KM[Redacted] again asked Claimant if he wanted to see a workers' compensation doctor or to decline workers' compensation treatment.

23. Claimant ultimately stated he would like to go see a workers' compensation doctor. Ms. KM[Redacted] then instructed Claimant to choose a workers' compensation doctor, and immediately informed Claimant that he would be required to submit to a mandatory drug test per Employer procedure. In response, Claimant stated that he did smoke marijuana at night. Ms. KM[Redacted] commented that Claimant would likely fail a drug test on top of everything else, and that he ran the risk of his injury not being covered by workers' compensation. Claimant then elected to decline treatment through workers' compensation and signed another Declination of Treatment Form for his October 20, 2020 injury.

24. Upon Claimant signing the second Declination of Treatment form, Mr. M[Redacted] informed Claimant that he was being terminated. Mr. M[Redacted] informed Claimant that his failure to inform Employer of his restrictions while he continued to work had put the company, himself, and other employees at risk. Mr. M[Redacted] presented Claimant a Performance Improvement Plan dated October 20, 2020. The Performance Improvement Plan stated Claimant was terminated because Claimant continued to work under restrictions and did not notify Employer of the restrictions until 20 days later. The document states Claimant violated company policies by putting others at risk because he was not physically capable of performing his job.

25. Claimant emailed Ms. KM[Redacted] after the meeting at 11:15 a.m. on October 23, 2020 requesting a list of designated providers to treat his back. Ms. KM[Redacted] replied via email later that day, sending Claimant a Designated Provider List. Ms. KM[Redacted] wrote on the list, "Employee opted to not go to worker comp doctor. He admitted he would fail drug test." (R. Ex. E, p. 20).

26. Claimant sought treatment at one of Employer's designated providers, Thornton COMP, and underwent a drug test for which he tested negative. Claimant presented to

Monica Fanning-Schubert, APN on October 30, 2020, who diagnosed Claimant with cervicalgia, low back pain, and strain of muscle, fascia, and tendons in the back. She referred Claimant for physical therapy and massage therapy and for lumbar and cervical spine MRIs. APN Fanning-Schubert placed Claimant on work restrictions including: lifting a maximum of 50 pounds; a maximum of 10 pounds for repetitive lifting, carrying, and pushing or pulling; no repetitive lifting from floor to waist; and zero hours per day crawling and no climbing of ladders.

27. On November 18, 2020, Claimant attended an evaluation with Bryan Alvarez, M.D. Dr. Alvarez's diagnoses were the same as ANP Fanning-Shubert's. Dr. Alvarez referred Claimant for chiropractic treatment and a consultation with a physiatrist. He changed Claimant's lifting, carrying, and pushing and pulling restrictions from 10 pounds to 20 pounds.

28. Claimant continued to see Dr. Alvarez. He also underwent physical therapy from November 3, 2020 through January 7, 2021, and massage therapy from November 13, 2020 through January 8, 2021. As of Claimant's March 23, 2021 evaluation with Dr. Alvarez, he remains on 10 pounds restrictions for lifting, pushing/pulling and pinching/gripping.

29. On October 27, 2020, Insurer created an Employer's First Report of Injury (E-1) for Claimant's October 20, 2020 injury. Insurer assigned a claim file number of FQV8949. The form does not specify any safety rule violation. [Redacted, hereinafter VP], Investigative Adjuster, testified this form was not filed with the Division as, per her understanding of Division guidelines, Division training, and experience, the claim was not the type of claim required to be reported to the Division. This matter gave rise to W.C. No. 5-157-564.

30. On December 7, 2020, Claimant filed a Workers' Claim for Compensation with the Division noting the date of injury as "8/10/20 aggravated on 10/20/20." (R. Ex. 7, p. 36). The Division assigned the claim W.C. # 5-155-726.

31. On December 9, 2020, the Division sent Insurer a letter advising Insurer to admit or deny liability within 20 days for WC #5-155-726.

32. Ms. VP[Redacted] handled Claimant's claims for Insurer. She testified that Insurer received Claimant's claim and the Division's December 9, 2020 letter on December 15, 2020 and put it into an "electronic file cabinet."

33. On December 12, 2020, Claimant's counsel emailed Ms. VP[Redacted] regarding FQV8949 stating that the E-1 filed on 10/27/20 was in a penalty situation as Insurer had not yet admitted or denied the claim. Ms. VP[Redacted] replied to the email on December 17, 2020 stating that the Claimant had been placed in denial with a Notice of Contest forthcoming. Claimant's counsel responded on December 19, 2020 stating the Notice of Contest would be filed late and Insurer would continue to be in violation.

34. On December 22, 2020, Insurer filed a Notice of Contest for October 20, 2020 claim.

35. On January 12, 2021, the Division sent notice to Insurer regarding W.C. #5-155-726. The letter stated that Respondents were in a potential penalty situation because they had failed to take a position within 20 days of the Division receiving notice of the claim.

36. Ms. VP[Redacted] testified that, upon receiving the Division's January 12, 2021 letter, Insurer realized there had been confusion regarding two separate claims being filed by Claimant. At that time, Insurer created a file for the August 10, 2020 claim in their system.

37. On January 14, 2021, Ms. VP[Redacted] filed a Notice of Contest for August 10, 2020 injury.

38. On April 27, 2021, Respondents filed General Admissions of Liability in the August 10, 2020 and October 20, 2020 claims admitting liability for medical benefits only. Respondents assert Claimant is not entitled to temporary indemnity benefits as Claimant is responsible for termination of his employment.

39. Claimant testified that, as a result of Respondents' delays in filing the Notice of Contests, he experienced anxiety and stress. Claimant testified he is unable to perform his regular job duties as a result of his injuries.

40. Ms. KM[Redacted] testified Employer could have accommodated the restrictions put in place by both Kaiser Permanente and COMP with modified duty work. She also testified other injured employees had returned to work under restrictions at light duty.

41. Regarding Claimant's responsibility for termination, the ALJ credits Claimant's testimony, as supported by the records, over the testimony of Ms. KM[Redacted].

42. The ALJ finds that Claimant proved it is more probable than not he is entitled to TTD benefits October 23, ongoing.

43. The ALJ finds that Respondents failed to prove it is more probable than not Claimant was responsible for his termination.

44. The ALJ finds that Claimant failed to justify imposition of penalties against Respondents based on the totality of the circumstances.

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).

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*,

971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved he is entitled to TTD benefits from October 23, 2020, ongoing. Claimant credibly testified that as a result of his work injuries and restrictions, he has been unable to perform his regular work duties and has not or earned wages since October 23, 2020. Claimant's termination from employment is addressed below.

Responsibility for Termination

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

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial*

Commission, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

Respondents assert Claimant was terminated from his employment because he failed to timely notify Employer of his work restrictions. Respondents rely on the Employee Handbook, which provides that failure to report unsafe actions or conditions could be grounds for discharge.

Ms. KM[Redacted]'s October 20, 2020 email response to Claimant undermines Respondents' contention that Claimant was terminated for failing to timely notify Employer of his restrictions. In her response, Ms. KM[Redacted] questioned why Claimant presented something he received on 10/1 to her on 10/20 **that is not work comp related.** (Emphasis added). She goes on to remind Claimant he signed a waiver regarding the injury resulting in the injury no longer being a workers' compensation or Employer issue. Thus, while Ms. KM[Redacted] did mention a delay in providing the restrictions, the crux of her response focused on admonishing Claimant for notifying Employer of restrictions Employer deemed unrelated to his work due to Claimant signing a waiver. She specifically states that it is no longer an Employer issue. It is important to note Claimant solely notified Employer of his restrictions in this email and did not indicate he was requesting additional medical treatment from Employer. Thus, Ms. KM[Redacted]'s response stating it was not an Employer issue and admonishing Claimant for sending such information undermines

the argument that Claimant was reasonably expected to promptly notify Employer of his restrictions under such circumstances.

While Employer purports that Claimant's actions put Claimant and his co-workers in potential danger, Employer continued to permit Claimant to work full duty for two days after becoming aware of the restrictions. There is no indication Claimant was placed on any sort of suspension or modified duty prior to his termination. Additionally, the E-1 form completed by Employer on October 20, 2020 does not allege any safety rule violation.

Additionally, the recording of the termination meeting provides further insight into the circumstances surrounding Claimant's termination. Immediately after Claimant affirmatively stated his desire to see a workers' compensation physician, Ms. KM[Redacted] announced that Claimant would be required to undergo a drug test, which could result in his claim being denied. The ALJ is not persuaded this statement was solely an attempt to apprise Claimant of the process for seeking workers' compensation treatment. In the context of the conversation, the statement reasonably appears to be an attempt to dissuade Claimant from pursuing treatment through Employer's workers' compensation insurance. When Claimant changed his mind based on Ms. KM[Redacted]'s statement, Ms. KM[Redacted] immediately presented Claimant yet another Declination of Treatment form, after which Mr. M[Redacted] proceeded to terminate Claimant.

Here, Employer presented Claimant with not one, but two, Declination of Treatment forms after Claimant reported separate work injuries. Claimant signed the first form because Employer paid him for his time off due to the injury, and the second form because he did not wish to undergo a drug test in connection with a worker's compensation claim. Upon notifying Employer of his work restrictions, Claimant was not suspended or placed on modified duty, but allowed to continue working his regular duties. Employer questioned why Claimant was providing evidence of work restrictions that were "not work related" and "not an Employer issue." Employer effectively terminated Claimant under the pretext of Claimant failing to timely notify Employer of his work restrictions. Considering the totality of the credible and persuasive evidence, the ALJ does not find that the Employer's stated reason for terminating Claimant was, in fact, the reason for his termination. The preponderant evidence does not establish Claimant was responsible for his termination.

Penalties

Claimant seeks penalties against Respondents in the August 10, 2020 claim (WC # 5-155-726) under Section 8-43-203(1)(a), C.R.S. and WCRP Rule 5-2(D). Claimant also seeks penalties in the October 20, 2020 claim (WC# 5-157-564) under Section 8-43-203(1)(a), C.R.S.

Section 8-43-203(1)(a) requires a Notice of Contest to be filed within 20 days after a report is or should have been filed pursuant to §8-43-101. Section 8-43-101(1) states,

> Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule. Within ten days after notice or knowledge that an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury, or fatality to the division. The report shall contain such information as shall be required by the director.

Respondents contend that no penalties apply under Section 8-43-203(1) as both claims are no lost time claims and thus did not require reporting under Section 8-43-101(1). Specifically, Respondents argue that no lost time occurred on the August 10, 2020 claim because Employer paid Claimant his full wages for the time he missed from work due to the August 10th injury. Regarding the October 20, 2020 injury, Respondents argue that no lost time occurred because Claimant was responsible for his termination.

Here, Respondents conflate the requirement for lost time referenced in §8-43-101(1) with the requirement for wage loss as related to temporary total disability benefits.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See §§8-42-(1)(g) & 8-42-105(4), C.R.S. That Respondents paid Claimant his full wages for the time he missed from work due to the August 10, 2020 injury is relevant to a consideration of whether Claimant sustained actual wage loss, entitling him to TTD benefits. Similarly, whether Claimant was responsible for his termination from employment is relevant to determining whether resulting wage loss is attributable to the industrial injury. The reporting requirements outlined in Section 8-43-101(1) do not refer to wage loss, but lost time. A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987).

Injuries without loss of pay do not exclude Respondents' obligation under Section 8-43-203(1)(a). *See Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Thus, both Claimant's August 10, 2020 and October 20, 2020 were lost time claims, as Claimant missed more than three days of work.

Nonetheless, Claimant failed to justify the imposition of a penalty under Section 8-43-203(1). The phrase "may become liable" means imposition of penalties under § 8-42-203(2)(a) is discretionary. E.g., Gebrekidan v. MKBS, LLC, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over

the claim process. Smith v. Myron Stratton Home, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter future misconduct. May v. Colorado Civil Rights Commission, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. Dami Hospitality, LLC v. Industrial Claim Appeals Office, 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under § 8-43-203(2)(a). Pioneer Hospital v. Industrial Claim Appeals Office, 114 P.3d 97 (Colo. App. 2005).

Claimant did not file a claim for compensation until December 7, 2020. At the time, Insurer was aware only aware of the October 20, 2020 injury. The Division sent a letter to Insurer on December 9, 2020 asking Insurer to take a position. Twenty days from that date would have been December 29, 2020. The NOC was filed on January 14, 2021. In December 2020, the Insurer only had one file open for Claimant and that was for his October 20, 2020 case (FQV8949) as the Employer had 'filed' that claim with them electronically. The December 12, 2020 email from Claimant's counsel requesting that Insurer file a position specifically referred to FQV8949 and the E-1 filed on 10/27/20. Ms. VP[Redacted] responded that she would be filing a NOC, which she did in a timely manner on December 22, 2020. Insurer reasonably believed they had complied under the circumstances. Upon receiving the Division's January 12, 2021 letter stating Insurer was in a penalty situation for failure to timely take a position, Insurer realized there were two separate claims requiring NOCs. Insurer then promptly filed a NOC in the August 10, 2020 matter on January 14, 2020. Insurer was reasonably confused under the circumstances and took reasonable action in an attempt to comply.

WCRP Rule 5-2(D) provides, "The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation...".

This subsection of the rule is distinct from §8-43-203(1) to the extent that it applies to any claim, but only when the claimant has filed a Claim for Compensation. Under Rule 5-2(D), a position statement is due 20 days after a Workers' Claim for Compensation was mailed to the insurer. An admission or contest was made necessary by Rule 5-2(D), solely because the claimant had filed a Claim for Compensation.

The Division mailed a copy of the Claimant's Workers' Claim for Compensation to Respondents on December 9, 2020 asking Respondents to take a position on the claim WC #5-155-726. Respondents did not file a NOC until 1/14/21, thus violating Rule 5-2(D).

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See*

Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

As discussed above, while Respondents failed to take a timely position on the August 20, 2020 claim pursuant to WCRP Rule 5-2(D), Respondents conduct was objectively reasonable. Thus, imposition of penalties is inappropriate. Accordingly, no penalty for violation of Rule 5-2(D) shall be assessed.

ORDER

1. Claimant proved he is entitled to TTD benefits beginning on October 23, 2020; Respondents shall pay Mr. Ocana TTD benefits at the rate of $668.63 per week beginning on that date and continuing until terminated by operation of law.

2. Respondents' affirmative defense of termination for cause is denied and dismissed.

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

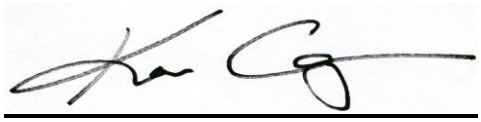
4. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

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: March 31, 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 workplace injury on February 25, 2019.

II. Whether Claimant proved by a preponderance of the evidence he sustained a compensable occupational disease with a date of onset of April 21, 2019.

III. If Claimant proved he sustained a compensable workplace injury on February 25, 2019 and/or occupational disease with a date of onset of April 21, 2019, whether Claimant proved by a preponderance of the evidence he is entitled to specific reasonable, necessary, and related medical benefits.

IV. If Claimant proved he sustained a compensable workplace injury, whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability benefits from February 25, 2019 through April 23, 2019.

FINDINGS OF FACT

1. Claimant worked for Employer for nine years. Claimant initially worked for Employer in quality assurance. He worked as a microbiologist for the last six years.

2. Claimant alleges he sustained an injury to his right elbow and forearm on February 25, 2019. Claimant alleges he was injured when opening a tight cap on a Sharpie marker. Claimant frequently used Sharpies while performing his job duties. Claimant testified he forcefully gripped and twisted the cap of the marker with his right hand, causing pain in his right forearm. Claimant reported the incident to Employer but did not seek medical attention.

3. Claimant alleges that, following the February 25, 2019 incident, he experienced pain when squeezing the squeeze bottles, and difficulties with his right hand, arm and shoulder when: pouring the water samples into the funnels; carrying heavy water samples from the line to his lab; collecting and unloading supplies from the logistics department; diluting the culture media with the mechanical pipettes using a motion similar to pushing up and down on a pen.

4. Claimant testified that the bottle claimant uses to pour his water samples is glass and contains one liter of water. He stated he feels pain in his hand/arm/wrist shoulder from the repetitive motion of pouring combined with the weight of the bottle. Claimant testified that collecting and unloading supplies causes pain to his right shoulder because it requires pulling a heavy cart from the front across the entire building.

Claimant testified his work also includes unloading large boxes of supplies and placing them in the refrigerator or other storage. Claimant testified his other work requires that he reach overhead, upwards, out to the side both sides and bend over to get supplies under his workstation. He occasionally uses a step stool. Claimant stated he spends half of his day in the lab doing sampling, approximately four (4) to five (5) hours, which is when he does most of his reaching for supplies.

5. Claimant continued to work full-duty for Employer after the February 25, 2019 incident. Claimant testified that he experienced intermittent pain in his right hand, forearm and shoulder during this time period.

6. Claimant alleges he suffered an occupational disease with a date of onset of April 21, 2019.

7. Claimant testified that, on April 21, 2019, he developed pain in his right shoulder when he rolled over in bed at night. Claimant associated his right shoulder pain with his work activities and reported his symptoms to Employer the following day and requested medical evaluation.

8. Claimant presented to Jay Reinsma, M.D. at Concentra on April 23, 2019. He reported that on February 25, 2019, he felt pain in his right forearm and lateral elbow when he pulled a stuck cap off of a marker. Claimant reported using some pain cream and over the counter medication to manage his pain. Dr. Reinsma noted that 10 days prior to this evaluation Claimant began to develop severe right shoulder pain. Claimant denied any new injury. On examination of the right shoulder, Dr. Reinsma noted tenderness in the bicipital groove and in the deltoid, as well as full range of motion with pain. Examination of the right forearm was normal. Dr. Reinsma diagnosed Claimant with a right forearm strain and tendinitis of the upper biceps tendon of the right shoulder. He noted that he could not opine with greater than 51% certainty that Claimant's shoulder is a work-related issue. He opined that Claimant's forearm injury did appear to be work-related. Dr. Reinsma referred Claimant to physical therapy and released Claimant to modified duty with the following work restrictions: may lift up to 10 pounds occasionally, no reaching above shoulders with affected extremity, unable to use power/impact/vibratory tool with right upper extremity. Occasional grip squeeze pinch and no behind reaching with right arm.

9. A physical therapy record from April 23, 2019 notes that the right shoulder humeral head is slightly anterior to the acromion. This evaluation also showed radial sided wrist pain radiating up the arm. Claimant had right shoulder pain over the AC joint, causing difficulty reaching overhead and reaching behind him to put on his jacket. The pain is described as burning and sharp, onset was delayed, and symptoms occur intermittently. His pain is rated as 3/10.

10. Claimant returned to Dr. Reinsma on April 25, 2019 stating there was miscommunication regarding his injury at his first evaluation. Claimant reported that he inadvertently pointed to his shoulder when his pain was just above his right elbow. On

examination of the right elbow, Dr. Reinsma noted tenderness in the lateral epicondyle with full range of motion. Claimant resisted wrist range of motion with pain. Examination of the forearm revealed tenderness in dorsal mid forearm with full painful range of motion. Dr. Reinsma removed his shoulder diagnosis and continued Claimant on restrictions.

11. A physical therapy record dated April 30, 2019 documents that Claimant reported that he confused his body parts and misnamed the region that was bothering him and that he never had shoulder pain. He reported that the pain was always in his forearm and again related his pain to the cap twisting incident.

12. On May 13, 2019 Claimant reported to Dr. Reinsma 3/10 pain with gripping heavy objects. He reported being pain-free except when lifting. Claimant further reported that he was working regular duty but not using his right arm as he usually would. Dr. Reinsma opined that further physical therapy was not indicated. He returned Claimant to regular duty using his right arm as normal.

13. At a follow-up visit on May 20, 2019, Claimant reported to Dr. Reinsma having pain when reaching out and attempting to lift items. Dr. Reinsma noted that Claimant reported pain but appeared comfortable during his examination. He continued Claimant on regular duty. On May 28, 2019, Claimant reported worsening pain in his biceps area to Dr. Reinsma. Dr. Reinsma referred Claimant to Craig Davis, M.D. for evaluation.

14. Claimant presented to Dr. Davis on June 4, 2019. Claimant reported that he developed right forearm pain on February 25, 2019 when removing a marker cap, and right shoulder pain since rolling over in bed in April 2019. On examination of the right shoulder, Dr. Davis noted limited range of motion and strongly positive impingement signs. There was full range of motion of the elbow, wrist and hand with tenderness over the mid forearm dorsally over the extensor musculature. Claimant was nontender at the epicondyles and had pain with resisted wrist extension and supination. Dr. Davis noted that right shoulder x-rays showed type II acromion with no other abnormalities, and that x-rays of the right elbow were normal. Dr. Davis diagnosed Claimant with right shoulder subacromial bursitis and tendinitis of the right forearm. He administered a shoulder injection and injections into three trigger points of the forearm. Dr. Davis's medical note does not address causality.

15. Claimant returned to Dr. Davis on July 9, 2019 reporting no improvement in his right shoulder but "virtually complete relief" in his forearm following the trigger point injections that were done for radial tunnel syndrome. Claimant reported that he as working fully duty using a forearm strap and occasionally took anti-inflammatory medication. Dr. Davis referred Claimant for a shoulder MRI.

16. Claimant underwent a right shoulder MRI on July 19, 2019 which revealed: 1) Tendinosis-tendinopathy change rotator cuff without cuff tear, muscle atrophy or denervation change; 2) Anterolateral downsloping of the acromion and degenerative changes about the acromioclavicular joint indent and the supraspinatus myotendinous

margin. Correlation with the patient's clinical exam for any symptoms of outlet impingement is suggested; 3) Tenosynovitis change biceps tendon sheath with intra-articular tendinosis of the biceps tendon as it courses to insert on the degenerated SLAP 2 superior labrum. On further review a SLAP 3 appearance may be present. Extension of the SLAP 2 labral tearing down to almost the 10 o'clock to the 9:30 position is noted as well. Correlation with the patient's clinical exam referable to the biceps superior labral complex is recommended; 4) Synovitis change rotator interval and thickening and edematous change inferior capsular margins; 5) Grade 3 chondral loss humeral head, no subcortical bone marrow edema. (C. Ex. 00145).

17. Claimant returned to Dr. Davis on August 6, 2019. Dr. Davis noted Claimant's MRI demonstrated a Type 2 to 3 SLAP tear of the superior labrum with some biceps tendinitis and rotator cuff tendinitis, but minimal otherwise. Claimant continued to report severe activity-related pain diffusely around the shoulder. Dr. Davis noted that the trigger point injections had worn off and Claimant was now reporting significant pain over the dorsal forearm. He remarked that he was concerned that Claimant's subjective complaints seemed rather diffuse and more than he would expect given Claimant's MRI pathology. Dr. Davis recommended Claimant undergo a glenohumeral injection, which he administered on August 20, 2019.

18. At a follow-up examination with Dr. Reinsma on August 23, 2019, Dr. Reinsma noted that Claimant continued to complain of right forearm pain but that his exam appeared entirely normal. He recommended proceeding as recommended by Dr. Davis.

19. On September 24, 2019, Dr. Davis noted that Claimant's shoulder had markedly improved for two weeks following the injection but that Claimant had since returned to baseline. Claimant continued to report forearm pain. Dr. Davis opined that Claimant had an excellent temporary response to the shoulder injection and thus was a reasonable candidate for arthroscopic evaluation with possible biceps tenotomy and possible debridement or repair of the superior labrum. He further opined that Claimant's forearm pain may improve following the shoulder surgery, and recommended additional trigger point injections if it did not. Dr. Davis requested authorization for surgery.

20. Respondents filed a Notice of Contest on October 1, 2019.

21. At some point in October 2019 Claimant requested leave under the Family Medical Leave Act ("FMLA") and went on a medical leave of absence.

22. On October 23, 2019, William J. Ciccone II, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported that on February 25, 2019 he opened a tight sharpie marker cap resulting in pain in his forearm with increased pain using equipment. He confirmed that he has remained in full work duties using his left upper extremity most of the time and that he was able to return to work with full duties but did have some discomfort in the left forearm. Claimant reported that in April 2019 he experienced increased right shoulder pain when he rolled over in bed at night. Claimant was currently on medical leave from his job, noting he last

worked October 10, 2019. Claimant reported that over the last few weeks he experienced hand paresthesias into the third and fourth fingers of his right hand.

23. On examination, Dr. Ciccone noted active forward flexion of 150 degrees, external rotation of 40 degrees, internal rotation to L5; mild impingement signs; no pain at the AC or SC joints; no pain with bear hug testing; negative O'Brien's test; normal lift-off test; no pain with palpation along the anterior aspect of the shoulder; full range of motion of the elbow; some pain with palpation over the lateral epicondyle; no pain medially; negative Tinel's at the cubital tunnel; no pain with Tinel's at the carpal tunnel; some pain along the mid forearm; pain does not radiate down to the hand; palpable radial pulse; symmetrical trapezial shrug. Dr. Ciccone reviewed Claimant's medical records, including imaging.

24. Dr. Ciccone concluded that Claimant did not suffer a work-related injury to his right forearm or shoulder. He opined that the only reported mechanism of injury, removing a cap from a marker, was unlikely to cause an injury. He noted that Claimant's findings on his examination were inconsistent with findings on prior exams. Specifically regarding Claimant's right shoulder, Dr. Ciccone noted that Claimant's pain occurred at night while at home, and there was no shoulder injury or pain complaints while at work. He opined that Claimant degenerative changes in the glenohumeral joint. He explained that labral tearing is commonly found on MRI with age, in addition to the degenerative disease, which also causes degenerative labral tearing unrelated to trauma.

25. Dr. Ciccone diagnosed Claimant with right forearm pain and right shoulder pain with degenerative changes. He opined that the Slap lesion evidenced on MRI is unrelated to any work injury and was probably degenerative in nature. He noted he did not find any findings on his examination associated with symptomatic biceps. Dr. Ciccone opined Claimant was at full duty with no restrictions or impairment.

26. Claimant returned to Dr. Reinsma on November 19, 2019. Dr. Reinsma reviewed Dr. Ciccone's IME report and agreed with Dr. Ciccone's assessment that reported mechanism of injury was inconsistent with Claimant's complaints. Dr. Reinsma placed Claimant at MMI as of that day, noting any further care should be provided outside of the workers' compensation system.

27. Subsequent to being discharged from care by Dr. Reinsma, Claimant continued his treatment with Montbello Family Health Center under his private health insurance. Claimant was diagnosed with chronic right shoulder pain, referred to orthopedics, and released to full-duty on November 22, 2019.

28. On November 30, 2019, Claimant reported for a Physical Abilities Test. The form indicates that his job requires 40 pounds of lifting and that he is able to meet that goal. It states that Claimant has "normal" range of motion but it does not refer to a specific body part. There is strength testing for both hands but no mention of repetitive work activities. (C. Ex. 00289).

29. On December 4, 2019, Dr. Reinsma approved the return to work evaluation. Dr. Reinsma opined that Claimant could perform the essential functions of his job. The form indicates that no job formal description was available and the determination was based solely upon description of duties provided by the patient/applicant. (C. Ex. 00289).

30. Dr. Davis performed arthroscopic right shoulder surgery on December 18, 2019.

31. Claimant underwent an EMG of the right upper extremity on January 21, 2020, revealing ulnar nerve slowing across the cubital tunnel. There was no evidence of radial nerve injury, right cervical radiculopathy or polyneuropathy.

32. On April 30, 2020, John Hughes, M.D. performed an IME at the request of Claimant. Claimant reported that he developed right forearm pain after opening a package of markers on February 25, 2019 which required forceful gripping. He further reported that, on April 21, 2019, he turned over to his right side in bed and felt intense pain in his right shoulder. Regarding work duties, Claimant reported that he processes samples throughout the production line, requiring carrying bottles and cases of bottles, as well as buckets, that might weigh 60 pounds. Claimant further reported having to repetitively reach overheard for bottles.

33. On examination of the right shoulder Dr. Hughes noted smooth but limited motion with flexion and extension 143 and 46 degrees respectively, abduction and adduction 117 and 37 degrees, external and internal rotation 73 and 66 degrees respectively. Dr. Hughes assessed Claimant with: 1) work-related strain of the right forearm with development of symptomatic radial tunnel syndrome, improved post trigger point injections done on June 4, 2019; 2) onset of right shoulder pain with subsequent discovery of right shoulder subacromial bursitis, biceps tendinitis and a type II superior labral tear; 3) right shoulder arthritis, post arthroscopic biceps tenotomy, superior labral repair and subacromial bursectomy done on December 18, 2019; 4) postsurgical onset of right ulnar neuropathy with persistence of symptoms but without hard neurological deficits.

34. Dr. Hughes opined that Claimant's initial injury was a strain of the right forearm with development of myofascial and neurological symptoms characterized by Dr. Davis as radial tunnel syndrome. He concluded that Claimant such condition essentially resolved after the initial course of trigger point injections in June 2019. With respect to Claimant's shoulder, Dr. Hughes remarked that rolling over in bed is insufficient by itself to cause a right shoulder injury of the type sustained by Claimant. However, Dr. Hughes opined that Claimant's shoulder condition could be work-related, stating, "I strongly suspect that work place exertional factors have played a significant role in his development of right shoulder subacromial bursitis, labral tear and biceps tendinitis." (C. Ex. 00307). Dr. Hughes opined that Claimant had not reached MMI and recommended a job site analysis to assess ergonomic factors in Claimant's workplace. He further recommended that Claimant be followed closely by Dr. Davis for the next few months for any concerns for nerve damage. Dr. Hughes opined that Claimant's right shoulder

surgery was reasonable, necessary and related to his work. Dr. Hughes provided a 6% provisional impairment of the upper extremity.

35. No job site analysis was performed.

36. On May 22, 2020 Claimant presented to Simon Oh, M.D. with complaints of numbness and tingling in his right second finger. Claimant reported that two to three months ago he began having numbness and tingling in his right lateral thigh, and that today she also began having the same sensation distal to his right knee. Dr. Oh opined that Claimant met the criteria for fibromyalgia, noting he had clinical findings of a length-dependent sensory neuropathy. Dr. Oh Ordered an EMG of Claimants right upper and lower extremities to determine the extent of the polyneuropathy.

37. Claimant underwent an EMG on June 11, 2020, which revealed mild right peroneal neuropathy at the fibular head, demyelinating, and mild right ulnar neuropathy at the elbow, demyelinating.

38. Claimant returned to Dr. Davis on April 7, 2021 reporting that his symptoms had worsened over last nine months. Dr. Davis diagnosed Claimant with persistent ulnar neuropathy at the right elbow and opined that Claimant is a reasonable candidate for surgical treatment for subcutaneous transposition of the right ulnar nerve with decompression over the dorsal forearm.

39. Dr. Ciccone performed a follow-up IME on April 14, 2021 and issued a report dated May 19, 2021. Dr. Ciccone reviewed additional medical records, including Dr. Hughes' IME report. Dr. Ciccone continued to opine that Claimant did not sustain any work-related injury on February 25, 2019 or onset of April 21, 2019. Dr. Ciccone reiterated that Claimant's MRI findings were likely degenerative and atraumatic. He explained that removing a pen cap is not a mechanism of injury for developing radial tunnel syndrome. Dr. Ciccone opined that Claimant's response to injections was unrelated to the presence of any injury. He noted Claimant has pain from fibromyalgia as documented on June 11, 2020. Dr. Ciccone opined that Claimant's right ulnar neuropathy is also unrelated to any work injury. Dr. Ciccone opined that any potential need for a cubital tunnel release is unrelated to Claimant's work.

40. Dr. Hughes performed a follow-up DIME on June 23, 2021, reviewing additional medical records, including Dr. Oh's records and Dr. Ciccone's IME report. Dr. Hughes opined that Claimant was not at MMI due to a recrudescence of regional myofascial pain syndrome from the work-related sprain/strain of the right forearm, meriting further treatment. Dr. Hughes opined that this was likely related to Claimant's current occupational activities, but that he did not have a job site evaluation to assist in confirming that his work duties are injurious. Dr. Hughes opined that there was resistance in the extertional activity of opening a marker cap on February 25, 2019, which resulted in swelling and inflammation that led to radial tunnel syndrome. Dr. Hughes further opined that Claimant sustained a right shoulder injury – specifically a labral tear – that was initiated with rolling over in bed, and that the worsening of his

condition likely was accelerated by Claimant's occupational tasks. He again noted he had no job site evaluation to assist in confirming this impression. Dr. Hughes recommended that Claimant undergo a trial of physical therapy and PRP injections. He opined that the demyelinating neuropathies of Claimant's right ulnar and right peroneal nerves were not related to Claimant's work injuries and may have developed in the setting of prediabetes.

41. Dr. Ciccone testified by deposition on behalf of Respondents as Level II accredited expert in orthopedic surgery. Dr. Ciccone testified consistent with his IME reports and continued to opine Claimant did not sustain any work-related injury or occupational disease. Dr. Ciccone explained that Claimant's right shoulder MRI showed pre-existing degenerative pathology. He testified that there was no medical documentation indicating Claimant's job duties substantially and permanently aggravated, accelerated or exacerbated his right shoulder pathology. Dr. Ciccone testified that it is unlikely anyone would sustain an injury removing a pen cap from a pen, and that such mechanism of injury is not known to cause radial tunnel syndrome. He opined that there is no medical evidence that Claimant required treatment for his right forearm pain as related to any work injury.

42. Dr. Ciccone explained that Claimant's nerve condition is not the result of any occupational injury or occupational disease, noting Claimant's condition was more likely related to some early diabetes or some other internal genetic disorder. He testified that the symptoms from the demyelinating neuropathies of the right peroneal and right ulnar nerve can include right forearm pain, and that would be a reasonable explanation for Claimant's complaints of right forearm pain. Dr. Ciccone further testified that there is no objective medical evidence Claimant's Type 2 superior labral tear or resultant surgery was caused by an occupational injury or occupational disease. He reiterated his opinion that Claimant's experience of shoulder pain while rolling over in bed is unrelated to Claimant's work. Dr. Ciccone stated that there is no objective medical evidence supporting Dr. Hughes' opinion that workplace exertional factors played role in Claimant's shoulder condition. Dr. Ciccone further opined that PRP injections and PT for his right forearm are not reasonably necessary or causally related to any work injury. Dr. Ciccone testified that he reviewed Claimant's job description and that there is no evidence any of the diagnosed pathology was a result of the alleged February 25, 2019 incident or Claimant's job duties. He further testified that the description Claimant gave in his testimony of the repetitiveness and awkward posture required by his job duties was insufficient to determine causation from a cumulative trauma standpoint.

43. Claimant's job description from Human Resources reads, "[a]bility to move/handle fifty pounds, stand on your feet for long periods throughout the day," in addition to, "able and willing to work 12 hour shifts including the potential for nights, weekends, and holidays." (C. Ex. 00342). Claimant's job description proffered by Respondents does not include any exertional requirements.

44. The ALJ finds the opinion of Dr. Ciccone, as supported by the opinion of Dr. Reinsma and the medical records, more credible and persuasive than the opinion of Dr. Hughes and Claimant's testimony.

45. Claimant failed to prove it is more probable than not he sustained a compensable occupational injury on February 25, 2019.

46. Claimant failed to prove it is more probable than not he sustained a compensable occupational disease with a date of onset of April 21, 2019.

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

Alleged February 25, 2019 Industrial Injury

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

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

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or 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 Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove he sustained a compensable industrial injury on February 25, 2019. While Claimant may have felt pain while removing a pen cap off

of a marker on such date, the ALJ is not persuaded Claimant sustained a work injury. Claimant did not seek medical treatment for several months after the alleged injury and continued performing his full duties. Dr. Ciccone credibly testified the mechanism of injury reported by Claimant would not result in Claimant's purported symptoms or his objective pathology. While Dr. Reinsma initially opined Claimant sustained a right forearm strain, he ultimately agreed with Dr. Ciccone's assessment that the reported mechanism of injury was inconsistent with Claimant's complaints. Dr. Ciccone credibly opined that Claimant's right forearm findings and diagnosis are not related to the February 25, 2019 work incident or Claimant's other work duties. Although Claimant experienced pain while at work, the preponderant evidence does not establish that the work incident caused, aggravated or accelerated a condition resulting in disability or the need for medical treatment. While Claimant may require additional medical treatment for his right forearm, as credibly opined by Dr. Ciccone, such treatment in unrelated to Claimant's employment.

Alleged Occupational Disease April 21, 2019

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

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

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

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The "rights and liabilities for occupational diseases are governed by

the law in effect at the onset of disability." *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when "the occupational disease impairs the claimant's ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity." *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

Claimant failed to prove it is more probable than not he suffered a compensable occupational disease. Claimant argues that his experience of pain while rolling over in bed at night at home represented the date of onset of an occupational disease caused by his work duties. When Claimant sought medical treatment in April 2019, he initially denied having any pain in his right shoulder, reporting to his providers that he had misnamed the alleged body part he injured. Dr. Ciccone credibly opined that Claimant's right shoulder pathology did not result from Claimant's work duties. Claimant's shoulder MRI revealed a labral tear and other degenerative changes. While Dr. Hughes suspects Claimant's condition is due to his work duties, Dr. Hughes did not have a job site analysis upon which to base his conclusion. The job description provided does not establish that Claimant met the risk factors for cumulative trauma under the Medical Treatment Guidelines, nor does Claimant's testimony.

ORDER

1. Claimant failed to prove he suffered a compensable industrial injury on February 25, 2019.

2. Claimant failed to prove he suffered a compensable occupation disease with a date of onset of April 21, 2019.

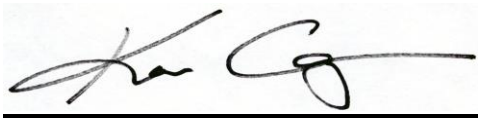
3. Claimant's claim for benefits is denied and dismissed.

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

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

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts