ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits that are reasonably necessary and related to the admitted injury, including up to 24 hours home healthcare or attendant care.

PROCEDURAL HISTORY

This workers' compensation matter is an admitted claim. Two prior hearings in this case resulted in final orders. The first was ALJ Margo W. Jones' Findings of Fact, Conclusions of Law and Order dated September 21, 2016 determining Claimant was injured in the course and scope of his employment on October 23, 2015, suffering a lumbar spine injury while installing solar panels. The second was ALJ Edwin L. Felter, Jr.'s Full Findings of Fact, Conclusions of Law and Order dated February 21, 2018, granting permanent total disability (PTD) benefits.

Respondents filed a Final Admission of Liability on March 28, 2018 admitting for post maximum medical improvement (MMI) medical benefits (*Grover* medical benefits) provided by the authorized treating physician that were reasonably necessary and related to the compensable injury.

Claimant filed an Application for Hearing (AFH) on December 5, 2021 on the issue of medical benefits that are authorized, reasonably necessary, and related to the injury including home health care. The issue was not limited in the pleading to the amount of time for the home health care being requested.

Respondents filed a Response to the AFH on January 4, 2022 on the above issues but added that Respondents were in the process of a Rule 16 challenge of the Rasheed Singleton, M.D.'s undated (received December 6, 2021) request for authorization for 24 hours per day, 7 days a week home health care and Respondents denied authorization of Kyla Oliver or any other family members to provide 24 hours, 7 days a week of home health care.

Respondents objected on the record to proceeding with the issue of home healthcare for anything less than 24 hour care as the Rule 16 denial only entertained a request for that amount and nothing less than that amount, but stated they were ready to proceed despite a ruling that the issue of home health care for any amount of time would be addressed.

FINDINGS OF FACT

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

1. Claimant, who was 43 years old at the time of the hearing, was injured in the course and scope of his employment with Employer on October 23, 2015. Claimant explained that while he was climbing a ladder, holding a solar panel, a forceful gust of wind caught the panel, twisting him, he felt a pop in his low back. He continued to work and on October 23, 2015, while bent over installing solar panels on a roof, putting in lag bolts when he felt his back pop again, causing him not to be able to stand. He continued with severe spasms in the low back and pain going down his lower extremities. Claimant described that whenever he attempted to put pressure on his lower extremities, the pain would immobilize him. He stated he had never, before this injury, felt pain and spasming like what he feels now.

2. Before Claimant reached maximum medical improvement (MMI) he would suffer severe symptoms, including severe spasms down his bilateral legs, would have cramps while attempting to walk, had pain in both lower extremities, felt a shock like sensation into his legs and testis, and burning pressure from the low back down the legs. He would wake up twisting in pain from the spasms, and this continues to happen to the present day.

3. He continues to have chronic pain that limits his ability to walk and requires frequent massage therapy and attendant care as he is limited in what he is able to do on his own, including many activities of daily living. The spasms and cramping are a stabbing sensation that run from the back down his legs. His foot would twist from the spasm and he would need assistance to twist it back to alleviate some of the pain. The pain also affects his groin area, sending electrical shocks from the lower back into his testicles.

4. Claimant received treatment from Ms. Rachel Moore, including massage therapy, tens unit treatment, used exercise bands, performing different exercises, and heat therapy. What helped the most was the deep tissue massage. He explained that it assisted him to be able to do more, be more functional for a few hours of relief until the next spasming episode occurred.

5. Claimant stated it was extremely upsetting to continue to have the spasming and cramping, especially in public places. He requires deep pressure massage in the thighs around the groin area, inner thigh and legs to stop the intense spasming. The spasming occurs on a regular basis. The legs tighten up so bad that it makes him cry from the symptoms. He frequently get the severe spasming at least ten times in a day.

6. He tried pain medications but they would make him moody, could not think so he discontinued using them, especially since he did not want to be addicted to them.

7. Claimant relies on his domestic partner of approximately 14 years to assist him with dressing, getting in the shower, preparing his meals, washing his clothes, and basically all the chores he used to do around the house. Claimant states he has become a burden on his domestic partner, including relying on her to do most of the child care, especially if it is a bad day form him.

8. When Claimant has spasming in his low back or lower extremities, he will call his partner and she will massage the body part, whether it is his low back or his shin or his inner thigh or even his ankle, which causes his foot to turn sideways. He noted that

sometimes the spasming is so bad that he will sweat and cry, becoming somewhat claustrophobic, from the intensity, but his partner always knows what to do, how much pressure to apply in releasing the spasming muscle and provide him some relief. When he has these episodes, they are so extreme that he will frequently fall asleep, exhausted, after the massage session. Some of the worst episodes occur in the middle of the night, and they are generally sporadic and spontaneous. He cannot predict when they will occur but he has them every few hours generally.

9. Claimant explained that when his partner is not available to help him during a spasming episode, he uses tools but rarely is able to help relieve the pain very much other than slightly until she returns and can help him with massage, putting her full body force, sometimes even having to use her knee to dig into the muscle to release the spasming muscle. It is most embarrassing when he has a spasming episode in public places, especially if the spasming is in his upper thigh/groin area.

10. His domestic partner has had to take on the greater part of difficult activities of daily living, such as assisting him into the tub to shower, washing his lower half of his body, dressing the lower half of his body, preparing meals, fetching him water or things he needs, perform all household chores like laundry, cleaning and taking care of the children. Claimant believes he is a burden to her. If he attempts to perform these activities on his own, like reaching to put on his socks, he has immediate onset of spasms in his legs. Regardless, he tries his best to be as mobile as possible, does some weight bearing in order to ward off onset of thrombosis and keep nerves firing. Claimant explained that when he places weight on his right leg he frequently has sharp, stabbing, pressurized, throbbing pain going down his leg. Claimant's way of walking changes, depending on the type of pain he is experiencing on any particular day.

11. Claimant stated that he does drive but only for short distances. He started very slowly in 2019, progressing from just driving the car on the driveway, to going around the block, to going to the bank or store that are a few miles away. But he does have to be very careful because if his legs starts spasming, he knows he can be in a dangerous situation. He has also tried to be as mobile as possible though he keeps his crutches with him at all time, trying to progress to a cane but he has been unsuccessful to date.

12. Claimant agreed that he has had physical therapy and medications that did not work and that he declined to proceed with injections, as Dr. Andrew Castro had advised him that they would not work on him because there was too much scar tissue in his low back. Claimant has chosen to manage his pain symptoms with medicinal cannabis and deep tissue massage that his partner does for him.

13. Claimant and his partner both testified that she would leave Claimant on his own when she was performing necessary shopping or taking care of the children. However, while Claimant could manage for short periods of time without her assistance, using the tools at his disposal, he would frequently call her and request she return to assist him, especially if it was a particularly hard day with severe spasming in his back or legs. His partner stated that she had received family tickets to see a game, but had to give them away because she was unable to leave Claimant for such a long time.

14. This ALJ noted that Claimant was extremely emotional and his composure altered while testifying at hearing.

15. The video surveillance of Claimant, which was approximately 24 seconds long, showed Claimant was seen looking out his bathroom window, walking on his porch while holding his crutches, with only a very slight limp favoring his right leg and showed Claimant driving.[1]

16. Claimant's domestic partner testified at the hearing that she has been with Claimant for approximately fifteen years and have three children together, but has only been living with Claimant for the last seven years. She stated that she would help Claimant get somewhat comfortable because, right after Claimant's injury he was in excruciating pain, and had difficulty with thought processing. She would bathe him, dress him, and feed him, trying to make him comfortable. She would also take him to appointments and helped him understand what was happening to him. At the time, she had been continuing her education and home schooling her daughter, but had to drop out because she could not keep up. She would attend Claimant's massage appointments with Rachel Moore, PT and watched Ms. Moore would do to then help Claimant with the frequent spasming when he was at home. She also received some training from the staff at Craig Hospital.

17. Claimant's partner has continued to do deep tissue massage and myofascial release on Claimant to this date, approximately ten to twelve times a day, depending on his level of activity. She will typically have to intervene a couple times at night but she does the therapy, including his leg stretching and massage early in the morning and late into the evening to make sure to ward off the spasming for a while, taking a proactive approach. If she does not do this, Claimant will have spasms and cramping a lot more frequently throughout the day. The morning and evening sessions lasts around one and one half hour, other sessions are shorter between five to fifteen minutes depending on the cramp or spasming level and the activity Claimant is involved in. However, if he has an episode in the middle of the night, or during the day while his partner is away for a few hours, Claimant would require a really long massage session. She continues to help him with meal preparation, showering, dressing, and she has to do the laundry, especially his sheets because Claimant has night sweats frequently. She helps because she has observed how hard it is for Claimant when he tries to do anything that requires him to extend his arm out, causing increasing back problems. She also has to mount the lift onto their vehicle in order to take the scooter with them if they have a family outing, as well as carry out his wheel chair or scooter. She does all the domestic tasks, like carry groceries, taking out the trash, child care, household chores and meal preparation. She even has to wash his feet and clip his toenails.

18. Claimant's partner testified that she was taught by Rachel Moore and the therapists at Craig Hospital how to release the muscles when they are spasming, in order for the nerves to get oxygen. They did so by showing her what to feel for and how much pressure to put into the massage, in order not to injure Claimant. While she does not hold

[1] Respondents' Exhibit K, the video surveillance was presented during the hearing and was admitted into evidence. A hard copy of the video was submitted to the OAC.

herself out to be an expert, she has been giving Claimant massages that help with the spasms since his injury.

19. Claimant was seen by Rachel Moore, PT, from December 2015 through April 2015, frequently documenting a slow and guarded gait and significant hyposensitivity on the right in the lumbosacral spine, as well as an absent S1 Achilles reflex and an intolerance to prolonged positioning. Her main goal was to decrease pain and reduce spasms. Treatment included e-stim, modalities, hot packs, manual therapy to lumbar paraspinal muscles and along the sciatic nerve path.

20. Claimant's authorized treating physician (ATP), Bennett I Machanic, M.D., placed Claimant at maximum medical improvement (MMI) on July 25, 2017.

21. Terry Young, an occupational therapist at Starting Point performed a functional capacity evaluation (FCE) dated October 3, 2017, stating that markers for consistency showed Claimant put forth full effort and indicated no symptom exaggeration. Following testing she found Claimant was limited to sitting for 5-45 minutes, stand from 0-5 minutes and walk only for very short distances due to onset of spasming and increased pain. She noted that he could not bend, crouch, squat, kneel, crawl, or climb stairs. He could not reach above shoulder level and any reaching forward to perform functional tasks for more than a few seconds to a few minutes is extremely limited due to the onset of muscle spasms.

22. In her report of, she documented that the Claimant suffered from pain and muscle spasms in his legs during the testing which were palpable and so severe that Ms. Young had to massage his legs and at one point, Ms. Young had to use both knees on the Claimant's hamstrings to get the spasms to stop. Ms. Young stated that despite multiple attempts on the part of the Claimant to perform any type of productive task during the FCE, he was simply unable. Ms. Young noted that Claimant had no ability to engage in home making chores, family activities, and social functions in any consistent or reliable way. She said that reaching, leaning forward, standing or any type of activity, no matter how sedentary, would prompt spasms within minutes. Even simple reaching caused Claimant to go into painful muscle spasms. Ms. Young noted that Claimant "continues to rely on his wife for assistance with all aspects of care including providing meals, assisting with bathroom transfers, transportation, childcare, and cleaning his lower body," stating that Claimant "relies solely on his wife and has no other caregiver assistance." Ms. Young remarked that Claimant "seldom drives, and it is only to get out of the house and maybe go to the ATM." Ms. Young ultimately opined that Claimant "will require high levels of care life."

23. Dr. Jeffrey Kleiner evaluated Claimant on October 25, 2017, findings significant abnormalities on exam including severe lumbar spine pain and lower extremity cramping with motion, dense numbness below the right knee level, reduced sensation to the level of the groin, decreased sensation to the knee, paraspinal spasms bilaterally and while FABER test was negative, it elicited paraspinal lumbar spasms.

24. Dr. Machanic issued a report on November 27, 2017 that stated that, based on the EMG testing he performed, Claimant had nerve abnormalities at the L5 and S1 levels in addition to scarring, with the right side being worse than the left. He noted that

the nerves were not completely dead, but they were not vigorous either, stating that the H reflexes were not functioning well and that Claimant did not have normal voltage over the peroneal nerve. He opined that there were no real treatment options to restore the nerves to normal function and that the problems were likely permanent. He opined that Claimant required help with activities of daily living and would need assistance for the rest of his life.

25. On February 27, 2019 Dr. Machanic noted that Claimant also had severe weakness of the right leg, stating that massage therapy works well to alleviate some of the pain and spasms and he requires it to maintain his status quo, though it is temporary. On exam he noted that Claimant had foot drop on the right, decreased strength in the L5 distribution, reduced sensation and reduced reflexes. He also recorded some allodynia. Dr. Machanic remarked that the delay in proceeding immediately with surgical intervention caused Claimant's catastrophic disability.

26. Claimant was also evaluated on May 28, 2019 by Dr. Machanic who observed that Claimant's condition was not changed, appeared depressed, withdrawn, and frustrated. He had loss of sensation in the L5 distribution, had weakness in the gluteus medius, tensor fascia lata and foot dorsiflexors. He stated that he had no objection to Claimant using cannabidiols or cannabis tea but also prescribed diclofenac ointment and lidocaine patches. In fact, Dr. Machanic recommended that Claimant continue with cannabidiols and cannabis preparations on January 6, 2020. He also noted on exam that Claimant attempted to stand and had shooting pain down his right leg, causing him immobilization and in turn causing his right lower back to go into spasm. Straight leg raise was impossible to achieve and he had weakness of the right foot. Lastly he observed that Claimant had worsened allodynia and was very impaired.

27. On June 16, 2020 Ms. Young performed a second FCE, where she noted that "]I]t was evident that his [Claimant's] tolerances for sitting, standing, walking, and performing any functional activities using his arms have not changed and he continues to be intolerant of work activity." Ms. Young observed severe muscle spasms in his hamstrings which were also observed during testing in 2017." She noted that when sitting, Claimant must use his arms to push down and relieve pressure off his buttocks/spine, rendering them unusable for functional or sedentary tasks and that standing and walking were still severely limited. She recommended 24 hour caregiver services as Claimant required assistance with most all ADLs, including manual therapy to reduce muscle spasms, as well as an adjustable bed, replacement shower bench, and a track chair.

28. Dr. Rasheed Singleton took over as ATP for Claimant on October 8, 2020. Dr. Singleton discussed potential treatment options but Claimant elected to continue to maintain his status with cannabis products. On exam he noted abnormal findings in the lumbar spine, with diminished sensation in the left lower extremity and negative Waddell's testing. Dr. Rasheed documented that Claimant continued to complain of lumbar spine and lower extremity spasms. He documented on multiple dates that Claimant was awaiting durable medical equipment (DME) that Dr. Rasheed ordered but Claimant had not received. He also documented similar findings on exam during subsequent medical visits, including lumbar spine tender to palpation, and abnormal sensation. On

September 8, 2021 he noted that Claimant had lumbar paraspinal muscles spasm and spasticity in the legs. He also recommended a new PT evaluation.

29. Dr. Singleton issued an undated letter which stated that Claimant required home health care assistance 24 hours per day as a result of the on the work injury. Respondents indicated that they received this letter on December 6, 2021. Dr. Singleton noted that Claimant's domestic partner was currently providing Claimant's home health care and massage therapy, and that someone needed to continue to do so for Claimant. He specifically documented on September 8, 2021, that Claimant's partner was providing approximately eight hours of home care to Claimant, including for home exercise and ADLs.

30. On February 3, 2022, Claimant attended an independent medical evaluation (IME) with Dr. Fall, upon Respondents' request. She reviewed Claimant's medical records and examined Claimant. Dr. Fall observed Claimant walking down a hall and noted that he had the ability to go up and down stairs without assistance. Dr. Fall noted a benign examination and diagnosed Claimant with a chronic pain disorder associated with psychological issues.

31. Dr. Singleton testified at hearing and stated that he was a pain medicine specialist of fifteen years' experience with a fellowship at Stanford University. He had approximately 500 chronic pain patients that he was currently treating. Dr. Singleton was qualified as an expert in pain management and pain medicine. Claimant became Dr. Singleton's patient pursuant to his prior ATP's referral, upon retirement. He documented Claimant had lumbar radiculopathy as a main and prominent diagnosis.

32. Dr. Rasheed noted that Claimant's symptoms included severe pain across his low back, shooting pains, numbness, tingling, electrical-type shock sensations, ongoing cramping and spasms throughout his lower extremities to his feet, all of which are typical for patients with radiculopathy, including derangement or abnormality within the lumbar spine caused by nerve compression. Dr. Rasheed stated he had discussed multiple options for treatment with Claimant, including but not limited to epidural steroid injections, lumbar sympathetic blocks, spinal cord simulator trials, Gabapentinoids, Lyrica, and opiate medications, but documented that Claimant wished to stay with the massage and manual therapy because they had been of the most benefit to him. He explained that massage therapy would break through the muscle spasms by increasing blood flow to the area and allow for the muscle to stretch and release in large muscle groups.

33. Dr. Rasheed explained that throughout all his visits with Claimant and his domestic partner, that Claimant was very dependent on his partner for his activities of daily living. He stated that to remain somewhat functional, Claimant required the physical therapy, manual therapy, massage treatment sessions his partner performs for him throughout the day and into the evening. Based on the totality of evidence before Dr. Rasheed, he concluded that Claimant required assistance, whether it was from his partner or another source, to maintain his level of functionality. Dr. Rasheed opined that Claimant requires home health care assistance for therapy and activities of daily living. He dis stated that it would be best for Claimant to have a professional provide the therapy,

instead of his He stated that the need for home health care was causally related to the October 2015 workplace accident.

34. Dr. Rasheed detailed that factors he looked at are Claimant's ability to accomplish his activities of daily living, including grooming, bathing, changing, upkeep of his home, and ability to feed himself, as well as his medical needs. He stated that, due to the difficulties that Claimant has, during the night especially, with severe spasming, a 24 hour home health care provider would be appropriate to alleviate Claimant's partner's burden of taking care of Claimant. However, it need not be the full 24 hours as a professional licensed therapist may be able to alleviate the amount of treatment he may require during the day. In light of this, Dr. Rasheed opined that Claimant would require at least a 12 hour per day home health care and attendant care services, including the massage therapy.

35. Allison M. Fall, M.D., a board certified physician in physical medicine and rehabilitation, was accepted an expert in that field. Dr. Fall noted that she had examined Claimant on February 3, 2022, and reviewed his medical records. She opined that Claimant did not require either a physical therapist or home heath attendant care services because he needs to learn self-management and use self-management techniques such as use of foam rollers, a Theracane or a Theragun to perform his own massage to alleviate pain as well as learn to perform all activities of daily living on his own as he had no impairment of his upper extremities. She suggested Claimant use techniques of "biofeedback or mindfulness or whatever to – for relaxation, given that he doesn't want to utilize any medications." Dr. Fall further witnessed Claimant crying out in pain during the evaluation, and had his partner get up on the exam table with him to put pressure on Claimant's adductor upper thigh, inner thigh muscle using both her elbow and her knee, to put deep pressure. Despite witnessing this, Dr. Fall did not stop her from performing the muscle spasm release or indicate she took any steps to admonish this activity. Yet she criticized the practice of an unlicensed and untrained individual performing such tasks stating that Claimant did not require the service and should turn to more traditional chronic pain treatments.

36. Dr. Fall did concede that someone with radiculopathy can have lower extremity pain, cramps and spasms, but it is not common for a chronic pain patient out of the acute phase. She stated that for someone that has radiculopathy, the sporadic cramps and spasms can interfere with their ADLs. She stated that she had no evidence that massage therapy relieved or alleviated Claimant's spasm. She agreed that Claimant's current chronic pain condition is related to the October 2015 accident.

37. As found, Dr. Singleton is more persuasive and credible in this matter than Dr. Fall. The medical records document a long history of providers noting muscle spasming. In fact, Ms. Young, while conducting the FCE had to specifically treat the Claimant to relieve the spasming so that she could conduct the FCE, which was valid. Dr. Machanic and Singleton also have noted decreased sensation and mobility limitations. Claimant credibly testified that he required and needed assistance at home to carry out his activities of daily living. Dr. Fall's opinion that only those with severe brain injury and spinal cord injuries should be entitled to home health care or attendant care services is not credible. Claimant clearly continues to suffer from the effects of the injury, which his

providers have stated are permanent neurological impairments that affect his ability to carry out activities of daily living, and requires assistance to maintain and relieve him of the effects of the injury. Claimant has shown by a preponderance of the evidence that he is entitled to home health care including both for massage therapy in order to maintain his level of function and to attendant care to assist with activities of daily living.

CONCLUSIONS OF LAW

A. Generally

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131,

134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Respondents have a right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, *supra*. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*; *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).

Here, Claimant's claim for compensation was previously found compensable by ALJ Jones and was permanently totally disabled by a serious lumbar spine and radicular medical condition as found previously by ALJ Felter. The work related injury causes multiple intermittent muscle spasming throughout the day that seriously incapacitates Claimant from being more functional. From the time Claimant was placed at MMI, his life partner has been providing Claimant with the needed attendant care and massage therapy in order to reduce critical spasms that occur throughout the day and night. Claimant and his partner credibly testified that Claimant is able to alleviate some of his own spasming, to warding off the ultimate imminent progression of spasming, by self-care or self-treatment with a thera cane and other tools, but requires someone's assistance, especially if the spasming is severe or involves massaging his lower extremities. They both also credibly testified that Claimant requires assistance to get into the tub, bathing his lower extremities, dressing his lower body, travel to his medical appointments, and performing most activities of daily living, including shopping, making meals other than simple fare, washing his clothes and bedding, which he requires on a frequent basis due to night sweats, and generally taking care of the household and child care duties.

Dr. Rasheed credibly testified that Claimant required attendant care services to relieve his partner of some of the duties she now performs for Claimant, which need is caused by the work injury. He stated that Claimant requires dedicated massage therapy to assist Claimant in relieving the significant and chronic muscle spasming, especially in the thigh, groin area and calves. While Dr. Rasheed prescribed 24 hours of attendant care, seven days a week, to include massage therapy, he testified that the more critical times are the twelve hours between 7 p.m. and 7 a.m. The question, however, that needs to be answered is if such services would be available. It is clear from Dr. Rasheed's testimony that Claimant's domestic partner should not be burdened with all of Claimant's care related to the workers' compensation injuries. However, some of the chores and care directly affecting Claimant should be compensated. Whether it is Claimant's partner or an outside facility, Respondents are liable for care that is reasonably necessary and related to the injury. Here, it is found that, from the totality of the credible evidence, Claimant's partner or an outside provide should be providing for at least 5 hours a day seven days a week of attendant care service, which is found to be reasonably necessary and related to the injury. In addition, Claimant should be attended by a professional massage therapist up to twice a day for up to one and one half hour per session, which is also found to be reasonably necessary and related to the injury. This would provide for approximately eight total hours of care per day.

While Dr. Fall testified that seven years after the work injury, Claimant should be providing himself self-care, and not require attendant care services, this is not found

persuasive. Claimant credibly testified that Claimant's spasms are so bad that they immobilize him and he needs help with deep tissue massage. This is supported by the medical records in this matter that describe a severe injury. See Dr. Machanic's records of January 6, 2020. This is supported by his partner's testimony as well, who credibly testified that she provided both massage therapy and deep tissue massage, frequently in the middle of the night when Claimant wakes up with his leg in such severe spasms that his foot would be turned out and had to be massaged back into place. While Claimant has demonstrated to both Dr. Rasheed and Dr. Fall that he is able to ambulate with and without assistance, he credibly testified that he has difficulty when he places pressure on his right foot and the pain can be excruciating. Claimant has shown by a preponderance of the evidence that his work related injury results in severe limitations of activities of daily living and muscle spasming and Claimant requires assistance to relieve him from the effects of the work related injury. The muscle spasming and limitation are proximately caused by the admitted work injury in this matter as testified by both Claimant and Dr. Rasheed. Dr. Rasheed is found more credible than Dr. Fall in this matter and Claimant has shown that it is more likely than not that continuing home health care should include attendant care services and professional deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner for the services she is currently providing.

Respondents argue that Claimant failed to properly raise the issue of any amount of time for home health care services less than 24 hours per day, seven days a week. This ALJ disagrees. Nowhere on the Application for Hearing does Claimant state how much time he is requesting for home health care services that are reasonably necessary and related to the injury, only that the issue of home health care was an issue set for hearing. Claimant was relying on the request sent by his ATP that recommended the home health care or attendant services for 24 hour care. There are always two avenues to obtain reasonably necessary and authorized medical benefits that are related to a claim. The first is established by W.C.R.P. Rule 16 by a request for prior authorization. The second is to pursue the benefits by applying for hearing to obtain a judicial determination. Further, there was no objection to Dr. Rasheed's testimony when he stated that less than the 24 hour care might be required, "a minimum of ten or 12 hours, perhaps, in that, in that timeframe." In fact, Dr. Fall testified extensively that Claimant did not require any home health care services. It is found that Respondents had notice and an opportunity to be heard in this matter. Respondents' objection to having this ALJ address the issue of quantity of home health care services is overruled.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for home health care services to assist Claimant with activities of daily living up eight hours a day that are reasonably necessary and related to the work injury of October 23, 2015. This shall include both therapy and

attendant care services to relieve him from the effects of the October 23, 2015 work related injury.

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

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

DATED this 2nd day of May, 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. 5-145-493-004

ISSUES

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

II. Whether medical treatment Claimant received from Joint Chiropractic was authorized.

STIPULATIONS

- The parties stipulated to an Average Weekly Wage of $1,056.00.
- The issue of temporary disability benefits (TTD/TPD) was reserved for future determination.

FINDINGS OF FACT

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

Medical and Procedural History

1. Claimant is a 59-year-old equipment delivery driver who alleges he sustained an injury to his back on Thursday, July 16, 2020, while driving. Claimant did not experience the onset of symptoms until Friday, July 17, 2020, after he got off work and started pulling weeds at home. Respondents' Hearing Exhibits (RHE) B at 8. Claimant did not report a work injury on Thursday July 16 or Friday July 17, though he worked full shifts on both days. Claimant was subsequently off work for a vacation (July 19 through July 25, 2020). Hearing Transcript (Tr.) at 52.
2. Claimant had prior instances of ambiguous onset of back pain, dating back to 2015, which resolved with brief treatment. RHE 63. Claimant had a minor back injury on November 15, 2019, approximately nine months before the onset of similar pain for this alleged injury. RHE 66. Treatment for this injury ended on December 3, 2019, approximately seven months before this alleged injury. RHE 73.
3. Text messages between Claimant and his supervisor, JB[Redacted], reflect no work-related reports of injury or pain from the period from July 15, 2020, and before July 27, 2020. RHE C at 28-31.
4. On Monday, July 20, 2020, Claimant emailed Kayla Squires at John Hopkins Clinic, complaining of sciatic pain in the right leg. RHE D at 70. Claimant stated that he was "currently on vacation and had completed some stretches recommended from an internet search." *Id*. Claimant stated that he could barely walk and that the "pain got worse after Friday." *Id*. Ms. Squires stated that Claimant may get the most relief by seeing a chiropractor. *Id*. It was noted that Claimant would be leaving for California that evening.

5. The same day, on July 20, 2020, Claimant presented to The Joint Chiropractic and was evaluated and adjusted by Dr. Patrick Hailey. Claimant reported right lower back and leg pain but denied radiating pain in either extremity, numbness, tingling, or any other neurological signs. RHE D at 55. Claimant denied any recent surgery, accidents, hospitalizations, or fractures. *Id*. Claimant did not state the onset of pain at work or mention a mechanism of injury. Despite Claimant alleging he was injured at work just four days earlier - July 16, 2020 - Claimant filled out an intake form specifying his symptoms first began approximately one month earlier. RHE D at 51.

6. Claimant left for California on Tuesday, July 21, 2020. RHE B at 8. Claimant claims his symptoms increased and that when he returned on Monday, July 27, 2020, he felt like there was no way he could work so he let his employer know. *Id*.

7. On Monday, July 27, 2020, Claimant contacted the Pepsi JOBHURT hotline and reported a work-related injury. RHE C at 32. Claimant reported that an injury had occurred on July 16, 2020, at 9:00 a.m. The incident description states that: "While driving the tractor, the seat did not have air in it, the EE hit a pothole on Washington Street, near I70, went airborne and landed very hard on the seat. The EE is feeling pain in his right upper leg and right lower leg." *Id*.

8. Claimant subsequently called his supervisor, JB[Redacted], on July 27, 2020 and reported a work injury. Tr. at 54. Claimant was not sure how he injured himself, stating he may have hurt his back pulling weeds or bouncing on his truck seat. *Id*.

9. Claimant was given a list of designated providers pursuant to W.C.R.P. 8 and chose the John Hopkins Clinic/Pepsi Wellness Clinic. RHE C at 33.

10. On July 28, 2020, Claimant presented to Jennifer Pula, M.D., at the Wellness Clinic for initial evaluation. RHE D at 75. Claimant reported pain in the right leg. *Id*. Claimant stated that he thought the injury happened on Thursday July 16, when he either drove over a pothole or bump, without air in his seat, causing him to land hard and awkwardly. *Id*. Claimant reported "he did not notice anything until Friday afternoon when he went to pull weeds in his yard, then he started noticing pain in his leg." *Id*. Claimant stated, "he did not connect that it could have been connected with the hard landing after hitting the bump in the road, until Monday when he went to see a chiropractor." *Id*. Claimant also reported that "he did not feel an initial injury" and the pain started "the next day [when] he was home pulling weeds when he felt a pain in his right leg/calf." RHE D at 76. It is noted that Claimant was in California from July 21 through July 25, 2020, and felt pain the entire time. *Id*. X-ray studies of the lumbar spine showed mild degeneration, most pronounced at L2-3. RHE D at 77. The sacrum and coccyx were unremarkable. RHE D at 87. Claimant was given restrictions and referred for physical therapy. RHE D at 77.

11. Claimant returned to Dr. Pula on August 6, 2020, where it was noted he had attended physical therapy and continued with the chiropractor. RHE D at 80. It is further noted that Claimant returned to work Tuesday and felt good but was back to where he was before on Wednesday. *Id*. Claimant continued to work under restrictions during the course of treatment at the Wellness Clinic.

12. Respondents filed a Notice of Contest on August 17, 2020, stating a non-related injury. RHE A at 5. Respondents denied further medical care after this time. Claimant's last

treatment at the Wellness Clinic was on August 12, 2020, at which time he was still working under restrictions. RHE D at 83.

13. Claimant subsequently treated through his personal care provider at Kaiser Permanente. On August 20, 2020, Claimant presented for treatment of the back, and it was stated he had been having low back pain/right buttock pain for the past month, radiating down the right let to the ankle. RHE D at 108-110. It is noted that the pain improved from the initial injury but had not gone away. *Id*. Claimant was referred for neurosurgical evaluation.

14. On August 26, 2020, Claimant presented to Zachary Hutzayluk II, M.D., for neurosurgical assessment. RHE D at 113. It was stated that Claimant's back pain was worse since July 17, 2020. *Id*. Claimant reported on July 17, 2020, there was pain after work, severe enough that he couldn't pull weeds. RHE D at 115. Claimant stated that there was "Initially a sharp shocking pain that went all the way down the right leg. Now more of a dull aching pain in the right buttocks." *Id*. An MRI was ordered.

15. On September 8, 2020, Claimant returned to Dr. Hutzayluk and it was indicated he was on light duty from July 17 through August 16, 2020 but had been unable to return to work since because of severe pain. RHE D at 120. It was noted that the pain was "radiating more up into buttocks" than at first. *Id*. It is further noted that "Acute low back pain can be caused by a number of things, but most commonly occurs when you overstretch or pull a muscle in your back." RHE D at 121.

16. An MRI of the lumbar spine from October 21, 2020, showed an L4-5 focal right lateral recess extrusion contacting the right L5 nerve roots. RHE D at 153. There was no other impingement identified. *Id*.

17. On November 23, 2020, Claimant underwent an epidural steroid injection (ESI) at Kaiser at L5-S1. Claimant's Hearing Exhibits (CHE) 5 at 111. Claimant subsequently underwent lumbar traction therapy. CHE 5 at 116. On December 10, 2020, Claimant reported that he was improving each week and would try to return to work for the Employer late next week. *Id*. Claimant returned on December 15, 2020, and reported that the traction had been helpful and that he continued improvement. *Id*. Claimant was still not working but hopeful to return that Thursday. CHE 5 at 119.

18. Claimant returned to work December 12, 2020, and has been working since.

19. Carlos Cebrian, M.D., performed an IME on October 8, 2021. Claimant reported he first developed symptoms on Friday, July 17, 2020, at 5:15 p.m., shortly after he had returned home from work. RHE B at 7. Claimant stated he stopped to pull some weeds that were in the driveway, spent five minutes doing that, and when he attempted to bend down, he noticed that he had pain down his right leg. *Id*. Claimant denied any back pain. *Id*. Claimant stated that he was trying to think about what may have caused these symptoms and recalled that the day prior, Thursday July 16, he hit a bump while driving his work truck, which had no air in the seat, and went down and hit the frame. *Id*. Claimant reported he felt jarred but did not have pain at that time. RHE B at 8. Claimant denied any symptoms until the next day when he was pulling weeds. *Id*. Claimant reported that by mid-December 2020 he was pain free and able to return to full duty on December 21, 2020. *Id*. Claimant stated he never really had any back pain and it was all in his right

leg. *Id*. Dr. Cebrian noted that Claimant had a lumbar strain in November 2019, for which he treated for two weeks and reported resolution of pain without symptoms. *Id*.

20. Dr. Cebrian opined there was no work-related injury from July 16, 2020. Dr. Cebrian stated the mechanism was minimal and there was not sufficient force to cause an injury, occupational disease, or acceleration to the lumbar spine to aggravate a preexisting condition. RHE B at 25. Dr. Cebrian noted that the timeline of the onset of symptoms did not correlate with the timeframe claimed for the injury, referencing no pain at the time of the reported injury but an onset a day later with a non-related mechanism. *Id*. Dr. Cebrian also noted that Claimant told The Joint Chiropractic on July 20 that his symptoms had been present for about one month. RHE B at 26. Dr. Cebrian noted that Claimant had non-related risk factors for low back pain, including a BMI of over 30. Dr. Cebrian concluded that Claimant could work in a full and unrestricted capacity and further treatment under worker's compensation was not medically reasonable, necessary or related. *Id*.

Testimony of Claimant

21. Claimant testified that on July 16, 2020, he drove over a pothole in his truck and it threw him into the air, and the air in his seat was not enough to cushion his fall so he bottomed out "on the bottom of the cab" and basically came down on metal and metal. Tr. at 27. Claimant testified that he felt a shock in his vertebrae but was able to continue working "somewhat pain-free." *Id*. Claimant testified that "it hurt" but subsided immediately. Tr. at 39-40. Claimant did not report an injury on this date. Tr. at 40. This contradicted Claimant's statement in interrogatory responses that indicated that he did not feel pain until the next day. Tr. at 43.

22. Claimant worked on July 17, 2020, and did not report an injury. Id. Claimant did not have symptoms until he was off work and got out of his vehicle to bend down. Tr. at 44. Claimant was not on shift at this time. *Id*. Claimant testified he returned home and was going to bend over to pull some weeds on his driveway but couldn't bend without straightening his leg and "practically had to lay on the ground and get it." Tr. at 28. Claimant testified he was feeling pain in his leg. *Id*. Claimant testified he then went on vacation and didn't report any injury until he returned from vacation. Tr. at 45.

Testimony of JB[Redacted]

23. Mr. JB[Redacted] is Claimant's supervisor at the Employer. Tr. at 48. Mr. JB[Redacted] did not receive notice of the injury until July 27, 2020. Tr. at 49. Claimant called JOBHURT to report the injury on the same day, before reporting the injury to Mr. JB[Redacted] and contrary to Pepsi policy. Tr. at 50. Mr. JB[Redacted] testified that all employees are trained in how to properly report injuries. *Id*. Mr. JB[Redacted] testified that he did not have any interaction with Claimant on July 16, 2020, and did not receive any communication until the next Friday, via text, at which time Claimant did not report any work injury or pain. Tr. at 50-51.

24. Mr. JB[Redacted] testified he wasn't aware of any issues with the truck in question and that all DOT drivers are supposed to do quality checks every morning and report any vehicle issues right away. Tr. at 51. Mr. JB[Redacted] testified that there was another

employee that also drove the same truck and did not report any problems with the vehicle or seat. Tr. at 52-53. Mr. JB[Redacted] testified that Claimant had been driving the same truck up until approximately January/February 2022. Tr. at 53. Claimant had no further complaints about the truck during this time. *Id*.

25. When Claimant reported the injury to Mr. JB[Redacted] on July 27, 2020, he stated he wasn't sure whether he hurt his back at work when the air went out in the seat or if he hurt his back pulling weeds at home. Tr. at 54. Mr. JB[Redacted] gave Claimant a Rule 8 letter upon report. *Id*. Claimant chose John Hopkins/Pepsi Wellness Clinic as the treating provider. RHE C at 33. Mr. JB[Redacted] testified that Claimant worked light duty after the report but was unaware of any lost time. Tr. at 55.

Testimony of Carlos Cebrian, M.D.

26. Dr. Cebrian testified he took a history of the injury from Claimant and that Claimant reported the first onset of pain was when he went to bend to pick up weeds and experienced pain in the right leg. Tr. at 58. Dr. Cebrian testified the initial symptoms did not include back pain. Tr. at 59. Claimant reported he believed he injured himself the day prior, on July 16, 2020, but didn't describe having pain on that date. *Id*.

27. Dr. Cebrian described the MRI from October 21, 2020, as showing an L4-5 disc protrusion contacting the right-sided L5 nerve root. Tr. at 60. Dr. Cebrian testified that there were no acute findings, and that the protrusion was unrelated to the incident on July 16, 2020 described by Claimant. *Id*. Dr. Cebrian concluded that the mechanism was minor and insufficient to cause a protrusion or aggravation of the nerve root. *Id*. Dr. Cebrian testified that if there was an injury, this would have manifested itself earlier than it did for Claimant. Tr. at 61. Dr. Cebrian testified that he felt what was most important was that Claimant did not initially attribute his symptoms to any event on July 16, 2020, but only attributed the alleged air seat event in retrospect weeks after the onset of pain. Tr. at 62. Dr. Cebrian concluded that the cause of the pain was due to non-related factors, including age, obesity, and a diabetic condition, which increases risk of degeneration. Tr. at 63. Dr. Cebrian testified that with degeneration of discs, most people become symptomatic at some point in time and the onset was incidental to pulling weeds. *Id*. Dr. Cebrian credibly concluded that there was no association with what happened on July 16, 2020, and Claimant's back pain. *Id*.

28. The ALJ finds that Claimant developed back pain about a month before his alleged injury. The ALJ further finds that Claimant developed additional back pain and injured his back on July 17, 2020, while pulling weeds at home. The ALJ finds that Claimant did not injure his back on July 16, 2020, while driving his work truck.

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 proved by a preponderance of the evidence that he suffered a compensable injury to his back on July 16, 2020.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. 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. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish a compensable injury 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).

Claimant alleges he suffered a work-related back injury with corresponding right leg radicular pain on July 16, 2020, after driving over a pothole in his work truck. It is apparent from the records and testimonial evidence that Claimant experienced the first onset of pain on July 17, 2020, after work was finished when he arrived home and was pulling weeds in his driveway. While Claimant claimed at hearing the first onset of pain occurred after bouncing on the seat of his work truck on July 16, 2020, this is contradicted by his own prior statements in interrogatory answers and medical records. Claimant did not posit a work-related mechanism from the July 16 pothole incident until July 27, 2020, when he first reported the incident to the Employer. In the interim, Claimant was on vacation and had stated to Kayla Squires, PA, that he experienced pain after stretching.

Claimant's first treatment was with The Joint Chiropractic during the time he was on vacation. Claimant denied any specific injury as the cause of back pain. He did not state a mechanism of injury or onset. He stated he had no work-related mechanism and instead stated the onset of pain one month before July 20, 2020, which would have been nearly a month before the claimed July 16, 2020, onset.

Claimant did not report an injury on the date of alleged onset. Instead, Claimant reported a work-related injury on July 27, 2020, after his return from vacation. Claimant's report was in violation of company policy, as it was made first to JOBHURT and then to his supervisor. Claimant did not report any defect in the vehicle before the report of injury. Claimant's colleague drove the same truck during the entire time Claimant was on vacation and reported no defect in the air seat. Claimant subsequently drove the same truck through January/February 2022 with no report of defect or further incident or aggravation, though the vehicle had no known repairs in the seat.

Dr. Cebrian persuasively testified that the timeframe regarding the onset and manner of Claimant's pain complaints were significant in the consideration of causation. The ALJ finds that this portion of his opinion is supported by the fact that Claimant reported the onset of back pain about a month before his alleged injury as well as the day after the alleged injury while pulling weeds. As a result, the ALJ finds persuasive Dr. Cebrian's ultimate conclusion that Claimant did not suffer an injury while driving his work truck.

The ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury at work on July 16, 2020.

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.

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: May 4, 2022.

/s/ Glen Goldman

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

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right upper extremity arising out of the course of his employment with Employer on or about October 5, 2020.

2. Whether Claimant proved by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits causally related to a work-related injury, including past medical benefits.

3. Whether Claimant proved by a preponderance of the evidence an entitlement to temporary total disability benefits from December 24, 2020 through May 4, 2021.

4. Determination of Claimant's Average Weekly Wage.

STIPULATIONS

The parties stipulated to the following facts:

1. The parties stipulated that Claimant's average weekly wage is $1,433,23, with a TTD rate of $955.49.

2. Claimant was released to full duty on May 4, 2021.

3. If the Claimant is found compensable, Mark Fitzgerald, M.D., is an authorized treating physician.

FINDINGS OF FACT

1. Claimant is a 64-year-old right-hand-dominant male who was employed by Employer as a crane operator. Claimant has been employed by Employer on and off for approximately 22 years.

2. Claimant alleges that on October 5, 2020, while working for Employer, he was throwing a canvas rigging strap over a large crane boom that was loaded on a trailer when he heard a "pop" in his shoulder, resulting in a sharp, severe pain in his upper, right arm. Claimant testified he was unable to lift his right arm above shoulder level after the injury.

3. Claimant testified that the injury occurred after his last load of the day, and that he reported to supervisor TS[Redacted] that he "tweaked" his shoulder. Claimant testified that Mr. TS[Redacted] told Claimant to tell another supervisor, DB[Redacted], and that Mr. DB[Redacted] advised Claimant to report the incident to SB[Redacted], the safety manager. Claimant testified that he spoke to Mr. SB[Redacted] 2-3 days later at a safety meeting, and that Claimant told Mr. SB[Redacted] that he (Claimant) needed to complete

paperwork. Claimant testified he continued to request "paperwork" to report his injury, but it was not provided to him until December 2020.

4. Employer's policy requires that after a work-related accident, a written report is to be completed. Approximately six months earlier, in March 2020, Claimant reportedly sustained an injury to his lower back while moving a piece of equipment in the course of is employment. The incident occurred on March 27, 2020, and Claimant completed the incident report within three days. (Ex. B).

5. One month before his claimed injury, on September 5, 2020, Claimant saw his primary care provider, Daniel Grossman, M.D., with complaints of right shoulder pain. Claimant described a "knot" in his right shoulder and reported he was unable to lift his right arm above 90 degrees without pain. Claimant characterized the condition as a "pinched nerve" and reported taking daily ibuprofen was of little benefit. Dr. Grossman noted the etiology was unclear and Claimant's examination was normal. He recommended over-the-counter medications and advised Claimant to follow up if there was no improvement. (Ex. E).

6. Claimant did not seek immediate medical attention for his right shoulder after October 5, 2020, until October 26, 2020, when he saw In Sok Yi, M.D., for a longstanding issue with his hands. Claimant reported right shoulder pain to Dr. Yi. Claimant, but did not report he had sustained any injury at work. Dr. Yi's records do not document a date of injury, mechanism of injury, and do not mention any acute condition of Claimant's right shoulder. Dr. Yi diagnosed Claimant with right shoulder tendinitis, performed a right shoulder subacromial injection, and referred Claimant for physical therapy. (Ex. F). Claimant testified he did not report to Dr. Yi that his injury was work-related because Claimant was "taking care of it himself."

7. Claimant began physical therapy and saw Jill Rechtien, P.T., on November 4, 2020, and attended several physical therapy appointments between November 4, 2020 and December 30, 2020. (Ex. G).

8. According to Employer's records, on October 5, 2020, Claimant submitted a request for days off between November 5, 2020 and November 13, 2020 for an elk hunt. Claimant testified that he went on this hunting trip.

9. On December 7, 2020, Claimant saw Dr. Yi and reported continued pain in his right shoulder. Claimant did not report that the injury was work-related. Dr. Yi suspected Claimant's had rotator cuff tendinitis and possible arthritis of the glenohumeral joint in his right shoulder. Dr. Yi ordered an MRI and referred Claimant to orthopedist, Mark Fitzgerald, M.D. (Ex. F).

10. Claimant saw Dr. Fitzgerald on December 10, 2020. At that visit, Claimant reported increasing pain in his right shoulder since September 2020. While Claimant indicated that working with his arms over shoulder level aggravated his shoulder, he did not mention any specific incident, and did not report that he sustained any work-related injury. Dr. Fitzgerald reviewed Claimant's MRI and diagnosed Claimant with right sided rotator cuff

tendinitis, sprain of the rotator cuff capsule, primary arthritis, and impingement syndrome. He recommended a right shoulder arthroscopy with subacromial decompression, distal clavicle excision, and evaluation of Claimant's rotator cuff. (Ex. F). Surgery was scheduled to take place on January 4, 2021.

11. On December 18, 2020, Claimant saw Daniel Grossman, M.D., for a pre-operative clearance. Although Claimant reported his employment as a crane operator, he did not report any specific work injury to Dr. Grossman. (Ex. E).

12. Claimant continued to work for Employer until December 24, 2020, taking leave before his scheduled surgery due to a pre-surgical Covid quarantine requirement.

13. On December 29, 2020, Claimant was seen for physical therapy at OCC. At that time, Claimant reported he had been dealing with his shoulder pain for a while, and that he "tweaked his arm while at work while tossing heavy items repeatedly when the pain became too much." (Ex. G). Claimant's report is inconsistent with his testimony that he sustained an acute injury while tossing a rigging strap over a boom on October 5, 2020.

14. On December 30, 2020, Claimant filed a Worker's Claim for Compensation (WCC), in which he indicated that he had sustained a "tear" of his right shoulder while throwing a rigging strap on October 5, 2020. On the WCC form, Claimant indicated Employer was notified of the injury on "10/15.20." (Ex. 1),

15. On January 4, 2021, Dr. Fitzgerald performed surgery on Claimant's right shoulder. The procedures performed included an acromioplasty with release of CA ligament, distal clavicle excision, and extensive debridement, bursectomy. The operative report indicates that Claimant's MRI scan showed "signs of chronic external impingement and AC joint arthrosis." During surgery, Dr. Fitzgerald examined Claimant's anterior, posterior, inferior and superior labrums, the intraarticular portion of the biceps, the supraspinatus, infraspinatus, subscapularis, and teres minor (i.e., the rotator cuff) and found no pathology, instability, lesions or tearing of those areas. Examination of the bursal surface of the anterior supraspinatus tendon showed a "delaminating type tear" which was debrided. Dr. Fitzgerald's post-operative diagnosis was chronic external impingement and AC joint arthrosis. (Ex. H).

16. On January 11, 2021, Claimant submitted a Disability Notice: Claim for Weekly Disability Benefits to Employer. (Ex. 12).

17. On January 15, 2021, Respondents filed a Notice of Contest, noting that Claimant's claim was contested for further investigation to determine compensability. (Ex. A)

18. During this time, Claimant continued to undergo physical therapy. Dr. Fitzgerald and Jill Rechtien, P.T., cleared patient to return to work with lifting restrictions approximately 4 weeks after the Claimant's surgery and continued to lighten restrictions as time went on. (Ex. G).

19. On June 10, 2021, Mark Failinger, M.D., performed an Independent Medical Examination at Respondents' request. In his report, Dr. Failinger opined that Claimant's mechanism of injury (underhand throwing of a strap) would not likely result in a rotator cuff injury, and that lack of corroboration of a specific work-related injury indicated that the Claimant's onset of pain was likely insidious and was not work-related. Dr. Failinger was not provided Dr. Fitzgerald's operative report or the Claimant's MRI prior to the IME, and was not able to determine the procedure performed. (Ex. C).

20. Respondents submitted Dr. Failinger's deposition transcript in lieu of live testimony. Dr. Failinger was admitted as an expert in orthopedic surgery without objection. Dr. Failinger reviewed Dr. Fitzgerald's operative report and the MRI report in conjunction with his deposition. He testified that the surgery Dr. Fitzgerald performed included two procedures, a distal clavicle resection involving removal of inflamed or arthritic bone at the end of the clavicle and a decompression, involving removal of bone or tissue impinging or pressuring the rotator cuff. He opined that the surgery performed was to address an arthritic AC joint, not a specific work incident or repetitive work injury. He further opined that it was not a reasonable medical probability that throwing a strap (either overhand or underhand) would create supraspinatus inflammation or partial tearing or affect AC joint arthritis. He opened that the pathology shown on the MRI, including the partial thickness tearing was likely a preexisting degenerative condition. Dr. Failinger's testimony was credible.

21. Dr. Yi testified by deposition in lieu of live testimony. Dr. Yi testified that he had treated Claimant for approximately ten years for hand pain, and that October 26, 2020 was the only time Claimant complained of shoulder pain. Dr. Yi did not recall Claimant reporting the mechanism of injury and did not become aware that Claimant had a workers' compensation claim until he was contacted for his deposition, three or four weeks before December 21, 2021.

22. GT[Redacted], a co-worker was with Claimant on October 5, 2020, and testified he was standing on opposite side of the trailer from Claimant and heard an audible "pop" when Claimant threw the rigging strap. Mr. GT[Redacted] testified that the "pop" sounded like cracking knuckles. Based on the photographs contained in Exhibit 13, and Mr. GT[Redacted] 's testimony, the ALJ finds that Claimant was at least 8-10 feet away from Claimant when Claimant threw the rigging strap. Given the pathology Dr. Fitzgerald identified in Claimant's shoulder, the ALJ does not find credible Mr. GT[Redacted] 's testimony that he heard an audible "pop" from more than 8 feet away.

23. Employer's director of safety, BS[Redacted] testified at hearing. Mr. BS[Redacted] testified that Employer's policy requires injured workers to report incidents immediately no matter how small the injury. He testified that Employer did not learn of Claimant's alleged injury until December 30 or 31, 2020.

CONCLUSIONS OF LAW

Generally

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

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

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

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 Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of the course of his employment on or about October 5, 2020. The evidence demonstrates that one month before Claimant’s alleged injury, on September 5, 2020, he saw his primary care provider, and reported right shoulder pain and the inability lift his arm above 90 degrees without pain. Claimant did not seek medical care again for his right shoulder until October 26, 2020, and continued to work in a physical job until December 24, 2020. When Claimant did seek medical care, he did not report any acute injury occurring on October 5, 2020. The first documented report of a work-related condition was on December 29, 2020, when he reported to physical therapy that his shoulder pain was exacerbated by repeatedly throwing objects.

Claimant testified that he specifically requested “paperwork” from Mr. SB[Redacted] and others within 2-3 days of October 5, 2020. Claimant’s testimony that he reported an alleged injury to multiple supervisors indicates Claimant was aware that if he was injured, “paperwork” needed to be completed to initiate a workers compensation claim. If Claimant sustained a work-related injury on October 5, 2020, expected it to be a workers’ compensation claim, and was merely waiting on paperwork from Employer, one would expect, at a minimum, he would report a work-related injury to one of the health care providers he saw between October 26, 2020 and December 29, 2020. However, no such report exists.

Notwithstanding the lack of timely reporting to health care providers, none of Claimant’s health care providers opined that Claimant’s right shoulder pathology, or the need for surgery was the result of a work-related injury on October 5, 2020. Dr. Fitzgerald’s operative report shows no significant tear the Claimant’s shoulder labrum or rotator cuff, and instead showed chronic conditions, including chronic impingement and

arthritis. Although there is an indication of a "delaminating type tear" of the supraspinatus, Dr. Failinger credibly testified that it was not likely that Claimant sustained a tear as a result of throwing a rigging strap. Dr. Failinger's testimony was unrebutted.

The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he sustained a work-related injury to his right shoulder on October 5, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). 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). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant's request for medical benefits is denied and dismissed.

TEMPORARY DISABILITY BENEFITS (TOTAL AND PARTIAL)

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *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) 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*, 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 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 regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant 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).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant's request for temporary disability benefits is denied and dismissed.

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 shoulder on or about October 5, 2020.

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

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

4. All other issues are moot.

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: May 2, 2022

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

ISSUES

1. Whether the claimant's workers' compensation claim is barred by the statute of limitations set forth in Section 8-43-103(2), C.R.S.

2. Which party bears the burden of proof regarding the compensability of the claimant's claim?

3. Whether the party bearing the burden of proof has demonstrated, by a preponderance of the evidence, that the claimant has or has not sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received from Dr. Amir Beshai on August 16 and August 17, 2017 was authorized.

5. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he received from Dr. Amir Beshai on August 16 and August 17, 2017 is reasonable, necessary, and related to the compensable occupational disease.

6. If the claim is found compensable, whether the respondent has demonstrated, by a preponderance of the evidence, that any compensation to which the claimant may be entitled should be reduced based on his failure to timely report this claim pursuant to Section 8-43-102(2) C.R.S.

FINDINGS OF FACT

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

1. The claimant began his employment as a firefighter with the employer (and its predecessors) in 1983. The claimant retired from his firefighting position on January 19, 2003.

2. In approximately June 2017, the claimant noted left rib and back pain. Initially the claimant sought chiropractic treatment. However, when his symptoms did not improve, he sought treatment with his primary care providers at Trailhead Clinics. Blood work was done and the claimant's PSA[1] was noted to be 100. Given this elevated PSA,

[1] Prostate specific antigen

the claimant was referred to urologist Dr. Amir Beshai with Urological Associates of Western Colorado.

3. The claimant was first seen by Dr. Beshai on August 16, 2017. At that time, the claimant reported that the last time his PSA was tested was four years prior and his PSA was one. Dr. Beshai noted an abnormal prostate exam and recommended a prostate ultrasound and biopsy. Dr. Beshai performed the ultrasound and biopsy on August 17, 2017.

4. The biopsy revealed prostatic adenocarcinoma. The claimant was 58 years of age at the time of this diagnosis. The claimant immediately began cancer treatment, including radiation and chemotherapy.

5. On November 15, 2019, the claimant filed a Workers' Claim for Compensation. In that document, the claimant identified the date of injury as August 16, 2017.

6. On December 17, 2019, the respondents filed a Notice of Contest denying liability pending further investigation.

7. The employer has continuously participated with the Colorado Firefighter Heart and Cancer Benefits Trust since its inception on July 1, 2017.

8. Shannon Rush is the employer's Human Resources Manager. Ms. Rush credibly testified that she spoke with the claimant on one occasion in 2018. The claimant initiated a telephone call to Ms. Rush and asked for a letter verifying his dates of service and the balance of his retirement account. Ms. Rush authored the letter requested by the claimant. Ms. Rush further testified that the claimant did not say anything to her about his general health or any cancer diagnosis.

9. Although she had no further contact with the claimant, Ms. Rush testified regarding what steps she would have taken if, hypothetically, the claimant had requested additional information. Specifically, Ms. Rush testified that if the claimant had asked if the employer could assist him with his cancer condition, she would have referred him to the Colorado Firefighter Heart and Cancer Benefits Trust and/or to the employer's workers' compensation manager. However, the claimant made no such inquiries to Ms. Rush.

10. The ALJ credits the testimony of Ms. Rush over the contrary testimony of the claimant regarding their communications.

11. The experts in this matter addressed findings of the International Agency for Research on Cancer (IARC). IARC is a division of the World Health Organization (WHO). IARC reviews thousands of substances and then classifies those that are likely to cause various types of cancer. IARC publishes a list of substances in two categories:
1) carcinogenic agents with *sufficient evidence* in humans, and 2) agents with *limited*

evidence in humans *(emphasis in the original).* IARC defines these two categories as follows:

> ***Sufficient evidence of carcinogenicity:*** A causal association between exposure to the agent and human cancer has been established. That is, a positive association has been observed in the body of evidence on exposure to the agent and cancer in studies in which chance, bias, and confounding were ruled out with reasonable confidence.
>
> ***Limited evidence of carcinogenicity:*** **A** causal interpretation of the positive association observed in the body of evidence on exposure to the agent and cancer is credible, but chance, bias, or confounding could not be ruled out with reasonable confidence. *(emphasis in the originaf).*

12. With regard to prostate cancer, IARC has identified no carcinogens with "sufficient evidence" in humans.

13. In the second category of "limited evidence in humans" for prostate cancer, the IARC lists: androgenic (anabolic) steroids; arsenic and inorganic arsenic compounds; cadmium and cadmium compounds; occupational exposure as a firefighter; malathion; night shift work; consumption of red meat; rubber manufacturing industry; thorium-232 and its decay products; and x- and gamma-radiation.

14. On August 20, 2020, Dr. Annyce Mayer issued an independent medical examination (IME) report on the claimant's behalf. In her report, Dr. Mayer opined that the claimant's cancer "meets the medical requirements of the Colorado Firefighter Presumption Statute". In support of this opinion, Dr. Mayer noted that the claimant worked as a firefighter in "unprotected and inadequately protected exposure" to carcinogens. Dr. Mayer further noted that "the risk of age from prostate cancer in Caucasians begins to increase at about 45 years of age, with peak incidence in the 60 to 70 age group, with approximately tenfold risk compared to those in younger age groups."

15. Dr. Mayer's testimony was consistent with her written report. Dr. Mayer testified that she was asked to issue an opinion regarding whether the claimant's cancer diagnosis was covered under Section 8-41-209, C.R.S. Dr. Mayer agreed that there are several well recognized risk factors for prostate cancer, including age, race, family history, and genetic factors. Dr. Mayer also testified that age is the most important risk factor. Dr. Mayer further agreed that prostate cancer was the most common non-skin cancer in men.

16. Dr. Mayer testified that, although not comprehensive, there was general agreement in the scientific and medical community regarding the carcinogens found in firefighting. Dr. Mayer acknowledged that in making her determinations in this case, she relied on studies that have shown the types of substances that are present at fire

scenes and that are found on firefighters' bunker gear. That these studies did not involve the claimant specifically, but were based on other firefighters and their firefighting exposures.

17. Regarding IARC, Dr. Mayer acknowledged that IARC has not identified any carcinogens with "sufficient evidence" of causing prostate cancer.

18. Dr. Mayer testified regarding her understanding of IARC's list of agents with "limited evidence" in humans. Specifically, it is Dr. Mayer's belief that IARC has found that these agents are credible causes of cancer, but do not meet the requirements for the "strong level of evidence" needed to be put into the "sufficient evidence" category. Dr. Mayer testified that she believes that IARC has determined the agents in "limited evidence" category for prostate cancer, (including firefighting occupational exposures), to be credible causes of prostate cancer. Dr. Mayer's opinion in this case is based upon this belief.

19. Although Dr. Mayer discussed several factors and agents in her written report, she testified that she was primarily relying on IARC's listing of firefighting occupational exposures in the "limited evidence" column. Dr. Mayer agreed that early studies of firefighters and cancer did not consistently show an increased rate of prostate cancer in firefighters.

20. At the request of the claimant's counsel, on October 14, 2020, Dr. Sander Orent authored an IME report. Dr. Orient opined that the claimant's prostate cancer is the "direct result" of exposure to carcinogens during his career as a firefighter.

21. Dr. Orient's testimony was consistent with his written report. Dr. Orent testified at length regarding the various inadequacies of the claimant's personal protective equipment (PPE) and the practices employed during the time he was employed as a firefighter. Dr. Orent further testified that if he were evaluating a firefighter with cancer who had an extensive firefighting career, and no other risk factor relevant to that cancer, he would conclude that the firefighting exposure caused the firefighter's cancer.

22. At the request of the respondent, on April 6, 2021, Dr. Thomas Allems issued an IME report. In his report, Dr. Allems opined that the claimant's prostate cancer is unrelated to his career as a firefighter. Dr. Allems noted that IARC has not identified carcinogens with "sufficient evidence" for prostate cancer. Dr. Allems opined that attributing prostate cancer to any specific job or exposure is speculative.

23. Dr. Allems's testimony was consistent with his written report. Dr. Allems testified that causation cannot be ascribed to a person's occupation by default just because there is no other explanation or identified cause for a prostate cancer. Dr. Allems further testified that in the present case, there is nothing unusual about the claimant's prostate cancer presentation as a 58-year old Caucasian male at the time of diagnosis. Dr. Allems testified that the claimant's exposure history confirmed that he

was a career firefighter with the expected range of exposures and personal protective equipment issues.

24. Dr. Allems testified that the epidemiologic literature regarding prostate cancer is extensive and spans decades. Despite this extensive research, the data remains inconclusive, and there are currently no identified prostate carcinogens. Dr. Allems also testified that the vast majority of prostate cancer cases occur without any risk factors being present. With regard to IARC's list of agents with sufficient evidence of causing cancer in humans, there is no carcinogen that has been identified as having "sufficient evidence" for causing prostate cancer.

25. Regarding the literature specific to firefighters, Dr. Allems testified that some of this data is impacted by a "built-in bias" due to a phenomenon involving increased PSA screening in firefighters. Beginning in the early 1990s, general public health recommendations were that PSA screenings should be done annually for males in the general population beginning at 50 years of age. Simultaneous with these recommendations, firefighters also began PSA screenings on an annual basis, as part of employment mandated physicals. As a result of this frequent testing, firefighters tended to get many more PSA measurements over time compared with non-firefighters that did not undergo physical evaluations on such a regular basis.

26. Dr. Allems noted that the claimant's history of PSA testing screenings reflects this phenomenon. Specifically, the claimant obtained regular PSA screenings while he was working as a firefighter, but then after his retirement in 2003, he only got a few of tests over the years.

27. Dr. Allems explained that the issue from an epidemiologic standpoint is that, during the annual PSA years, firefighters had much greater screening and much greater potential for being diagnosed with prostate cancer than non-firefighters. Therefore there is concern in the literature that the epidemiologic data has been skewed, particularly in the number of cases that appear to reflect an increased incidence of prostate cancer in firefighting groups, but no change in mortality rates. On February 25, 2016, the National Firefighters Association dropped the annual PSA screening from annual physicals.

28. Regarding more recent firefighter prostate cancer literature, Dr. Allems testified that the data is "consistently inconsistent". Despite more and more studies, there is still no information that has led IARC to identify a known carcinogen for prostate cancer.

29. Both Dr. Mayer and Dr. Allems testified regarding a 2010 meta-analysis conducted by IARC's working group. Both experts noted that this study found a 30 percent increased risk of prostate cancer in firefighters. Both Dr. Mayer and Dr. Allems recognized that IARC stated that, "Of 20 studies of prostatic cancer, 17 reported elevated risk estimates that range from 1.1 to 3.3; however, only two reached statistical significance and only one showed a trend with duration of employment."

30. Dr. Allems explained that given this explanation from IARC, he considers these findings to be weak. He further explained that in this meta-analysis, study after study was not statistically significant. Two studies were statistically significant, but only one study showed increased risk with duration of employment. Dr. Allems also testified that IARC recognized the weakness of the 30 percent data point as firefighting is identified in the "limited evidence" category.

31. In addition to these recent meta-analyses, Dr. Allems testified regarding a meta-analysis done in 2020 (Casjens), in which no association was found between prostate cancer and firefighting.

32. The opinions of Dr. Allems are found to be more credible and persuasive than the opinions of Ors. Mayer and Orent. Evidence and inferences contrary to these findings were not credible or persuasive.

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. 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).

Statute of Limitations

4. Section 8-43-103(2), C.R.S. provides that the right to workers• compensation benefits is barred unless a notice claiming compensation is filed with Division within two years after the injury. However, §8-43-103(2), C.R.S. also provides, in relevant part, that the limitation does not apply to:

> [a]ny claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after

> the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation of benefits within the meaning of this section...

5. The statute of limitations begins to run when the claimant, as a reasonable person, should have recognized the nature, seriousness, and probable compensable character of the industrial injury. *City of Boulder v. Payne,* 426 P.2d 194 (Colo. 1967); *Intermountain Rubber Industries v. Valdez,* 688 P.2d 1133 (Colo. App. 1984).

6. In the present case, the claimant learned of his cancer diagnosis in August 2017. However, he did not report his cancer diagnosis to the employer until he filed his Worker's Claim for Compensation on November 15, 2019. This was more than two years from his date of injury.

7. The ALJ concludes that no reasonable excuse exists for the claimant's late reporting. Here, the claimant was diagnosed with prostate cancer in August 2017 and immediately began treatment. The ALJ finds that in August 2017, the claimant recognized the nature, seriousness, and probable compensable character of this diagnosis. As found, Ms. Rush's testimony regarding her communication with the claimant is credible and persuasive. The ALJ concludes that the claimant made no report of his cancer diagnosis to the employer until November 15, 2019. Therefore, the claimant's claim is barred by the statute of limitations.

Burdens of Proof

8. Notwithstanding the ALJ's determination that the claimant's claim is barred by the statute of limitations, the ALJ also makes conclusions of law regarding the appropriate burden of proof in this matter and compensability.

9. Typically, 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).

10. However, the Colorado legislature has established a specific provision for workers' compensation claims of firefighters with a diagnosis of cancer. Section 8-41-209, C.R.$. provides:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system

and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

(3) Repealed.

(4) **An** employer who participates in the voluntary firefighter cancer benefits program created in part 4 of article 5 of title 29 Is **not subject to this section** unless the employer ends participation in that program. *(emphasis added).*

11. In the present case, the claimant worked as a firefighter for 20 years. Prostate cancer is a cancer of the genitourinary system. Therefore, as an initial matter the firefighter provision shifts the burden of proof from the claimant to the employer.

12. However, the ALJ finds that the employer has demonstrated that they are a participant of the voluntary firefighter cancer benefits program as identified in Section 8-41-209(4) C.R.S. Therefore, the firefighter provision does not apply to the present case and the burden shifts **back** to the claimant.

Compensability

13. Based on the facts of the current case, the ALJ concludes that it is the **claimant's** burden, by a preponderance of the evidence, to demonstrate that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with employer.

14. 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.*

15. 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.

16. Although it is the claimant's burden in this case, the Colorado Supreme Court has provided guidance regarding the analysis of causation in firefighter cancer cases. In *City of Littleton v. Industrial Claim Appeals Office,* 370 P.3d 157, 165 (Colo. 2016), the court discussed the type of evidence that may be used in order to rebut the presumption of compensability under Section 8-41-209 and prove that a claimant's cancer is not work-related.

17. Section 8-41-209(2), C.R.S. does not require the employer "to disprove causation from every conceivable substance." *Id.* In fact, if a firefighter's exposure is "speculative, remote or illogical, then it is not typical of the occupation." *Id.* With regard to general causation, the *City of Littleton* court noted that epidemiological evidence is "highly probative" *Id.*

18. In the companion case of *Industrial Claim Appeals Office v. Town of Castle Rock,* 370 P.3d 151, 157 (Colo. 2016), the Supreme Court further determined that to meet its burden of proof under Section 8-41-209(2)(a), the employer is not required to establish a specific alternate cause of the firefighter's cancer. *Id.*

19. Although the Supreme Court was primarily addressing the issue of how to rebut the presumption of compensability in both *City of Littleton* and *Town of Castle Rock,* the principles articulated in these decisions are applicable to issues regarding causation in cancer claims more generally.

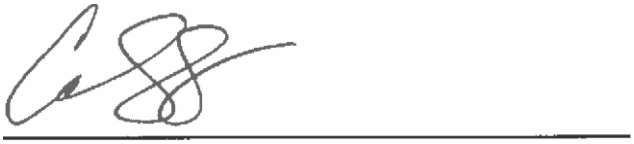
20. The ALJ concludes that the claimant has failed to demonstrate, by a preponderance of the evidence, that his cancer diagnosis is causally related to his employment with the employer as a firefighter. As found, Dr. Allems's opinion regarding the lack of evidence to support a causal association between the claimant's firefighting exposures and his prostate cancer is well supported by the epidemiologic literature. No

clear evidence of causation between firefighting occupational exposures and prostate cancer has emerged, as reflected by IARC's placement of that exposure in the "limited evidence" category.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed. All remaining endorsed issues are dismissed as moot

Dated this 4th day of May 2022.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to continuing maintenance medical benefits that are reasonably necessary and related to the admitted workplace injury of May 26, 2016.

PROCEDURAL HISTORY

Claimant was injured in the course and scope of her employment with Employer on May 26, 2016.

This is an admitted claim that was closed by Final Admission of Liability (FAL) of December 13, 2016, with the exception that maintenance medical benefits were left open for reasonably necessary medical care related to the workplace injury.

On September 17, 2021 Claimant filed an Application for Hearing on issues of medical benefits that are authorized, reasonably necessary and related to the May 26, 2016 workplace injury, including maintenance care as recommended by Dr. Olsen and admitted in the FAL.

Respondents filed a Response to Application for Hearing on October 25, 2021 adding the issues of causation and relatedness to the issues listed by Claimant.

FINDINGS OF FACT

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

1. At the time of injury, Claimant was seventy-two (72) years old and seventy eight (78) years old at the time of the hearing.

2. On May 26, 2016 Claimant was reaching overhead and pulling down a box to get an "event kit" ready when she experienced a pop and sharp pain in the left side of her neck and upper back. Claimant was ultimately diagnosed with neck pain, a left shoulder strain, and acute left-sided back pain.

3. Claimant was initially seen on May 26, 2016 by a nurse practitioner. Claimant complained of pain in her neck, back, and left arm to her authorized treating physician ("ATP"), Dr. Dean Prok, from June 2016 to January 2017.

4. Claimant had an MRI of the cervical spine read by Dr. Scott Lowe on July 15, 2016. The MRI showed: (1) Central and right paracentral disc protrusion at the C3-4 level with abutment of the cervical cord but no cord compression. Mild narrowing of the central canal down to 10 mm. (2) Degenerative disc changes at C4-5 with posterior disc

and osteophyte complex. Neural foraminal narrowing, right greater than left with mild central canal narrowing. (3) Degenerative disc changes at C5-6 with mild central canal stenosis and right foraminal narrowing. (4) Degenerative disc changes at C6-7 with mild to moderate right foraminal narrowing but no central stenosis or left foraminal narrowing.

5. On June 22, 2016, Claimant's ATP referred Claimant to Dr. Nicholas Olsen for evaluation and treatment. Dr. Olsen recommended steroid injections but the insurer required her to see an orthopedic specialist before they would authorized injections. The request for prior authorization was initially denied on September 16, 2016 by Dr. Frank Polanco.

6. On September 28, 2016 Claimant was evaluated by Dr. B. Andrew Castro for a surgical consultation pursuant to referrals from both Dr. Prok and Dr. Olsen. Dr. Castro stated that Claimant was not a surgical candidate, recommended conservative care and consideration of epidural steroid injections.

7. Dr. Prok recommended Claimant receive facet injections from Dr. Nicholas Olsen to help alleviate the lingering pain Claimant continued to experience. Dr. Polanco authorized the procedure on October 14, 2016.

8. Claimant subsequently received facet injections from Dr. Olsen on October 25, 2016 at the left C5-6 and C6-7 levels to alleviate her lingering pain. Pre-injection VAS[1] score was 4-5 of 10 and a positive axial neck pain increasing to 6-7 pain level with neural foraminal compression. Post-injection, Claimant reported a 0 of 10 on the VAS scale with no aggravation of complaints on exam.

9. On October 28, 2016 Claimant was seen at for physical therapy at SCL Health Medical Group Front Range and therapist Leah Luther reported that Claimant had no pain lately except for end range of motion pain.

10. Claimant commented that she immediately saw a reduction in her symptoms, reporting to Dr. Olsen on November 2, 2016, that she was "95% improved" and that the shot was a "miracle." On exam he found that neural foraminal compression test was negative for axial neck pain and facet loading was also negative bilaterally. They discussed the fact that, if Claimant continued her exercise program and followed correct lifting mechanics, they may not have to offer additional treatment. Dr. Olsen noted Claimant did quite well with the injection, that Claimant may not need additional treatment beyond her assigned exercise program, and recommended Claimant do a trial of full duty work.

11. Claimant returned to see Dr. Prok on November 4, 2016, after the injection and was reporting much less pain but still at 4 out of 10 aching on the left side of the neck and upper back areas. On exam he observed that the cervical spine had near full range of motion in all planes with mild pain reported at the left cervical paraspinals and trapezius and posterior shoulder area with minimal tenderness to palpation in those areas without palpable firmness, hypertonicity or spasm. Dr. Prok noted that Claimant was doing better and gave her a trial of full duty per Dr. Olsen's recommendation. He continued to diagnose neck pain and upper back strain and stated that the diagnosis were related to

[1] Visual Analog Scale

the work injury based on all information available. Lastly, he concluded that the objective findings were consistent with the history and work related mechanism of injury.

12. Claimant had a follow-up appointment with Dr. Olsen on November 30, 2016. Claimant reported that she had "no return of her complaints" and could return to full duty work without difficulty. Dr. Olsen reported Claimant would be a candidate for a repeat injection up to three times per year if needed. Dr. Olsen performed an impairment rating finding that, pursuant to Table 53II-C of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), Claimant had a specific disorder due to moderate spondylosis and facet disease of 6% whole person. Range of motion loss for flexion and extension provided a 4% whole person impairment. This combined to a 10% whole person final impairment. Dr. Olsen discharged Claimant from his care at that time. Dr. Olsen encouraged her to continue her exercise program, remain at full work duties, and advised that if she wished to engage in maintenance care, she was to contact his office.

13. By December 7, 2016 Dr. Prok stated that Claimant was much better, but still had pain of 2 out of 10 in the left upper neck and back areas. Dr. Prok placed Claimant at maximum medical improvement (MMI) based on Dr. Olsen's impairment rating of ten percent whole person impairment and provided for post-MMI medical maintenance treatment consisting of repeat injections up to three times per year and some continuing massage therapy.

14. Claimant attended a post-MMI follow-up appointment with Dr. Prok on January 18, 2017. Dr. Prok noted that Claimant was to continue full duty status without restrictions, as Claimant demonstrated full functionality during the examination, and Claimant remained at MMI. At that time Claimant continued to have neck pain of 2 out of 10. Dr. Prok noted on exam, mild pain in the left cervical paraspinals and upper thoracic region on the left side with mild tenderness to palpation diffusely throughout that region. This is the last record from Dr. Prok in the exhibits.

15. Respondents cite to a February 12, 2019 report allegedly from Claimant's PCP but those records were not in evidence so any statements quoted by other providers is not considered.

16. On May 28, 2019, Claimant returned to Dr. Olsen's office for the first time since November 30, 2016. Claimant relayed to Dr. Olsen that she was continuing to work full duty, denied any new injuries, but noted that her pain returned three to four weeks prior. On exam, Dr. Olsen found neural foraminal compression test negative bilaterally but facet loading was positive on the left side and negative on the right. Claimant requested maintenance care, and Dr. Olsen recommended a repeat left C5-6, C6-7 facet injection, noting Claimant did quite well with the procedure previously.

17. Claimant received a left C5-6 and C6-7 facet injections from Dr. Olsen on June 18, 2019. Claimant's pre-injection VAS score was 5 of 10 and post VAS score of 1 of 10 with a negative exam after the injection. Clamant attended a follow up with Dr. Olsen on July 1, 2019. Claimant stated that her pain had been reduced by "95%," and was following her home exercise program without difficulty. On physical exam, all tests were negative. Claimant was to return to Dr. Olsen's office if she had any further difficulties. There are not further records from Dr. Olsen following this visit.

18. Claimant went to Good Samaritan Medical Center on September 12, 2021. Claimant relayed that she tripped and fell in a King Soopers parking lot and struck a concrete curb. Claimant experienced pain in her right wrist, knees, and lip on the right side of her face. Claimant denied any neck pain at that time. On exam, Physician Assistant Boone Allen noted that Claimant had tenderness of the left shoulder but normal range of motion. He also documented that the cervical spine exam was normal, with normal range of motion and that her neck was supple. Claimant had an x-ray of her left shoulder during her visit at Good Samaritan Medical Center which showed no fracture or dislocation of the left shoulder, and the acromioclavicular joint showed no acute abnormality.

19. Claimant was attended by Dr. Nathalie Nys of the Rock Creek, Lafayette Kaiser Clinic on November 12, 2021. Claimant had had trigger point injections for the bilateral upper back and shoulders on November 4, 2021, had returned for "injections on my neck and also a check on my left hip." Claimant was complaining of left shoulder pain, citing her fall in the King Soopers' parking lot as the source of the pain. Claimant relayed that she had also hurt her lip from the fall and that she had "zinging" pain in her neck which traveled down her left arm. On exam, Dr. Nys noted neck, upper, mid and low back and buttocks pain with muscle spasms and multi tender points. Claimant received trigger point injections in the right and left infraspinatus, right and left levator scapulae, right and left rhomboid major, and right and left trapezius as well as in the neck bilaterally and the cervical paraspinal muscles.

20. Dr. John Burris Performed an Independent Medical Evaluation (IME) upon Respondents' request on December 21, 2021. Dr. Burris reviewed medical records and conducted a physical examination of Claimant. On exam, he found that Claimant's cervical spine was supple and nontender to palpation throughout the suboccipital and bony midline regions, though was diffusely tender in the left paraspinal and trapezius musculature. Otherwise, she had a negative neurological, sensation and motor exam.

21. Dr. Burris found that: (1) Claimant's injury on May 26, 2016 involved a very minor injury mechanism of reaching overhead, which Dr. Burris labeled as a relatively sedentary activity consistent with daily living; (2) the only condition that could have possibly been related to the abovementioned mechanism of injury is a minor soft tissue strain, with the natural course of minor soft tissue strain being a rapid and predictable recovery within days to weeks regardless of treatment; (3) the MRI of the cervical spine Claimant dated July 15, 2016, revealed moderate degenerative changes predominantly at C5-6 and C6-7 with no acute abnormalities; (4) the described May 26, 2016 mechanism was not sufficient to cause, accelerate, aggravate, or contribute in any meaningful manner to Claimant's abovementioned underlying pre-existing condition; (5) Claimant's current symptoms (greater than five years later) are, more likely than not, a result of the natural progression of her underlying degenerative condition and are unrelated and independent from the May 26, 2016 workers' compensation claim; and, (6) no further care is reasonable, necessary, or related to Claimant's May 26, 2016 claim.

22. Respondents took the deposition of Dr. Burris on April 8, 2022. He is a level II accredited physician and board-certified in occupational medicine. He testified consistent with the findings and conclusions of his report. He specifically stated that

Claimant suffered only a minor neck strain on May 26, 2016, which was treated and resolved as expected. He stated that any symptoms Claimant is currently experiencing are due to the natural progression of Claimant's underlying degenerative condition, not the May 26, 2016 work related claim.

23. Claimant testified that she did not have a minor injury to her neck and left shoulder because when she lifted the box, she felt a specific pop in her neck that cause significant pain, which continued after she was placed at MMI and released from care. She stated that, after MMI, she took care of her own pain with massage, exercise and over the counter medications such as Aleve, as she was instructed to do by her ATPs. She only returned to see Dr. Olsen in 2019 when it became unbearable again and the second injection she received from Dr. Olsen decreased her pain back to a manageable level and continued with her exercise program, yoga, massage and stretching to maintain that level.

24. Claimant stated that she attempted to return to see Dr. Olsen after the COVID-19 pandemic started but she was unable to reach anyone in Dr. Olsen's office as they were closed. She called them multiple times without response. She finally received a call back from them a few months later to advise her that her workers' compensation claim was closed and needed to be reopened to obtain further treatment or injections from Dr. Olsen.

25. Claimant was initial told that she only had two years of care and that time had transpired so her case was closed. She later found out that she had up to six years to reopen her claim in order to obtain the care that Dr. Olsen had recommended. She stated that she does not like to take medications and she waited as long as possible to get care. Claimant filed an application for hearing with the Office of Administrative Courts in Denver after reaching out to Dr. Olsen's office for maintenance care and being unable to obtain the requested maintenance care.

26. Claimant stated that the current symptoms are the same symptoms she was feeling when she was injured originally in May 2016 and that they have continued all along. She testified that she did not injure her left shoulder or neck in the incident of September 2021 but that she already had that problem much before the incident of falling in the parking lot as she had attempted multiple times during the pandemic to get her care. This ALJ takes administrative notice that the pandemic closed most businesses around March 2020 through May 2020.

27. As found, Claimant has failed to prove by a preponderance of the evidence that the current symptoms are related to the May 26, 2016 work related injury.

28. As found, Dr. Burris is persuasive in his opinion that the Claimant's current symptoms of neck and left shoulder pain are related to the underlying degenerative disc disease and the natural progression of the degenerative condition, not the May 26, 2016 work related injury. As found Dr. Burris was not persuasive that there was no aggravation of the underlying degeneration caused by the May 26, 2016 event, however, that aggravation reached a baseline and resolved following the reasonably necessary medical care provided by her authorized treating physicians through July 1, 2019.

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). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

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

B. Reasonably Necessary Medical Benefits after MMI

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The right to workers' compensation benefits, including medical payments, arises only when an injured employee establishes 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, C.R.S; *see Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

In a dispute over medical benefits that arises after the filing of an admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. C.R.S. § 8-41-301(1)(c); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *In re Claim of Deane*, 122121 COWC, 4-664-891-001 (Colorado Workers' Compensation Decisions, 2021). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, *supra*.

Here, Respondents admitted by Final Admission of Liability dated December 13, 2016 with a general award of medical benefits that were reasonably necessary and related to the claim after the maximum medical improvement determination. From December 2016 through July 2019 Claimant received no maintenance care other than one steroid injection with Dr. Olsen. Respondents allege that the medical care Claimant now requires is no longer reasonably necessary or related to the May 26, 2016 work related injury. The MRI report by Dr. Lowe dated July 15, 2016 revealed very significant degenerative disc disease from the C3 to C7 levels of the spine. As found, Dr. Burris is persuasive in his report and testimony that the Claimant's current symptoms complex affecting her neck and left shoulder are related to the natural progression of the Claimant's underlying degenerative disc disease at multiple spine levels. Any facts to the contrary are specifically not found to be persuasive in this matter. Claimant has failed to prove by a preponderance of the evidence that the current symptoms are proximately caused and related to the May 26, 2016 aggravation of the underlying spine disease and, therefore, Claimant is not entitled to further maintenance medical care in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for reasonably necessary medical benefits related to the May 26, 2016 claim are denied and dismissed.

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

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

DATED this 4th day of May, 2022.

Digital Signature

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

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Did Claimant prove a one-time evaluation with her ATP is a reasonably necessary post-MMI medical benefit?

FINDINGS OF FACT

1. Claimant works for Employer as a department manager. She suffered an admitted low back injury on August 20, 2020 while moving end cap "power panels."

2. Claimant was diagnosed with a lumbar strain and left leg "sciatica." She received conservative treatment including physical therapy, chiropractic, activity modification, and psychological counseling.

3. Dr. Dwight Leggett performed a left SI joint injection on April 5, 2021. Claimant's pain flared badly at first, but subsequently improved significantly. At her April 12, 2021 follow up appointment with Kelsey Walls, PA-C, Claimant reported 90% improvement. Ms. Walls anticipated Claimant's pain would continue to improve over the next 2-3 weeks.

4. On April 21, 2021, Claimant's ATP, Dr. Terrance Lakin noted she had returned to work after the injection and "is functioning pretty well." Claimant was "tagging," which required a lot of bending, kneeling, and squatting. Dr. Lakin wrote, "She got used to the kneeling and squatting but bending seemed to aggravate her low back pain, but not to the point where she feels she needs restrictions." Dr. Lakin referred Claimant to physical therapy for work hardening and instruction on a home exercise program.

5. Claimant returned to Dr. Lakin on May 12, 2021. Her pain was "better just sore any ach[y]." She was "currently working with no restrictions and having no issues." She was still taking naproxen for pain. Physical examination showed mild tenderness at the left SI joint and piriformis areas, and minimal paralumbar muscle spasms. Dr. Lakin stated,

> Patient has resolved SI joint dysfunction very well. She desires to close her case. We reviewed that she had a left SI joint injection in the office with Dr. Leggett. She reported more pain for a week but then gradually cool[ed] down and she is happy with the results. We discussed considering repeat injection in 3-6 months and she is adamant she does not want that again. She believes she is resolved well enough to continue on with home exercise program.

> She has been scheduled for physical therapy for what she thinks is one visit to make sure that she has a home exercise program to continue on with. I believe that is a good preventive visit.
>
> She concurs with closing her case and only medical maintenance for physical therapy next several weeks.

6. Dr. Lakin put Claimant at MMI with no impairment. Regarding maintenance care, Dr. Lakin recommended, "Finish physical therapy 1-3 appointments in next 3-4 weeks to assure good home exercise program."

7. Claimant saw Dr. Wallace Larson for a DIME on August 30, 2021. She described constant pain in her left lower back and buttock. The pain waxed and waned depending on how much lifting or other work she did. He agreed Claimant was at MMI, but thought her residual symptoms and limitations warranted an impairment rating. Dr. Larson assigned a 10% whole person lumbar spine rating. He opined Claimant required no maintenance care.

8. Claimant testified she has daily back pain that worsens with increased activity, particularly at work. Claimant explained she previously told Dr. Lakin she did not want future injections because of the painful flare she experienced after the first injection. She was feeling much better and assumed she would not need more injections. But by the time of the hearing, she felt the injection had "worn off" and she was open to another injection were it recommended by her ATP.

9. Claimant saw her PCP on several occasions after MMI for various personal health issues. The PCP records contain no reference to any ongoing low back or SI joint problems. Claimant testified she did not mention or seek treatment for her low back from her PCP because she was under the impression that Medicaid would not cover injury-related treatment.

10. Claimant's testimony was credible and persuasive.

11. Claimant proved a general award of medical benefits after MMI is reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

12. Claimant proved a one-time evaluation with an ATP to explore maintenance care options is reasonably necessary.

CONCLUSIONS OF LAW

The respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award

of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). A DIME is not entitled to special weight regarding medical treatment after MMI, but is simply another medical opinion to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant established the probability of a need for future medical treatment, which entitles her to a general award of future medical benefits. Although Claimant's injury improved with treatment, she still suffers from residual pain that justified a 10% whole person impairment. At the time of MMI, Claimant was still enjoying the benefit of an SI joint injection. But injections frequently produce temporary instead of permanent relief. This is recognized by the Low Back Pain MTGs, which provide for up to "2 to 3 injections per year" if they are producing at least 80% improvement. *See* DOWC Rule 17, Exhibit 1 § 8.a.iii. Dr. Lakin contemplated additional injections as maintenance, and the ALJ infers he probably would have recommended repeat injections as a potential maintenance care option had Claimant not declined them. Because of her ongoing injury-related symptoms, Claimant's request for a one-time evaluation with an ATP to discuss maintenance care options is reasonably necessary.

ORDER

It is therefore ordered that:

1. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

2. Insurer shall cover a one-time evaluation with an ATP to explore maintenance care options.

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

electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 4, 2022

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

ISSUES

The issues addressed in this order concern the calculation of Claimant's average weekly wage (AWW). The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $506.46 to $707.27.

FINDINGS OF FACT

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

1. Claimant suffers from non work-related chronic Crohn's proctocolitis, which has required substantial medical management, including hospitalization and surgery resulting in lost time from work. (See generally, Claimant's Hearing Exhibit (CHE) 1; Respondents' Hearing Exhibit (RHE) D).

2. Claimant's Crohn's disease has proven difficult to control. He underwent surgery on February 13, 2019, consisting of an Ileostomy and segmental resection. (CHE 1, p. 5). He was subsequently discharged from the hospital on February 18, 2019. (Id.). Shortly after his discharge, Claimant experienced complications related to his February 13, 2019 surgery. (Id. at p. 17). He was readmitted to the hospital with a partial small bowel obstruction (SBO) in early May 2019. (Id.) Following his discharge from the hospital on May 3, 2019, Claimant was readmitted to the hospital on May 7, 2019 for recurrent symptoms and low ostomy output for which he underwent additional surgery consisting of a small bowel decompression and mesenteric fixation procedure. (Id.)

3. Claimant developed a post-surgical infection approximately 10 days following his SBO surgery when his incision separated at the bottom. (Id. at p. 28). He was started on antibiotics and by June 6, 2019 was "doing much better." (Id.)

4. Claimant then went to work for Employer. Based upon the evidence presented, Claimant's first pay period under Employer extended from July 26, 2019 to August 8, 2019. He was paid $1,371.06 for 72.72 regular and 2.30 overtime hours on August 16, 2019 for this pay period. (RHE B, p. 5). Claimant was paid the following amounts for the subsequent pay periods:

Period Start	Period End	Pay Date	Current	Reg. Hrs.	OT Hrs.
08/09/2019	08/22/2019	08/30/2019	$1,674.99	79.72	8.89
08/23/2019	09/05/2019	09/13/2019	$1,540.71	67.02	7.05

09/06/2019	09/19/2019	09/27/2019	$1,336.23	62.76	7.65
09/20/2019	10/03/2019	10/11/2019	$ 142.20	6.37	0.00
10/04/2019	10/17/2019	No hours reported- no pay			
10/18/2019	10/31/2019	11/08/2019	$ 138.24	6.16	0.00
11/01/2019	11/14/2019	11/22/2019	$ 597.42	31.66	0.00
11/15/2019	11/28/2019	12/06/2019	$1,154.16	46.59	0.00

5. The symptoms associated with Claimant's Crohn's disease worsened in September 2019. Claimant testified that he was admitted to the hospital on September 23, 2019 and subsequently underwent additional surgery to remove several anatomical structures related to his digestive tract. He requested a leave of absence from September 23, 2019 to October 21, 2019. (RHE C, p. 6). Claimant's leave of absence was approved on September 27, 2019. (RHE D, p. 35). Because Claimant was on leave for much of the pay period extending from September 20, 2019 through October 3, 2019, his wages dropped significantly from the prior pay period. (See, RHE B, p. 5). As noted above, Claimant earned $142.20 for the pay period extending from September 20, 2019 through October 3, 2019.

6. As referenced above, Claimant underwent proctectomy surgery on October 7, 2019. (CHE 1, p. 36).

7. On October 17, 2019, Physician Assistant (PAC) Shanna M. Zwick drafted correspondence indicating that Claimant could return to modified work beginning October 21, 2019. (RHE D, p. 34; See also, RHE D, p. 33). On October 24, 2019, SM[Redacted], HR Specialist for Employer, sent an e-mail message to BD[Redacted] that Claimant had returned to work on October 23, 2019. (RHE D, p. 35). Because Claimant was unable to work for much of the pay period extending from October 18, 2019 through October 31, 2019, he only earned $138.24. (RHE B, p. 5).

8. While Claimant returned to work, he continued to experience residual nerve pain. On November 4, 2019, Claimant sent an e-mail message to SM[Redacted] that he was going to try a new medication to help reduce his persistent nerve pain. In this message, Claimant notes that the plan was for him to return to "full-time" work the following Monday. (RHE D, p. 32). Ms. SM[Redacted] notified KW[Redacted] that Claimant had provided her a "note that says he [could] return to work full-time on 11/11, with a lifting restriction of not more than 10lbs, and is released on 11/22 to normal work duties without restriction." (RHE D, p. 30; See also, RHE D, p. 29). Again, because Claimant was restricted for much of the pay period between November 1, 2019 and November 14, 2019, he only earned $597.42. (RHE B, p. 5).

9. On November 11, 2019, Claimant notified Ms. SM[Redacted] and Mr. BW[Redacted] by e-mail that he was experiencing a flare of his Crohn's disease but that he would do his best to schedule medical appointments and infusion therapy sessions

on Friday's to miss as little work as possible. (RHE D, p. 27).

10. Claimant continued to miss work secondary to medical appointments and being sick through the reminder of November and into December 2019. (RHE D, pp.14-26). On December 16, 2019, Mr. BW[Redacted] forwarded an e-mail message to Ms. SM[Redacted] noting that Claimant came into work for an hour, left for a doctor's appointment and then went home because he had a fever. Mr. BW[Redacted] [Redacted] expressed that the impact of Claimant's absences on Employer were unsustainable and asked Ms. Medsker to call him to discuss the situation. (RHE D, p. 13).

11. Claimant sustained an admitted industrial injury to his low back on December 17, 2019.

12. Respondents admitted liability for Claimant's December 17, 2019 work-related low back injury on March 12, 2020. (CHE 4). As Claimant lost time from work due to his industrial injury between December 18, 2019 and January 26, 2020, it was necessary for Respondents to calculate his AWW to insure proper payment of temporary total disability (TTD) benefits.

13. Respondents used Claimant's earnings from August 9, 2019 through November 28, 2019 to calculate an AWW of $506.46.[1] (RHE A, p. 3 & RHE B, p. 5). As noted, Respondents admitted for this AWW in a General Admission of Liability (GAL) filed March 12, 2020. (RHE A, p. 1).

14. Claimant asserts an AWW of $707.72. In reaching his claimed AWW, Claimant asserts that the three pay periods extending from September 20, 2019 through November 14, 2019 should be excluded from the calculation, as they do not represent an accurate reflection of the wages he routinely earned while working for Employer. Disregarding the three pay periods between September 20, 2019 and November 14, 2019 leaves a ten (10) week period upon which Claimant calculates his AWW. Adding the total wages earned for these ten weeks and dividing the figure by ten yields Claimant's asserted $707.27 AWW. ($1,371.06 + $1,674.99 + $1,540.71 + $1,336.23 + $1,154.16 = $7,077.15 ÷ 10 weeks = $707.72). (CHE 3, p. 50).

15. Based upon the evidence presented, the ALJ finds that it would be

[1] Respondents' counsel represented that the aforementioned period extending from August 9, 2019 – November 28, 2019 comprised 13 weeks and reflected the entirety of Claimant's employment with Employer. Counsel's characterization appears incorrect. Indeed the period Insurer used to calculate Claimant's AWW is 14 weeks long, not 13, which period also does not include a two week pay cycle for October 4, 2019 through October 17, 2019, otherwise the period used would comprise 16 weeks. Moreover, this 14 week period does not equate to Claimant's entire period of employment with Employer as evidenced by the fact that Claimant was paid $1,371.06 for the pay period extending from 7/26/2019 – 8/8/2019 and his admitted injury occurred December 17, 2019. Nonetheless, using Claimant's earnings for the 14-week period extending from August 9, 2019 through November 28, 2019, which, as noted above, excludes the pay period for October 4, 2019 – October 17, 2019 since Claimant earned no wages for these two weeks, yields an AWW of $470.28 ($6583.95 ÷ 14 weeks = $470.28/week).

manifestly unjust to calculate Claimant's AWW by including earnings he made over pay periods that included time he spent in the hospital or in the acute recovery period following his October 7, 2019 surgery when he was unable to work full time. Simply put, the ALJ is persuaded that the pay periods between September 20, 2019 and November 14, 2019 reflect an irregularity in Claimant's proven earning capacity and that these wages should not be included in the calculation of his AWW.

16. Based upon the evidence presented, the ALJ adopts Claimant's methodology in calculating his AWW as $707.27. Accordingly, the ALJ finds that Claimant has proven that his AWW should be increased from $506.46 to $707.27 as this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his December 17, 2019 industrial injury.

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).

Average Weekly Wage

C. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a 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)[2]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

[2] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

D. Sections 8-42-102(3) and (5) (b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity as of December 17, 2019 comes from the wage records admitted into evidence. As found here, careful review of the wage records (RHE B) persuades the ALJ that the computation of Claimant's AWW should not include the pay periods between September 20, 2019 through November 14, 2019. Here, the evidence presented supports a conclusion that the aforementioned pay periods represent an aberration in Claimant's proven earning capacity. Indeed, Claimant earned in excess of $506.46 per week (Respondents admitted AWW) for every pay period included in his wage statement prior to his September 23, 2019 hospitalization and subsequent October 7, 2019 surgery. Based upon the evidence presented, the ALJ is not convinced that Claimant's lower earnings between September 20, 2019 and November 14, 2019 represent an inability to work a full time job, which would have continued indefinitely beyond November 14, 2019. Indeed, the assertion is speculative and dispelled by the fact that Claimant was hospitalized and underwent surgery on February 13, 2019 only to recover sufficiently by June 6, 2019 to return to work for Employer earning in excess of Respondents admitted AWW for every paid period leading up to Claimant's subsequent hospitalization and follow-up surgery in September/October, 2019. Accordingly, the ALJ concludes that it would be unjust to include Claimant's lowered earnings for the period between September 20, 2019 and November 14, 2019, when he was hospitalized and/or recovering from surgery, when calculating his AWW. Based upon the evidence presented, the ALJ agrees with Claimant that his AWW is $707.27, as this represents the fairest approximation of his wage loss and diminished earning capacity due to his December 17, 2019 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he is entitled to an increase in his AWW from $506.46 to $707.27.

2. Respondents shall pay temporary total disability (TTD) benefits corresponding with an AWW of $707.27 for the time period reflected in the GAL filed March 12, 2020, i.e. from December 18, 2019 thru January 26, 2020.

3. Insurer 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.

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: May 4, 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

1. Whether Claimant suffered a compensable injury to his right knee, and if so, whether Claimant's treatment with Dr. Von Stade is reasonably necessary and related to his admitted claim;

2. Whether Claimant's referral to the hip specialist, Dr. White, is reasonably necessary and related to his admitted claim;

3. Whether Claimant's referral to a spine specialist, Dr. Castro, is reasonably necessary and related to his admitted claim;

4. Whether Claimant's dental issues and care are reasonably necessary and related to his admitted claim;

5. Whether treatment for Claimant's vestibular and balance issues is reasonably necessary and related to his admitted claim; and

6. Whether home health care and home modifications are reasonably necessary and related to his admitted claim.

FINDINGS OF FACT

1. On February 7, 2019, Claimant sustained injuries arising out of the course of his employment with Employer when a horse he was riding slipped on ice and fell. Claimant worked as a "pen rider" which required him to ride through cattle pens and finding sick cattle and pull them out. Claimant testified that he has been working as a pen rider on and off for his entire life.

2. Following his injury, Claimant received extensive medical care from multiple providers for multiple areas of the body. On the date of injury, Claimant initially complained of only left shoulder and lateral neck pain and denied any impact to his head or loss of consciousness. (Ex. 8). The following day, Claimant was sent for a left hip x-ray due to hip pain. (Ex. 11). Over the next two weeks, Claimant reported additional issues, including headaches, upper back pain, pelvic pain, and vision problems. (Ex. 8 & 16). Imaging studies of Claimant's cervical spine, hips, and brain taken within three weeks of his injuries were negative for traumatic injuries. (Ex. 11). In March 2019, Ramon Perez, D.O., at Banner Health diagnosed Claimant with concussion syndrome. (Ex. 16).

3. Over the course of the next year, Claimant received treatment from multiple providers for headaches, neck pain, left shoulder, right hip, pelvic pain, dizziness, tinnitus, memory and cognitive issues, and knee pain.

4. On March 31, 2020, a hearing was held before ALJ Edwin L. Felter, Jr., which addressed whether "Claimant suffered compensable injuries to his head, his hips, and his lumbar spine." ALJ Felter issued his Full Findings of Fact, Conclusions of Law, and Order on April 23, 2020 ("Order"). (Ex. 1). In that Order, ALJ Felter found that Claimant sustained compensable injuries to his head, back, and hips, causally related to Claimant's February 7, 2019 injury. He further ordered that "Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's head, back, hips, blurred vision and headaches caused by the admitted event of February 7, 2019, subject to the Division of Workers' Compensation Medical Fee Schedule." (Ex. 1).

5. On December 18, 2020, the Industrial Claim Appeals Office affirmed ALJ Felter's April 23, 2020 Order regarding the compensability of Claimant's head, back and hip injuries, and Respondents' liability for authorized and reasonably necessary medical treatment for Claimant's head, back, hips, blurred vision, and headaches. (Ex. 2).

6. The ALJ incorporates by reference the Findings of Fact contained in ALJ Felter's April 27, 2020 Order, as if set forth fully herein. (Ex. 1).

7. After issuance of ALJ Felter's Order, Claimant resumed treatment with multiple providers. As relevant to the present issues, on September 27, 2021, Claimant's authorized treating physician, Paul Ogden, M.D., at Workwell, referred Claimant to Brian White, M.D., an orthopedist for evaluation of Claimant's hips. (Ex. 6). Dr. Ogden also referred Claimant for evaluations with Eleanor Von Stade, M.D., for knee issues. (Ex. 6).

8. Following Dr. Ogden's requests for authorization, Respondents requested that Claimant undergo an IME with John Raschbacher, M.D., an occupational medicine physician. Dr. Raschbacher performed the IME on October 22, 2021, and issued a report with his opinions on November 4, 2021. (Ex. T). Dr. Raschbacher testified at hearing and was admitted as an expert in occupational medicine.

9. By letter dated November 18, 2021, Respondents notified Dr. Ogden they were "contesting and denying" the September 27, 2021 request for authorization of the referrals to Dr. Von Stade, Dr. White and Brian Castro, M.D., "as not being reasonable, necessary ad related to Claimant's work injury of February 7, 2019." Respondents' denial was based on the opinions expressed in Dr. Raschbacher's November 4, 2021 report. (Ex. Y).

Vestibular and Balance Issues

10. As a result of his February 7, 2019 work injury, Claimant sustained injuries to his head. (Ex. 1). Multiple providers have diagnosed Claimant with concussion syndrome and post-concussive issues, and have documented issues with gait, balance, and dizziness, although no provider has documented witnessing Claimant falling. Claimant's medical records document a pattern of repeated falls. Claimant has variously attributed the falls to issues with his hips, dizziness, and balance issues. Claimant testified that he did not have a history of falls prior to his February 7, 2019 injury. Claimant testified at hearing that he had no prior issues with balance or dizziness. Given that Claimant's employment required Claimant to spend hours each day riding a horse, the ALJ finds Claimant's

testimony credible. Claimant's friend, Crystal Stevens-Smith also testified that she has known Claimant for five years, and had not previously observed Claimant fall or display balance issues. She credibly testified that she has witnessed Claimant fall on several occasions since February 7, 2019.

11. Beginning in March 2019, Claimant reported experiencing dizziness, tinnitus, initially to Dr. Reichardt. See (Ex. 1, ¶ 11). On April 2, 2019, Claimant saw Dr. Snyder at Orthopaedic and Spine Center of the Rockies, who recommended an evaluation with concussion specialist, and recommended Dr. Wicklund. (Ex. P. 652).

12. Claimant first saw Dr. Wicklund on August 21, 2019, who noted dizziness and other concussion symptoms. Dr. Wicklund performed multiple tests and noted that Claimant was experiencing a protracted recovery from concussion, likely due to vestibular dysfunction, cognitive fatigue, sleep, and emotional dysregulation. (Ex. C).

13. Claimant's post-injury medical records document frequent and consistent complaints of dizziness which persisted but did improve with physical and vestibular therapy (Ex. 6).

14. At her February 23, 2021 appointment with Claimant, Dr. Wicklund noted that Claimant had consistently reported a similar constellation of symptoms over the previous year, including, but not limited to, headaches, balance problems, dizziness, fatigue, sleep dysregulation, ringing in the ears, and vision problems. (Ex. C). Based on her evaluation, Dr. Wicklund recommended that Claimant re-engage in physical therapy and vestibular rehabilitation, an ENT evaluation for tinnitus, and a more extensive neuropsychological testing. (Ex. C). Dr. Wicklund reiterated these recommendations on August 4, 2021, and noted that physical therapy had helped decrease Claimant's falls. (Ex. C).

15. Claimant was also evaluated by Inhyup Kim, M.D., a neurologist at Banner Health Neurology Clinic. Claimant was initially seen by Dr. Kim's nurse practitioner, Reena Dhakal, NP, on May 2, 2019, and diagnosed with concussion syndrome. (Ex. 7). He returned to Dr. Kim on October 24, 2019, and again diagnosed with concussion syndrome. (Ex. 7).

16. On February 16, 2021, Claimant saw Dr. Kim for a neurologic evaluation on referral from Dr. Ogden. In discussing Claimant's reports of frequent falls, Dr. Kim indicated Claimant had "VERY limited ROMs in left arm and both legs, due to shoulder, hip and knee pain. I suspect his joint pain and limited ROM are cause [sic] of his balance problem. - No clear-cut evidence of neurologic disorder responsible for his poor balance." (Ex. 7).

17. In 2021, Claimant was referred to Mark Loury, M.D., for an ENT evaluation. Claimant first saw Dr. Loury on April 28, 2021, and was diagnosed with bilateral tinnitus and inner ear vestibular equilibrium issues. (Ex. 12).

18. On June 24, 2021, Claimant had a consult with Natalie Phillips, Au.D., for vestibular function testing. Dr. Phillips noted that the testing indicated potential central vestibular pathology, however, due to "excessive blinking, poor neck and body mobility, the patient's disposition, and functional results on audiologic tests results may be

inaccurate." Dr. Phillips referred Claimant back to Dr. Loury for further evaluation. (Ex. 12).

19. On July 1, 2021, Dr. Loury indicated that, based on Dr. Phillip's testing, he likely had difficulty with ocular motor function. Dr. Loury recommended both vestibular and ocular rehabilitation. (Ex. F).

20. On November 28, 2021, Claimant saw Lori Perrin, Ph.D., for a psychological evaluation. As relevant to the present Issues, Dr. Perrin indicated that Claimant exhibits symptoms of a traumatic brain injury, including cognitive Issues, vision Issues, ringing In the ears and headaches. (Ex. 23).

21. In his February 16, 2022 report, Dr. Loury recommended continuation of vestibular therapy and tinnitus treatment. Dr. Loury also opined that there may be a cervical component to Claimant's tinnitus and imbalance. (Ex. 12).

22. In his February 21, 2022 letter, Dr. Loury indicated that Claimant demonstrates weakness in the left ear and abnormalities in how his eyes track, which affect balance. He also opined that likely had a labyrinthine concussion which resulted in damage to both hearing and balance functions. (Ex. 28).

23. Dr. Raschbacher opined that Claimant did not sustain any closed head injury, and that even if he did sustain a head injury "it would have been by definition a mild traumatic brain injury, and much more likely than not that symptoms would have cleared long ago and he would have no residual." Dr. Raschbacher also opined that "the medical record clearly indicates [Claimant] did not have a head injury." The ALJ finds Dr. Raschbacher's opinion that Claimant did not sustain a head injury unpersuasive, given ALJ Felter's previous finding that Claimant did sustain a compensable head injury and Dr. Loury's credible opinion regarding the cause of Claimant's vestibular and balance issues. (Ex. T).

24. The ALJ finds that Claimant sustained injuries to his head which have resulted in vestibular and balance issue which require additional treatment.

Right Knee

25. Claimant did not sustain trauma to his right knee in the February 7, 2019 horse accident. Claimant testified that as a result of his work injury, and that he has sustained multiple falls onto his right knee, resulting in injury. Claimant reported numerous falls to his health care providers between July 29, 2019 and September 2021. Claimant testified that his first fall occurred within two months after his injury. He testified that he could not really explain what precipitated falls, and that he cannot anticipate when a fall will occur. Claimant testified that he falls 1-5 times per week and that it has gotten worse over time. Claimant testified that before his work injury, and the subsequent falls, he had no problems with his right knee and had not had any prior injuries to his right knee.

26. On July 29, 2019, Claimant saw Logan Jones, D.O. at Workwell, and reported that he had recently fallen down steps at his home and impacted his right knee, resulting in

swelling which had improved, although Claimant reported popping and grinding of the knee. (Ex. 6).

27. On November 15, 2019, Claimant saw Dr. Snyder for evaluation of his shoulder following shoulder surgery. Claimant noted that he was experiencing problems with his right knee, which claimant contributed to "compensatory pain." Claimant was using a cane for ambulation. Dr. Snyder did not offer any opinion regarding Claimant's knee pain at that time. (Ex. 14).

28. On December 3, 2019, Claimant saw Lloyd Luke, M.D., at Workwell. Claimant marked his right knee on his pain diagram and reported right leg pain. Dr. Luke's diagnoses did not include any diagnosis of the knee, and no examination of the knee was documented. (Ex. 6).

29. On March 5, 2020, Claimant saw Dr. Snyder for evaluation of his shoulder. Claimant reported having "multiple falls" recently, twice directly on his elbow, and reported "blacking out" 3 to 5 times per week. Claimant reported knee pain and was wearing a knee brace on his right knee and requested evaluation of his right knee as part of his workers' compensation claim. Dr. Snyder indicated he believed Claimant's claim only involved the left shoulder, and did not perform an evaluation of Claimant's right knee. (Ex. 14).

30. On April 29, 2020, Claimant was apparently evaluated for right knee pain at Sidney Regional Medical Center in Sidney, Nebraska, after falling on his knee. X-rays performed showed a large right knee joint effusion and chronic degenerative changes with medial compartment narrowing. The only record of this visit offered into evidence is the x-ray report from April 29, 2020. (Ex. 11).

31. On June 11, 2020, Claimant saw Dr. Watson. Dr. Watson noted that Claimant reported popping in his right knee, examined Claimant's right knee and noted some popping in the medial knee and a positive McMurray test. Dr. Watson ordered an MRI of Claimant's right knee, which he later indicated was denied by insurer. Dr. Watson offered no opinion on the cause of Claimant's knee symptoms. (Ex. 6).

32. On November 5, 2020, Claimant saw Dr. Ogden and reported that he continued to have dizziness and had a fall two days earlier and "a number of recurrent falls." Dr. Ogden did not document any specific injuries resulting from Claimant's reported falls. On physical examination, Dr. Ogden noted Claimant was intermittently unsteady on his feet using a walking stick, but sometimes experienced disequilibrium. Dr. Ogden noted that he did not witness any episodes of loss of consciousness. Dr. Ogden noted a bruise on Claimant's left elbow from a recent fall. No injuries to Claimant's knee were documented. (Ex. 6).

33. On November 19, 2020, Dr. Ogden noted that Claimant's reported falls were a safety issues, and that "his falls always seem to be when he is walking, but has never had an episode when sitting." (Ex. 6).

34. On January 18, 2021, Dr. Ogden noted that Claimant reported being unsteady on his feet and a history of falls with "multiple injuries – struck elbow, head, laceration." Dr.

Ogden also documented swelling and pain in Claimant's right knee. He indicated Claimant's left knee was starting to be painful, "because of compensating for right knee injury from earlier falls from dizziness from head injury Feb 2019." He referred Claimant for bilateral knee x-rays. He opined that it was critical for Claimant to be evaluated to address falls and balance issues. (Ex. 6)

35. On February 1, 2021, Dr. Ogden noted that Claimant reported falling on his right knee that Saturday with swelling. (Ex. 6).

36. On February 18, 2021, Claimant underwent a WCRP Rule 16 IME with Kathy McCranie, M.D., following which she recommended that Insurer deny request for bilateral knee x-rays. In her report, Dr. McCranie did not directly address whether Claimant's knee injuries or falls were causally related to his February 7, 2019 injuries. Instead, Dr. McCranie indicated that ALJ Felter's Order did not authorize treatment of Claimant's knees, and indicated that "[a]n objective basis for his falling has not been determined." Consequently, Dr. McCranie's opinion on this issue is not persuasive. (Ex. S).

37. On March 25, 2021, Claimant saw Dr. Ogden and "requested coverage for … the right knee." Dr. Ogden indicated he would wait on evaluation of Claimant's orthopedic complaints pending a rheumatology evaluation. (Ex. 6). On April 15, 2021, Dr. Ogden reported Claimant had seen a rheumatologist who "did not feel multiple pain in the joints was related to an autoimmune condition." Dr. Ogden noted that Claimant was falling less, indicating that this due to physical therapy. (Ex. 6).

38. On June 21, 2021, Dr. Ogden recommended that Claimant undergo a physiatry consult with Scott Primack, D.O., given Claimant's limited progress. Dr. Ogden also noted that Claimant did have improvements with "falling." (Ex. B)

39. On July 16, 2021, Claimant saw Dr. Primack. Dr. Primack noted that when Claimant used a cane in his left hand, he had a steady gait pattern and unsteady when using his right. Dr. Primack noted that Claimant's knees were both painful to movement, and McMurray testing was positive on the right and negative on the left. He further indicated that he did not believe a spine surgical consultation would be appropriate. (Ex. 19).

40. On August 30, 2021, Claimant reported to Dr. Ogden that he had recently fallen on his right knee descending stairs outside his home using the handrail and a walking stick. Claimant did not know why he fell. Dr. Ogden referred Claimant for a home evaluation for fall prevention. Dr. Ogden noted he discussed Claimant' falls and knee pain indicating "there are no clear reasons for repeated falls, and don't seem to be preceded by a syncopal event, vertigo event or something else to further evaluation." (Ex. 6).

41. On September 2, 2021, Claimant was seen at the Torrington Community Hospital in Wyoming, reporting chronic knee pain. Claimant's knee was swollen and had difficulty walking. Claimant reported he had been experiencing knee pain since the horse accident, but did not report any specific recent trauma to his knee. A right knee x-ray showed a large suprapatellar effusion, which "may be infectious, inflammatory or posttraumatic.

Given the history, occult bony pathology not excluded" The x-ray also showed patellar chondromalacia and chondrocalcinosis. Claimant was provided a knee brace and pain medication, and advised to follow up with his primary provider. (Ex. 11).

42. On September 7, 2021, Claimant was seen by Natalie Beck, FNP, at Torrington Family Medicine regarding his right knee. Claimant reported his right knee was injured due to falls related to dizziness after the horse accident. Ms. Beck referred Claimant for an orthopedic evaluation. (Ex. J).

43. On September 9, 2021, Claimant saw orthopedist Eleanor Von Stade, M.D., in Torrington, Wyoming. Claimant reported his knee had become progressively worse since the horse accident. On examination, Dr. Von Stade noted a large effusion in the right knee, tenderness, and limited range of motion. Dr. Von Stade recommended an MRI of the knee to evaluate Claimant for a potential meniscal tear or ACL injury. (Ex. 10).

44. On September 10, 2021, Claimant underwent a right knee MRI which showed large knee joint effusion, and "subtle fraying and irregularity of the free edge of the medial meniscus." (Ex. H).

45. On September 27, 2021, Dr. Ogden requested authorization for a referral to Dr. Von Stade for evaluation of Claimant's right knee. (Ex. 6). Respondents denied authorization based on Dr. Raschbacher's IME report. (Ex. Y).

46. On September 28, 2021, Claimant saw Dr. Von Stade. Claimant reported he had had several falls on his right knee since the horse accident, and was still having pain in his right knee. Dr. Von Stade recommended an arthroscopy with partial medial meniscectomy. (Ex. 10). Ultimately, Claimant underwent a right knee surgery on January 12, 2022. The operative report from the January 12, 2022 surgery was not offered or admitted into evidence.

47. 24. Dr. Von Stade's report of February 10, 2022 indicates Claimant underwent a right knee arthroscopy with subtotal medial meniscectomy, and Claimant was noted to have some instability of his lateral meniscal root, which was repaired with a stitch. (Ex. 10).

48. Claimant testified that his right knee is approximately 70% improved following his surgery, although he has had one instance of Dr. Von Stade draining fluid from his knee.

49. In his November 4, 2021 report, Dr. Raschbacher opined that treatment of Claimant's right knee was not related to his February 7, 2019 work injury and the condition of Claimant's knee was not related to any falls Claimant may have had. He opined that imaging studies of Claimant's right knee were 'benign" and did not show evidence of bone contusion, fracture, acute trauma, or other pathology within the joint. (Ex. T).

Right Hip and Lower Back Referrals

50. As found by ALJ Felter, Claimant sustained compensable injuries to his hips and back as a result of the February 7, 2019 work incident. (Ex. 1). As previously noted, Dr.

Ogden referred Claimant to Dr. White for evaluation of his hips, and to Dr. Castro for a lower back evaluation on September 27, 2020. (Ex. 6).

51. Prior to making these referrals, on July 19, 2021, Dr. Ogden noted he discussed with Claimant his "hips in detail and I explained that from my standpoint any hip procedure is unlikely to result in the changes [Claimant] is hoping for." (Ex. B). After that evaluation, Claimant underwent hip and pelvic MRI arthrograms on September 9, 2021, which showed "slight fraying and irregularity of the anterior superior hip labrum on the left." (Ex. H).

52. In his February 28, 2022 note, Dr. Ogden noted that additional care for Claimant's hip and lower back was "unlikely to be indicated per IME, no further treatment planned." (Ex. 6). The ALJ infers the IME referenced is Dr. Raschbacher's opinion. Other than making the referral to Dr. White, Dr. Ogden did not provide an explanation. (Ex. 6)

53. In his report, Dr. Raschbacher opined that referral to Dr. White for a hip evaluation was not reasonable, necessary, or related to his injury. He noted that Claimant had "fairly benign" MR arthrograms of the hips which showed no labral abnormality, and normal hip x-rays. He concluded that Claimant "does not appear to have any likely surgical condition at all at his hips. Referral on that basis alone should not be authorized." Dr. Raschbacher also opined that imaging studies showed no acute findings at the spine, but showed pre-existing non-work-related degenerative changes. Dr. Raschbacher further opined that Claimant "does not likely have any surgical disease, and my medical opinion is that even if he had surgical intervention he would not likely report significant benefit…" (Ex. T). The ALJ finds Dr. Raschbacher's opinion on this issue credible.

54. In his IME report, Dr. Hughes diagnosed Claimant with bilateral hip sprain/strain injuries with persistent hip joint pain. He noted that Claimant had done poorly after surgeries on his left shoulder and right knee, which provided "a relative contraindication to proceeding with additional spine and hip surgeries." (Ex. 1).

55. On November 15, 2021, Dr. Ogden indicated in a WC164 form, that he had reviewed Dr. Raschbacher's IME stating that referrals for orthopedic evaluations for cervical spine, lumbar spine, and hips were not indicated. Dr. Ogden stated: "while it would be nice to have a second opinion, I'm in agreement that further interventions in those areas are unlikely to have a major impact on in [Claimant's] functional status." (Ex. B).

56. Based on the opinions of Drs. Raschbacher, Hughes, and Ogden, referrals for orthopedic evaluations for Claimant's hip and spine are not reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Dental Treatment

57. At hearing, Claimant testified that he began experiencing pain in his teeth four to six months after the February 7, 2019 horse accident. Claimant did not seek dental care until approximately 18 months after February 7, 2019.

58. On August 4, 2020, Claimant saw Trevor Skinner, DDS at Granite Springs Dentistry. Claimant reported that his last dental visit was 32 years earlier, and indicated that he wanted to get all of his teeth removed to get upper and lower dentures. Dr. Skinner noted that Claimant was not a candidate for dental implants due to periodontal and hygiene issues. He diagnosed Claimant with generalized mild to moderate chronic periodontitis, (> 30% of tooth surfaces), and started the process of preparing Claimant for dentures. (Ex. 22).

59. On September 3, 2020, Dr. Skinner extracted 14 teeth, and noted that Claimant had very dense bone along with very brittle teeth that tend to break. Dr. Skinner extracted the remainder of Claimant's teeth on September 17, 2020, and Claimant was ultimately provided dentures. (Ex. 22).

60. On October 27, 2020, Dr. Skinner authored a letter indicating that when Claimant presented to the dental clinic, many of his teeth were broken, worn down and/or infected with areas of intraoral bone loss. Dr. Skinner noted that Claimant "also informed us that he was involved in a traumatic horse accident within the last couple of years. I cannot guarantee with 100% certainty that the accident was the sole cause of his dental problems, but it likely contributed to it." (Ex. 22). Dr. Skinner's opinion is not credible or persuasive. The records do not demonstrate that Claimant sustained any direct trauma to his face, jaw or teeth, or any other injury that would have resulted in the need for dental treatment. Dr. Skinner offers no rationale for how Claimant's accident caused his teeth to break, wear down or become infected, or how his accident contributed to intraoral bone loss.

61. On March 25, 2021, Dr. Ogden opined that "loss of teeth would be an unusual event related to this injury." (Ex. 6).

62. On June 3, 2021, Claimant saw Blake Ballenger, D.D.S., for an evaluation and to request that Dr. Ballenger write a letter on his behalf. Dr. Ballenger noted that Claimant attributed his dental issues to the February 2019 horse incident. Dr. Ballenger reviewed Claimant's dental records, and stated: "Clinically I cannot comment on the trauma from 2019 causing any maxillofacial damage as I do not have his immediate pre or post x-rays or clinical exams. (Ex. 20).

63. Claimant's need for dental care is unrelated to his February 7, 2019 work injury.

Home Modifications and Home Health Care

64. On August 30, 2021, Dr. Ogden referred Claimant for a home evaluation for fall prevention. (Ex. 6). On or about September 22, 2021, Marnie Herring, DPT performed a safety assessment of Claimant's home. (Ex. 9, p. 463). Ms. Herring is a physical therapist at North Platte Physical Therapy in Torrington, Wyoming, where Claimant received physical therapy and vestibular rehabilitation, and testified at hearing. Ms. Herring testified that she has experience performing home safety evaluations. Based on her inspection of Claimant's home and interview with Claimant, Ms. Herring opined that Claimant's home does require some modifications due to vestibular and balance defects.

Ms. Herring's recommendations are set forth in her report dated September 22, 2021. In that report, Ms. Herring recommended the following modifications to assist in preventing falls:

a. An ADA ramp with railings to enter his front door;

b. Grab bars in shower;

c. . Elevated toilet set with railings on either side;

d. Grab bar on wall across from toilet to assist with transfers and balance;

e. Grab bars strategically placed on 3 sides of garden tub to allow him to get in and out safely;

f. Tub bench to assist with transfers into tup;

g. Option to elevate or place a step in the garden tub to allow him to get out in a graduated fashion.

(Ex. 9, p. 463).

65. Ms. Herring testified that assessment was limited to safety within the home, and she had no opinion regarding the Claimant's need for home health care.

66. On February 7 and 18, 2022, Angie O'Connor, R.N., performed an assessment of Claimant's home and his activities of daily living. (Ex. 4). Ms. O'Connor interviewed Claimant and evaluated his home and completed a report related to her assessment on February 21, 2022. In her report, Ms. O'Connor opined that Claimant required home modifications recommended by Ms. Herring. In addition, Ms. O'Connor recommended Claimant receive home care to include nursing for medication compliance, routine clinical assessment, and caregiver services for activities of daily living, including personal hygiene, bathing, dressing, house cleaning, laundry and assistance with finances and support for outside chores for his dogs, horses, and yard work. (Ex. 4).

67. At hearing, Claimant testified that he would like assistance around his home with activities of daily living. Claimant testified that he has difficulty retrieving cans from his cupboard. Claimant testified that he is able to drive to the grocery store, cook for himself, although these activities are somewhat limited. Claimant testified that he uses crutches when walking. Claimant also testified that he receives help from friends with his horses, and around the house. Ms. Stevens-Smith testified that she assists Claimant with chores around his home, including laundry, housekeeping, cooking, and caring for Claimant's dogs and horses, approximately once every two weeks.

68. On March 8, 2022, Dr. Von Stade completed a form entitled "Physician Progress – Need for Home Care," indicating that Claimant required nursing assistance for "medication help, aid with ADLs," and indicated that the need for such treatment was due to right knee meniscal tear, right knee post-traumatic arthritis, and bilateral hip injuries."

She indicated that Claimant was "unable to walk without crutches and has frequent falls due to his multiple orthopedic injuries." No credible evidence was admitted explaining the meaning of "medication help" or the specific activities of daily living for which Dr. Von Stade is recommending nursing assistance related to his meniscal tear, hip injuries, or post-traumatic arthritis.

69. In his IME, Dr. Hughes opined that the home modifications recommendation from Ms. O'Connor were reasonably necessary. In testimony, Dr. Hughes indicated that "further evaluation was needed to assess [Claimant's] ability to meet the activities of daily living. Much of the home assessment of Angie O'Connor dealt with incapacities in [Claimant's] self-sufficiencies and the activities of daily living, and I felt that a neuropsychological evaluation needed to be done to assess the severity of a mild traumatic brain injury." He further indicated that such an evaluation would "show us the degree of impairment stemming from a traumatic brain injury versus stemming from a lack of motivation." (Hughes, Depo, p. 9-10).

CONCLUSIONS OF LAW

Generally

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

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

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

COMPENSABILITY – Right Knee

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 Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that he sustained injuries to his right knee arising out of the course of his employment with Employer. As found, Claimant had no balance issues prior to his February 7, 2019 work accident. Claimant's health care providers documented numerous contemporaneous reports of falls. Taken in its totality, the evidence demonstrates that more likely than not, Claimant sustained injuries to his hip and head which caused issues with mobility, balance, and stability. These injuries resulted in Claimant falling frequently, including at least four separate instances of Claimant falling on and injuring his right knee. Multiple providers found objective evidence of injury in the form of large effusions in his knee, positive McMurray tests, and evidence of grinding and popping in the knee. Claimant credibly testified that he had no knee issues prior to his work injury. ALJ Felter's found Claimant sustained compensable injuries to his head and hip. These injuries resulted in Claimant's mobility and balance issues, which caused his falls. The ALJ concludes that Claimant has

proven that it is more likely than not that he sustained injuries to his right knee as a result of his February 7, 2019 work accident.

SPECIFIC MEDICAL BENEFITS AT ISSUE

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

Authorization of Treatment for Claimant's Right Knee

Claimant has established by a preponderance of the evidence that treatment of his right knee is reasonably necessary to cure or relieve the effects of his industrial injury. But for Claimant's industrial injury, he would not have sustained falls resulting in trauma to his right knee, which lead to the need for treatment. Dr. Raschbacher's opinion that Claimant's right knee MRI was benign is not persuasive, given Dr. Von Stade's performance of a right knee meniscectomy and partial meniscal repair. Claimant has established that treatment by Dr. Von Stade was reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Orthopedic Evaluation of Claimant's Hips

Claimant has failed to establish by a preponderance of the evidence that referral to Dr. White for an evaluation of his hips is reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, although Dr. Ogden originally referred Claimant to Dr. White for evaluation, he later opined that a referral was not likely to improve Claimant's functional status. His opinion is consistent with both Dr. Hughes and Dr. Raschbacher. No credible evidence was offered to indicate that the slight labral fraying shown on Claimant's September 9, 2021 MRI was causally related to his February 7, 2019 injury, or that referral for a hip evaluation is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Orthopedic Evaluation Of Claimant's Lower Back

Claimant has failed to establish by a preponderance of the evidence that referral to Dr. Castro for evaluation of Claimant's back. As with his referral to Dr. White, after making the initial referral, and reviewing Dr. Raschbacher's IME report, Dr. Ogden indicated that he did not believe referral for an orthopedic evaluation of Claimant's lower back would likely improve Claimant's function. No credible evidence was admitted indicating that Claimant has a surgical condition of the lumbar spine which would reasonably be addressed by an orthopedic surgeon. Again, Dr. Ogden's opinion is consistent with Dr. Hughes, Dr. Raschbacher and Dr. Primack. No credible evidence was admitted demonstrating that referral for an orthopedic evaluation of Claimant' lumbar spine is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Treatment for Dental Issues

Claimant has failed to establish by a preponderance of the evidence that his dental issues are arise out of the course of his employment with Employer. Claimant did not complain of dental issues to his workers' compensation providers until after his teeth were removed in September 2020, and he reported no dental issues to his providers in the nineteen months after the work accident. When Claimant was first examined for dental issues, Dr. Skinner noted significant issues with Claimant's teeth, including periodontitis, worn down teeth, broken teeth, infection, and intraoral bone loss. No credible evidence was offered demonstrating Claimant sustained any trauma to his teeth or other injuries that would cause periodontitis, worn down or broken teeth, infections, or intraoral bone loss. Dr. Ogden acknowledged it would be unusual for Claimant's dental symptoms to be related to his work accident.

Dr. Skinner's opinion that Claimant's injuries "likely contributed" to his dental issues is neither credible nor persuasive. Dr. Skinner's opinion appears to be based solely on Claimant's statement that he had a "traumatic horse accident," but offers no substantive explanation for his causation opinion. No medical or dental provider has credibly opined how these conditions are related to Claimant's work injuries. Claimant has failed to establish by a preponderance of the evidence that dental treatment is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Treatment for Vestibular and Balance Issues

Claimant has established that treatment for vestibular and balance issues is reasonably necessary to cure or relieve the effects of his industrial injury. As found, Claimant has sustained numerous falls over a prolonged period of time. Claimant and Ms. Stevens-Smith credibly testified that Claimant had no prior issues with falls or balance. Given that Claimant's employment required him to ride horses on a daily basis, the ALJ finds credible that Claimant had no prior balance or fall issues. ALJ Felter previously found that Claimant sustained a head injury, and that Respondents are liable for treatment for that injury. The ALJ credits the opinion of Drs. Loury Claimant requires further treatment for vestibular issues to address ocular and vestibular issues. Claimant has established by

a preponderance of the evidence that treatment for vestibular and balance issues is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

Authorization of Home Modifications and Home Health Care

Claimant has established by a preponderance of the evidence that home modifications to address falling issues are reasonably necessary to cure or relieve the effects of his industrial injury. The ALJ finds credible the testimony of Marnie Herring, DPT, that Claimant requires limited modifications of his home to assist with mobility and to prevent falls. As found, Claimant has sustained multiple falls and has balance and mobility issues which prevent fall risks.

Claimant has failed to establish by a preponderance of the evidence that home nursing care recommended by Dr. Von Stade is reasonably necessary to cure or relieve the effects of his industrial injury. No credible evidence was admitted indicating that Claimant requires in-home health care or "medication help." With respect to activities of daily living, no treating provider other than Dr. Von Stade has recommended nursing care for assistance with activities of daily living. No persuasive, credible evidence was offered to establish that Claimant requires in-home nursing care to assist him with cleaning his home, bathing, personal hygiene, tending to animals or other activities.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right knee as the result of his February 7, 2019 industrial injury.

2. Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's right knee caused Claimant's February 7, 2019 industrial injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

3. Claimant's request for authorization of a referral to a hip specialist is denied and dismissed.

4. Claimant's request for authorization of a referral to a spine specialist is denied and dismissed.

5. Claimant's dental issues are not related to his February 7, 2019 industrial injury. Claimant's request for authorization of dental treatment is denied and dismissed.

6. Respondents shall pay the costs of all authorized and reasonably necessary medical care and treatment for the Claimant's vestibular and balance issues right knee caused

by Claimant's February 7, 2019 industrial injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

7. Claimant's request for authorization of home health care is denied and dismissed.

8. Respondents shall pay the cost of home modifications recommended by Marnie Herring, DPT, as set forth in her report of September 22, 2021, subject to the Division of Workers' Compensation Medical Fee Schedule, were applicable.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on 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: May 6, 2022

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

ISSUES

Whether the claimant had demonstrated, by a preponderance of the evidence, that the cervical fusion surgery recommended by Dr. Wade Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 2, 2019 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury to his left shoulder and neck on October 2, 2019. The injury occurred when the claimant's work truck fell off a jack and struck the claimant while he was attempting to change a tire.

2. Since the injury the claimant has undergone physical therapy and two surgeries. On August 4, 2020, Dr. Ferdinand Liotta performed surgery on the claimant's left shoulder. The arthroscopic surgery included anterior capsular release, debridement of labral fraying, biceps tenodesis, subacromial decompression, distal clavicle excision, and suprascapular nerve decompression at that suprascapular notch.

3. Following the shoulder surgery, the claimant continued to experience neck related symptoms and was subsequently seen by Dr. Wade Ceola. On October 2, 2020, Dr. Ceola noted that a magnetic resonance image (MRI) of the claimant's cervical spine showed neuroforaminal narrowing that was consistent with C6 radiculopathy.

4. On January 20, 2021, Dr. Ceola performed an anterior cervical discectomy and fusion at C5-C6.

5. On February 10, 2021, the claimant was seen in Dr. Ceola's practice by Natalie Arena, PA-C. At that time, the claimant reported some neck pain. On exam, PA Arena noted that the claimant had full strength in his bilateral arms. On that same date, x-rays of the claimant's cervical spine showed "excellent position of placement of hardware with no evidence of complicating features."

6. On April 15, 2021, the claimant returned to PA Arena and reported incisional pain with intense pain in his right shoulder radiating to his neck. PA Arena noted that "muscle spasm is largely responsible for his continued pain and difficulty with range of motion." She recommended massage therapy and physical therapy.

7. On May 27, 2021, the claimant was seen in Dr. Ceola's office by Lara Kroepsch, PA-C. At that time, the claimant reported excruciating pain in his left shoulder, with occasional radiation into his left elbow. The claimant also reported a left shoulder injection that dramatically worsened his symptoms. PA Kroepsch opined that

the claimant's issues were due to tightness that was "secondary to his chronic pain which really seems to coming from the shoulder at this time."

8. On July 8, 2021, the claimant was seen by Dawn Kopf, PA-C in Dr. Ceola's practice. The claimant reported that he had ongoing neck and left shoulder pain that had worsened over the last several months. PA Kopf reviewed the prior x-rays and noted that the surgical hardware had good alignment and good body arthrodesis. PA Kopf ordered a cervical spine MRI for further evaluation of adjacent segment disease and possible radiculopathy.

9. On July 12, 2021, an MRI of the claimant's cervical spine showed neuroforaminal stenosis at multiple levels. There was no noted central canal stenosis at any level. There was no noted issue with the surgical hardware.

10. On July 15, 2021, the claimant returned to PA Kopf. On that date, PA Kopf noted that "there is no spinal canal stenosis or evidence of acute injury." PA Kopf opined that the claimant's symptoms could be caused by neuroforaminal narrowing at the C4-C5 level. As a result, she recommended a left-sided epidural steroid injection at that level.

11. On August 18, 2021, the claimant was again seen by PA Kopf. The claimant reported that he had undergone a left sided C7-T1 epidural steroid injection with Dr. Giora Hahn. The claimant also reported that the injection did not improve his symptoms. The claimant further reported that physical therapy had been beneficial in improving his arm strength.

12. On September 16, 2021, the claimant was seen by Dr. Ceola. In the medical record of that date, the claimant reported that the recent injection made his symptoms worse. Dr. Ceola also noted that the claimant continued to experience bilateral occipital pain that radiated into his shoulders. Dr. Ceola opined that this could be indicative of facet disease. At that time, Dr. Ceola explained that possible treatment would include facet blocks and radiofrequency ablation. Alternatively, he could perform additional spinal surgery. This surgery would include: bilateral foraminotomy from C3 to C6, left C6-C7-T1 with instrumented fusion, and removal of spinous process and leave lamina. The claimant informed Dr. Ceola that he did not want to pursue additional injections. Dr. Ceola requested authorization for the recommended spinal fusion.

13. On December 6, 2021, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant reported that his primary complaint was neck pain that radiated from the base of his neck into his skull. In his IME report, Dr. Rauzzino opined that the additional surgery recommended by Dr. Ceola is not reasonable, necessary, or related to the claimant's work injury. In support of this opinion, Dr. Rauzzino noted that the claimant's current symptoms involve axial neck pain, with no radicular symptoms. It is Dr. Rauzzino's understanding that the claimant's radicular symptoms were resolved following the first spinal fusion. Based upon Dr.

Rauzzino's opinions, the respondents denied authorization for the recommended spinal surgery.

14. Dr. Rauzzino's deposition testimony was consistent with his written report. Dr. Rauzzino testified that the claimant does not have significant radicular symptoms in his upper extremities. In addition, during the IME, Dr. Rauzzino was not able to produce radicular symptoms. Dr. Rauzzino reiterated his opinion that the surgery recommended by Dr. Ceola is not reasonable or necessary to treat the claimant's symptoms. In support of this opinion, Dr. Rauzzino noted that the claimant does not have spinal instability or radiculopathy. He further testified that findings of foraminal stenosis do not justify surgery because those nerves are not producing symptoms that can be relieved by surgery.

15. The claimant testified that his current symptoms include sharp and shooting pain in his neck and up into his skull. At times, this pain will also radiate into his left shoulder and left elbow.

16. The ALJ credits the medical records and the opinions of Dr. Rauzzino over the contrary opinions of Dr. Ceola. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the cervical fusion surgery recommended by Dr. Ceola is reasonable medical treatment necessary to cure and relieve him from the effects of the October 2, 2019 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. 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.

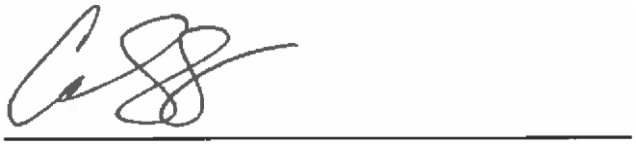
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the cervical fusion surgery recommended by Dr. Ceola constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 2, 2019 work injury. As found, the medical records and the opinions of Dr. Rauzzino are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for cervical fusion surgery (as recommended by Dr. Ceola) is denied and dismissed.

Dated this 11th day of May 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-113-117-001 & 5-113-117-002

ISSUES

1. Whether Respondents have established by clear and convincing evidence that the DIME physician was incorrect when he determined Claimant was not at maximum medical improvement (MMI) on September 9, 2021, and at MMI on February 28, 2022.

2. Whether Respondents have established by clear and convincing evidence that the DIME physician's permanent impairment ratings are incorrect.

3. Whether Claimant has established by a preponderance of the evidence that his right shoulder permanent impairment rating should be converted to a whole person impairment.

PROCEDURAL ISSUES

The parties stipulated to the consolidation of WC 5-113-117-001 & WC 5-113-117-002.

The parties stipulated that the issues of average weekly wage, temporary total disability, and medical benefits, raised in Claimant' Response to Application for Hearing in WC 5-113-117-001, are to be held in abeyance.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on July 14, 2019, arising out of the course of his employment with Employer. The incident occurred when a co-worker operating a boom lift struck a portable metal staircase weighing several hundred pounds, causing it to strike Claimant.

2. Following the injury, Claimant was seen at the UC Health emergency department and discharged. Claimant then initiated treatment with Concentra, which included physical therapy, chiropractic, massage therapy, pain, and anti-inflammatory medications. (Ex. I). Claimant's authorized treating provider (ATP) was Thomas Corson, M.D., at Concentra. Claimant moved between Colorado and Utah at various times, and received treatment and evaluations at Concentra locations in both Colorado and Utah.

3. After several months, Claimant was referred to Craig Davis, M.D., for an orthopedic evaluation on October 8, 2019. On examination, Dr. Davis noted Claimant's right shoulder range of motion was 90% with pain in extremes of motion, good rotator cuff strength, and minimally positive impingement signs. Dr. Davis did not document any specific shoulder test performed, or any specific range of motion measurements. Dr. Davis reviewed x-rays of Claimant's right shoulder and cervical spine, and diagnosed Claimant with myofascial strains of the right neck and shoulder. He stated: "It does not seem to me like he has a

significant rotator cuff injury." Dr. Davis recommended continuing physical therapy and chiropractic visits, and medications. (Ex. E).

4. In December 2019, Claimant was seen at Concentra in Sandy, Utah by Mark Aldrich, FNP, for neck and shoulder pain. Aldrich ordered cervical and shoulder MRIs which were performed on December 27, 2019 and January 9, 2020, respectively. Claimant's right shoulder MRI demonstrated a Type 2 superior labral anterior-to-posterior (SLAP) tear, anterior labral tear, and mild AC degenerative joint disease. It was noted that the findings raised suspicion for impingement syndrome. (Ex. I).

5. Claimant did not see an orthopedic surgeon after his shoulder MRI was performed. However, Claimant continued to receive treatment through Concentra in Colorado and Utah, including physiatry evaluations with Dallin DeMordaunt, M.D., in Salt Lake City. In March 2020, Dr. DeMordaunt indicated several recommended treatment or diagnostic modalities had been denied by insurer. Dr. DeMordaunt indicated Claimant had a potentially severe shoulder injury that was not being treated and may require an orthopedic surgery consult. (Ex. I).

6. On April 22, 2020, Stephen Lindenbaum, M.D., performed an independent medical examination.[1] Dr. Lindenbaum recommended a shoulder MRI and indicated it had been previously denied. Dr. Lindenbaum also indicated Claimant should be seen by an upper extremity specialist. (Ex. I).

7. Over the next several months, Claimant continued to treat with Dr. DeMordaunt, and physical therapy. (Ex. I).

8. On October 23, 2020, Claimant saw Dr. Lindenbaum for a second IME. Dr. Lindenbaum noted that Claimant had a significant delay in treatment, possibly due to Covid. Dr. Lindenbaum also indicated Claimant had a one-time visit with Dr. Davis, and recommended a follow-up visit with Dr. Davis with the MRI being made available. He indicated Claimant could return to work with restrictions until cleared by Dr. Davis. Dr. Lindenbaum opined that Claimant would not be at MMI until he had seen an orthopedic surgeon and completed all treatment. (Ex. I).

9. Claimant continued see his ATP, Dr. Corson, and Dr. DeMordaunt over the next several months. (Ex. I). No credible evidence was admitted demonstrating that Claimant was referred back to Dr. Davis or another orthopedic surgeon as recommended by Dr. Lindenbaum.

10. In November 2020, Claimant participated in a functional capacity evaluation (FCE) at Functional Assessment Rehab in Salt Lake City. Claimant had limited range of motion of the shoulder and neck, and was able to lift and reach overhead, but not able to do so repetitively. With repetitive overhead reaching, Claimant guarded his right arm and showed indications of declining endurance. The FCE also noted that Claimant did not

[1] The record does not contain either of Dr. Lindenbaum's reports, but DIME physician summarized Dr. Lindenbaum's opinions in his September 9, 2021 report.

demonstrate inconsistencies in his effort and gave good effort performing the assessment tasks. (Ex. G).

11. On January 15, 2021, Claimant saw John Sacha, M.D., at Concentra. Dr. Sacha noted that Claimant had completed care and had moved out of state and returned. He indicated that MMI was appropriate, but no date was provided. He deferred to Dr. Corson for assignment of the MMI date. Dr. Sacha recommended work restrictions, and maintenance care, including trigger point injections and a possible and a repeat shoulder injection. He assigned a 5% upper extremity impairment rating, and an 8% cervical spine impairment rating. The impairment ratings assigned by Dr. Sacha correspond to a combined 11% whole person impairment. (Ex. H).

12. On January 25, 2021, Dr. Corson placed Claimant at MMI, and assigned Claimant the permanent impairment ratings determined by Dr. Sacha. Dr. Corson's work-related diagnosis was acute cervical myofascial strain, cervical radiculopathy, partial tear of right rotator cuff, thoracic sprain, right rotator cuff strain, and Type 2 superior labral anterior-to-posterior (SLAP) tear of the shoulder. Dr. Corson recommended permanent work restrictions consisting of a 35-pound lifting restriction and no overhead work with the right arm. He further noted that Claimant would require maintenance care in the form of maintenance medication, trigger point injections, and possible repeat shoulder injections. He further indicated that Claimant should be allowed follow with his ATP and receive medications for the following 6-12 months. (Ex. A).

13. After January 25, 2021, Claimant continued to receive care, including six follow up visits with Dr. Sacha, one visit with Dr. Corson, and physical therapy. (Ex. I). Claimant continued with physical therapy until August 2021.

14. On April 28, 2021, Respondents filed a Final Admission of Liability, admitting for reasonably and necessary treatment recommended by an authorized treating physician, and for an 11% whole person impairment, which corresponded to Dr. Sacha' s combined whole person impairment for Claimant's shoulder and neck. (Ex. A).

15. On May 26, 2021, Claimant filed an objection to the FAL, and requested a Division Independent Medical Examination (DIME). (Ex. B).

16. On August 3, 2021, Claimant underwent an FCE with Colorado in Motion. (No record of the FCE was offered or admitted into evidence). Claimant was assessed as not being able to do above the shoulder reaching or lifting with the right hand, or extend reaching away from the body with the right hand. (Ex. I).

17. On September 9, 2021, Anjum Sharma, M.D., performed a DIME of Claimant. Dr. Sharma indicated that Claimant sustained work-related injuries to his cervical spine and right shoulder. His examination demonstrated "very clearly a significant impairment in the right shoulder range of motion," and he opined that Claimant put forth his best efforts on range of motion testing. Dr. Sharma noted tenderness to palpation along the acromion at the glenohumeral and subacromial joints, and a positive Hawkins-Kennedy test. Claimant

had shoulder weakness in multiple planes. Dr. Sharma indicated that Claimant still had a significant amount of pain and pathology in the right shoulder. (Ex. I).

18. Dr. Sharma opined that Claimant was not at MMI on September 9, 2021, and provided non-binding, provisional impairment ratings for Claimant's cervical spine and right shoulder. Dr. Sharma assigned a 16% scheduled right upper extremity impairment rating for Claimant's right shoulder (which corresponds to a 10% whole person impairment); and 12% whole person impairment for Claimant's cervical spine. If combined as a whole person impairment, Dr. Sharma's provision impairment ratings correspond to a 21% whole person impairment. (Ex. I).

19. In discussing his MMI rationale, Dr. Sharma indicated Claimant had been seen for independent medical examinations by Dr. Lindenbaum twice (on April 22, 2020 and October 23, 2020), in which Dr. Lindenbaum had indicated Claimant would benefit from an orthopedic surgery evaluation. He further opined that even if Claimant has chronic degenerative changes to the shoulder, "there is no doubt that [Claimant] has had an exacerbation, acceleration and aggravation of the underlying condition." Dr. Sharma indicated that based on his review of Claimant's medical records, Claimant had not been seen by an orthopedic surgeon and or been informed whether he would benefit from surgery, and that Claimant's right shoulder had not been addressed. (Ex. I).

20. On December 14, 2021, Claimant returned to Dr. Davis. Dr. Davis reviewed Claimant's shoulder January 9, 2020 shoulder MRI, and noted that Claimant has a right shoulder Type 2 SLAP tear with a para-labral cyst. Dr. Davis examined Claimant's right shoulder and noted tenderness in the posterior aspect of the shoulder, forward elevation of 150 degrees, abduction of 140 degrees, external rotation of 70 degrees, and internal rotation to T11 with slight pain on abduction. Claimant had slightly positive Hawkins and cross body impingement tests, and negative Neer and Speed tests. (Ex. J).

21. Dr. Davis indicated "At the moment, his symptoms are minimal, an therefore, I would recommend simple observation." He indicated that if Claimant become symptomatic, a shoulder injection may be considered. He opined that surgical treatment would be a "last resort." Dr. Davis opined that if Claimant's shoulder "becomes refractory to treatment, it might be worth considering arthroscopic labral repair and excision of the cyst. For now, however, he is doing well and therefore no followup scheduled and no treatment indicated." (Ex. J).

22. Other than the evaluation by Dr. Davis, no credible evidence was admitted demonstrating that Claimant received treatment for his right shoulder or cervical spine after September 9, 2021.

23. On February 28, 2022, Claimant returned to Dr. Sharma for a follow-up DIME. Dr. Sharma reviewed Dr. Davis' December 14, 2021 report, and placed Claimant at MMI effective February 28, 2022. Dr. Sharma noted that based on his examination, Claimant had a worsening range of motion of the right shoulder. Based on his evaluation and measurements taken at the February 28, 2022 follow-up DIME, Dr. Sharma assigned Claimant an 18% whole person impairment his cervical spine. He also assigned an 18%

scheduled impairment for Claimant's right upper extremity which corresponds to an 11% whole person impairment. Claimant's cervical and right upper extremity impairments combine to yield a 27% whole person impairment. Dr. Sharma also indicated that he recommended maximum lifting of no more than 50 pounds, and lifting overhead to no more than ten pounds. (Ex. K).

24. Claimant testified at hearing that over time his symptoms have improved and then declined. Claimant has attempted to return to work in various capacities, and testified that he has difficulty completing tasks that required reaching over head with his right arm. Claimant testified that he continues to experience pain and popping in his right shoulder when he lifts his right arm, he cannot throw overhand, has difficulty driving with his right arm raised, and has difficulty sleeping. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming DIME on MMI and Impairment

The Act defines MMI as "a 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. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's

determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

MMI

Respondents contend that Dr. Sharma incorrectly determined Claimant was not at MMI on September 9, 2021, and that, consequently, his determination that Claimant reached MMI on February 28, 2022 was also incorrect. Both contentions are based on the same premise: That Claimant reached MMI on or before September 9, 2021. Respondents urge the adoption of Dr. Corson's MMI date of January 25, 2021 as Claimant's MMI date.

Respondents have failed to establish by clear and convincing evidence that Dr. Sharma's opinion that Claimant was not at MMI on September 9, 2021 was incorrect. At Dr. Sharma's DIME, Claimant reported continued and ongoing pain in his right shoulder that had not been alleviated with conservative treatment. Dr. Sharma determined Claimant should have an orthopedic evaluation for potential shoulder surgery before being placed at MMI. Although Dr. Sharma incorrectly stated that Claimant had not been seen by an orthopedic surgeon, that mistake does not render his opinion incorrect. Dr. Sharma's opinion is consistent with Dr. Lindenbaum's opinion that Claimant should not be placed at MMI until he had an orthopedic evaluation. Claimant's only evaluation by an orthopedic surgeon was in October 2019, approximately two years before Dr. Sharma's IME. Dr. Davis' October 2019 evaluation was done without the benefit of Claimant's right shoulder MRI, and appears, based on the documentation, to be a cursory examination. Dr. Davis reviewed only x-rays, did not document performance of specific testing (such as those documented in his December 14, 2021 evaluation) and opined only that "it doesn't seem to me like he has a significant rotator cuff injury."

Prior to Claimant's January 9, 2020 MRI, Claimant's only shoulder diagnosis was a shoulder sprain. Claimant's MRI revealed a Type 2 SLAP tear, and an anterior labral tear. Given that Claimant had not seen an orthopedic surgeon after shoulder pathology was identified on the MRI, continued to experience symptoms, and had not improved with conservative care, the evidence does not demonstrate that Dr. Sharma's opinion that Claimant had not reached MMI on September 9, 2021 was incorrect.

Respondents have similarly failed to establish by clear and convincing evidence that Dr. Sharma's assignment of February 28, 2022 as Claimant's date of MMI is incorrect. As noted above, Respondents contend the February 28, 2022 MMI date is incorrect because Claimant reached MMI on or before September 9, 2021. As found, Claimant was not at MMI on September 9, 2021. Respondents have failed to establish by evidence that is highly probable and free from serious doubt that Claimant reached MMI prior to February 28, 2022, or that Dr. Sharma's assigned MMI date was incorrect.

IMPAIRMENT

Respondents next contend that the permanent impairment ratings assigned by Dr. Sharma on February 28, 2022 are incorrect, again urging the adoption of Dr. Corson's and Dr. Sacha's impairment ratings from January 2021. Respondents have failed to establish by clear and convincing evidence that Dr. Sharma's assignment of a cervical spine impairment rating of 18% or a right upper extremity rating of 11% are highly probably incorrect. No credible evidence was admitted that Dr. Sharma misapplied the AMA Guidelines for the Evaluation of Permanent Impairment when assessing Claimant's range of motion or assigning an impairment rating, or that the measurements taken were invalid. Dr. Sharma was cognizant of the fact that Claimant's range of motion had decreased since his prior DIME, and, nonetheless, assigned impairment ratings based on range of motion measurements taken in February 2022. Dr. Sacha's assessment of lower impairment ratings in January 2021 does not constitute clear and convincing evidence that Dr. Sharma incorrectly assigned impairment ratings based on his findings on February 28, 2022. Respondents have failed to present evidence that is unmistakable and free from serious and substantial doubt demonstrating it is highly probable the DIME physician's impairment rating is incorrect.

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S.

The schedule includes the loss of the "arm at the shoulder." *See* § 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO June 11, 1998). Because § 8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). For a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas*

v. Excel Corp., W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *In re Claim of Barnes,* 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that his scheduled impairment rating for his right upper extremity rating should be converted to a whole person impairment. As found, Claimant reached MMI for July 14, 2019 right shoulder injury on February 28, 2022. As demonstrated by Dr. Sharma's DIME, Dr. Corson's assignment of work restrictions including no overhead use of the right arm, the functional capacity evaluations, Claimant has a loss of range of motion in his right arm, inability to use his arm overhead, and experiences pain in his right shoulder. Additionally, Claimant testified that he had difficulty working overhead and difficulty lifting his right arm. These limitations are not determinative of the "situs of functional impairment," but are, instead, manifestations of functional impairment. *See Garcia v. Terumo BCT*, W.C. No. 5-094-514-002 (ICAO, July 14, 2021). Claimant's July 14, 2019, injury resulted in damage to the structures of the shoulder, which are not currently surgical. The ALJ concludes that the Claimant's inability to fully use his right arm overhead and loss of range of motion are manifestations of an impairment of Claimant's right shoulder, beyond the arm. Accordingly, Claimant's right upper extremity impairment rating is converted from an 18% right upper extremity impairment to an 11% whole person impairment. Claimant is entitled to a whole person impairment rating combining his cervical and right upper extremities of 27%, as determined by Dr. Sharma.

ORDER

It is therefore ordered that:

1. Claimant was not at MMI on September 9, 2021.

2. Claimant reached MMI on February 28, 2022.

3. Claimant's 18% permanent impairment rating for his right upper extremity related to his July 14, 2019 work injury is converted to an 11% whole person impairment, and combined with his cervical impairment to yield a 27% whole person impairment.

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: May 11, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-139-080-002

ISSUES

The issues set for determination included:

- Did the Court have subject matter jurisdiction to hear Respondents' objection to the findings of the Division Independent Medical Examiner?
- In the alternative, did Respondents' Application for Hearing, dated May 17, 2021, substantially comply with the Workers' Compensation Act to allow the challenge to Dr. Ginsburg's findings?
- Did Claimant prove by a preponderance of the evidence that he should be awarded monetary penalties for Respondents' failure to comply with C.R.S. § 8-42-107.2(4)(c)?

PROCEDURAL HISTORY

A January 5, 2022 deadline for filing post-hearing briefs was agreed upon by counsel for the parties. On or about January 5, 2022, counsel for Respondents filed a Motion for Extension of Time to extend the deadline to January 12, 2022. In the interim, Administrative Law Judge Nemechek was ill during the time this Motion was pending. No response or objection was filed on behalf of Claimant. When ALJ Nemechek returned to the office, the deadline was extended to January 12, 2022 and Respondents' submission, filed on January 12, 2022 was accepted and considered. A Bench Order confirming the action on the Motion for Extension of Time was entered electronically by ALJ Nemechek and no further action was required with regard to the Motion.

The undersigned ALJ issued a Summary Order on March 28, 2022, which was mailed on March 30, 2022. Respondents requested a full Order on April 13, 2022. Respondents submitted an Amended proposed Findings of Fact, Conclusions of Law and Order on April 21, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant is employed by Respondent-Employer as a utility maintenance worker, a position he has held since July 1, 2019.

2. On April 15, 2020[1], Claimant was exposed to Covid-19 while working with a co-employee in a maintenance pit. Claimant notified Employer of the exposure.

[1] The Notice of Injury filled out by Claimant stated that the date of exposure was April 14, 2020. However, the Employer's First Report of Injury listed April 15, 2020 as the DOI. Also, the DIME report stated that Dr. Ginsburg and Claimant agreed that April 15, 2020 was the correct date.

3. Claimant received medical treatment at Advanced Urgent Care from April 23, 2020 through December 7, 2020. On April 23, 2020, Claimant was evaluated by Briana Vieth, PA, at which time he reported fatigue and a sore throat. He confirmed a potential exposure to COVID-19, as he was working in close proximity to a co-worker. PA Vieth stated that Claimant should be tested for COVID-19, due to his clinical presentation.

4. On April 26, 2020, Claimant presented to Yelena Brambila, PA, for a telehealth appointment and reported symptoms of fatigue and a low-grade fever. Claimant was notified that he had positive COVID-19 test results.

5. Claimant's symptoms of low grade fever and fatigue were documented by Morgan Ash, PA at Advanced Urgent Care in the follow-up appointment on April 28, 2020. PA Ash's assessment/plan was: 2019 novel coronavirus; fever; fatigue. Claimant was to continue self-quarantine and take Tylenol as needed. Claimant's symptoms continued, which was documented in the evaluation conducted by PA John Helfen on May 1, 2021. PA Helfen's assessment/plan was: 2019 novel coronavirus; fatigue; loss of taste; loss of smell.

6. On May 7, 2020, Claimant had a follow-up evaluation at Advanced Urgent Care at which time PA Lauren Wenzl noted Claimant's COVID-19 symptoms (cough, fever, shortness of breath) had resolved.

7. An Employee's Notice of Injury (Insurer form) was completed by Claimant on or about May 11, 2020. An Employer's First Report of Injury was completed that same day.

8. Claimant returned to Advanced Urgent Care on May 17, 2020 and the clinic notes stated that his symptoms had resolved and that he had tested negative for COVID-19 on May 13, 2020. Claimant was found to be at MMI by Audra Dust, PA-C and the report was signed by Kevin Chicoine, M.D.

9. On June 1, 2020, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for a closed period of TTD benefits (May 8, 2020 to May 17, 2020).

10. Claimant requested a Division of Workers Compensation-sponsored Independent Medical Examination ("DIME").

11. On September 11, 2020, Claimant contracted Legionella pneumonia while he was working. Two claims were filed for this issue, WC case numbers 5-149-004 and 5-148-269. These claims were merged under claim number WC 5-148-269.

12. Claimant received medical treatment at Peak Performance from January 26, 2021 through August 10, 2021. The focus of this treatment was on the symptoms related to Legionella pneumonia or Legionnaire's disease.

13. On April 8, 2021, Stanley Ginsburg, M.D. conducted the DIME. Dr. Ginsburg's record review chronicled his symptoms and treatment for both COVID-19 and

Legionnaire's disease. Claimant and Respondents stipulated that Dr. Ginsburg was the DIME physician on the COVID-19 claim only. Dr. Ginsburg described the COVID-19 as resolved. With regard to the Legionnaires disease, Dr. Ginsburg believed it to be resolved, but Dr. Ginsburg felt he needed more information. Dr. Ginsburg concluded Claimant was not at MMI. Dr. Ginsburg said he did not see evidence of cognitive impairment leading to an impairment rating. Dr. Ginsburg wished to see opinions from the providers about Claimant's pulmonary situation and any potential residual issues.

14. On April 27, 2021, the DOWC-DIME Unit sent an email to counsel for the parties which confirmed that Dr. Ginsburg concluded Claimant was not at MMI. This letter stated Respondents were required to file an admission of liability.[2]

15. The deadline for either Claimant or Respondents to file an Application for Hearing ("AFH") was May 18, 2021.

16. On May 17, 2021, an AFH was filed at the OAC by Respondents listing the following issues: "compensability, medical benefits, authorized provider, reasonably necessary, permanent partial disability benefits, causation, relatedness, overcome DIME report from Dr. Ginsburg, MMI, impairment rating, overpayments, waivers, offsets, etc".

17. The May 17, 2021 AFH had the correct date of injury, but listed case number WC 5-149-004 (the Legionella pneumonia claim) and also listed compensability as an issue. The AFH was not signed by Respondents' attorney of record. That AFH was rejected by OAC staff.

18. The ALJ determined the May 17, 2021 filing was a nullity, as it was not signed as required by C.R.C.P. 11. The AFH (as filed) did not constitute a timely response to the DIME physician's report and this fact deprives the Court of jurisdiction to hear the merits of Respondents' challenge to the DIME physician's conclusion on MMI. A copy of the AFH was admitted into evidence as Exhibit 6.

19. The filing of the AFH complied with the time requirement for contesting Dr. Ginsburg's findings. However, the AFH was deficient as noted above. Respondents did not comply with the requirements of § 8-42-107.2(4)(c), C.R.S.

20. The DOWC-IME Unit issued a letter on May 18, 2021 to Claimant and Respondent-Insurer that the DIME was complete in which it was noted that the time for filing an AFH had expired and a GAL was required.

21. Respondents did not file a GAL after the May 18, 2021 letter for the DOWC.

22. On June 4, 2021, Respondents filed an AFH at the OAC listing the identical issues noted above. (This occurred seventeen (17) days after the initial AFH was filed.)

[2] Exhibit 4.

This AFH was dated May 17, 2021, which corresponded to the prior AFH and was rejected by the OAC. The AFH was invalid because it was back-dated.

23. The ALJ concluded the June 4, 2021 filing was an effort on behalf of the Respondents to correct the prior filing. This was a reasonable attempt to correct the prior error with the May 17, 2021 AFH.

24. On June 24, 2021, Respondents filed an AFH at the OAC that listed the issue of "substantial compliance accomplished with May 17, 2021 Application for Hearing filed under W.C. No. 5-149-004", in addition to all of the original issues listed in the May 17 and June 4, 2021 AFH-s. Respondents also cited § 8-47-104, C.R.S.[3]

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

CONCLUSIONS OF LAW

General

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

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

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

Timeliness of Application for Hearing Contesting the DIME

[3] Exhibit 6. The ALJ noted that § 8-47-104, C.R.S. codifies substantial compliance, as it relates to "orders and awards of the director or industrial claim appeals office" that shall not be declared inoperative, illegal or void for "any omission or a technical nature". This section does not apply to the factual circumstances presented here.

As determined in Findings of Fact 2-6, Respondents admitted liability for both medical and wage benefits after Claimant was exposed to and contracted COVID-19. Claimant received treatment and was placed at MMI by the ATP. (Finding of Fact 8). Claimant then requested a DIME, which was performed by Dr. Ginsburg. (Findings of Fact 10, 13). Dr. Ginsburg concluded Claimant was not at MMI and opined Claimant required additional evaluation. (Finding of Fact 13). As found, the deadline for filing the AFH was May 18, 2021. (Finding of Fact 15). The ALJ determined Respondents' AFH that was filed on May 17, 2021 did not comply with § 8-42-107.2(4)(c), C.R.S., as it had the wrong case number. (Finding of Fact 17). The AFH was not signed as required by C.R.C.P. 11 and rejected by the OAC. *Id.* It also listed the issue of compensability, where Respondents previously filed a GAL. Under these circumstances, the AFH was a nullity and the Court had no jurisdiction to consider the challenge to the DIME physician's conclusions. (Finding of Fact 18).

The provisions of § 8-42-107.2(4)(c), C.R.S. (2021) required Respondents to either (i) file an admission of liability, or (ii) request a hearing before the Division contesting one or more of the DIME physician's findings or determinations contained within the DIME report within 20 days after the date of the mailing of the Division's notice that it had received the DIME report. The use of the word "shall" in this section is mandatory. Additionally, pleadings must be signed by at least one attorney of record. C.R.C.P. 11. As found, Respondents did not meet the May 18, 2021 deadline for fling the AFH and this deprived the Court of jurisdiction to hear a challenge to the conclusion that Claimant was not at MMI. (Findings of Fact 17-19). The ALJ concluded the deadline in § 8-42-107.2(4)(c), C.R.S. is jurisdictional and similar to the one present in § 8-43-203(2)(b)(II) 9A), C.R.S., which requires Claimant to file an AFH or Response within thirty days of the filing of an admission or AFH by Respondents.

The ALJ considered Respondents' argument that substantial compliance with the statute/rules governing their response to the DIME physician's opinion was all that was required. The Court will consider whether the allegedly complying acts fulfill the statute's purpose. *Gandnote Golf and Country Club, LLC v. Town of LaVeta*, 252 P.3d 1196 (Colo. App. 2011). In addition, substantial compliance requires that a party intend to or actually make a good faith effort to comply with the statutory requirements. *Kaur v. King Soopers, Inc.,* W.C. 5-017-566-001 (ICAO January 8, 2020).

The ALJ noted in some contexts, Colorado appellate courts have applied the doctrine of substantial compliance even when the requirements of a particular section of the Act appear mandatory by the use of the word "shall". For example, in *EZ Building Components Mfg., LLC v. Industrial Claim Appeals Office*, 74 P.3d 516, 518 (Colo. App 2003), the Colorado Court of Appeals concluded the statute which required the notice of insurance cancellation to be sent by certified mail (8-44-110, C.R.S.) need not be strictly enforced if actual notice was received and the statute did not treat the method is jurisdictional. In that case, the notice of cancellation was sent by regular mail to both the agent and DOWC. Both confirmed receipt and the rights of the employer were not affected by the method of giving notice. The Court concluded that substantial compliance with the notice requirements was sufficient to effect the cancellation of the policy. *Id.*

This is contrasted with other cases where the doctrine of substantial compliance was not applied. In *Postlewait v. Midwest Barricade*, 905 P.2d 21, 24 (Colo. App. 1995), the Court of Appeals reviewed the requirement in 8-43-102(1)(a), C.R.S. which specifies that an injured employee must notify his or her employer of the injury in writing within four days of its occurrence. In *Postlewait,* Claimant asserted that the employer instructed him not to file a workers' compensation claim, which prevented him from giving written notice of the injury. Claimant argued his oral notice of the injury constituted substantial compliance with the statute. The Court of Appeals declined to apply the doctrine of substantial compliance and held strict compliance with the written notice requirement was necessary. *Postlewait v. Midwest Barricade*, *supra*, 905 P.2d at 24. The Court affirmed the penalty imposed on Claimant for the failure to give written notice of the injury. See also *Pacesetter Corp. v. Colette*, 33 P.3d 1230 (Colo. App. 2001) in which the doctrine of substantial compliance was discussed in the context of admissions filed on behalf of an employer.

Similarly, in *Pinon v. U-Haul,* WC 4-632-044 (ICAO April 25, 2007)*,* the Panel considered the application of the doctrine of substantial compliance in connection with the filing of a Notice and Proposal to Select an Independent Medical Examiner. In that case, Claimant filed a timely objection to an FAL, along with an AFH. However, Claimant did not file a Notice and Proposal to Select a Division Independent Medical Examiner. A panel of potential physicians was issued and Dr. Jenks was selected as the DIME physician. Respondents filed a Motion to Strike which was granted by a Prehearing ALJ. At hearing, the merits ALJ declined Claimant's request for additional PPD benefits (based upon Dr. Jenks' rating), determining that filing of the Notice and Proposal was jurisdictional. On appeal, the Industrial Claims Appeals Office concluded Claimant did not substantially comply with the statutory and regulatory requirements in connection with the DIME, as he did not propose potential doctors to perform the evaluation. The Panel concluded it was unnecessary to determine whether substantial compliance could be invoked in connection with the requirement that a Notice and Proposal to Select a Division Independent Medical Examiner must be filed. The ALJ concluded the *Pinon* case was inapposite to the facts presented in the instant case.

In this regard, Respondents cited several cases (some of which arose under the Workers' Compensation Act) in which substantial compliance was deemed sufficient to satisfy the dictates of the statute. As noted, *Pinon v. U-Haul, supra,* does not provide a basis for relief, as the factual circumstances are difference. *Charnes v. Norwest Leasing*, 787 P.2d 145, 146 [addressing substantial compliance with § 39-26-117(1)(b), C.R.S., which identifies conditions a property owner must meet to exempt its property from a lien filed by the Department of Revenue sought to enforce] did not apply to the circumstances at issues here. Finally, in *Lockyer v. May's Concrete, Inc.* WC 4-623-424 (ICAO November 4, 2008), the Industrial Claim Appeals Office considered another case in which Claimant did not file a Notice and Proposal to Select a Division Independent Medical Examiner. The Panel adhered to the views expressed in *Pinon*, but the facts in the record were insufficient to determine whether Claimant's conduct constituted substantial compliance. Therefore, the case was remanded to the ALJ to make further findings of fact. Once again these facts were distinguished from those present here.

The ALJ found none of the cases cited by Respondents were directly applicable to the instant case; that is, these did not involve a case where Respondents were required to respond to the DIME report within twenty (20) days as required by § 8-42-107.2(4)(c), C.R.S. (2021).

The ALJ determined that Respondents filing of an AFH on May 17 at least nominally complied with the time requirements of § 8-42-107.2(4)(c), C.R.S. (2021). However, the AFH was a nullity (since it wasn't signed) and properly rejected at that time. Thus, while the original AFH was filed on May 17, 2021, since it was ultimately rejected, it was not timely. Respondents then filed the second AFH on June 4, 2021, which was backdated to May 17, 2021 and was also not valid. The mandatory terms of § 8-42-107.2(4)(c), C.R.S. (2021) required the AFH to be filed by May 18, 2021. The ALJ concluded this statute required strict compliance, which did not occur in this instance. Accordingly, the multiple filings of the AFH did not preserve Respondents' right to contest the DIME physician's determination of not at MMI.

Penalties

Claimant sought penalties against Respondents for lack of compliance with 8-42-107.2(4)(c), C.R.S. and the failure to file a GAL after the email was issued by the DOWC-DIME Unit. The imposition of penalties under § 8-43-304(1), C.R.S. is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Workers' Compensation Act, of a lawful duty or of an order. If the ALJ finds such a violation, penalties may be imposed if the ALJ also finds that Respondent(s)' actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601(Colo. App. 2003); *see also Pioneers Hospital of Rio Blanco v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005) [Court required to determine whether insurer's conduct was reasonable].

As determined in Findings of Fact, Respondents attempted to contest the DIME physician's findings by the filing of the AFH-s, the first two of which were not valid. (Findings of Fact 17-19, 22). Respondents did not file a GAL, as required by the letter issues by the DOWC on May 18, 2021. (Finding of Fact 21). However, the filing by Respondents of the last AFH, albeit untimely, was sufficient to apprise Claimant of the issues being controverted. The ALJ found Respondents' efforts to rectify the issues with the May 17, 2021 AFH were objectively reasonable. (Finding of Fact 23). Therefore, Claimant did not satisfy the second prong of the statute required for the imposition of penalties and the claim for penalties will be denied and dismissed.

ORDER

IT IS HEREBY ORDERED:

1. Since Respondents' AFH dated May 17, 2021 did not meet the requirements of § 8-42-107.2(4)(c), C.R.S. (2021), Respondents cannot contest the finding of "not at MMI" by the DIME physician. The ALJ lacks jurisdiction to hear the

merits of the challenge to the DIME physician's findings. Respondents' challenge to Dr. Ginsburg's conclusion is dismissed.

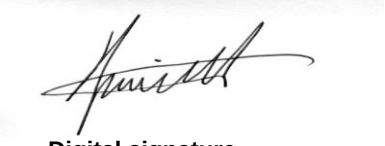
2. Claimant's request for penalties under § 8-43-304(1), C.R.S. (2021) is denied and dismissed.

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: May 11, 2022

STATE OF COLORADO



Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-962-003

ISSUE

1. Whether Claimant established by preponderance of the evidence that he sustained a compensable injury arising out of, and in the course of, his employment.

FINDINGS OF FACT

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

1. Claimant is a 62 year-old man who worked for Employer as a temporary day laborer. Claimant previously worked for Employer, and was rehired on November 8, 2019. (Ex. F).

2. On Friday, November 8, 2019, Claimant was dispatched to work for Epic Construction, at the McDonald's Restaurant on South Colorado Boulevard. TO[Redacted] was the project superintendent. Claimant's responsibilities included clean up and demolition. Claimant alleged that at approximately 8:40 a.m., he was electrocuted while using a sawzall to remove conduit. Claimant found Mr. TO[Redacted] and told him he had been shocked, and described what happened.

3. Mr. TO[Redacted] credibly testified that he asked Claimant if he needed medical attention, but Claimant said he was ok. Mr. TO[Redacted] suggested that Claimant sit down. He did not observe any burns or wounds on Claimant's hands. Mr. TO[Redacted] testified he believed Claimant returned to work and finished his shift. Claimant testified, however, that he did not finish his shift. According to Claimant's time slip, he worked his entire shift from 6:20 a.m. to 2:30 p.m. (Ex. F).

4. Mr. TO[Redacted] credibly testified that on November 8, 2019, he continued cutting pipe with the sawzall Claimant used without any issues.

5. Later that day, Claimant returned to Employer's temporary staffing office where he spoke with Melanie McKenzie who worked for Employer. Claimant had the Sawzall blade he had allegedly been using, and he told Ms. McKenzie he had been shocked.

6. Claimant presented no evidence that he sought medical attention, or that he told Employer he needed medical attention, on November 8, 2019.

7. The following day, Saturday, November 9, 2019, Claimant worked a full shift from 7:00 a.m. to 4:00 p.m. (Ex. F). Claimant presented no evidence that he had any difficulty working on November 9, 2019.

8. JP[Redacted] worked for Employer and was responsible for the morning

dispatch. On Monday, November 11, 2019, Claimant came to Employer's staffing office. Mr. JP[Redacted] was in the office when Claimant came in. Mr. JP[Redacted] credibly testified that Claimant came to the office to "cash out" for the work he performed the previous Saturday. Mr. JP[Redacted] further testified that Claimant held a sawzall blade up over the counter and it was red. Claimant's Exhibit 1 is a photo of the red sawzall blade.

9. CW[Redacted] is the office manager for Employer. Ms. CW[Redacted] was also in the staffing office on Monday, November 11, 2019. She testified that Claimant showed Employer the sawzall blade he allegedly used. Ms. CW[Redacted] further testified that she did not notice any wounds, burns, bleeding, or injuries on Claimant's hands. Ms. CW[Redacted] asked Claimant if he needed medical treatment, and Claimant again denied needing medical treatment.

10. Mr. JP[Redacted] went to the job site the week after Claimant's alleged injury to inspect the area. Mr. JP[Redacted] did not observe any signs of electrical arcing. This is consistent with Mr. TO[Redacted] 's testimony. Mr. Pries also examined the sawzalls at the job site and testified that the sawzalls were Milwaukee brand, and they were double-insulated to prevent against electrical shock. Mr. JP[Redacted] further testified that all of the sawzall blades used at the job site were a different brand and color than the one Claimant presented.

11. Mr. TO[Redacted] also testified that the sawzall Claimant used was double-insulated to prevent against shock. He further testified that Claimant was wearing gloves while working with the sawzall to protect against shock, and there were no live wires in the conduit that Claimant was cutting. Mr. TO[Redacted] testified that the electricians had pulled all of the wires out of the conduit in the area where Claimant was working. He looked in the pipes where Claimant was cutting, and there were no electrical wires in the pipes. Mr. TO[Redacted] testified that if the sawzall had cut a live wire, it would have tripped a breaker, and there were no tripped breakers.

12. The ALJ finds the testimony of Mr. TO[Redacted] and Mr. JP[Redacted] credible. The ALJ finds that the sawzall Claimant used on November 8, 2019 was double-insulated, and there were no electrical wires in the pipes Claimant was cutting that day.

13. Claimant did not request medical treatment until November 13, 2019, five days after the alleged incident. Claimant went to Denver Health and reported that he had been electrocuted at work on November 8, 2013. According to the medical records, Claimant reported he was shocked by electricity when using a sawzall to cut into a pipe with wires inside. Claimant reported that the electricity "entered through his left thumb and exit[ed] through his right middle finger PIP joint area." He said that the wound on his right middle finger was more like a skin crack and initially he "saw flames coming out of the wound." Claimant complained of dizziness, pain and tightness in his left ear, right finger, hand and left thumb. (Ex. 10).

14. Authorized treating physician (ATP), Lileya Sobechko, M.D. evaluated Claimant. She noted in the medical record, '[i]nspection and palpation of skin reveals

visible blood blister on the left thumb disral phalax and skin break (crack) on the right middle finger PIP joint not inflamed." Dr. Sobechko ordered x-rays and performed a "simple laceration repair procedure" on Claimant's right finger. (Ex. 10-13).

15. The November 4, 2019 x-ray of Claimant's left hand showed degenerative changes in the wrist and first and second digit, no acute abnormality, and a metallic foreign body in the soft tissues. (Ex. 18).

16. Claimant returned to Denver Health on November 18, 2019, for a follow-up appointment. Joan Mankowski, M.D. specifically noted that there were "no dermal burn signs." Claimant reported hand numbness and tingling, and dizziness. Dr. Mankowski recommended an EMG if the numbness and tingling continued after 4-6 weeks. (Ex. 19C).

17. Insurer retained Albert Hattem, M.D. to opine as a physician advisor as to whether Claimant's symptoms were causally related to the November 8, 2019 alleged work injury. Dr. Hattem is level-two accredited and board-certified in occupational medicine. On December 9, 2019, Dr. Hatten issued a report opining that it was unlikely Claimant suffered an injury from being electrocuted. (Ex. P).

18. On March 8, 2022, Dr. Hatten testified via deposition. Dr. Hattem testified that an electrical shock injury would cause a burn, and there were no dermal burns observed on Claimant's hands. (Dep. Tr. 8:18-10:9).

19. Dr. Hattem further testified that in cases of electric shock, the symptoms appear immediately, and it is unusual for a patient who has been electrocuted or shocked to wait five days to seek treatment. (Dep. Tr. 7:20-8:17).

20. Prior to this incident, Claimant brought a workers' compensation claim for a January 14, 2019 injury. Claimant alleged injuries to his neck, back, and both hands. Claimant treated for those alleged injuries through May 22, 2019. (Ex. L and Ex. N). As part of his treatment, Claimant was referred to Dr. Chan for an upper extremity EMG on May 1, 2019 due to persistent bilateral upper extremity numbness. The EMG showed that Claimant had severe peripheral neuropathy, most likely, secondary to diabetes with superimposed carpal tunnel syndrome bilaterally. (Ex. N).

21. Claimant continued to complain of tingling and numbness in his hands. He had an EMG on March 10, 2020 that showed an abnormal exam with polyneuropathy most likely on the basis of diabetes. The EMG specifically noted "evidence of bilateral median neuropathy at the wrist (carpal tunnel syndrome overlying neuropathy)." (Ex. K). A repeat EMG was done on August 5, 2020 for Claimant's ongoing bilateral hand numbness. He was diagnosed with bilateral carpal tunnel syndrome and polyneuropathy most likely on the basis of diabetes. (Ex. K). This was the same diagnosis he received in May 2019, while treating under his prior workers' compensation claim. (Ex. N).

22. Dr. Hattem credibly testified that there were no objective findings of an injury from being electrocuted. (Dep. Tr. 11:12-15). He testified that a blood blister, skin crack,

or laceration would not occur from an electrocution injury. (Dep. Tr. 10:10-23). Dr. Hattem testified that Claimant's complaints of tinnitus are pre-existing, and that Claimant had the exact same complaints of neck pain, bilateral numbness, tingling, and weakness in his upper extremities prior to this alleged incident. (Dep. Tr. 6:3-7:19).

23. Based on the testimony and objective evidence, the ALJ finds that Claimant did not sustain an injury at work on November 8, 2019.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Act, he was performing a service arising out of and in the course of his 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).

Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). While 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, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. *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). Rather, the occurrence of the symptoms may be the result of, or the natural progression of, a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Whether the claimant's condition is due to the natural progression of the pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant testified that he was shocked while using a sawzall on November 8, 2019 in the course of his employment with Employer. (Findings of Fact at ¶ 2). There is, however, no objective evidence that Claimant suffered an injury. Claimant told the medical providers that flames were coming out of his hand from the electrocution. (*Id.* at ¶ 13). Mr. TO[Redacted] , however, saw Claimant right after the alleged injury and credibly testified that he did not see any burns or wounds on Claimant's hands. (*Id.* at ¶ 3). When Mr. TO[Redacted] asked Claimant if he needed medical treatment, Claimant said he was ok. (*Id.*). Mr. TO[Redacted] credibly testified that Claimant worked the following day without any issues. (*Id.* at ¶ 7). Ms. CW[Redacted] also credibly testified that on November 11, 2019, she did not see any burns or wounds on Claimant's hands, and he again declined medical treatment. (*Id.* at ¶ 9). Claimant did not seek medical treatment until November 13, 2019. (*Id.* at ¶ 13). Dr. Hatten credibly testified that in cases of electric shock, symptoms, namely dermal burns, appear immediately. (*Id.* at ¶ 18).

The medical records demonstrate that Claimant did not have any dermal burns. He had a blood blister and simple laceration repair. (*Id.* at ¶¶ 14 and 16). Claimant's other complaints of numbness and tingling in his hands relate to his pre-existing peripheral neuropathy and carpal tunnel syndrome. (*Id.* at ¶ 21). As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of, his employment with Employer. (*Id.* at ¶ 23). Based on this ruling, Claimant's other endorsed issues are moot.

Penalties

During the hearing, Respondents' moved to strike Claimant's penalties claim. The ALJ took the Motion under advisement. In any application for hearing for any penalty pursuant to § 8-43-304(1) C.R.S. "the applicant shall state with specificity the grounds on which the penalty is being asserted." Claimant failed to plead his penalty with specificity, and has alleged a compensability determination as the basis for his penalty. Claimant bears the burden of proving that he sustained a compensable injury, and denial of a claim is not a valid penalty. Claimant has asserted no violation of a statutory provision, order, or rule, and has set forth no evidence supporting a penalty in this case. Claimant's penalties claim is stricken.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work injury and his claim is dismissed. Accordingly, the remaining endorsed issues, other than penalties, are moot.

2. Claimant's claim for penalties is stricken.

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: May 12, 2022

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[Redacted].,** Claimant, v. **[Redacted]** Employer, and **[Redacted]** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-957-002-003**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on December 15, 2021. Because of COVID-19 related restrictions, the hearing was conducted remotely via video/teleconference. The hearing was digitally recorded on the Google Meets platform between 1:10 and 3:00 p.m. Claimant proceeded *pro se*. Respondents were represented by [Redacted], Esq.

At the outset of the hearing, the ALJ addressed Claimant's renewed motion for deposition subpoenas and other forms.[1] Claimant is incarcerated and argued that he had been unable to secure the proper subpoena forms necessary to compel the testimony of the medical proividers who had attended to his alleged injury. Given the multiple delays in convening the hearing in this matter, the ALJ denied Claimant's oral motion for an extension of time and instead indicated that the subpoena forms and the Colorado Workers' Compensation Fee Schedule would be mailed to him so he could decide whether to schedule the depositions of his claimed experts. The ALJ then ordered any despositions be taken post-hearing and advised Claimant that the record would be kept open until the depositions were complete and lodged with the Office of Administrative Courts (OAC), but in the interim the ALJ would proceed by securing Claimant's testimony and the testimony of [Redacted, hereinafter EN] and Dr. Annu Ramaswamy.

Testimony was then taken from the aforementioned witnesses. In addition to the testimony of Claimant, Ms. EN[Redacted] and Dr. Ramaswamy, the ALJ admitted Respondents' Hearing Exhibits A-I into evidence. Claimant did not submit additional exhibits to the ALJ for inclusion in the record; however, questioning at hearing prompted

[1] This issue was previously addressed by ALJ Edie who, on November 29, 2021, ordered the hearing to proceed as scheduled on December 15, 2021.

the ALJ to order the production of and identify the Workers' Claim for Compensation form allegedly completed by Claimant as Claimant's Exhibit 1. The exhibit has been received. Following the presentation of evidence, the ALJ held the record open for 60 days to allow Claimant time to prepare for and take the depositions of his proposed expert witnesses.

On February 14, 2022, the ALJ convened a status conference to determine the posture of Claimant's requested depositions. During this status conference, Claimant advised the ALJ that he had elected not to take the depositions and reiterated that access to the law library necessary to prepare his post-hearing position statement was limited. Given Claimant's limited access to the prison's law library, the ALJ extended the due date for submission of post-hearing position statements up to and through March 31, 2022. The parties' position statements have been received.

Although he did not submit exhibits at hearing, Claimant attached several records consisting of "Exhibits A-D" to his post-hearing position statement. Because the ALJ received no objection from Respondents regarding the admission of the aforementioned documents and because they could be outcome determinative, the ALJ admitted the documents into the evidentiary record as "Claimant's Hearing Exhibits 1-4", rather than A-D to avoid confusion with Respondents similarly labeled hearing exhibits. As noted, the ALJ had previously ordered the production of the Workers' Claim for Compensation form, which was marked as Claimant's Exhibit 1. Given the subsequent admission of the exhibits attached to Claimant's Position Statement as Claimant's Hearing Exhibits 1-4, the Workers' Claim for Compensation form previously marked as Claimant's Exhibit 1 has been remarked as Claimant's Hearing Exhibit 1(a).

On April 22, 2022, the ALJ issued a Summary Order that the OAC served upon the *pro se* Claimant and Respondents' counsel. On April 28, 2022, Claimant filed a "Motion for Extension of Time" to file a "Petition of Rehearing" and a "Motion for a Full Order". The described motion was received by the OAC in Colorado Springs on May 2, 2022. On May 5, 2022, the Colorado Springs OAC received Claimant's "Request for a Rehearing" which pleading included a specific "Request for a Full Order". The ALJ considers Claimant's May 5, 2022, "Request for Rehearing" that included an entreaty for a Full Order as a request Specific Findings of Fact, Conclusions of Law and Order. Accordingly, the ALJ enters the following Findings of Fact, Conclusions of Law and Order pursuant to C.R.S. § 8-43-215 (1).

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

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2021); the "Act" refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., C.R.S; "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1 and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reopen his claim based on a change of condition, an error or a mistake.[2]

II. If Claimant established that he is entitled to reopen his claim, whether he also established, by a preponderance of the evidence, that he sustained a compensable injury, which arose directly from his employment or the conditions under which his work was performed for Employer.

FINDINGS OF FACT

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

1. Employer operates as a restaurant. In June 2014, the owner/operator of the restaurant contracted hepatitis A prompting all employees of the restaurant to be vaccinated against hepatitis A prophylactically. (Claimant's Hearing Exhibit (CHE) D).

2. On June 16, 2014, one week after receiving his vaccination, Claimant developed a fever and chills.[3] His symptoms progressed and around 5:30 in the evening, he was noted to be lethargic and cognitively impaired. His roommate called 911 and Claimant was transported to Poudre Valley Hospital. (CHE D).

3. On presentation to the Emergency Room, Claimant reported nausea and subsequently developed a petechial rash on his face and tongue swelling. He was worked up for possible bacterial meningitis and started on antibiotics. Workup was expended to include testing for West Nile virus and herpes simplex viral infection. MRI was completed which ruled out brain tumor, abscess or intracranial bleeding. Based upon Claimant's diagnostic testing, viral meningitis/encephalitis and seizure was suspected. Claimant was assessed with "encephalitis due to infection" and admitted to the hospital for further treatment. (CHE D).

4. Upon admission, Claimant was evaluated by the hospitalist, Dr. Adam Mack. Dr. Mack opined that the results of Claimant's MRI scan pointed to herpes simplex virus (HSV) meningeal encephalitis as the most likely "culprit" for his symptoms. While he noted that Claimant had been vaccinated against hepatitis A, Dr. Mack noted that vaccination had a less than 1% incidence of encephalitis development. He was "unclear" if Claimant's vaccination was contributing to Claimant's symptoms. (CHE D).

5. On June 17, 2014, Claimant was evaluated by Dr. Scott Strader of the hospital's neurology service. Dr. Strader noted that Claimant worked at a restaurant

[2] Claimant did not allege fraud as a basis for reopening the claim.

[3] Given that Claimant developed symptoms on June 16, 2014, one week after his vaccination, supports a finding that Claimant was likely vaccinated on or about June 9, 2014.

where all employees were vaccinated for hepatitis A because the owner had contracted a case of hepatitis A. Following his vaccination, Dr. Strader noted that Claimant did well until June 16, 2014, when he developed a fever and chills and was found around 5:30 with an "altered mental status and a bloody tongue". He noted further that Claimant underwent an MRI, which demonstrated "intensity in the right medial lobe suspicious for herpes simplex encephalitis". After review of Claimant's chart, including his diagnostic workup Dr. Strader reached the following impression:

> MRI findings demonstrate signal intensity in the right mesial temporal lobe. Lumbar puncture demonstrates a mild lymphocytic pleocytosis. Overall, the pattern is certainly concerning for herpes simplex encephalitis and I would suspect that this is the underlying diagnosis. Other viral encephalitides are possible, but these typically do not result in such severe neurologic dysfunction or seizures.

(CHE D).

6. Claimant was also evaluated on June 17, 2014 by the infectious disease service of the hospital. Dr. Jacob C. Liaoong completed the consultation. At the outset of his evaluation, Dr. Liaoong noted that he was asked to see Claimant in an effort to determine "other possibilities of infection nature" after the neurology service determined that Claimant had experienced a possible viral-related encephalitis. (CHE D).

7. After review of the available record/diagnostic testing results, Dr. Liaoong reached the following impressions:

> Combined with his low-grade fever and also, per history, some type of fever prior to admission, this might be a viral-related process that includes herpes, although patient has not had any recent or known episode of herpetic breakout preceding above, or this could by any other viruses, like enterovirus or Coxackie or other community type virus. The CSF panel is not consistent with a bacterial infection as well as imaging study. I cannot rule out HIV encephalitis, although this seems atypical. I do not think this is hepatitis A active infection with encephalitis. In less than 1%, there are reported cases of encephalitis, but nothing specific to temporal lobe, has been noted under the hepatitis A vaccination adverse events. I am not sure if we can totally rule this out, but it is so rare, that it is likely an exclusion diagnosis.

(CHE D).

8. Claimant was released from the hospital and returned to work. According to Claimant, he notified Employer of his assertion that the hepatitis A vaccine caused his encephalitis on June 21, 2014. Claimant testified that Employer refused to file a claim so

he filed one on July 31, 2014. Claimant then retained [Redacted], Esq. of [Redacted] to prosecute his claim.

9. EN[Redacted] testified that she was assigned the claim on August 8, 2014. She confirmed that Claimant filed a "Workers' Claim for Compensation" form on July 30, 2014. As noted, the ALJ ordered that the Workers' Claim for Compensation form be produced as Claimant's Hearing Exhibit 1. (Subsequently remarked as Claimant's Hearing Exhibit 1(a) given the admission of Exhibits 1-4 as attached to Claimant's Position Statement). In the Workers' Claim for Compensation form Claimant asserts that his injury occurred as a reaction to the hepatitis A vaccine. He also identifies the date of injury as June 16, 2014. (CHE 1(a)).

10. Respondents filed a "Notice of Contest" denying liability for Claimant's alleged injury/occupational disease on August 11, 2014. (Respondents' Hearing Exhibit (RHE) I).

11. On October 6, 2014, Respondent requested opinions from Dr. Annu Ramaswamy regarding the relatedness of Claimant's encephalitis to his receipt of the hepatitis A vaccine. Dr. Ramaswamy completed a medical records review after which he opined that he was unable to "implicate" the hepatitis A vaccine as the cause of Claimant's encephalitis. In support of his conclusions, Dr. Ramaswamy noted that there were "no clinical studies that implicate the hepatitis A virus as the cause for encephalitis". While there had been reported cases of encephalitis in individuals who had received the hepatitis A vaccine, the vaccine insert information noted, "Because these reactions are reported voluntarily from a population of uncertain size, it is not possible to reliably estimate their frequency or establish a causal relationship to a vaccine exposure". Dr. Ramaswamy concluded by indicating that "[m]ore times than not, an etiologic agent is not identified in encephalitis cases". (RHE H).

12. Based upon the evidence presented, it appears that Claimant's claim sat idle for many months after Dr. Ramaswamy's records review until October 2, 2017, when Respondents filed a Motion to Close Claim for Failure to Prosecute. (RHE G). By the filing of the motion to close, Claimant was incarcerated.[4] Nonetheless, the motion was mailed to Claimant's counsel of record, [Redacted] on October 4, 2017. (Id.).

13. On October 19, 2017, the Division of Workers' Compensation, through Director Paul Tauriello issued an Order to Show Cause advising Claimant that he must advise the Division of Workers' Compensation "what recent effort [he had] made or [was] making to pursue [his] claim for workers' compensation benefits and why [he thought] the claim should remain open". (RHE F). The order further advised that if Claimant did not demonstrate good cause why the claim should remain open within 30 days of the date the Show Cause Order was mailed, his case would automatically be closed. (Id.). The order was mailed to Claimant's counsel of record, Robert Weinberger, Esq. at the above referenced address. (Id.).

[4] Claimant indicated that he was incarcerated on February 1, 2017.

14. On November 28, 2017, Director Tauriello issued an "Extension of Time to Show Cause" suggesting that Claimant took action to keep the claim from closing.[5] (RHE E). The November 28, 2017 order instructed Claimant that his claim would automatically be closed unless it was set for hearing before an Office of Administrative Courts ALJ within 100 days of the mailing of the Order granting the extension of time. (Id.). In the alternative the order provided that the parties could file a stipulation indicating that they had agreed to keep the claim open while specifying the purpose and the time the claim would remain open. (Id.). Finally, the November 28, 2017 order explicitly indicated that if the parties were unable to schedule a hearing within the 100 days mandated by the order or if for any reason the hearing does not take place as scheduled, the claim would automatically close, unless Claimant filed a motion seeking an additional extension of time. (Id.). The November 28, 2017 order was not only mailed to Claimant's counsel of record, but also to Claimant directly. (Id.).

15. Claimant, through counsel, [Redacted] withdrew his previously filed Application for Hearing and cancelled an April 3, 2018 hearing on March 30, 2018. (RHE D). Because Claimant withdrew his Application for Hearing and did not attend the April 3, 2018 hearing within the 100-day deadline provided for in the November 28, 2017 order, his claim automatically closed. Nonetheless, the claim was subject to reopening pursuant to C.R.S. § 8-43-303.

16. Following cancellation of the April 3, 2018 hearing, the claim again sat idle until July 2020. On July 22, 2020, in response to a letter written by Claimant regarding the status of his claim, the Office of Administrative Courts directed correspondence to him attaching a "Petition to Reopen" form with instructions on how to complete and submit the form to the Division of Workers' Compensation (DOWC) along with an Application for Hearing to litigate the issue of reopening the claim, if it had indeed closed. (CHE 2).

17. Claimant filed a Petition to Reopen based upon error on August 21, 2020. (RHE C). Accompanying his Petition to Reopen was a hand written statement outlining the basis for the request to reopen the claim. (Id. at p. 3).

18. On August 27, 2020, Claimant filed an Application for Hearing endorsing, among other things "Compensability" and "Petition to Reopen Claim". (RHE B). Similar to the Workers' Claim for Compensation form completed July 30, 2014, Claimant listed the date of injury as June 16, 2014 in his August 27, 2020 Application for Hearing. (Id. at p. 1).

19. EN[Redacted] testified that the last payment of medical billing associated with Claimant's June 16, 2014 hospitalization was paid September 29, 2014. She also confirmed that no indemnity benefits have been paid to Claimant under the claim.

20. Ms. EN[Redacted] testified that she received the only Petition to Reopen the claim in her file on August 31, 2020. She also testified that she has never received

[5] The evidence presented, particularly Respondents' Hearing Exhibit D, supports a finding that Claimant's counsel responded to the October 19, 2017 Order to Show Cause by filing an Application for Hearing.

any indication from the Division of Workers' Compensation that the claim has been reopened.

21. Dr. Ramaswamy testified consistently with his medical records review report. He reiterated his opinion that the available medical data failed to support a causal connection between Claimant's receipt of the hepatitis A vaccine and his encephalitis and subsequent development of seizures. According to Dr. Ramaswamy, if a causal relationship between the hepatitis A vaccine and the development of encephalitis existed it would be known to the medical community because the hepatitis A vaccine is widely used around the world, yet there is no evidence-based medicine to support a correlation between receipt of the vaccine and the development of encephalitis. Indeed, Dr. Ramaswamy reviewed up to date research before testifying. That review failed to reveal any objective data to support the suggestion that there is a causal relationship between the development of encephalitis and the hepatitis A vaccine leading Dr. Ramaswamy to testify that he could not support the even remote 1% chance of such correlation referenced by the other medical providers in this claim. Regardless, he testified that it was very unlikely that Claimant's encephalitis and subsequent seizures were related to Claimant's receipt of the hepatitis A vaccine. Rather, the totality of the medical record lead him to conclude that Claimant's encephalitis was idiopathic in nature.

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). While the ALJ is convinced that Claimant's testimony is sincere, the medical evidence, including the testimony of Dr. Ramaswamy persuades the ALJ that his diagnosis and need for such treatment is not causally related to his June 2014 hepatitis A vaccination.

Reopening in General

D. Section 8-43-303(1), C.R.S. provides in pertinent part that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition . . ."

E. Section 8-43-303(2)(b), C.R.S. provides that "[a]t any time within two years after the date the last medical benefits become due and payable, the director or an administrative law judge may, after notice to all parties, review and reopen an award only as to medical benefits on the ground of an error, a mistake or a change in condition . . ."

F. The party seeking to reopen the claim shoulders the burden of proof to establish grounds for the reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (August 13, 2004); C.R.S. § 8-43-303(4). In this case, it is clear from the evidence presented that Claimant seeks to reopen the claim based upon an assertion that it was closed in error or by mistake. Although not specifically endorsed, this Summary Order also addresses any inference that Claimant is entitled to a reopening of his claim based upon a change of condition.

G. Respondents argue that Claimant's petition to reopen should be denied and dismissed for two reasons. Respondents first point out that the claim closed by order of the Director for failure to prosecute without a finding that Claimant suffered a compensable injury or occupational disease. Absent a finding of compensability, Respondents contend that a change in condition cannot form the basis for reopening the claim. Second, Respondents assert that Claimant did not file his petition to reopen until expiration of the above referenced statutes of limitation. Accordingly, Respondents argue that Claimant's request to reopen his claim for any reason is time barred. Claimant counters by arguing that because no "payments" were awarded to him, the statute of limitations, does not apply to this claim. Claimant argues further that even if the above referenced statutes of limitation apply in this case, a letter he authored on July 15, 2020, which was sent to the OAC requesting a status of the claim was sufficient to toll the running of the statute. According to Claimant, this letter requested that the OAC reopen the claim if it had closed. These arguments along with Claimant's endorsed reason(s) for reopening are addressed separately below.

Statute of Limitations

H. The time limits set forth in § 8-43-303, C.R.S.2005, as cited above, operate as a statute of limitations, *City of Colorado Springs v. Indus. Claim Appeals Office*, 89 P.3d 504 (Colo.App. 2004); Garrett v. Arrowhead Improvement Ass'n, 826 P.2d 850 (Colo. 1992); Valdez v. United Parcel Serv., 728 P.2d 340 (Colo.App.1986).

I. As noted, C.R.S. § 8-43-303(1), and (2)(b), provide that a claim may be reopened within six years after the date of injury or within two years after the date the last medical benefits become due and payable. Because these statutes allow the respondent to avoid liability for additional benefits, the time limitations for reopening a claim constitute an affirmative defense. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). An affirmative defense must be explicitly plead and is deemed waived if not raised at a point in the proceedings, which affords the opposing party an opportunity to present rebuttal evidence. See C.R.C.P. 8(c); *Kersting v. Industrial Commission*, 567 P.2d 394 (1977); *Terry v. Terry*, 387 P.2d 902 (1963); *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo.App. 1995). This principle protects the parties' due process rights to notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo.App. 1990); see also OAC Rule of Procedure 12(A), 1 CCR 104-1 ("After the hearing date is confirmed, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown"). Based upon the evidence presented, the ALJ is convinced that Respondents raised the affirmative defense of "Statute of Limitations" and Claimant has been afforded the proper notice and given the right to be heard concerning the issue. (RE A).

J. In this case, Claimant contends that his vaccination against hepatitis A resulted in the development of encephalitis, a seizure and his subsequent need for hospitalization/treatment. Review of the available evidence supports a finding that Claimant was vaccinated on or about June 9, 2014, one week before presenting to the Emergency Department at Poudre Valley Hospital (University of Colorado Health) on June 16, 2015, with chills, headache and progressive cognitive sequelae. Claimant was hospitalized for what was identified as "encephalitis due to infection". As noted, Claimant contends that his hepatitis A vaccination caused his encephalitis and need for treatment. Nonetheless, he did not suffer any alleged ill effects from the vaccine for a week. The delay between Claimant's vaccination and the development of his symptoms raises questions with regard to when the limitation period under C.R.S. § 8-43-303(1) begins to run. Indeed, Claimant seemingly raised the question in his August 27, 2020 Application for Hearing when he endorsed: "Actual date of Injury".

K. Based upon the evidence presented, the ALJ concludes that Claimant's onset of disability is an appropriate test for determining when the limitation period pursuant to C.R.S. § 8-43-303(1) begins to run in this case. The onset of a disability occurs when the injury/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. *Leming v. Indus. Claim*

Appeals Office, 62 P.3d 1015 (Colo.App.2002). In this case, the medical records support a finding that the first appreciable manifestation of Claimant's injury/disease occurred June 16, 2014. Although Claimant contends that the limitation period should begin to run as of July 31, 2014 when he filed his claim, he actually asserted a June 16, 2014 date of injury when filing his Application for Hearing on August 27, 2020. It is reasonable to infer based upon his Application for Hearing that following his hospitalization, Claimant recognized that as of June 16, 2014, his medical condition precluded his ability to effectively and properly discharge his duties to his employer. In short, the evidence presented supports a conclusion that Claimant recognized that June 16, 2014, represented the date he was actually injured and disabled as a consequence of his vaccine. Accordingly, the ALJ concludes that the limitation period for reopening this case began on June 16, 2014, not June 9, 2014 when he received his vaccination or July 31, 2014, when he filed his claim as Claimant now suggests. Even if one were to accept Claimant's argument that the limitation period did not begin to run until July 31, 2014, when he filed his claim, the evidence presented supports a conclusion that Claimant did not file his "official" Petition to Reopen until August 21, 2020, which represents a period of more than six years from July 31, 2014.

L. As noted, Claimant contends that he sent a letter to the OAC on July 15, 2020, which included a request to reopen the claim if it had closed. While Claimant did not include a copy of the letter including the request to reopen the claim in his exhibits, the ALJ is convinced that he probably did sent such a letter. Indeed, an answer letter referencing that Claimant's letter regarding the procedural posture of his claim had been received was sent to him by the OAC on July 22, 2020. (CE 2). Although the July 22, 2020 letter generated by the OAC does not reference/acknowledge Claimant's request to reopen the claim, it does provide a form to do so along with a "packet of instructions for completing the form". (Id.) Accordingly, it is reasonable to infer that on July 15, 2020, Claimant requested that his claim be reopened if it had closed. Citing *Mascitelli v. Giuliano & Sons Coal Company*, 402 P.2d 192 (Colo. 1965), Claimant contends that his July 15, 2020 letter which included a request to reopen the claim should be construed as his petition to reopen the claim which was sufficient to toll the statute of limitations. Simply put, Claimant contends that he petitioned to reopen his claim on July 15, 2020, which request was followed by his "official" petition on August 21, 2020.

M. In *Mascitelli*, Claimant sustained an injury to his right foot while working as a coal miner on March 5, 1956. He was awarded a 35% disability as a consequence of the injury; however, he sought to reopen the claim based upon his contention that he was entitled to 50% disability due to the accident. On March 3, 1962 (two days before the date the statute was scheduled to run) Claimant wrote a letter to the Industrial Commission asking that his claim be reopened. The letter, which the Commission accepted as Claimant's petition to reopen, was received on March 5, 1962; however, the Commission did not issue an order to reopen until May 1, 1962, which order admittedly was more than six years after the accident and therefore outside the statute of limitations. Consequently, the respondent-insurer objected to the reopening and alleged that the Commission was without jurisdiction to act. On appeal, the Court rejected respondent-insurer's contention that the Commission must act within the six-year limitation or is

without jurisdiction to do so. Rather, the Court agreed with claimant that the filing of the notice (petition) **prior** to the termination of the statute of limitations, tolls the running of the statute. In concluding as much, the Court stated ". . . once a claimant properly files his notice within the statutory period, he is within its protective folds".

N. Accepting Claimant's representation that he sent a letter to the OAC, which included a petition to reopen his claim on July 15, 2020, affords him no relief based upon the facts of this case. Construing Claimant's July 15, 2020 letter as his petition does not change the fact that the letter/petition was sent **after** the running of the six-year period provided for by statute. The distinguishing fact between the instant case and the facts presented in *Mascitelli* is that Mr. Mascitelli's letter predated the running of the statute whereas Claimant's letter was sent after the six-year statute had run out, given the above conclusion that the six-year limitation started to run on June 16, 2014. Thus, while the ALJ agrees that Claimant's letter can/should be construed as his petition to reopen, which would serve to toll the statute while a determination of the claim is pending as per the holding in *Mascitelli*, the statute in this case had already run by July 15, 2020. Accordingly, the ALJ concludes that Claimant's reliance on *Mascitelli,* for the proposition that his July 15, 2020 letter tolled the statute from running in this case, is misplaced.

O. Aside from the general six-year limitations period in § 8-43-303(1), the statute distinguishes between disability and medical benefits. The latter are specifically covered by C.R.S. § 8-43-303(2)(b), which provides a two-year limitations period from the date the last medical benefits are due and payable. As the evidence presented supports a finding that the last medical benefits paid in this case on September 29, 2014, the ALJ concludes that Claimant's petition to reopen, whether that be July 15, 2020 or August 21, 2020 is beyond the two-year limitation, which would have run by September 30, 2016. Because Claimant's petition to reopen was not filed within the applicable limitations period set out in either C.R.S. § 8-43-303(1) or (2)(b), the ALJ agrees with Respondents that his petition to reopen must be denied. See *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998)(claim was barred from reopening where it was filed more than six years after onset of disability). Even if Claimant had established that he had filed his petition within the applicable limitations period, he failed to prove that he is entitled to reopen the claim based upon an error, a mistake or a change of condition.

Claimant's Request to Reopen Based on Error and/or Mistake

P. As noted Claimant contends primarily that he is entitled to reopen the claim as the matter was closed in error or by mistake given that he was incarcerated, had limited access to a law library, experienced Covid-19 lockdowns, had no access to forms, suffered delays in mailing and because his attorney of record stopped communicating with him. When a claimant alleges that an error or mistake justifies the reopening of a claim, the ALJ must engage in a two-step analysis concerning that assertion. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo.App. 1981).

Q. First, the ALJ must determine whether there has been an error or mistake. If there is an error/mistake, then the ALJ must determine whether it is the type of

error/mistake that warrants a reopening. *Travelers Insurance Co. supra; Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo.App. 1984). As is pertinent here, when determining whether a mistake warrants reopening, the ALJ may consider whether the mistake could have been avoided by the timely exercise of available remedies. *See Fisher v. Wal-Mart Stores,* W.C. No. 4-247-158 (August 20, 1998); *Travelers Ins. Co v. Industrial Comm'n, supra*.; *Industrial Commission v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Industrial Commission*, *supra*.

R. In *Klosterman v. Industrial Commission*, claimant filed a claim for compensation against her non-insured restaurant employer (Klosterman). The Division forwarded a copy of the claim to the employer at its address of record. Mr. Klosterman responded by denying that claimant had been injured. A hearing was held at which the employer (Mr. Klosterman) failed to appear. The hearing officer found that claimant had sustained a compensable injury. Much later, the claimant requested a hearing on indemnity benefits and a copy of the Application for Hearing (AFH) was sent to Mr. Klosterman at the address where the pervious notice was sent. Mr. Klosterman did not appear at that hearing. The hearing officer awarded substantial benefits and uninsured penalties against him as employer. Thereafter, Mr. Klosterman filed a petition to reopen alleging error or mistake. Klosterman alleged that he did not receive notice of either hearing due to changing addresses and communication issues with an attorney he had consulted. The hearing officer determined that the error or mistake in the case was Mr. Klosterman's "neglect." Accordingly, the hearing officer found no basis for reopening and denied Klosterman's motion to reopen. The Industrial Commission affirmed.

S. The Court of Appeals reviewed the Panel's decision in Klosterman only as to the bases in the statute for determining a reopening of the claim under Colo. Sess. Laws 1975, ch. 71, § 8-53-119 at 307, the predecessor statute to § 8-43-303, C.R.S. This section provided in pertinent part that an award could be reopened "on the ground of an error, a mistake, or a change in condition." The Court analogized the provisions of C.R.C.P. 60(b) for setting aside a judgment. Klosterman contended that excusable neglect falls within the definition of error or mistake and that his conduct met the criteria for excusable neglect as that term had been applied in cases decided under C.R.C.P. 60(b) and therefore, his petition to reopen should have been granted. The Court rejected these contentions stating:

> The procedure for reopening set forth in the WC Act is complete and definitive and need not be supplemented by the Colorado Rules of Civil Procedure or principles applicable thereto. The statute specifically enumerates the grounds upon which the director may reopen an award. Excusable neglect is not included among those grounds, and, therefore, we may not read it into the statute.

T. Here, the evidence presented persuades the ALJ that despite having knowledge concerning the procedural posture of his claim, Claimant took no action to prosecute his claim for more than two years after his prior counsel withdrew his Application for Hearing on March 30, 2018. Indeed, after Claimant's counsel withdrew

the Application for Hearing on March 30, 2018, the available record supports a finding that Claimant did not take action in furtherance of prosecuting his claim until August 21, 2020 when he filed the pending Petition to Reopen. Claimant subsequently filed an Application for Hearing endorsing reopening on August 27, 2020. (See generally, Respondents' Hearing Exhibits (RE) B, C, and D). While Claimant contends that he wrote the OAC on July 15, 2020 "asking about the status of the claim and to reopen the claim if it had been closed", he did not provide a copy of the purported letter to the ALJ for inclusion in the evidentiary record. Even assuming that Claimant initiated contact with the OAC on July 15, 2020, such contact occurred more than two years after Claimant withdrew his Application for Hearing without taking additional steps to prosecute his claim. Based upon the totality of the evidence presented, the ALJ is convinced that, regardless of his incarceration, the Covid-19 pandemic or the myriad of other reasons Claimant cites for his inaction to prosecute the claim, such inaction, on his part or the part of his attorney[6] in excess of two years following the withdrawal of his Application for Hearing constitutes neglect rather than error/mistake for purposes of reopening the claim. Where the putative error/mistake concerning claim closure actually stems from a party's own neglect, as it does here, that neglect should not be construed as an error/mistake for purposes of reopening. See, *Goodman Assocs., LLC v. WP Mountain Properties, LLC*, 222 P.3d 310 (Colo. 2010)(loss of pleadings due to deficient office practices and procedures amounted to neglect, not mistake). Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that an error or mistake of law or fact occurred in this case. Rather, the evidence presented supports a conclusion that Claimant and his prior counsel neglected the case for a significant period of time, which neglect ultimately resulted in closure of the claim. Accordingly, Claimant's request to reopen the matter on the grounds of error or mistake must be denied and dismissed. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo.App. 1996).

Reopening Based upon a Change of Condition

U. Although not specifically plead, to the extent that Claimant contends that the evidence presented supports a claim for reopening based upon a change in condition, the ALJ agrees with Respondent that Claimant is precluded from doing so. In reaching this conclusion, the ALJ finds the claim of *Amin v. Schneider National Carriers*, W.C. No. 4-881-225-06 (November 9, 2017), instructive. On facts strikingly similar to those before the ALJ in this case, Mr. Amin's case closed by order of the Director of the Division of Workers' Compensation without a determination that he sustained a compensable injury. Following the closure of his claim, Mr. Amin filed a petition to reopen the claim based upon a change of condition. He subsequently filed an Application for Hearing endorsing "Petition to Reopen" and a hearing was set. Citing the Colorado Court of Appeals decision in *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo.App. 2002), the ALJ granted a Motion for Summary Judgment filed by Respondents arguing that because they had never admitted liability for the claim and it was undisputed that the

[6] It is unknown if or when Claimant's prior attorney withdrew as his counsel of record. Rather, the evidence supports only that as of June 19, 2020, more than two years after he withdrew Claimant's Application for Hearing, Claimant's counsel noted that his office was "no longer able to pursue your claim." (Claimant's Exhibits (CE) 1).

claim was contested and never found compensable, there was nothing to reopen. The ALJ concluded that in order for Mr. Amin to reopen his claim on the basis that his condition had changed, he was first required to establish that the underlying injury forming the basis for reopening was compensable. Because compensability had not been determined in the first instance, the ALJ dismissed Mr. Amin's Petition to Reopen. Mr. Amin appealed. On appeal, a Panel of the Industrial Claim Appeals Office affirmed. Because the Director's Order closing the claim amounted to an "award" bringing the claim for reopening under the purview of the statute[7] and because there had been no original determination of compensability before the claim was closed, the Panel reasoned that Mr. Amin was precluded from reopening his claim based upon a change of condition. *Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780, 784 (Colo.App. 1994); *See also, City and County of Denver, supra*. In this case, the evidence supports a conclusion that the claim closed automatically by order of the Director following the issuance of his November 28, 2017 order. Consistent with the opinions announced in *Amin* and the *City and County of Denver*, *supra*, the Director's November 28, 2017 order constitutes an "award" bringing the instant case under the reopening statute. Accordingly, while Claimant is not precluded from attempting to reopen his claim on the grounds of error or mistake as he has done, he is precluded from reopening the claim based upon a change of condition. *Amin v. Schneider National Carriers, supra.* Consequently, any claim for reopening based upon a change in condition must be denied and dismissed. Even if Claimant had established that he was entitled to reopen his claim, the evidence presented persuades the ALJ that he failed to prove that he suffered a compensable injury.

Compensability

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

W. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

X. The "arising out of" element is narrower and requires Claimant to show a causal connection between her employment and the injury such that the injury has its

[7] The portion of the ALJ's decision holding that no award of "any sort" had been issued because compensability had not been determined was set aside

origins in her work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and Claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996).

Y. In this case, Claimant contends that he suffered encephalitis and seizures requiring hospitalization as a consequence of being vaccinated against Hepatitis A imported into the work place by his supervisor. Because he was "100% healthy" prior to taking the Hepatitis vaccination and all diagnostic testing returned negative results for pathogens/conditions known to cause symptoms consistent with those manifested by Claimant, including seizures, Claimant contends that it is "logical to make a causal connection between the Hepatitis A vaccination, his hospitalization and his ongoing seizures. Indeed, Claimant contends that the only "possible cause not ruled out" is the vaccination.[8] As support for his contention that his medical condition was caused by the Hepatitis A vaccination, Claimant relies on a passage in Dr. Mack's June 17, 2014 report which indicates: "He also recently was vaccinated against hepatitis and this has less than a 1% incidence of encephalitis and could be a possible source". The ALJ finds the aforementioned passage to be poorly written and susceptible to misinterpretation. Indeed, it is unclear if Dr. Mack is suggesting that the vaccine creates less than a 1% chance of developing encephalitis or if hepatitis itself gives rise to a less than 1% incidence of development of encephalitis. Based upon the statements of Claimant, it is clear that he interprets Dr. Mack's June 17, 2014 report as indicating that the vaccine creates a 1% chance of developing encephalitis. This question was clarified by Dr. Jacob C. Liaoong in a report dated June 17, 2014, when he noted:

> I do not think this is hepatitis A active infection with encephalitis. In less than 1%, there are reported cases of encephalitis, but nothing specific to [the] temporal lobe, [that] has been noted under the hepatitis A vaccination adverse events. I am not sure we can totally rule this out, but it is so rare that it is likely an exclusion diagnosis.

Z. Dr. Liaoong went on to note that Claimant's encephalitis "might be a viral-related process that includes herpes although [Claimant] has not had any recent or known episode of herpetic breakout preceding above or this could be any other viruses, like enterovirus of Coxsackie or other community type virus".

---

[8] Dr. Ramaswamy rebutted this contention by testifying that not all potential avenues of infection were actually tested for while Claimant was hospitalized. Rather, Claimant was tested for the most probable pathogens capable of causing his encephalitis and placed on antibiotics. The evidence presented supports a conclusion that once Claimant responded to treatment, further testing to identify a cause for his encephalitis stopped, leading Dr. Ramaswamy to conclude that the actual cause of Claimant's encephalitis was unknown.

AA. When viewed in its totality, the ALJ concludes that the evidence presented supports Dr. Ramaswamy's expert medical opinion that Claimant suffered an idiopathic, non-work related episode of meningeal encephalitis caused by an unknown infectious origin. While it is possible that Claimant's encephalitis may be related to his Hepatitis A vaccination, the ALJ credits the testimony of Dr. Ramaswamy to find and conclude that Claimant's clinical picture and the more likely causes of his encephalitis render it medically improbable. A coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between his alleged injury and his work. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), To the contrary, as noted by the Panel in *Scully* "correlation is not causation." As noted, the ALJ credits the content of Claimant's medical records and the opinions of Dr. Ramaswamy to find/conclude that Claimant's encephalitis is more probably than not idiopathic in origin and unrelated to his Hepatitis A vaccination as he alleges. Because Claimant has failed to establish the requisite causal connection between his hepatitis A vaccine and his encephalitis, he has failed to carry his burden that he suffered a compensable "injury" as defined by the above referenced legal opinions. Accordingly, his claim must be denied and dismissed.

ORDER

It is therefore ordered that:

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

DATED: May 13, 2022

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER were served by placing same in the U.S. Mail, or by e-mail to:

Gary Baumann, Jr. #166014 (*pro se*)
P.O. Box 6000
Sterling, CO 80751

Joe M. Espinosa, Esq.
joe.espinosa@farmersinsurance.com

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

Date: May 13, 2022

/s/ Matthew Chavez_____
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-186-986-001

ISSUES

I. Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination resulting in termination of wage loss benefits?

II. Whether Respondents have proven by a preponderance of the evidence that they are entitled to an overpayment of wage loss benefits?

STIPULATIONS

- The parties stipulated that Claimant has been receiving temporary total disability benefits since at least November 2, 2021, and such benefits have not been terminated.

FINDINGS OF FACT

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

1. On October 10, 2021, Claimant was working for Employer as an inline inspector in the quality department. **TR. 13:22-25**. The job required Claimant go up and down the production line, inspecting parts as they were produced. **TR. 14:1-3**.
2. Before working in the quality department, Claimant worked for Employer as a production operator. **TR. 14:10-12**.
3. On October 2, 2021, Claimant sustained an admitted work-related injury from lifting a box. **Ex. A:2; B:12**. She complained of pain in her upper and middle back, left shoulder and arm, and neck. **Ex. A:2**.
4. On October 15, 2021, Claimant was seen by Dr. Drapeau at Workwell. At this visit, Claimant complained of pain in her neck, upper and middle back, as well as her left shoulder and arm. After evaluating Claimant, Dr. Drapeau assigned work restrictions. The work restrictions included no lifting, pushing, or pulling greater than 10 pounds and avoid bending, kneeling, and squatting. **Ex. A:2**.
5. On October 28, 2021, Claimant returned to Workwell for additional medical treatment. At this visit, Claimant was evaluated by William E. Ford, ANP-C. Claimant reported that her symptoms were getting worse. Claimant complained of pain in her neck and her right posterior and anterior shoulder. She also complained of pain in her right arm with any movement. Claimant did not, however, have any mid or lower back pain at this visit. Claimant also stated that her pain got so bad, she went to Long's Peak Hospital. At this appointment, Mr. Ford continued Claimant's restricted duty through November 1, 2021. But he also excused Claimant from working until her follow up

appointment – which might have been scheduled for November 1, 2021. **Ex. A:5-8**. There is not, however, a medical report for a follow up appointment until November 12, 2021, in which Mr. Ford continued Claimant on restricted duty. Therefore, despite the Employer and adjuster discussing Claimant having a November 1st or 2nd medical appointment, there is not a corresponding medical report from such visit. Therefore, the extent of Claimant's work restrictions between November 2nd and November 11th is unclear. Based on the reports of Dr. Drapeau and Mr. Ford, the ALJ finds that Claimant was restricted from performing her regular job duties from October 15, 2021, through November 12, 2021.

6. On November 2, 2021, Claimant returned to work and began working her modified job as an in-line inspector. During the morning portion of her shift, LJP[Redacted], her immediate Supervisor, asked her to meet in the conference room with SMK[Redacted], who works in Human Resources. **TR 26:4-12, Ex. B:14.**

7. For the conversation which occurred in the conference room, LJP[Redacted] served as the translator. The Claimant would speak in Spanish. Ms. SMK[Redacted] would speak in English. Ms. SMK[Redacted] was relying on LJP[Redacted] to give a correct interpretation of the Claimant's position regarding the transfer to the molding department. **HT 16:2-8, 29:13-15, 30:1-2, 50:2-13**. There is no information about the ability of Mr. LJP[Redacted] to act as an interpreter.

8. Ms. SMK[Redacted] testified that when the Claimant returned to work on November 2, 2021, the company needed to make a reduction in "head count." She said that Claimant was identified as one person that the company needed to reduce out of the quality department. Rather than terminate Claimant, she was offered a position in the molding department. **HT 5:14-22**. Ms. SMK[Redacted] testified that when the Claimant was offered the position in the molding department the Claimant's response was that the position was not within her restrictions. **HT 58:3-8**. Ms. SMK[Redacted] had LJP[Redacted] explain that the company was attempting to have Claimant remain employed rather than be terminated. Ms. SMK[Redacted] thought the Claimant was not happy about the offer. **HT 16:9-25, 17:1-5**. Ms. SMK[Redacted] said the Claimant did not ask for an accommodation. **HT 17: 9-11**. But, on the other hand, it does not appear that Ms. SMK[Redacted] conveyed to Claimant that they would accommodate her restrictions. Ms. SMK[Redacted] stated the Claimant conveyed to LJP[Redacted]she wanted some time to think about it. **HT 17:12-16**. Ms. SMK[Redacted] testified the Claimant left the plant and she subsequently called LJP[Redacted] and informed him she was going to quit and heal her back. **HT 17: 17-21**.

9. On November 3, 2021, Ms. SMK[Redacted] communicated with the adjuster via email. Ms. SMK[Redacted] provided the adjuster the dates Claimant missed work. She also advised the adjuster that they moved Claimant to another job. Ms. SMK[Redacted] did not, however, advise the adjuster that Claimant had called in and quit. **Ex. B:14**.

10. Ms. SMK[Redacted] also testified that she did not tell the adjuster that Claimant quit in that email because she must have learned about Claimant quitting after she wrote the email. Ms. SMK[Redacted] did not, however, tell the adjuster Claimant quit until

the adjuster asked Ms. SMK[Redacted] about Claimant's work status a month later, on December 5, 2021. **HT 44:24-25, 45:1-6.** Nor did Employer submit any credible and persuasive documentation that was generated on November 3, 2021, or shortly thereafter, documenting Claimant quit on November 2, 2021. In other words, there was no concurrent documentation documenting Claimant quitting. As a result, the ALJ does not find persuasive the testimony of Ms. SMK[Redacted] that Claimant called Mr. LJP[Redacted] and quit.

11. Claimant testified about her understanding of the conversation which occurred in the conference room. The Claimant stated that Ms. SMK[Redacted] offered two options: 1) stay in the plastics department working as an operator, or 2) go home. Claimant's response was " I- - I told her that I knew what was the job like in plastics and I could not do that job because of my restrictions, that I could not do them because of my restrictions" **HT 56:14-25, 57:1-25, 58:1-8, 60:13-16**. Therefore, Claimant left work and went home. Claimant testified that during the conference room conversation she never indicated that she quit or refused to do her job. **HT 58:9-17**. Claimant also testified that she did not have a subsequent telephone conversation with LJP[Redacted] telling him that she was quitting. **HT 58: 18-23, 61:4-7.** The ALJ credits Claimant's testimony and finds that Claimant was given the option of working as an operator or not working and further finds that Claimant chose to not work so she could get better from her work injury. Thus, Claimant went home that day and did not return to work.

12. Based on the testimony, there is a dispute over whether Claimant called her supervisor, Mr. LJP[Redacted] and whether she told him that she was quitting at any time. Mr. LJP[Redacted] did not, however, testify at the hearing. Therefore, the ALJ is left with trying to determine whether Claimant told Mr. LJP[Redacted] that she was quitting without being able to judge the credibility of Mr. LJP[Redacted] as to whether Claimant called him - and what was said. Moreover, without Mr. LJP[Redacted]'s testimony at hearing, the ALJ cannot determine whether there were any issues with the interpretation at any time. For example, without his testimony, there is no way to determine how well he speaks English. Or, even if the call occurred, whether he considered Claimant's choice to stay home – as offered by Ms. SMK[Redacted] – as Claimant quitting, even though Claimant never said she was quitting. As a result, this is another basis to not credit Ms. SMK[Redacted] 's testimony that Claimant called Mr. LJP[Redacted] and said that she quit.

13. The ALJ finds that on November 2, 2021, Claimant was provided the option of accepting the molding position or going home. Claimant chose to go home so she could get better. Thus, Claimant did not quit, and she was not terminated. As a result, Claimant was not working due to her work injury.

14. On November 12, 2021, Claimant returned to Workwell and was seen again by Mr. Ford. At this appointment, Claimant complained of ongoing upper and lower back pain as well as neck pain. During his physical examination of Claimant, Mr. Ford noted Claimant had decreased range of motion of her left shoulder because of pain in all planes. Mr. Ford continued Claimant on restricted duty through November 22, 2021. At this appointment he returned her to work – with restrictions. The restrictions were no lifting, pushing, or pulling greater than 10 pounds and avoid bending, kneeling, and

squatting. He also restricted her from no bending of her neck and reaching with her arms. Ex. A, pp. 8-10. The ALJ finds that these restrictions continued to preclude Claimant from performing her regular job duties.

15. Based on the evidence, the ALJ finds that Claimant is not responsible or at-fault for her wage loss.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination resulting in termination of wage loss benefits?

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).

As found, Claimant was given the option to accept the transfer to another job or go home and not work. Due to her work injury, Claimant chose to go home and not work so she could recover from her work injury. At no time did Claimant quit and at no time did Employer terminate Claimant. Moreover, Claimant's injury has continued to preclude her from performing her regular job duties. As a result, Respondents failed to establish by a preponderance of the evidence that Claimant is at fault for her wage loss and not entitled to temporary disability benefits.

ORDER

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

1. Respondents failed to establish that Claimant quit and is responsible, or at-fault, for her wage loss. Therefore, Claimant's temporary total disability benefits shall continue until terminated by law.

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: May 17, 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 established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on August 5, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of medical benefits to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

1. Claimant is an undocumented Honduran immigrant who was employed by Employer as a temporary worker from June 2021 until August 5, 2021. Claimant does not speak, read, or write English, and cannot read Spanish. Claimant provided Employer with a fictitious name, and worked under the alias "NN[Redacted."

2. Employer is a temporary staffing company that provides workers for various positions in the Denver area. Generally, employees who wish to work on a given day appear at Employer's office located on 6th Avenue in Aurora, Colorado for work assignments. Employer then assigns individual employee to daily temporary assignments which take place at client locations away from Employer's office. Employees are required to travel from Employer's Office to the location of the daily assignment. Because none of the temporary jobs assigned by Employer take place on Employer's premises, employees must travel to off-site locations.

3. Employer's "Assignment Memo," to which Claimant's alias electronic signature was affixed on June 21, 2021, informs employees of Employer's requirements both before and after the completion of job assignments.[1] (Ex. M, p. 133 (Spanish language version) and p. 134 (English language version). The Assignment Memo indicates that employees seeking work on a given day must present to one of Employer's offices and "be available and prepared to work immediately. Being available and prepared means that you must be dressed appropriately, have all transportation and child care arrangements taken care of and be willing to accept suitable work." (Ex. M, p. 134).

4. Notwithstanding the Assignment Memo's instruction that employees have all "transportation … arrangements taken care of," in practice, employees were not required to provide their own transportation to off-site locations. Employer owns two vans used to transport some workers to off-site locations. However, Employer typically does not have the capacity to transport every worker to a job assignment. In such instances, Employer's branch manager, DMN[Redacted], or another employee, assign individual employees to

[1] Claimant testified that she informed Employer that she was not able to read, and that one of Employer's employers – "Carla" – completed the forms on Claimant's behalf.

ride with co-employees who have transportation (in the co-employee's personal vehicle) to the off-site job assignment.

5. Ms. DMN[Redacted] initially testified that Employer does not assign employees to ride to job sites with specific people. Ms. DMN [Redacted]'s later contradicted this statement, when she testified that Employer does arrange for workers without transportation to ride to job sites with co-workers. (Tr., p. 83: 13-20; p. 84:4-7). Although Employer facilitates and arranges for employees to ride with co-workers to job sites, Employer does not compensate employees for time while traveling to job assignments, or for transportation expenses.

6. Employer's business thus requires temporary employees to appear in-person at Employer's office to obtain a job assignment; travel from Employer's office to an off-site location to perform the job assignment; have transportation available, or be willing to travel either in Employer's vans or with a co-worker to an off-site location. The ALJ finds that Employer's employment contract necessarily contemplates that employees will travel as part of their employment. That travel also provides a benefit to Employer beyond the employee's mere arrival at the work place, because Employer cannot fulfill its obligations to its customers without employees traveling off-site to job assignments.

7. The Assignment Memo also provides that "On condition of employment with [Employer], you as the employee, are required to contact our office immediately upon completion of an assignment." (Ex. M, p. 134) (emphasis original). The Assignment Memo also provides "If you do not contact our office immediately upon completion of an assignment, or fail to comply with this written notice in any manner, you will be deemed to have voluntarily terminated employment with [Employer]. Failure to contact our office at the end of every assignment may result in reduction of unemployment wage claims." (Id.).

8. Employer offers its employees different options for payment of wages, including daily or weekly payment. One of Employer's procedures for paying employees is the use of an Employer-issued debit card. Employer electronically adds funds to an employee's debit card to pay wages after receiving and processing the employee's timecard for a given assignment. When employees elect to be paid daily, Employer is able to transfer funds to the employee's debit card on the same day that the timecard is submitted and processed.

9. Employees are required to submit timecards to Employer to received payment for a job assignment. Employer permits employees to submit timecards through various methods, including in-person delivery at Employer's office, email, or text message. Employer does not require employees to submit timecards on the date that they work, or on any specific schedule.

10. On August 5, 2021, Claimant reported to Employer's office for a job assignment, and was assigned to work at a rental car company located near Denver International Airport (DIA). Claimant's work assignment was to provide labor for an entity called "MLS" which is a staffing agency that services rental car companies at DIA. Claimant does not own a vehicle and does not drive, and thus required transportation to the off-site job

assignment on that day. Claimant either elected to or was assigned to ride with two other employees to the off-site job assignment at DIA. (Although the parties dispute whether Claimant knew the co-employees with whom she rode to DIA prior to being assigned to ride with them, Claimant's familiarity with the co-workers with whom she rode that day is not relevant to the determination of the issues before the ALJ).

11. After leaving Employer's office, Claimant was transported to the off-site job assignment and worked from 8:00 a.m. until 3:42 p.m. at the rental car agency, as assigned by Employer. (Ex. M, p. 163-165).

12. After completing her assignment, Claimant rode in the same car with the co-employees, to return to Employer's 6th Avenue office to turn in her timecard for the day. Claimant credibly testified that after every shift where she received transportation from a co-worker, she returned back to the 6th Avenue office in the same vehicle. Once Claimant returned to Employer's office, employer did not transport or arrange transportation back to Claimant's home. Claimant also testified that she was returning to Employer's office on August 5, 2021, to submit her timecard, because submission of the timecard was a requirement for payment for shifts worked.

13. At approximately 4:30 p.m., the vehicle in which Claimant was a passenger was involved in a collision with another vehicle. When police arrived at the scene, the vehicle's driver and other passenger, fled the scene, leaving Claimant in the car.

14. As a result of the accident, Claimant was seen at the UC Health emergency room on August 5, 2021, and diagnosed with a left eyelid laceration, lip laceration, injury to left facial nerve, abrasion and closed fracture of tooth. (Ex. H).

15. On August 27, 2021, Claimant filed a Workers' Claim for compensation, alleging injuries to her face, head, neck, upper back, lower back, upper extremities, and lower extremities. (Ex. A). On September 27, 2021, Claimant saw David Yamamoto, M.D., and diagnosed with neck pain, left shoulder pain, lower back pain, blurry vision, face lacerations, jaw pain, weakness of left arm, headache, memory loss and dizziness. (Ex. J). On December 13, 2021, Claimant saw Robert Messenbaugh, M.D., for an independent medical examination at Respondents' request. Dr. Messenbaugh indicated that as a result of the motor vehicle accident, Claimant sustained injuries including a laceration of the left eye, broken tooth, cervical and lumbar sprain, left shoulder strain with possible labral tear, and possible lingering cognitive issues. (Ex. K).

16. On September 17, 2021, Respondents filed a Notice of Contest, indicating that Claimant's injuries are not work-related. (Ex. B).

17. On October 4, 2021, Clamant filed an Expedited Application for Hearing. (Ex. C). Respondents timely filed their Response on October 8, 2021. (Ex. D). Claimant contends her injuries are work-related. Respondents contend that Claimant's injuries are not work-related asserting that Claimant was traveling to-and-from work when the accident occurred and that her injuries did not, therefore, arise out of the course of her employment with Employer.

18. Between June 17, 2021 and August 5, 2021, Claimant worked 27 days for Employer, as reflected on timecards she submitted to Employer and in Employer's payment ledger. (Exhibit M, p. 137-164). For the majority of days Claimant worked, she submitted her timecards to Employer in person. Although on June 18, 2021, June 24, 2021 and June 27, 2021, Claimant's timecards were emailed to Employer by an unidentified sender. (Ex. M, p. 139, 141, & 140). Claimant testified that does not know how to use email. Given that Claimant can neither read nor write, the ALJ finds credible Claimant's testimony that she does not know how to use email.

19. Ms. DMN [Redacted] testified that prior to August 5, 2021, Claimant had also texted Ms. DMN [Redacted] her timecard on multiple occasions. However, no credible evidence exists that Claimant texted timecards prior to August 5, 2021. Claimant testified that she does not know how to text on her phone, although it was possible that her son had texted information on her behalf. The one timecard Respondents contend Claimant is a timecard submitted on July 16, 2021. (Ex. M, p. 151, Timecard #283843). The timecard is for eight hours of work from 7:00 am until 3:30 p.m., on July 12, 2021. (Timecard #283843). The timecard, however, does not bear Claimant's name, and is signed by a supervisor with last name of "D[Redacted]." In contrast, Ex. M, p. 150, is a different timecard for July 12, 2021, (Timecard #287368), which does bear Claimant's name, shows Claimant worked from 7:00 am to 3:30 p.m., and is signed by a supervisor named "AS[Redacted]." Because no other credible evidence was presented that Claimant texted timecards to Employer, the ALJ finds that Claimant did not submit any timecards by text message prior to August 5, 2021.

20. Claimant submitted the remainder her pre-August 5, 2021 timecards in person at Employer's 6th Avenue office. This is consistent with Claimant's testimony and Ms. DMN [Redacted]'s testimony that most of the time Claimant returned from the jobsite and submitted her timecards in person. To do so, Claimant required transportation from the off-site temporary job assignment to Employer's 6th Avenue office.

21. During the first four weeks Claimant worked for Employer, she was paid weekly, by check, four days after the end of the corresponding week (*i.e.*, the weeks ending June 20, 27, July 4 and 11). (*See* Ex. M, p. 137). After the week ending July 11, 2021, Claimant was paid daily (and remotely) through the debit card Employer provided, and payment was issued within 2 days of the date she worked. Comparison of Claimant's timecards to the payment ledger demonstrates that from July 16, 2021 through July 28, 2021, Claimant was paid on the date she worked. From this, the ALJ infers that Claimant submitted her timecards from July 16, 2021 through July 28, 2021 on the dates she worked.

22. Ms. DMN[Redacted] testified that she first learned of Claimant's accident around 4:30 p.m. on the afternoon of August 5, 2021. She testified she called Claimant on her cell phone because Claimant had not sent in a picture of her timecard for that day (either through text or email). DMN [Redacted]'s testimony that she called Claimant because she had not texted or emailed in her timecard was not credible because Claimant had not previously texted in her timecards. Instead, Claimant had submitted her timecards in person for each of the 22 days she had worked since June 28, 2021, and submitted them in person on the date she worked for the previous three weeks. More likely, Ms. DMN

[Redacted] called Claimant because she had not returned to the office to personally deliver her timecard to the office, as was Claimant's normal practice.

23. Respondents also imply that Claimant did not actually work on August 5, 2021. The evidence does not support this inference. When Ms. DMN[Redacted] spoke with Claimant, Claimant reported she had been in an automobile accident. Ms. DMN[Redacted] walked approximately four minutes from the office to the location of the accident. Ms. DMN[Redacted] testified that she looked in the vehicle and saw the timecards for Claimant and the other two co-employees, and that the timecards did not have the time Claimant worked for the day completed on the card. Ms. DMN[Redacted] also testified that she could not get in the car, and that she could not see what was written on the timecards. Ms. DMN [Redacted]'s testimony that the Claimant's timecard did not contain the hours Claimant worked when she looked into the vehicle is inconsistent and not credible.

24. Ms. DMN [Redacted] also testified that when she received the timecard from Claimant on August 6, 2021, by text, the timecard was not signed by a supervisor. Claimant testified that at the rental car location, she gave her timecard to a person at the start of her shift, and he returned it to her with the hours filled in. She testified that the person did not sign the timecard as a "supervisor" because "he didn't understand anything about that." Ms. DMN[Redacted]testified that she called a supervisor, "Kirill" who could not confirm, and did not know if Claimant worked on August 5, 2021. The ALJ infers that Kirill was a supervisor at MLS, not the rental car agency where Claimant worked that day. No credible evidence was admitted indicating that Kirill would have had personal knowledge of whether Claimant worked at the rental car agency that day. Moreover, "Kirill" did not tell Ms. DMN[Redacted]that Claimant did not work on August 5, 2021, only that he did not know. Notwithstanding the lack of confirmation, Employer paid Claimant for 7.25 hours of work on August 5, 2021. Considering all relevant evidence, the ALJ finds that Claimant did perform work at a rental car agency on August 5, 2021, as assigned by Employer.

25. At hearing, NL[Redacted], Insurer's claim representative assigned to Claimant's claim testified. Ms. NL[Redacted]'s testimony related primarily to Insurer's rationale for contesting Claimant's claim. Ms. NL[Redacted] has no direct knowledge of the events of August 5, 2021, or Claimant's employment with Employer. Insurer's rationale is not relevant to the issues before the ALJ.

CONCLUSIONS OF LAW

Generally

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

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

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). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

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. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold d/b/a Atlas Logistics*, 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: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. *Id.* Whether meeting one of the variables, by itself, is sufficient to create a "special circumstance" warranting recovery depends upon whether the evidence supporting that variable demonstrates such a causal connection between the employment and the injury to bring the travel within the course and scope of employment. *Id*. The question of whether Claimant presented "special circumstances sufficient to establish the required nexus is a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Electric, Inc.*, W.C. 4-939-901-03 (ICAO February 22, 2016).

Here, neither the first, second, or fourth factors have been established. Claimant's accident arguably occurred outside working hours because Claimant was not being compensated while traveling and Claimant had completed her off-site job assignment for the day; it occurred off Employer's premises; and the obligations of employment did not create a special zone of danger. The primary issue is whether the travel in which Claimant was engaged at the time of her injury was contemplated by the employment contract.

In considering whether travel is contemplated by the employment contract, the critical inquiry is whether the travel is a substantial part of service to the employer. *Madden*, 977 P.2d at 865. Travel may be contemplated by the employment contract when the employer delineates the employee's travel for special treatment as an inducement to employment. *See Staff Administrators Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in the travel at the express or implied consent of the employer, and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Labs v. Indus. Claim Appeals Office*, 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risk of travel become the risk of the employment. *Briedenbach v. Black Diamond, Inc.*, W.C. No. 4-761-479 (ICAP Dec. 30, 2009). Where a "temporary service requires the employee to travel to a fixed location, then dispatches the employee to another work site to perform services, the travel between the temporary service employer's premises and the remote site is an 'integral part of the employment." *Schutter, supra, citing* 1 *Larson's Workers' Compensation Law*, §14.03 (2001). "Thus, injuries sustained during travel between remote job sites and the

employer's premises have been found compensable." *Schutter v. Outsource Int'l/Tandem Staffing*, W.C. No. 4-520-338 (ICAO Feb. 21, 2003), citing *Benson v. Colorado Compensation Ins. Auth.*, 870 P.2d 624 (Colo. App. 1994); and *Tatum-Reese Develop. Corp. v. Indus. Comm'n*, 30 Colo. App. 149, 490 P.2d 94 (1971). Moreover, "an employee who is away from home on business remains under continuous workers' compensation coverage from the time of the departure until the employee returns home." *SkyWest Airlines v. Indus. Comm'n*, 487 P.3d 1267 (Colo. App. 2020).

Claimant has established by a preponderance of the evidence that the injuries she sustained as a result of the August 5, 2021 automobile collision arose out of the course of her employment with Employer. Employer's business contemplates that its Employees will travel to off-site job assignments as a condition of employment. Employee travel to off-site job assignments is the *sine qua non* of Employer's business. Absent such travel, Employer could not provide services to its clients. Thus, because of the nature of temporary employment, travel to and from remote job sites confers a benefit on Employer beyond the mere fact of arrival at work. Whether an employee traveled to an assignment in their own vehicle, in Employer's van, or with another co-worker does not alter the fact that Employer's contract contemplated employee travel to off-site assignments.

As found, on August 5, 2021, Claimant presented at Employer's office and received an assignment to work at a rental car agency at DIA. Claimant did not have her own transportation to the assignment, and rode to the assignment with two co-employees. Claimant worked that day as assigned by Employer. Claimant credibly testified that she returned to Employer's office each day after completing an assignment with the person who drove her to the assignment in the morning. Claimant was in the process of returning to Employer's office to submit her timecard in person, and sustained injuries in an automobile accident. Employer required employees to submit timecards as a precondition to payment. While no specific means of submitting timecards was required, the overwhelming majority of the time, Claimant submitted her timecards in person, and submitted them on the day she worked for the three weeks preceding August 5, 2021.

No credible evidence was admitted to demonstrate that Claimant was engaging in any distinct departure on a personal errand or that she was not returning to Employer's office. The ALJ concludes that Claimant was in "travel status" while traveling between Employer's office and the off-site job assignment. Claimant's travel status ended when she returned to the office at the end of the day.

Based on the totality of the evidence the ALJ concludes that Claimant has established by a preponderance of the evidence that she sustained injuries arising out of the course of her employment with Employer on August 5,2021.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). 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). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has to establish that she sustained a compensable injury, Claimant is entitled to an award of general medical benefits for all authorized treatment that is reasonable, necessary and related to the injuries sustained as a result of the August 5, 2021 automobile accident.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable injuries arising out of the course of her employment with Employer on August 5, 2021.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury.

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: May 17, 2022

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery {as recommended by Dr. Norman Lindsay Harris) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury at work on December 27, 2018. The body parts injured at that time were the claimant's neck and right shoulder. The respondents have admitted liability for the claimant's December 27, 2018 injury.

2. The claimant has undergone various surgical procedures during this claim.

3. On February 28, 2019, Dr. Norman Lindsay Harris performed an arthroscopic repair of the claimant's right rotator cuff. The claimant had a second right shoulder surgery on May 21, 2020. At that time, Dr. Harris performed biceps tenodesis.

4. On August 17, 2020, the claimant underwent surgery to his cervical spine. That surgery was performed by Dr. Wade Ceola. The procedure included C3-C4 anterior microdiscectomy, nerve root decompression, anterior interbody arthrodesis, cage placement with plating for stabilization. The surgical note identifies the use of Gardner-Wells tongs with ten pounds of traction.

5. The claimant testified that prior to the August 17, 2018 cervical surgery he had no left shoulder symptoms. However, immediately following the August 17, 2020 cervical surgery, the claimant began to experience pain in his left shoulder. The claimant also testified that he continues to have pain in his left shoulder.

6. The claimant testified that it is his understanding that during the cervical surgery additional traction was placed on his left shoulder. The claimant further testified that because he had recently undergone right shoulder surgery, more traction was placed on the left.

7. In a medical record dated October 9, 2020, Dr. Michael Campian identified a diagnosis of left rotator cuff tendinitis. At that time, Dr. Campaign recommended physical therapy for the claimant's left shoulder.

8. On February 2, 2021, a magnetic resonance image {MRI) of the claimant's left shoulder showed a high grade partial thickness articular sided tear, a partial

thickness tear of the mid and superior subscapularis tendon, moderate osteoarthritis of the AC joint, and a small subacromial spur.

9. On February 23, 2021, Dr. Harris reviewed the MRI results and recommended left shoulder surgery. Specifically, Dr. Harris recommended a diagnostic arthroscopy with rotator cuff repair.

10. On March 2, 2021, Dr. James Ferrari reviewed the request for left shoulder surgery. Dr. Ferrari opined that the requested surgery was reasonable and necessary to treat the condition of the claimant's left shoulder. However, Dr. Ferrari also opined that the condition of the claimant's left shoulder is not related to the work injury or to the August 2020 spine surgery. In his report, Dr. Ferrari noted that during the spinal surgery there was no traction on the claimant's left arm. Based upon Dr. Ferrari's opinion, the respondents denied the left shoulder surgery.

11. On March 9, 2021, Dr. Harris authored an appeal regarding the respondents' denial. Dr. Harris referenced that the claimant has experienced "migratory pain affecting his bilateral shoulders." Dr. Harris also noted the claimant's report that during surgery his left arm was held "with about 10 pounds of traction". Dr. Harris opined that the condition of the claimant's left shoulder could have been caused by the initial work injury and then worsened by the cervical spine surgery.

12. On March 19, 2021, Dr. Jon Erickson reviewed the request for a left shoulder surgery. Dr. Erickson opined that the claimant could not have suffered a left rotator cuff tear during the spinal surgery. It is Dr. Erickson's opinion that the MRI findings are degenerative in nature and secondary to age. Dr. Erickson further opined that the claimant's left shoulder was not injured on December 27, 2018 or on August 17, 2020. Based upon this opinion of Dr. Erickson, the respondents continued to deny the left shoulder surgery.

13. Subsequently, on November 15, 2020, Dr. Harris requested a repeat left shoulder MRI.

14. On November 22, 2021, Dr. Erickson reviewed the MRI request. Dr. Erickson recommended denial of the requested MRI. He also recommended denial of any treatment of the claimant's left shoulder

15. At the request of the respondents, Dr. Erickson conducted a review of the claimant's medical records. In his January 2022 report, Dr. Erickson opined that the abnormalities found in the left shoulder MRI are likely age-related and degenerative. Dr. Erickson reiterated his opinion that the claimant's left rotator cuff was not torn during the August 17, 2021 cervical spine surgery.

16. Dr. Erickson's testimony was consistent with his written reports. During his testimony, Dr. Erickson explained how a patient's shoulders are placed during an anterior cervical spine surgery. Specifically, a patient's shoulders are pushed down and then are held in position by wrapping their arms in a drape. Dr. Erickson also testified

that there is no traction applied to either arm during this type of surgery. Dr. Erickson further testified that the act of holding the claimant's arms during spinal surgery would not aggravate a pre-existing left shoulder condition to cause it to become symptomatic.

17. Natalie Arena, PA-C, testified by deposition. PA Arena was Dr. Ceola's assistant during the claimant's treatment, including the August 17, 2020 cervical surgery. PA Arena explained the standard process used in placing a patient for the type of spinal surgery the claimant underwent in August 2020. The patient is in the supine position (on their back) with their arms tucked at their sides. PA Arena explained that this is necessary to keep the shoulders down and away from the neck. The patient's arms are not held with traction. Rather they are wrapped in a sheet to the patient's sides. PA Arena also explained that Gardner-Wells tongs are used to hold the patient's cervical spine. The tongs are connected to the patient's skull and traction is used.

18. With regard to the spinal surgery, the claimant would have experienced the process as described by PA Arena. The claimant's arms and shoulders would have been placed in the same manner, regardless of the claimant's recent right shoulder surgery. PA Arena explained that it is necessary to place the arms the same way during this surgery to ensure that the cervical spine can be adequately reached. PA Arena further testified that it is her recollection that the claimant first reported left shoulder-related symptoms to her approximately two months after the surgery.

19. The ALJ credits the medical records, the testimony of PA Arena and the opinions of Drs. Ferrari and Erickson over the contrary opinions of Dr. Harris. The ALJ specifically finds that the claimant's arms, and therefore his shoulders, were placed in the same manner during the cervical spine surgery. In addition, there was no "traction" placed on either of the claimant's arms or shoulders during that surgery. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the left shoulder surgery recommended by Dr. Harris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury. The ALJ further finds that the claimant did not suffer an aggravation of a pre-existing left shoulder condition during the spinal surgery.

CONCLUSIONS OF LAW

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

of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Harris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 27, 2018 work injury. As found, the medical records, the testimony of PA Arena and the opinions of Ors. Ferrari and Erickson are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a left shoulder surgery (as recommended by Dr. Harris) is denied and dismissed.

Dated May 18, 2022.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained injuries in the course and scope of his employment on April 5, 2021.

ONLY IF THE CLAIM IS COMPENSABLE:

II. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to authorized, reasonably necessary medical benefits that are related to the alleged workplace injury of April 5, 2021.

III. Claimant's average weekly wage (AWW).

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits from April 5, 2021 until terminated by law subject to offsets, if appropriate.

STIPULATIONS

The parties stipulated that, if the claim is found compensable and that Claimant was eligible for temporary disability benefits, Respondents are entitled to an offset for the time Claimant received unemployment insurance (UI) benefits. The ALJ approves and adopts this stipulation of the parties.

The parties also stated that, if the parties did not communicate with the ALJ that the issue of AWW had been resolved, this ALJ should make that determination.

FINDINGS OF FACT

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

1. Claimant was working for Employer as a window, glass, and shower door installer and technician for both commercial and residential projects. He had worked for Employer for over two years and had been doing the same kind of work for other employers for approximately 20 years. His job required both a mix of technical work, window and door delivery and installations. The job required lifting, pushing, pulling anywhere from one to 200 lbs., depending on the thickness of the product, type of window and depending on the job. They would sometimes have to carry the product up multiple flights of stairs, for blocks, or just a few feet.

2. Claimant had no prior issues with his back immediately before his work injury, other than a back injury approximately twenty years before. Claimant recalled that

the day before the alleged injury incident was Easter Sunday and he spent it with his family and had no issues. He did have a prior work related right knee injury that was feeling "pretty good," after his September 16, 2020 right knee surgery. He had returned to work full duty, full time as of January 2021. Claimant is 5'4".

3. On April 5, 2021 Claimant bent down to open a large garage bay door in order to load windows into the back of his box truck. The truck Claimant drove required a clearance of approximately twelve feet to fifteen feet high. Claimant bent down to yank the dock door up utilizing enough force and momentum to make the door go up above the catch lines at about two feet and eight feet. Claimant described the door as an older door, approximately ten feet wide and about twenty feet tall. The door was a manual door and did not open smoothly, that is did not glide up to the required twelve feet on its own. It would typically stop at approximately eight or nine feet high but that was not high enough for his box truck.

4. Claimant felt a pop in the right knee and immediate pain. Claimant's first concern was the right knee because he had surgery the previous year and was finally feeling better. Claimant waited for the knee pain to subside, which it did after resting a few minutes, though it did swell up, which worried him as well. Claimant started feeling pain in the low back after he got up from resting and he tried to lift a window to load onto his truck. He was unable to do it as he started having back spasms. This was approximately ten minutes after he opened the dock door. He had to have coworkers load his truck for him. Claimant did work the full day but only performed the driving and two other co-workers, one of whom does not have a drivers' license, went with him to unload the truck.

5. Claimant stated that he advised his supervisor when the initial accident happened and told him about his knee. Claimant did not initially mention the low back as he did not immediately perceive or understand the seriousness of his injuries. Then, when he started having spasms in the low back, he told his supervisor about that as well. He asked where he should go for care. His supervisor indicated he would contact the HR representative in Phoenix, where the company's main office was located. When Claimant returned from deliveries, his supervisor had still not heard back from HR about where Claimant should seek medical attention.

6. Claimant's back got worse throughout the day. Claimant followed up with his supervisor but did not receive any instructions about how to proceed with medical care. Claimant left work at approximately 4:15 p.m. that afternoon but after getting home he decided he required immediate medical attention because of the severe pain. The most concerning problem was that Claimant was having difficulty walking because he would take three to four steps and his back would immediately go into spasms.

7. Claimant went to the emergency room at North Suburban Medical Center and was attended that evening. He was treated and released. Before he was released, they took an MRI of his lumbar spine but did not provide him the results by the time he was released. Claimant stated he received a call the following day[1] and was instructed

[1] While Claimant stated that he was called the following day, he was actually called on April 6, 2021 in the afternoon, which was the same day he was released at 2:35 a.m. in the morning.

to return to the emergency department, which he did, as the pain in his back was severe whenever he put pressure on his leg or walked for more than a few steps.

8. Claimant stated that he texted his supervisor his statement regarding the injury as follows:[2]

> On 4/5/2021 I arrived to work about 7:00 am I clocked in, grabbed my paperwork and proceeded to locate my materials. I opened my box truck and lowered the ramp then came inside to lift the garage door. I bent and gave it a good hard yank trying to get it high enough to load my truck and immediately felt pain in my right knee. I was able to walk on it but it hurt. I waited for Braun to help load the large window and rested. When we pulled it from the rack and dragged it to the ramp I was unable to lift it and Bob, Lou or Dom and Braun finished loading. We were really shorthanded that day so I continued with my route knowing that Dom and Braun would do most of the physical work. Throughout the day my lower left back began to spasm and eventually I could only go a few steps before having to stop and let the pain subside. After we returned to the shop I asked Doug to contact HR to find out what I should do. After an hour or more I decided to have Doug call me at home when he heard something. Then eventually after no reply from HR, Doug and I decided that I would go to my own Dr.

9. Employer completed an Incident Report on April 6, 2021. The supervisor testified that he completed the report. He acknowledged that Claimant had notified him of the incident on April 5, 2021. He noted that the "Employee's Statement" was attached and that Claimant had a "[P]inched nerver." [sic.]. This ALJ infers that the above statement was the attached statement. The supervisor's statement says as follows:

> I was in the office and did not witness or see anything. He was worried he had hurt his knee. When he returned to the shop, he said it was also in his back now and he needed to see a doctor. I reached out to HR as we thought his was a continuation of his previous workers comp claim. Mario left at 4:15pm and apparantly [sic.] went to the emergency room that night.

The supervisor also noted that Claimant "initially thought he had hurt his knee and was limping. Later, he said his back hurt and was spasming." He noted that Claimant was taken to North Suburban for medical care by his wife.

10. Claimant was initially seen at North Suburban Medical Center on April 5, 2021 at 6:04 p.m. Claimant provided a history that he had had no trauma to the low back and that he had a history of a lumbar spine herniation 20 years before that resolved with physical therapy. Claimant presented to the emergency department complaining of acute onset low back pain, radiating down his left leg and that his left leg felt numb. The ED physician ordered an MRI to rule out possibility of epidural abscess and significant neurologic deficits. The differential diagnoses were cauda equina, epidural abscess, spinal stenosis, disc herniation, lumbar pain. Claimant was discharged with narcotic pain

[2] Respondents' Exhibit E, identifies this as Claimant's "statement regarding injury" on April 5, 2021. Original was texted to his supervisor. See April 13, 2022 Hearing Transcript p.30:4-12; p. 30:22-25 & p. 31:1.

medication on April 6 at 2:35 a.m. by PA Bryce Holland with instructions to see a neurosurgeon.

11. At approximately 8:40 p.m. on April 6, 2021 PA Holland reviewed the images and MRI report and added an addendum to her medical report stating that she called the patient to follow up. She noted that Claimant could take a few steps but was "exquisitely painful." She recommended that Claimant return to the ER if he was having worsening pain, foot drop or weakness. Claimant indicated that if he could he would wait until the following day to see the workers' compensation doctor.

12. The MRI read by Dr. Kevin O'Connor stated that Claimant had degenerative changes at L5-S1, resulting in impingement of the descending left S1 nerve roots and bilateral high-grade neural foraminal narrowing. He recommended the attending correlate the findings for a left S1 and/or L5 radiculopathy as the both the right and left foraminal narrowing was severe at the L5-S1 level with probable effacement of the descending left S1 nerve root.

13. Respondents, through the HR department authorized an appointment with the workers' compensation provider. Claimant was scheduled for Thursday, April 8, 2022 but Claimant never made the appointment.[3]

14. Claimant was re-admitted to the ED on April 6, 2021 at 10:02 p.m. by Dr. Simi Varanasi who took a history that Claimant was seen at the emergency room the day before for acute onset low back pain and presented to the ER for worsening pain and weakness in his left leg. He documented that Claimant developed symptoms after lifting a heavy door at work causing pain and weakness going from the low back, into the left buttock down the left leg, causing numbness from the knee down with some weakness. He stated that Claimant was able to make a virtual appointment with the neurosurgeon for the following Thursday and he was scheduled to see the Workmen's Comp. physician the following day but the pain was too severe for him to wait. Dr. Varanasi noted that Claimant was unable to walk due to the discomfort and the weakness in his left side and that he had foot drop. Dr. Varanasi stated Claimant was admitted due to significant findings from MRI and musculoskeletal findings. He consulted with Dr. Richard Kim of Colorado Brain & Spine Institute, who recommended steroid treatment and reevaluation the following morning.

15. On April 7, 2021 PA Stephanie Tu stated that Claimant was a 52 year old male with back pain and left lower extremity pain and weakness which started after lifting heavy two days prior. On neurologic exam she found left EHL/DF/PF[4] weakness, which was consistent with the MRI findings of acute disc herniation at the L5-S1 level. They discussed treatment options and concluded that Claimant should proceed with surgery scheduled for 5:00 p.m. with Dr. Kim given his weakness and intractable pain.

16. Claimant proceeded with the surgery on April 7, 2021 by Dr. Kim with a post-operative diagnosis of left L5-S1 herniated disc. He performed a microdiskectomy removing a large disc fragment and decompressed the nerve. During the procedure, Dr.

[3] April 13, 2022 Hearing Transcript, p. 37-38.
[4] Extensor Hallicus Longus (Big toe extension)/Dorsiflexion/Plantar Flexion weakness.

Kim stated that the "[T]he herniated disk was obvious." He also stated that they were "able to remove a large fragment of disk in a single piece" and decompress the nerve.

17. Upon discharge on April 8, 2021 Dr. Alexandra Grieb diagnosed Claimant with acute left lumbosacral radiculopathy status post left L5-S1 microlumbar discectomy with discharge instructions to follow up with Dr. Richard Kim, the neurosurgeon and his PCP, Dr. Sharry Veres.

18. Claimant was seen by Dr. Samantha Matney of Rocky Mountain Medical Group on April 13, 2021, who took the following history:

> 52 y/o male presenting for a new work comp injury. Pt states he was at work on 4/5/2021 loading his truck. Pt went to open the dock door open (sic) and he felt immediate pain in his right knee. Pt states he went to sit down for a little bit. Pt states he got up and his lower back started to spasm. Pt drove the rest of the day and did not lift anything. Pt states he could not get out of his truck by the end of the day. Pt went to the ER that evening. Pt states they did an MRI which he was told he had pinched L5-S 1. Pt was called back to the ER the next day and had surgery on his back. Pt states his left foot and leg is numb and he has pins and needles in his left leg. Pt states certain positions makes his symptoms worse. Pt does not have feeling in his toes. Pt has a hard time sleeping. Pt denies ant genital numbness, stool/urinary incontinence. Pt continues to have pain radiating down his left leg. Pt states the surgery helped a lot. Pt is taking ibuprofen as needed now. Pt has been doing hot and cold packs. Pt is not doing PT. Pt was advised to walk which he has been doing short walks. Pt is not working. Pt reports having a herniated disc about 20years ago. Pt denies any previous back surgery. Pt states his right knee is now fine.

19. Dr. Matney found an abnormal gait and sensation in left lower extremity, advised Claimant not to lift anything, avoid climbing and squatting, crawling and kneeling, advised Claimant to take Tylenol and ibuprofen and to follow up in three weeks after he saw the surgeon. She opined that the objective findings were consistent with the history and/or work related mechanism of injury.

20. On April 29, 2021 Dr. Matney noted that Claimant was having difficulty with sleeping due to pain, continued to have left leg pins and needles sensation with symptoms that continued to radiate down his left leg, for which he was taking OTC[5] medication. She diagnosed L5-S1 herniated disc s/p microlumbar diskectomy on 4/7/2021 and was improving as expected.

21. He followed up at the Rocky Mountain Medical Group workers' compensation (WC) clinic, where primary WC services were provided initially by Dr. Matney and currently by Dr. Ramaswamy. Dr. Matney continued to see Claimant from April through November 23, 2021. Claimant had a no lifting restriction as of April 13, 2021. She increased Claimant's restrictions to 10 lbs. lifting as of June 10, 2021,

[5] Over the counter medication.

increased to 20 lbs. on July 1, 2021, to 75 lbs. on July 28, 2021 and reduced lifting back to 50 lbs. on November 23, 2021.[6]

22. On April 13, 2021 Dr. Matney noted that Claimant was not working. On April 29, 2021 Dr. Matney noted that Claimant was working with restrictions, though noted that he was ambulating slowly, and had a slight difficult getting up out of the chair.

23. On October 26, 2021 Dr. Matney noted that Claimant had followed up with his surgeon who ordered an MRI. Claimant continued with left buttocks pain going down his left leg with occasional sharp stabbing pain. Dr. Matney noted that the October 20, 2021 MRI showed a recurrent disc extrusion at the L5-S1, thickening of the ligamentum flavum, severe bilateral recess stenosis, left worse than right foraminal stenosis at the L5-S1, as well as joint arthritis. She recommended that Claimant follow up again with the spine surgeon.

24. Despite the April 7, 2021 surgery and physical therapy, Claimant continued to experience low back and left leg pain, left leg numbness, and drop foot on the left. Claimant proceeded with a second surgical procedure on December 30, 2021 with Dr. James Stephen, of Colorado Brain & Spine Institute, when symptoms in his low back and left lower extremity did not improve. At some point, his claim was denied and he did not receive additional physical therapy after the second surgery. He stated he has follow-ups scheduled with both Dr. Stephen and Dr. Ramaswamy and would like to continue care with the workers' compensation providers.

25. Claimant underwent an independent medical evaluation (IME) at Claimant's request, with Dr. Anjmun Sharma on March 21, 2022. Dr. Sharma reported that Claimant stated he had been lifting heavy windows and shortly after he developed acute low back pain and sudden weakness in the left leg. Claimant provided Dr. Sharma a prior history that approximately 20 years before he herniated a disc that did not require surgery and resolved with physical therapy. Dr. Sharma reviewed the medical records. On exam he noted some left quad atrophy with intermittent ongoing radiculopathy but much better than prior to the surgical intervention. This was correlated to the findings on neurologic testing with slightly decreased anterior and posterior compartments of the left lower extremity.

26. Dr. Sharma took a history that after the last appointment with Dr. Matney, Claimant proceeded with a second surgery due to an extruded disc fragment. He indicated that Claimant had been working prior to the second surgery and that he returned to work on February 4, 2022, which Dr. Sharma noted should be done with caution not to lift anything heavy. Dr. Sharma opined that Claimant was injured due to heavy lifting, had no history of back pain in the intervening years after the initial back injury 20 years prior and continued to work for many years in the same kind of employment. He noted Claimant had a predisposition to injury and the heavy lifting at work caused the current need for medical care and the injury. He cited to a Spine I peer reviewed medical article that concluded that an inciting event is not necessary in order to develop a lumbar spine herniation, but rather that any event, even a common every day event may cause a herniation to become symptomatic. He specifically noted that, while the article cited to

[6] November 23, 2021 is the last report in the records presented to this ALJ from Dr. Matney.

specific events listed by injured individuals as inciting events tended to prolong the disability, but that here, Claimant returned to work very quickly after both surgeries.

27. Dr. Sharma noted that Claimant was not at maximum medical improvement as he continued to require physical therapy after his second surgery, as well as a functional capacity evaluation and impairment rating assessment. He recommended against releasing Claimant to heavy lifting over 50 lbs. Finally, he concluded that "greater than 51 % probability that the mechanism of injury is directly related to have caused the resultant work injury accident and activities the patient had been doing just prior to presentation to emergency department for emergency room evaluation."

28. Dr. Sharma testified at hearing as an expert in family medicine, occupational medicine and as a Level II accredited physician hired by Claimant. Dr. Sharma opined that as a cause of lifting something heavy, a door they had been having problems with in the past, in the normal course of Claimant's work activities Claimant began to have pain and back problems, which eventually required emergency surgery for the acute disc herniation. He explained that Claimant had an acute disc injury that took a little time to extrude and impinge on the nerve and that is why Claimant did not have immediate onset of back pain but it took a few minutes to cause the effect and the direct causally related act of lifting the door was the cause of Claimant's injury on April 5, 2021, and was not related to the chronic changes.

29. Dr. Sharma opined that the work related incident was the proximate cause of the Claimant's injury, it was the inciting event that caused the acute disc herniation. He further opined that the microdiscectomy performed on April 7, 2021 was reasonably necessary and related to Claimant's April 5, 2021 work related injury. Dr. Sharma stated that since the disc was an acute herniation, without the emergency surgery it was likely that Claimant would have had severe, debilitating, long-term issues, including bowel problems, bladder problems and difficulty ambulating. Dr. Sharma noted that, while Claimant had a preexisting degenerative changes in his spine, what occurred on April 5, 2021 was an acute disc herniation.

30. With regard to the need for the second surgery, Dr. Sharma specifically stated that:

> More likely than not, it was probably a fragment that may not have been completely removed when he had his first surgery. And so -- and because it was at a similar level, it is related to the first surgery because he didn't have symptoms anywhere else in his back.

He stated that Claimant, at the time of his examination, was much better compared to how he was doing right after the work injury. On exam he found good strength, no foot drop, no numbness or tingling, normal reflexes. He opined that the second surgery was also reasonably necessary and related to Claimant's work related injury of April 5, 2021, was not at maximum medical improvement yet, and he required physical therapy post surgically. Lastly, her recommended that a functional capacity evaluation be performed after the PT was accomplished, to determine permanent work restrictions, if any, are necessary.

31. Dr. John Burris was contracted by Respondents to perform an independent medical evaluation (IME). Dr. Burris issued two reports, the first was dated March 22,

2022. Dr. Burris reviewed the medical records and obtained a history consistent with Claimant's testimony at hearing. He opined that, based on the Claimant's history and the medical record review as well as following examination, he opined that Claimant's disc injury was causally related to the events of April 5, 2022.

32. On March 25, 2022 Dr. Burris issued a supplemental report following receipt of a video of the garage door. At that time, he changed his opinion based on viewing the video provided by Respondents, which showed the supervisor opening the large garage bay door. He stated that in his opinion the function of the garage door required only minimal effort and categorized it in the sedentary category or consistent with activities of daily living.

33. Dr. Burris testified at hearing in this matter as a board certified occupational medicine physician and as a Level II accredited provider hired by Respondents. He provided his procedures for conducting an IME. Dr. Burris stated that at the time he issued the original IME report, he opined that the described event, which was consistent with Claimant's testimony, was the proximate cause of Claimant's work related condition. However, viewing the video tape, he changed his opinion based on information he obtained from the Division that if an event was sedentary or consistent with activities of daily living, that it usually means that the event did not cause a work related condition. He also stated that the Claimant's action of opening the bay door was not a special hazard or condition on the workplace that would have caused or been the proximate cause of his condition. He stated that his opinion continued to be, based on the video that he saw, if that truly represented the nature of opening the garage door, his opinion to a reasonable degree of probability.

34. Dr. Burris acknowledged that he could not pinpoint the cause of Claimant's low back condition. He stated that Claimant's testimony at hearing was very consistent with what Claimant told him during the IME. He acknowledged that, considering Claimant's described serious foot drop that the need for the first surgery was likely necessary as well as the second surgery, when the first one failed to resolve the ongoing symptoms. He also conceded that Claimant required ongoing treatment, including physical therapy following the second surgery.

35. The wage records prior to the work injury are limited to one check for a week for pay period from March 28, 2021 through April 3, 2021 showing earnings in the amount of $1,207.36. The second check earnings record is for pay period from April 5, 2021 through April 10, 2021 for $1,144.36. Since Claimant was injured on April 5,2021, was admitted to the hospital on April 6, 2021 and had surgery on April 7, 2021, Claimant's wages for that time period cannot be used to calculate average weekly wage. As found, Claimant's AWW is $1,207.36.

36. Claimant was off due to his surgery from April 6, 2021. The wages for pay period ending (PPE) April 17, 2021 were reduced. There are no earnings for PPE April 24, 2021 and reduced earnings for PPE May 1, 2021 forward. PPE May 1, 2021 showed wages earned for 30.37 hours. Claimant stated that he returned to work as of April 29, 2021 with limitations but that his employer paid him his vacation time.[7] Dr. Matney noted

[7] April 13, 2022 Hrg Tr. p. 42:1-25 & p. 43:1-3.

that Claimant was not working on April 13, 2021 but by April 29, 2021 she noted that Claimant returned to work with limitations. As found, since the wage records show some earnings for PPE May 1, 2021 that Claimant has shown that he is entitled to temporary total disability benefits from April 6, 2021 through April 28, 2021 and temporary partial disability benefits from April 29, 2021 through December 29, 2021. This is supported by Claimant's testimony that he returned to modified work in the office filing, making copies and shedding, following his first surgery.

37. Claimant stated that he received his vacation pay while off due to his surgery. As found this vacation time off should be reinstated as Claimant was due temporary total disability benefits during this time.

38. Claimant also received some unemployment benefits from May 2021 through March 2022, which Respondents are entitled to offset pursuant to statute.

39. Claimant proceeded with physical therapy, following his first surgery, at Rocky Mountain Medical Group. However, when Claimant reached a point where he was not having any progress with physical therapy, around September, 2021, the therapist recommended Claimant return to the surgeon to be evaluated. Claimant returned to see Dr. Kim, who ordered a second MRI, which showed that there was still a fragment impinging on the sciatic nerve, causing pain running down his leg.

40. Claimant continued to work until his second surgery, which took place on December 30, 2021. Claimant was off work from December 30, 2021 until February 4, 2022, when he returned to work light duty. Claimant was working light duty at least to the date of the hearing. He is now assisting the shop manager and runs errands while on light duty.

41. Claimant also continued to see the workers' compensation providers through the date of the hearing. The last physician Claimant saw was Dr. Annu Ramaswamy at Rocky Mountain Medical Group on April 13, 2022. Claimant has not received physical therapy following his second surgery. He stated that he wished to continue with his workers' compensation providers to obtain the treatment he requires.

42. Claimant stated that he had lubricated the dock door but it still has some sticking points and that he believed the shop manager has done it as well. Now Claimant raises the door in a different manner, standing in the middle of the door, lifting with his arms, not his back. Now, when he is unable to reach he uses a stick to make the bay door go all the way up, instead of using force bending down and pushing it up.

43. Claimant's supervisor and the General Manager for Employer's Colorado location testified at hearing. He confirmed that Claimant reported the incident to him on April 5, 2021, including that while he was lifting the garage bay door he felt a pop in his knee. Claimant did not initially mention the low back. Claimant had help that day and the supervisor advised Claimant that he did not have to do anything that he was unable to do. The supervisor and Claimant speculated that the back condition was being caused by overcompensating due to the knee injury caused by the incident of opening the door.

The supervisor reached out to the HR representative in the corporate office in Phoenix, to clarify whether to send Claimant to the same providers he had previously seen for the knee claim or as a new claim.

44. The supervisor testified as to the conditions of the garage bay door, that it was functional and not difficult to operate. He had the shop manager take a video of him opening the garage bay door on April 12, 2021. To his knowledge no one had oiled or lubricated it between the day of the incident and the day of the video recording. After the recording took place, the garage door was mangled a little bit because a technician drove into the door, so it was not operating in the same manner as it did the day of the incident. He further stated that they do not normally open the door all the way every day.

45. Respondents submitted Exhibit I, which was a video of Claimant's supervisor opening the garage bay door. The supervisor was standing upright at the middle point of the door and lifted the door with ease. The supervisor only lifted the door to the height it would open without additional help.

46. Claimant testified that the supervisor is approximately six feet tall, compared to his five foot four. As his truck is over twelve-foot-tall, the door had to be open to that level in order for Claimant to back it up into the bay to have it loaded. This ALJ observed that, if the supervisor was approximately six feet tall, then each panel of the garage door was approximately two feet tall. When the supervisor raised the door, the video only showed that the door opened to approximately the fourth panel, which would mean it raised only to around eight-foot-tall and not the twelve-foot height required.

47. As found, the video is an inaccurate representation of how Claimant lifted the garage bay door by bending down, and raising the bay door by giving the garage door a good hard yank to get it high enough to load his twelve-foot plus box truck. While Claimant would likely not have injured himself if he had lifted the door in the same manner as his supervisor, that does not change the compensable nature of the work related injuries to Claimant given that Claimant bent down, and gave the garage bay door a good yank, causing injury to his low back by herniating his disc by this mechanism of injury. As found Claimant has proven the claim to be compensable.

48. As found, Claimant was attended at North Suburban Medical Center on an emergency basis on April 5, 2021 and was advised to return to the ER on April 6, 2021 after the ER physician reviewed Claimant's MRI films and communicated with Dr. Kim. Dr. Kim performed emergency surgery on April 7, 2021. All of this care was reasonably necessary and related to the injury. Claimant was sent to Rocky Mountain Medical Group where he was treated by Dr. Matney and Dr. Ramaswamy as well as for physical therapy. These providers are designated authorized providers within the chain of referral. As found Claimant obtained reasonably necessary and authorized care from these providers.

49. As found, Dr. Matney recommended Claimant continued to follow up with his neurosurgeon, especially in light of the October 20, 2021 MRI findings of a recurrent extruded disc and severe stenosis at the L5-S1 level. Claimant continued to have foot drop, neurological findings and symptoms in his low back as documented by Dr. Sharma

in his medical records review. Claimant returned to the surgeon and was attended by Dr. Stephen, who performed a second lumbar spine surgery on December 30, 2021. All of this care and treatment was related to the April 5, 2021 work injury as well as reasonably necessary and authorized.

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 seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Compensability

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

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

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

coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

As found, Claimant has established by a preponderance of the evidence that he suffered a compensable injury on April 5, 2021 during the course and scope of his employment with Employer. Claimant was at work when he bent down to lift the garage bay door. He credibly stated that he needed to use force to lift the dock door with sufficient impact to cause a herniated disc. Following the incident, he immediately had a swollen right knee that had popped during the incident. While the knee problems resolved, the impact on his low back did not resolve, causing him to report the injury to his employer. The written report to Employer credibly stated that Claimant bent and gave the garage door a good hard yank to get it high enough to load his twelve-foot height box truck. As found, Claimant's testimony is more credible with regard to the actions taken by Claimant while lifting the garage bay door than those presented by the video of the supervisor opening the door or the supervisor's testimony. As found, Dr. Sharma's testimony is credible in determining that Claimant's herniated disc was proximately caused by the actions by Claimant while opening the bay door. Dr. Burris testified that he relied on the mechanism of opening the door provided by Claimant before he changed his opinion. Dr. Burris' initial findings that the Claimant's injuries were causally related to and proximately caused by the events described by Claimant was credible.

Respondents' emphasis on the emergency room (ER) records is misplaced when determining a mechanism of injury. ER personnel are focused on identifying injuries and pain generators and stabilizing the patient. Causation is of secondary concern, as is the precise mechanism of injury, unless it helps to target a treatment modality. The patients are in varying degrees of distress, and ER personnel are often multitasking. Leading questions are sometimes asked, certain dots get [mis]connected, and things can get lost in translation in that environment. Further, this ALJ infers that PA Holland did not complete her paperwork until several days later and any statements made with regard to Claimant injuring himself two days before arriving at the ER are simply not credible.

Simply stated, Claimant herniated his disc at work, but his symptoms continued to worsen as the day went on, on April 5, 2021. His pain got progressively worse. The pain and symptoms going into his lower extremity became more prevalent. Immediate symptoms after the initial opening of the door are inconsequential as a herniated disc, as explained by Dr. Sharma, sometimes take some time to start impinging on the nerve. In this case, it only took approximately ten minutes for that to happen and this is the nexus that drives this ALJ to the conclusion that the inciting event was the cause of Claimant's injury and subsequent need for medical care. Claimant's inability to walk without substantial pain was noted by Claimant almost immediately. The fact that Claimant assumed the difficulty with walking was caused by his prior aggravated knee condition is for naught, as Claimant did not have the requisite medical knowledge to determine the cause of his lower extremity problems or that he had a herniated disc. The ALJ finds Claimant sustained an acute injury to his low back, left leg and left foot on April 5, 2021, while at work and performing the duties of his job. Claimant appropriately reported to the ER after he failed to receive instruction from his supervisor with regard to medical care. He was treated by a physician at the first opportunity, apparently not realizing the urgent significance of his condition, and was release. No such severe symptoms had ever befallen Claimant prior to April 5, 2021. Claimant's current condition is not the result of a natural progression of his (admittedly) preexisting condition and the inciting action that proximally caused the injury was Claimant's action of opening the large bay door.

Despite some inconsequential inconsistencies in the ER records, the ALJ actually finds that a more precise mechanism of injury can be described in the calm of a physician's office after the fact, and even more so while being forged in the crucible of cross-examination. This ALJ finds that there is no credible evidence in the record to suggest any material inconsistency by Claimant in describing how he was hurt, and how he felt on the date of his injury. Claimant has shown that the events of April 5, 2021 proximally caused his work injury and the claim is judged compensable.

C. Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his

industrial injury. Claimant reported to North Suburban Medical Center on April 5, 2021 and returned on April 6, 2021 when Dr. Varanasi documented a history of Claimant developing symptoms after lifting a heavy door at work causing pain and weakness going from the low back, into the left buttock down the left leg, causing numbness, from the knee down, with some weakness. This is consistent with Claimant's credible testimony as well as other providers' documentation of the mechanism of the injury. Respondents' recitation of portions of the article submitted by Dr. Sharma as well as pointing to other inciting potential factors are not persuasive. Here, there was a specific incident that occurred to cause the herniation, which compressed the nerve and caused immediate symptoms affecting the lower extremity. Claimant's symptoms are closely tied to the event, even if Claimant did not necessarily understand what was causing the symptoms to occur. Despite other potential inciting events, as found, the specific incident of lifting the bay door while bent over and placing force behind the yanking of the door was the proximate cause of the disc herniation and compression of the nerve. Any evidence to the contrary is not persuasive.

As found, Claimant reported to his supervisor, immediately, that he had injured himself and required medical attention. Claimant sat down to rest for a few minutes, but when he got up to go help load the windows on his truck, he was unable to do so and coworkers proceeded to load his truck. Claimant did report to his supervisor that it was not only his right knee but had low back problems from the incident and requested medical attention. Claimant continued to work on April 5, 2021, only driving, but when he returned he asked his supervisor if he had heard anything from headquarters about medical care. When Claimant did not get any further instruction, he was seen on an emergent basis at North Suburban and his subsequent surgical treatment on April 7, 2021 by Dr. Kim is considered emergent care in light of his neurological findings including drop foot and severe pain related to the herniated disc.

D. 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. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, 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." 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). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that the providers at Rocky Mountain Medical Group (RMMG) as well as the neurosurgeons are authorized providers. Initially, on April 5, 2021 Claimant reported his injury to his supervisor. His supervisor prepared a report and provided no instructions with regard to what care Claimant should avail himself. Claimant appropriately sought emergent medical care at North Suburban and the neurosurgeon, Dr. Kim, proceed with emergent surgery. Claimant explained he kept his supervisor informed that he had been admitted to the hospital for surgery, and while the supervisor was surprised that the surgery took place so quickly, instructions regarding medical care follow up took some time. Claimant was supposed to see a workers' compensation provider at Rocky Mountain Medical Group the day following his surgery but he had not been released at that point. Claimant was first seen by Dr. Matney of RMMG on April 13, 2021. The preceding chronology reveals that Employer had some knowledge of the accompanying facts connecting Claimant's injury with his employment and the matter might involve a compensable claim.

As found, the ER providers, North Suburban, RMMG providers as well as the neurosurgeons seen by Claimant at North Suburban are authorized providers either seen for emergent medical care needs or seen within the chain of referral as designated by employer and are authorized providers that tendered reasonably necessary medical care related to the April 5, 2021 work related accident.

E. 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).

Claimant has shown by a preponderance of the evidence that his average weekly wage is $1,207.36 based on the wage records prior to the work injury submitted into evidence and is limited to one check for pay period from March 28, 2021 through April 3, 2021. Post-injury wage records were not considered in calculating the AWW as they included vacation pay and Claimant's return to modified part time work.

F. Temporary Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont*

Toyota, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Industrial 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. The same is true in order to receive TPD benefits.

As found, Claimant's April 5, 2021 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. The records and testimony reveal that Claimant has established a causal connection between his work-related injuries and subsequent wage loss Specifically, Claimant suffered a complete inability to work or that work restrictions impaired his ability to effectively and properly perform his regular employment. Claimant has been unable to work his regular job since April 5, 2021 and has not reached Maximum Medical Improvement (MMI). Accordingly, Claimant is entitled to receive temporary disability benefits until terminated by statute.

As found, Claimant has established by a preponderance of the evidence that he is entitled to receive temporary total disability benefits for the period of April 6, 2021 through April 28, 2021. Claimant stated he returned to modified work as of April 29, 2021 and this was documented by his treating provider.

From April 29, 2021, Claimant was provided with modified duty in the office. Wage records show Claimant was earning substantially less than his AWW after his work injury. Claimant has shown by a preponderance of the evidence that he is entitled to temporary partial disability benefits from April 29, 2021 through December 29, 2021, as he had his second surgery on December 30, 2021.

Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability benefits from December 30, 2021 through February 3, 2022, which was his period of convalesce following the second surgery.

Claimant returned to modified work on February 4, 2022 through the date of the hearing. For the period February 4, 2022 until terminated by statute Claimant is entitled to temporary partial disability benefits.

Vacation and sick benefits paid to the claimant cannot be deducted from, or credited against, the temporary disability benefits to which the claimant is entitled. *See,* COLO. REV. STAT. § 8-42-124(2); *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990). Section 8-42-124(2) of the Act "reflects a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits. Indeed, it is generally recognized that vacation and sick pay are benefits earned by virtue of past services rendered and that, as such, these 'earned' benefits should not be impaired by the employee's work-related injury. *See* 2 A. Larson, *Workmen's Compensation Law* § 57.46 at 10–164.53 (1989)." *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990) (discussing the former statute 8-52-107(2)&(4), with the same language as the current Section 8-42-124, C.R.S.). If the employer has charged the employee with any earned vacation leave, sick leave, or other similar benefit for any reason when the employee was entitled to receive an award of temporary partial or total disability, then the reduced benefits "shall be reinstated." Sec. 8-42-124(4), C.R.S.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant was injured in the course and scope of his employment on April 5, 2021 and the claim is compensable.

2. Respondents shall pay for all authorized, reasonably necessary and related medical benefits for the treatment of Claimant's lumbar spine, left lower extremity and foot injuries, including but not limited to North Suburban Medical Center, Dr. Richard Kim, Dr. James Stephen, Rocky Mountain Medical Group and other providers within the chain of referral.

3. Respondents shall pay temporary total disability (TTD) benefits for the period of April 6, 2021 through and including April 28, 2021. Respondents shall pay temporary partial (TPD) disability benefits from April 29, 2021 through December 29, 2021. Respondents shall pay TTD from December 30, 2021 through February 3, 2022. Respondents shall pay TPD from February 4, 2022 until terminated by law.

4. Employer shall reinstate any vacation credit, which was paid on or after April 5, 2021.

5. Respondents' are entitled to an offset for Claimant's receipt of any unemployment insurance benefits.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation 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 20th day of May, 2022.

Digital Signature

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to Temporary Total Disability ("TTD") and Temporary Partial Disability ("TPD") benefits for the period February 2, 2021, ongoing.

II. Whether Claimant proved by a preponderance of the evidence medical treatment for her right hip, including the right hip surgery recommended by Dr. Omer Mei-Dan and Dr. James Genuario, is reasonable, necessary and causally related treatment for her July 29, 2020 work injury.

III. Whether Claimant proved Respondents are subject to penalties pursuant to §§8-43-304(1) and 305, C.R.S., and WCRP Rules 5-6(A) and 6-8.

FINDINGS OF FACT

1. Claimant worked for Employer as a Logistics/Inventory Manager.

2. Claimant sustained an industrial injury on July 29, 2020 when she was attacked during a robbery. One of the perpetrators twice struck Claimant with a shopping cart on her right side while another swung a machete at Claimant. The impact of the shopping cart pushed Claimant back approximately 10 feet into a glass wall.

3. Claimant first sought medical treatment on August 13, 2020 at AFC Urgent Care. Claimant reported that she was struck in the shins and right upper thigh with a shopping cart during a robbery. She was diagnosed with an abrasion and cellulitis of the left lower leg, bilateral lower leg contusions, and anxiety. No hip or low back complaints or examinations were noted.

4. Complaints of shin contusions and post-traumatic stress disorder ("PTSD") were noted at follow-up appointments on August 15 and August 20, 2020. The medical records from the aforementioned dates do not address hip or low back complaints or examinations.

5. On September 3, 2020, Claimant attended a follow-up examination with John Vermityen, NP at AFC Urgent Care. Claimant reported pain in her bilateral shins, right lower back and right hip, as well as anxiety. NP Vermityen noted Claimant had a history of lumbar spinal fusions four years prior but that Claimant reported her current back pain was of a different nature. On examination, NP Vermityen noted muscular tenderness to palpation of the lower right lumbar and upper buttock and right posterior and lateral hip. There was no external swelling, ecchymosis, erythema or rash. SLR was negative. There was bilateral mid-shin tenderness and a small scab on the left mid-shin. NP Vermityen diagnosed Claimant added diagnoses of right lower lumbar pain and strain and right hip

strain and referred Claimant for physical therapy. He remarked that Claimant's back and right hip pain were consistent with strain due to the injuries received to the lower extremities.

6. Claimant continued to attend follow-up appointments at AFC Urgent Care with multiple providers. Right hip pain, findings and/or a diagnosis of right hip strain are documented on September 17, 2020 and October 29, 2020. Claimant also attended multiple psychological evaluations with Gary Gutterman, M.D. as well as multiple physical therapy sessions.

7. On January 18, 2021, Claimant presented to authorized treating physician ("ATP") Henry Johnston III, M.D. at AFC Urgent Care with complaints of shin and leg pain. On examination, Dr. Johnston noted both legs had healed with no evidence of swelling or ecchymosis. Claimant was still tender in the right lower leg. No hip or back exam is noted. Dr. Johnston diagnosed Claimant with right shin pain and PTSD. He recommended Claimant complete physical therapy and follow-up with her psychologist. On the WC-164 form, Dr. Johnston noted Claimant's date of maximum medical improvement ("MMI") was unknown at the time because "In progress." (R. Ex. C, p. 54).

8. Dr. Johnston reevaluated Claimant on February 1, 2021, at which time Claimant reported low back pain. Dr. Johnston referred Claimant to a Level II physician for evaluation. He again noted Claimant's MMI date was unknown at the time.

9. On March 30, 2021, the parties attended a hearing before ALJ Peter J. Cannici on the issues of compensability, entitlement to temporary indemnity benefits, and Claimant's responsibility for termination from employment.

10. ALJ Cannici issued a Findings of Fact, Conclusions of Law and Order ("FFCL") on May 14, 2021, finding Claimant's July 29, 2020 work injury compensable. ALJ Cannici further found Claimant was not responsible for termination from her employment and that Claimant was entitled to TPD or TTD benefits from August 27, 2020 to February 1, 2021. ALJ Cannici determined that Claimant's entitlement to benefits ended on February 1, 2020, the day which he found Dr. Johnston placed Claimant at MMI. He noted no Level II impairment rating had been scheduled as of the date of the hearing had been held before him. The parties did not ask ALJ Cannici to address average weekly wage ("AWW"), as such, ALJ Cannici's order did not order a specific dollar amount to be paid to Claimant.

11. Respondents appealed ALJ Cannici's FFCL on June 3, 2021 prior to the issuance of any benefits to Claimant.

12. On May 6, 2021, Gary Gutterman, M.D. performed a permanent mental impairment rating, assigning Claimant 7% whole person mental impairment rating. Dr. Gutterman did not address MMI.

13. On May 19, 2021, David L. Reinhard, M.D. performed an impairment rating. Claimant reported persistent low back and right hip pain. Dr. Reinhard noted that Claimant walked with a limp on her right side due to pain around the right lateral hip extending into the right lower lumbosacral region. On examination, Dr. Reinhard noted decreased right hip range of motion; inguinal pain with passive rotation of right hip and positive Faber pain with range of motion; pain along the right lumbar paraspinal musculature and pain with lumbar flexion and extension. Dr. Reinhard assessed Claimant with a right hip contusion and sprain, right tibia contusion and PTSD. He deferred timing of MMI to Claimant's primary care physician, but opined that Claimant should undergo a right hip MRI and/or orthopedic evaluation to rule out intraarticular pathology. He gave a 21% provisional permanent impairment rating of the right hip.

14. Claimant returned to Dr. Johnston on June 4, 2021 with complaints of right hip and right shin pain. Dr. Johnston noted,

> Patient did acknowledge the shin and some right hip pain but not to the degree she is expressing now and was hardly mentioned in the previous WC visits prior to 1/27/21. She was experiencing PTSD from the event. Still complained of sensitivity to her right shin that was struck with a shopping cart. We were working on Level 2 evaluation for PTSD and then complains of all this pain and discomfort in right hip and shin no better than after the initial injury.

(R. Ex. C, p. 59).

15. Claimant reported to Dr. Johnston having right hip pain since last August, which was improving with physical therapy at end of December, but that she had missed appointments since 1/27/21. On examination, Dr. Johnston noted tenderness and abnormal range of motion in the hips and/or pelvis. Dr. Johnston's diagnoses were PTSD, right shin pain and right hip pain. He referred Claimant for a right hip MRI and orthopedic consultation. Dr. Johnston did not place Claimant at MMI.

16. On June 28, 2021, the parties entered into a stipulation regarding the payment of temporary indemnity benefits ordered in ALJ Cannici's May 14, 2021 FFCL. The parties agreed to an AWW of $1,486.00 (with a corresponding TTD rate of $990.67) for a total of $19,848.00 temporary disability benefits owed for the period August 27, 2021 through February 1, 2021, subject to applicable offsets and credits. The parties further agreed that the stipulation applied only for the temporary disability benefit period as ordered by ALJ Cannici (August 21, 2021 through February 1, 2021). The parties further stipulated that Claimant could still claim additional benefits for additional periods subsequent to February 1, 2021, if applicable, and Respondents reserved the right to claim all defenses or offsets that are applicable for any claimed additional disability period.

17. Claimant testified it was her understanding the stipulation was entered into because she had been placed at MMI due to the impairment rating appointments being scheduled with Dr. Gutterman and Dr. Reinhard. Claimant testified she has never seen a

medical report placing her at MMI, remains on work restrictions and continues to receive referrals and treatment from the ATP, Dr. Johnston.

18. ALJ Susan Phillips approved the stipulation in an order dated July 8, 2021.

19. On July 15, 2021, Insurer filed a General Admission of Liability ("GAL"), admitting for medical benefits and TPD from August 27, 2020 through February 1, 2021 totaling $19,848.00. Under the remarks section, Insurer stated, "MMI and impairment are yet to be determined." (Cl. Ex.11, p.172).

20. Respondents withdrew their appeal of ALJ Cannici's order on July 20, 2021.

21. Claimant subsequently received the payment(s) of temporary indemnity benefits for the period August 27, 2021 through February 1, 2021 in the amount of $19,848.00, as ordered by ALJ Cannici, stipulated to by the parties and admitted by the Respondents in the July 15, 2021 GAL. No evidence was introduced into the record regarding when Claimant received the payment(s).

22. Claimant underwent a right hip MRI on July 1, 2021. The radiologist's impression was: severe macerated degenerative tearing of the superior acetabular labrum of the right hip giving rise to a labral cyst along the superior lateral labral margin; mild peritendinitis involving the right hip abductors.

23. On July 2, 2021, Dr. Johnston referred Claimant for orthopedic evaluation of her right hip with James Genuario, M.D. He again indicated the MMI date was unknown at this time because "In progress." (R. Ex, C, p. 63). On July 8, 2021, Kara Carpino, NP indicated the MMI date was unknown at this time because "In progress." (Id. p. 66).

24. Dr. Genuario first evaluated Claimant on July 23, 2021. Claimant reported that she had experienced right hip pain since the work incident, with no hip pain prior to the work injury. Dr. Genuario physically examined Claimant and reviewed imaging. His impression was status post traumatic incident with acute injury superimposed on hip dysplasia with femoroacetabular impingement ("FAI"). He noted that Claimant had significant right hip dysplasia as well as a cam deformity on her right femoral neck and then had a severe traumatic episode which caused injury to her hip. Dr. Genuario referred Claimant for a CT scan and surgical evaluation with Omer Mei-Dan M.D.

25. On July 26, 2021, Claimant filed an Amended Application for Hearing endorsing, *inter alia*, penalties against Respondents under §8-43-304(1), C.R.S., §8-43-305, C.R.S., and WCRP Rule 5-6(A) from June 15, 2021, ongoing for Respondents alleged failure to issue benefits in a timely manner. Claimant also alleged penalties under §8-43, 304(1), §8-43-305, C.R.S. and WCRP Rule 6-8 beginning February 1, 2021 and ongoing, for Respondents alleged failure to comply with applicable rules which provide TTD benefits may not be suspended, modified or terminated except pursuant to the provisions of the WCRP rule, or an order from the Director or an ALJ.

26. On July 30, 2021, claimant returned to AFC and was seen by Michael Noce, M.D. Dr. Noce noted Claimant has a labrum tear in the right hip and both doctors wanted to proceed with surgery. Dr. Noce did not place Claimant at MMI, noting Claimant would be scheduled for right hip surgery soon.

27. On August 16, 2021, Dr. Genuario recommended injections and physical therapy as a conservative option, or hip preservation surgery.

28. Claimant presented to Dr. Mei-Dan on August 26, 2021. Claimant reported that she had been experiencing right hip pain since a work incident during which an individual drove a shopping cart into her right hip. Dr. Mei-Dan noted Claimant had a known history of hip dysplasia but reported no prior right hip pain. Based on his examination and imaging, Dr. Mei-Dan diagnosed Claimant with symptomatic right hip pain due to hip dysplasia. He recommended Claimant undergo a total hip replacement or periacetabular osteotomy ("PAO"). Dr. Mei-Dan explained Claimant's hip dysplasia condition and noted that a labral tear is rarely the root of the problem, and typically occurred secondary to an underlying abnormality in the shape and mechanics of the hip joint.

29. On September 10, 2021, Timothy O'Brien, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported being struck on the right side with a shopping cart that pushed into her right hip and the front of her thighs. Based on his physical examination and review of the medical records, Dr. O'Brien concluded that the extent of Claimant's work-related injuries resulting from the work incident included bilateral shin contusions and abrasions, which had healed. Dr. O'Brien noted that Dr. Johnston's January 18, 2021 documented that Claimant's abrasions and contusions had healed as of that date with no swelling or ecchymosis on exam and normal range of motion. Dr. O'Brien opined that Claimant returned to her pre-injury level of function on or before January 18, 2021 and did not require further medical treatment as of that date.

30. Dr. O'Brien explained that his physical examination did not evidence any sequelae of the shin injuries, noting fully healed wounds, no swelling, and full range of motion of the knees and ankles. He noted normal exams of Claimant's legs, low back and hips. Dr. O'Brien opined that the medical documentation refutes Claimant's contention that she injured her low back and right hip, noting Claimant did not seek treatment for two weeks, and did not report back or hip complaints at her first or second examinations. Dr. O'Brien further opined Claimant's delayed onset of pain and low back and right hip complaints are a manifestation of her personal health and secondary gain. He concluded that Claimant's congenital hip dysplasia and labrum degeneration are pre-existing. Dr. O'Brien opined that it is "virtually impossible" Claimant tore her labrum as a result of the July 29, 2020 work incident and did not complain of pain. He further opined that the mechanism of injury would not have produced a labral tear. Dr. O'Brien opined Claimant reached MMI on or before January 18, 2021 with no permanent impairment.

31. On November 1, 2021, Dr. Johnston replied to a letter from Respondents' counsel inquiring about his opinion on Dr. O'Brien's IME assessment of Claimant's medical

history. Dr. Johnston opined that there could be a significant component of PTSD with Claimant's work injury, but agreed that her injuries as initially documented did not corroborate with her extensive hip pain and diagnosis of which she was referred for surgery.

32. Claimant continues to receive treatment from her ATP, Dr. Johnston. As of the date of hearing, there is no evidence Claimant has been placed at MMI an ATP.

33. Claimant credibly testified at hearing. Claimant testified that she had right hip pain when she presented to AFC on August 13, 2020. Claimant testified she was under the impression Dr. Johnston did not want to help her get better due to his poor bedside manner after the January 18, 2021 visit. Claimant testified that to her knowledge she has never been placed at MMI by any of her treating physicians nor has she ever seen a medical record indicating she is at MMI. Claimant testified she would like to proceed with the recommended surgeries so she can get back to work and get her life back. Claimant testified she stopped working for a different employer, on or around August 14, 2021. Claimant is not currently working. Claimant testified her unemployment benefits ended on September 2, 2021 and she is not currently receiving unemployment benefits.

34. Claimant has not received any TTD/TPD benefits for lost wages incurred on or after February 1, 2021.

35. Claimant testified she has not returned to her pre-injury level of function physically or mentally. Claimant testified she experiences anxiety, panic attacks, nightmares and is taking medication to deal with these symptoms. The medicine is being administered via the workers compensation carrier. Claimant has sensitivity issues in the right shin and her right hip is in constant pain.

36. No Final Admission of Liability, Application for Hearing, or DIME Application has been filed by Respondents.

37. Claimant proved by a preponderance of the evidence right hip treatment, including the right hip surgeries recommended by Drs. Genuario and Mei-Dan, is causally-related to her July 29, 2020 work injury and reasonably necessary to cure or relieve its effects. It is more probable than not the July 29, 2020 work injury aggravated, accelerated or combined with Claimant's pre-existing degenerative right hip condition, producing disability and the need for medical treatment.

38. Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021, ongoing. Claimant has yet to be placed at MMI for her July 29, 2020 work injury. Claimant's work injury, including injury to her right hip, resulted in disability, which caused Claimant actual wage loss.

39. Claimant failed to prove Respondents should be subject to penalties.

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 Benefits

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).

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).

As found, Claimant proved it is more probable than not medical treatment for her right hip, including the surgeries recommended by Drs. Genuario and Mei-Dan, is related to her July 29, 2020 work injury and reasonably necessary to cure and relieve Claimant of the effects of the work injury. Claimant did not solely report a mechanism of injury to her shins. At Claimant's initial evaluation on August 13, 2020, Claimant reported being struck with a shopping cart on her right side and upper right thigh. Although the next evaluation did not document hip complaints or examination, a subsequent evaluation on September 3, 2020 specifically documented right hip complaints and findings. At that time, Claimant was diagnosed with a right hip strain which was noted to be consistent with the injuries Claimant received to her lower extremities as a result of the work injury. While the right hip was not mentioned at each subsequent evaluation leading up to Dr. Johnston's initial evaluation on January 18, 2021, right hip complaints, findings and/or diagnoses were noted on at least two other evaluations prior to January 18, 2021. Level II physician Dr. Reinhard specifically noted right hip findings on his examination and credibly assessed Claimant with a right hip contusion and sprain. Dr. Reinhard recommended Claimant undergo a right hip MRI and/or orthopedic evaluation. He assigned a provisional 21% permanent impairment rating of the right hip, denoting his opinion that Claimant's right hip condition is work-related.

Although Dr. Johnston agreed with Dr. O'Brien that Claimant's injuries as initially documented did not corroborate with her current degree of hip pain and diagnosis, Dr. Johnston acknowledge there was some prior mention of right hip complaints. He did not place Claimant at MMI and instead ordered a right hip MRI and orthopedic evaluation. Dr. Genuario credibly opined that Claimant's work injury resulted in an acute injury superimposed on her pre-existing hip dysplasia. Dr. Mei-Dan assessed Claimant with symptomatic right hip pain due to hip dysplasia. There is no evidence Claimant was experiencing hip issues or limitations prior to the work injury. Claimant credibly testified that since the work injury, she has experienced consistent right hip pain and limitations. Claimant has required right hip treatment and received recommendations to undergo right hip surgery to relieve her pain. Claimant's pre-existing history of a degenerative right hip condition does not preclude a determination that her disability and need for treatment is not work-related. The credible and persuasive opinions of Drs. Reinhard, Genuario and Mei-Dan, as supported by Claimant's credible testimony and the medical records,

establish that it is more likely than not the work injury aggravated, accelerated, or combined with Claimant's pre-existing right hip condition, resulting in disability and the need for treatment. Accordingly, Respondents are liable for the recommended right hip surgeries and other causally-related, reasonably necessary medical treatment for the right hip.

Temporary Indemnity Benefits

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

As found, Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021 and ongoing. Claimant has continued to sustain wage loss since such time as a result of disability caused by the July 29, 2020 work injury. As of the date of hearing, there is no evidence Claimant has been placed at MMI by her ATP, nor is there evidence that any other circumstances resulting in termination of TTD or TPD have occurred. The stipulation entered into by the parties specifically provided that Claimant retained eligibility to receive future indemnity benefits if applicable. Claimant remains on work restrictions as a result of the work injury and sustained wage loss. As Claimant's work injury caused a disability lasting more than three work shifts, resulting in Claimant leaving work and sustain full or partial wage loss, Claimant is entitled to temporary indemnity benefits from February 2, 2021 and ongoing, until terminated by operation of law.

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.*

Section 8-43-305, C.R.S. provides that each day during which any employer or insurer fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title 8 constitute a separate and distinct violation.

WCRP Rule 5-6(A) provides that benefits awarded by order are due on the date of the order. After all appeals have been exhausted or, in cases where there have been no appeals, insurers shall pay benefits within thirty days of when the benefits are due. WCRP Rule 5-6(B) provides that temporary disability benefits awarded by admission are due on the date of the admission and the initial payment shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission.

WCRP Rule 6-8(A) provides that temporary disability benefits may not be suspended, modified or terminated except pursuant to the provisions of Rule 6-8; or pursuant to an order from the Director or pursuant to an order of the Office of Administrative Courts.

As found, Claimant failed to prove Respondents are subject to penalties in this matter. ALJ Cannici ordered Claimant was entitled to temporary indemnity benefits from August 27, 2020 through February 1, 2021. Respondents were not required to pay the benefits ordered by ALJ Cannici at the time due to Respondents filing a timely appeal. During the appeal process and prior to any order issued on appeal, the parties entered into a stipulation regarding the amount of temporary indemnity benefits owed for the temporary disability period ordered by ALJ Cannici. Respondents then filed a GAL on July 15, 2021 admitting for the stipulated amount of temporary disability benefits for the period of disability ordered by ALJ Cannici. Respondents were required to begin paying Claimant such benefits no later than five calendar days after the date of GAL. Respondents subsequently withdrew their appeal of ALJ Cannici's order. Claimant received the payment of temporary disability benefits in the agreed upon amount for the disability period ordered by ALJ Cannici. Claimant did not specify when she received the payments, nor was any other evidence introduced into the record indicating Respondents were late in issuing such payments.

ALJ Cannici specifically ordered Claimant was entitled to benefits through February 1, 2021. No order or admission was offered as evidence indicating that, prior to this order, Claimant was awarded temporary disability benefits from February 2, 2021 ongoing. As discussed, Respondents properly paid Claimant the temporary indemnity benefits owed as ordered by ALJ Cannici, agreed upon by the parties, and admitted to by Respondents. The very issue of Claimant's entitlement to temporary indemnity benefits for February 2, 2021 and ongoing was endorsed as an issue for hearing before this ALJ and is addressed herein on its' merits. As, pursuant to the Act, WCRP, ALJ Cannici's order, the approved stipulation of the parties, and the GAL, Respondents' were not required to pay Claimant temporary disability benefits subsequent to February 2, 2021, their failure to do so does not constitute an improper suspension, modification or termination of benefits, or any other violation warranting penalties.

ORDER

1. Claimant proved by a preponderance of the evidence medical treatment for her right hip, including the surgeries recommended by Drs. Genuario and Mei-Dan, are causally-related to her July 29, 2020 work injury and reasonably necessary to

cure or relieve its effects. Respondents are liable for the costs of the recommended right hip surgery and other reasonably necessary and related right hip treatment.

2. Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from February 2, 2021, ongoing until terminated by operation of law.

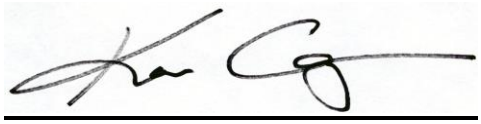
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Claimant's claim for penalties against Respondents is denied and dismissed.

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

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

DATED: May 23, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-134-649-001

ISSUES

The issues set for determination were:

- Did Claimant prove by a preponderance of the evidence that her need for shoulder surgery is reasonable, necessary and causally related to her industrial injury.

PROCEDURAL HISTORY

A Summary Order was issued on July 23, 2021. Following a Status Conference that was held on July 27, 2021, an Amended Summary Order was issued on August 3, 2021. Pursuant to § 8–42–503(3), C.R.S. (2020), the Amended Summary Order issued by the ALJ ordered Respondents to pay for a review of the plain x-ray and MRI films by a board-certified radiologist, who was asked to prepare a written report. James Piko, M.D. was the radiologist who conducted the review and prepared the report. Claimant requested a full Order on or about August 16, 2021.

Dr. Piko subsequently issued a report with regard to the x-rays and MRI-s taken of Claimant's right arm and shoulder, which was filed with the Court on September 24, 2021. The record was then closed and this Order follows.

FINDINGS OF FACT

1. Claimant was sixty-seven (67) years old (D.O.B. 7/27/53) as of the date of injury.

2. Claimant's medical history was significant in that she was treated for right shoulder pain prior to the injury. On June 2, 2017, Claimant underwent a right scapula x-ray for distal medial scapular pain that had been going into her right shoulder in the past month with no known injury.

3. Claimant began working for Respondent-Employer in February of 2018. Her job duties included working in shipping and receiving, putting merchandise in order, stocking product.

4. On June 5, 2018, a right shoulder x-ray was taken after Claimant fell. The radiologist's impression was: mild superior migration of the humeral head with respect to the glenoid; subacromial space narrowing at 6 mm and mild acromioclavicular and glenohumeral degenerative changes. Claimant was noted to have swelling, pain, tenderness by Cristen Mazzella, M.D. at Kaiser Permanente.

5. Claimant was seen for a follow-up evaluation at Kaiser on February 21, 2019 for shoulder pain. She was noted to be doing home exercises and referred for physical therapy ("PT").

6. Claimant testified she injured her shoulder when she fell at work in November 2019. She testified that she did not pursue a workers' compensation claim because she could not afford to go on workers' compensation benefits and take time off. Claimant testified she advised her boss of the injury.

7. On December 5, 2019, Claimant was evaluated at Kaiser after she was injured when she fell on ice (two weeks before) while getting the mail. Claimant was evaluated by Pamela Clift, P.A. at Kaiser and noted in the questionnaire that this was not related to "third party liability-workers' compensation. The exact location of this fall was not identified, however, the ALJ concluded it was not at work.

8. An x-ray of her right shoulder revealed an articular fracture of the humeral head; mild osteoarthritis of the glenohumeral joint; unremarkable acromioclavicular joint, probable rotator cuff tear, with an associated small degenerative bone spur arising from the anterior inferior aspect of the acromium and degenerative subcortical systic and sclerotic bone changes in the superior aspect of the greater tuberosity. Claimant was prescribed oxycodone and a Fentanyl patch.

9. An x-ray was taken of Claimant's right shoulder on January 6, 2020, which showed no interval changes since the previous study (December 11, 2019). The x-ray showed osteoarthritis and narrowing of the subacromial space consistent with rotator cuff pathology and a probable tear. The ALJ found these x-rays were objective evidence of degenerative changes in the right shoulder.

10. Claimant returned to Kaiser on January 29, 2020 and February 20, 2020, related to the right shoulder fracture and reported ongoing shoulder pain and weakness. Claimant was working on her motion and trying to use her left arm as much as possible, instead of her right arm. The ALJ inferred that the osteoarthritis and rotator cuff tear shown in the x-rays were the cause of shoulder pain and weakness.

11. The ALJ found the records from Kaiser before August 2020 documented Claimant's treatment for pain in the right shoulder. The x-rays showed degenerative changes in Claimant's right shoulder, including a probable torn rotator cuff. The x-rays also showed an articular fracture which was the result of trauma from the fall which occurred in November 2019.

12. Claimant denied that she had problems with her shoulder 2-3 months before her work injury. The Kaiser records showed Claimant was complaining of pain in her shoulder six months before the work injury.

13. There was no evidence in the record that Claimant had restrictions related to her prior shoulder injury. Claimant testified she was able to perform all of her job duties before August 2020, including stocking and reaching overhead. No physician recommended shoulder surgery before August 2020.

14. On August 2, 2020, Claimant was injured while working as a sales associate for Employer. She was attacked by a shoplifter and thrown to the ground. Claimant landed on her right side between two flower beds. The ALJ found Claimant injured her neck, shoulder, hips and head. This was a significant injury. Claimant's Employer offered to take her to the emergency department, but Claimant declined to go because she feared catching COVID.

15. Claimant was evaluated by Tiffany Knudsen, P.A. in the Emergency Department at Kaiser Permanente on August 3, 2020. She was complaining of hip and shoulder pain. PA Knudsen noted a hematoma and tenderness to palpation along the IT band bilaterally, with no midline spinal tenderness. Claimant had tenderness to palpation on the right pelvis, as well as scapular winging. Tenderness to palpation was present on the proximal and distal humerus. X-rays taken of the right shoulder showed no acute osseous abnormality, but mild glenohumeral osteoarthritis was present. There was a loss of the acromial humeral distance consistent with a large rotator cuff tear.

16. On August 14, 2020, Claimant was evaluated by Diana Halat, N.P. at Concentra. She had pain in her neck, head, both thighs and right shoulder. On examination, Claimant's right shoulder had tenderness in the AC joint, with no crepitus and no warmth. NP Halat's assessment was: assault, cervical sprain, initial encounter; shoulder dislocation, right, initial encounter; sprain, lumbar, initial encounter; sprain hip/thigh, unspecified laterality, initial encounter. Claimant was prescribed acetaminophen and referred to Cary Motz, M.D. (orthopedic surgeon), as well as for PT. The report was countersigned by Sophia Rosebrook, D.O., who also signed the WCM 164.

17. Claimant was evaluated by Dr. Motz on August 18, 2020, who evaluated her right shoulder. Pain was noted when Claimant abducted and reached across her chest, with Dr. Motz noting significant crepitus in the shoulder. Claimant's range of motion ("ROM") was 100° forward flexion, 0° of abduction, 20° external rotation and 70° of abduction. Dr. Motz' impression was: rotator cuff tear; possible glenohumeral arthritis. Dr. Motz did not have Claimant's X-rays from Kaiser at the time of the evaluation and an MRI was ordered.

18. Claimant returned to Concentra on August 19, 2020 and was evaluated by Kathy Okamatsu, N.P. At that time, she had pain in the head, right shoulder, bilateral hips, both thighs, neck and lower back. Bruising was noted on her legs. N.P. Okamatsu's assessment was the same as the evaluation on August 14, 2020. Claimant was noted to have attended one PT visit and was not cleared for a return to work.

19. On August 21, 2020, Claimant underwent an MRI of the right shoulder. The films were read by Munib Sana, M.D., whose impression was: ruptured and retracted long head biceps tendon; complete tear of the supraspinatus tendon, with significant retraction; high-grade partial tearing of the subscapularis tendon, with severe muscle atrophy; moderate grade interstitial tearing of the interior half of the infraspinatus tendon; high riding humeral head with acromial remodeling; moderate-sized joint effusion with synovitis. Dr. Sana stated those findings were age indeterminate and the ALJ inferred Dr. Sana was offering no opinion as to whether the findings were acute v. chronic, but severe muscle atrophy was present.

20. Claimant returned to Dr. Motz on September 2, 2020. Dr. Motz reviewed the MRI, which he said showed a massive retracted supraspinatus and infraspinatus tear, with significant atrophy. (It was unclear whether Dr. Motz reviewed the actual MRI and x-ray films.) He stated there was a significant loss of the acromiohumeral distance with remodeling of the head and some degenerative changes of glenohumeral joint. Dr. Motz' impression was: acute-on-chronic right massive rotator cuff tear; rotator cuff arthropathy. This description was persuasive to the ALJ.

21. Dr. Motz opined that clearly Claimant had a long-standing rotator cuff tear given the significant remodeling that was noted on the MRI, which was exacerbated with this fall. Dr. Motz performed a subacromial steroid injection at that time. Dr. Motz also noted Claimant had begun PT to work on her function, but there would limitations due to the chronic rotator cuff tear and arthropathy.

22. On September 3, 2020, a General Admission of Liability ("GAL") was filed on behalf of Respondents. The GAL admitted for medical and temporary total disability benefits.

23. Dr. Motz re-evaluated Claimant on September 29, 2020, at which time she reported no significant change following the steroid injection. She was making progress with PT. Dr. Motz‘ impression was the same as the prior appointment. He believed that Claimant would need a reverse total shoulder arthroplasty and characterized this as a chronic issue. Dr. Motz opined that the need for surgery was not related to the work injury two months ago and released Claimant from his care. There was no evidence Dr. Motz saw Claimant after that time. The ALJ inferred that Dr. Motz' opinion was that the surgery was reasonable and necessary, but not related to the industrial injury.

24. Claimant was evaluated by Nathan Faulkner, M.D. on October 2, 2020. At that time, she complained of persistent pain in the right shoulder, especially reaching across her body. She had not worked since the injury and denied any antecedent shoulder pain or dysfunction. This was not an accurate report of her prior medical history by Claimant. There was no evidence Dr. Faulkner had Claimant's prior treatment records from Kaiser at this evaluation.

25. Dr. Faulkner noted the MRI of August 21, 2020 showed a full-thickness tear of the supraspinatus and anterior infraspinatus retracted to the glenoid. There was a high-grade partial thickness tearing of the subscapularis with a large effusion. Grade 2 atrophy of the supraspinatus and subscapularis was present. Dr. Faulkner opined Claimant would benefit from an arthroscopic rotator cuff repair, as she had already ruptured her proximal biceps. In this report, Dr. Faulkner did not offer an opinion on relatedness or causation.

26. A surgery request was made by Dr. Faulkner on or about October 6, 2020. Authorization was requested for a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair, possible subscapular repair.

27. Respondents denied the request for authorization of the surgery.

28. Claimant was examined by John Sacha, M.D. on November 23, 2020. At that time, Dr. Sacha reviewed the MRI of the cervical spine, which showed straightening of her cervical lordosis and some mild disc degeneration at C5-6. On examination, cervical paraspinal spasm was noted, along with segmental dysfunction in the mid to lower cervical spine on the right side, with pain on extension, as well as extension rotation to the right. The examination of the right shoulder showed diminished range of motion and pain with Hawkins and Neer testing.

29. Dr. Sacha's impression was: cervical facet syndrome; history of rotator cuff tear; anxiety with adjustment disorder. Dr. Sacha misidentified the surgery proposed for Claimant-reverse arthroplasty. Dr. Sacha was concerned that Claimant was still wearing a shoulder sling and there was a high risk of Claimant developing adhesive

capsulitis/worsening cervical symptoms due to prolonged use of a sling. Dr. Sacha was going to contact Dr. Faulkner to discuss discontinuing the sling.

30. Claimant returned to Dr. Sacha on December 14, 2020, at which time Claimant had cervical paraspinal spasm and segmental dysfunction was noted. Crepitus with ROM pain was noted with Hawkins and Neer testing. Dr. Sacha recommended right C4-7 facet injections.

31. On December 28, 2020, Dr. O'Brien performed an IME at the Respondents' request and concluded that Claimant had degenerative changes in her right shoulder, as evidenced by a high-riding humeral heard. Dr. O'Brien opined that this was an incurable condition, with symptoms of crepitus or pain that can wax and wane. These symptoms would progressively worsen until a reverse total shoulder arthroplasty is needed. Dr. O'Brien stated that the pre-injury MRI findings were consistent with a longstanding rotator cuff tear, including the findings of the high riding humeral head, re-mottling of the undersurface of the acromion, glenohumeral joint arthritic changes, moderate to severe subscapularis atrophy associated with fatty atrophy. He believed the August 2, 2020 assault was a temporary aggravation and she reached MMI on or before September 3, 2020, which was not a credible opinion to the ALJ.

32. Dr. O'Brien opined that the surgery Claimant required was a reverse total shoulder arthroplasty. This opinion about what procedure was required was consistent with Dr. Motz' opinion. Dr. O'Brien did not believe the arthroscopic surgery would succeed, which would potentially make a reverse total shoulder arthroplasty more difficult.

33. Sander Orent, M.D. was present as a medical chaperone during Dr. O'Brien's IME with Claimant. On January 5, 2021, Dr. Sander Orent drafted a Rebuttal to Dr. O'Brien's IME report. Dr. Orent disagreed with Dr. O'Brien's description of Claimant's functionality prior to the August 2, 2020 injury. Dr. Orent also disagreed with Dr. O'Brien's description of Claimant's current shoulder symptoms. Dr. Orent opined that Claimant suffered a major injury to her right shoulder on August 2, 2020 and that Claimant's need for right shoulder surgery was causally related to her injury on August 2, 2020. The ALJ noted Dr. Orent did not evaluate Claimant.

34. Dr. Faulkner testified by way of an evidentiary deposition that was taken on March 1, 2021. Dr. Faulkner was qualified as an expert in the field of orthopedic surgery and Level II-accredited. Dr. Faulkner testified that 60-70% of his practice is performing shoulder surgeries. Dr. Faulkner stated he reviewed the actual films of Claimant's right shoulder x-ray and MRI and noted that Claimant had a "full thickness tear of the supraspinatus, as well as infraspinatus and she had a high-grade partial tearing of her subscapularis, as well as proximal biceps rupture.

35. Dr. Faulkner said he believed that the findings were acute in a nature. However, Dr. Faulkner did not have Claimant's prior records from Kaiser Permanente to review and she denied any prior injuries when he evaluated her. Dr. Faulkner said that Claimant's rotator cuff tear was acute because she only had a mild amount of atrophy of the rotator cuff. Dr. Faulkner disagreed with the radiologist's reading of the August 21, 2020 MRI and stated the findings of severe muscle atrophy were wrong. Dr. Faulkner was well-qualified and his expertise in the area of shoulder surgery was persuasive to the ALJ. His opinion was hurt by his lack of review of the prior records from Kaiser.

36. Dr. Faulkner recommended Claimant undergo shoulder arthroscopy and rotator cuff repair surgery. Dr. Faulkner stated he recommended this type of surgery because of the acute traumatic nature of the rotator cuff tear and size. Dr. Faulkner said surgery was required to repair the structures in the shoulder. Dr. Faulkner also testified that Claimant had failed conservative treatment in the form of physical therapy and injections.

37. The ALJ found Dr. Faulkner did not discuss how potential contraindications would be addressed. Dr. Faulkner testified the criteria surgeons looked at to see if someone needed a replacement versus rotator cuff repair was the amount of humeral head subluxation versus how high-riding the humeral head was relative to the glenoid. He did not believe Claimant had mild humeral head migration. Dr. Faulkner agreed that in patients with more advanced cases of humeral head migration, these patients will not do well with rotator cuff repair that a reverse shoulder replacement was required.

38. Claimant testified the pain she felt in her right shoulder was worse after the August 2, 2020 fall. Claimant said she wanted to have the surgery recommended by Dr. Faulkner. Claimant was a credible witness when describing her pain.

39. On or about September 21, 2021, Claimant's medical images were reviewed by Dr. Piko, who prepared a report detailing his findings. Dr. Piko reviewed x-rays of the right shoulder from June 5, 2018 which showed osteopenia, a high-riding humeral head and acromial enthesophyte formation contributing to high grade subacromial arch stenosis; Impression-advanced osteoarthrosis. The December 5, 2019 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head. The December 11, 2019 x-ray also showed persistent chronic osteoarthrosis and a high riding humeral head. The January 6, 2020 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head; no acute fracture or dislocation.

40. Dr. Piko reviewed the films of the MRI of the right shoulder done on August 21, 2020, that showed a complete tear of the supraspinatus tendon, anterior infraspinatus tear, subscapularis tendon had diffuse partial thickness tearing, along with attenuated biceps tendon. In addition, the superior labrum at the biceps labral anchor tendon was

torn and the inferior axillary capsule had central disruption. The posterior banc of the inferior glenohumeral ligament was torn, consistent with a P-HAGL lesion. Low grade supraspinatus atrophy was present, along with fibrovascular marrow changes at the superior humeral head.

41. Dr. Piko concluded that Claimant had a chronic appearing rotator cuff tear. Cephalad migration of the proximal humeral head and high-grade subacromial arch stenosis was present, along with a large joint effusion and sub- deltoid/subacromial bursa fluid extravasation. A SLAP tear extended into the biceps tendon. While some fibers were present, this was essentially complete interstitial tear and the origin was indistinct. The subscapularis tendon had intermediate grade partial tearing.

42. Dr. Piko opined these findings appeared long-standing and the serial x-rays confirmed chronic rotator cuff tearing/insufficiency, as well as osteoarthrosis. Dr. Piko stated no significant changes over the course of these exams were present from before and after stated injury. Dr. Piko's opinion that Claimant's shoulder had no changes to the rotator cuff over the course of various x-rays and the MRI was persuasive to the ALJ.

43. Claimant proved surgery was required for her shoulder. Claimant did not prove that her need for arthroscopic shoulder surgery was reasonable and necessary and related to her work injury.

44. The ALJ concluded Claimant's need for surgery was the result of several factors, including her prior trauma, the preexisting degenerative changes in the right shoulder and the work injury of August 2, 2020.

45. The ALJ determined it was more probable than not that Claimant required a reverse total shoulder arthroplasty.

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

CONCLUSIONS OF LAW

General

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of whether Claimant was entitled to medical benefits turned on the opinions offered by the expert witnesses.

Medical Benefits

In the case at bench, Claimant had the burden of proof to show that the surgery proposed by Dr. Faulkner was reasonable, necessary and related to the industrial injury. Claimant asserted the injuries sustained when she was assaulted aggravated the underlying condition of her shoulder and necessitated the surgery. Claimant relied upon the expert opinion of Dr. Faulkner to support her claim that the work injury caused the need for surgery. Respondents, while admitting that she was injured on August 2, 2020, averred Claimant's need for surgery was because of the degenerative changes in her shoulder. Respondents cited the opinions of Dr. Motz and Dr. O'Brien in support of their contentions. The question of whether Claimant proved by a preponderance of the evidence that they need for the arthroscopic surgery proposed by Dr. Faulkner was reasonable, necessary and related to her work injury required a review of her medical history, the trauma she sustained on August 20, 2020 and an evaluation of the respective opinions offered by the experts. The ALJ found Claimant did not meet her burden of proof that the surgery proposed by Dr. Faulkner was reasonable and necessary.

As a starting point, the ALJ found Claimant had degenerative changes in her right shoulder for which she required treatment before her August 2020 injury. As determined in Findings of Fact 2, 4-9, Claimant treated at Kaiser in 2017 and 2018 for right shoulder symptoms before her work-related injury. Claimant also required treatment in early 2019 and after a fall in November 2019, she treated in December 2019 and January 2020 at Kaiser for right shoulder issues. (Finding of Fact 7). The medical evidence in the record included x-rays taken in 2019 and 2020, in which the radiologist(s) noted the presence of a probable rotator cuff tear and osteoarthritis in the glenohumeral joint. (Findings of Fact 8-9). The ALJ concluded that these x-rays were objective evidence of degenerative changes in the right shoulder that were present before August 2020. No MRI was done before the 2020 injury.

Based upon the totality of the evidence, the ALJ found that the condition of Claimant's shoulder was the result of a combination of factors. (Finding of Fact 44). This included her degenerative changes and traumatic injury, as documented by the prior x-rays and need for treatment. *Id.* The ALJ also concluded Claimant suffered a significant injury on August 2, 2020 that caused an increase in her shoulder symptoms. (Finding of Fact 14). In this regard, the ALJ credited Claimant's testimony regarding her symptoms. (Finding of Fact 38). It is well-settled that 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. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* (Colo. App. 1990). Therefore, while Claimant's injuries on August 2, 2020 increased the symptoms in her shoulder, the objective evidence regarding damage to the structures of the shoulder showed that these were similar both before and after her injury. (Finding of Fact 42). As such, Claimant's need for surgery was the result of all of these factors.

In this regard, the ALJ concluded that the evidence admitted at hearing established that surgery was required for Claimant's right shoulder. (Finding of Fact 41). However, there was a conflict between the respective experts (Drs. Faulkner, Motz and O'Brien) as to what procedure needed to be performed and whether the condition of Claimant's shoulder was related to the industrial injury. There were issue with regard to all of these experts' credibility. Under the facts of this case, the ALJ concluded Claimant did not prove that an arthroscopic surgery was reasonable and necessary for her shoulder. The ALJ's reasoning was two-fold. First, the ALJ determined that the surgical procedure required by Claimant was a reverse total shoulder arthroplasty. This was based upon the opinions of Dr. Motz (Finding of Fact 23), as well as Dr. O'Brien (Finding of Fact 32). Both experts concluded that Claimant had a high riding humeral head and this was the surgery she required. *Id.* The ALJ found these opinions more credible as to what surgery Claimant required.

The ALJ's conclusion was further based upon Dr. Faulkner's deposition testimony in which he agreed that if Claimant had a higher riding humeral head, a total shoulder arthroplasty was the procedure she required. (Finding of Fact 36). The ALJ determined the objective radiographic evidence established Claimant indeed had a high riding humeral head. This determination was based upon the final expert opinion of radiologist, Dr. Piko who, after reviewing all the films taken of Claimant's shoulder found, as follows:

- June 5, 2018: a high-riding humeral head; advanced osteoarthrosis.
- December 5, 2019: persistent chronic osteoarthrosis; a high riding humeral head.
- December 11, 2019: persistent chronic osteoarthrosis and a high riding humeral head.

- January 6, 2020: persistent chronic osteoarthrosis and a high riding humeral head.
- August 21, 2020 MRI: complete tear of the supraspinatus tendon; anterior infraspinatus tear, diffuse partial thickness tearing of subscapularis tendon; torn superior labrum at the biceps; torn labral anchor tendon; central disruption of inferior axillary capsule; torn posterior banc of the inferior glenohumeral ligament.

Accordingly, because the medical evidence showed that Claimant had a high riding humeral head, the ALJ concluded the proposed arthroscopic surgery was not reasonable and necessary.

Second, the ALJ also considered the DOWC MTG when evaluating the proposed surgery. Dr. Faulkner recommended a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair possible subscapular repair. (Finding of Fact 25). The Colorado Workers' Division of Workers' Compensation Medical Treatment Guidelines ("DOWC MTG") address surgical indications and potential contraindications for the surgery at issue here:

"Shoulder Injury Medical Treatment Guidelines

10. ROTATOR CUFF TEAR:

a. Description/Definition:

Partial or full-thickness tears of the rotator cuff tendons, most often the supraspinatus, can be caused by vascular, traumatic or degenerative factors or a combination. Further tear classification includes: a small tear is less than 1cm; medium tear is 1 to 3cm; large tear is 3 to 5cm; and massive tear is greater than 5cm, usually with retraction. Partial thickness cuff tears usually occur in age groups older than 30. Full-thickness tears can occur in younger age groups; however, they are uncommon. Approximately 25% of asymptomatic patients over 60 have full thickness tears and between 40-60% have partial thickness tears. About 50% of those with asymptomatic full thickness tears will become symptomatic with tear progression in 2 years. This is more common with larger initial tears. Only about 10% of partial tears increase in size over time. Tendons do not repair themselves over time. The patient usually complains of pain along anterior, lateral shoulder or posterior glenohumeral joint."

…

"f. Surgical Indications:

"Goals of surgical intervention are to restore functional anatomy by re-

> establishing continuity of the rotator cuff, addressing associated pathology and reducing the potential for repeated impingement.
>
> **…**
>
> If no increase in function for a partial tear is observed after 6 to 12 weeks, a surgical consultation is indicated. For full-thickness tears, it is thought that early surgical intervention produces better surgical outcome due to healthier tissues and often less limitation of movement prior to and after surgery. Patients may need pre-operative therapy to increase ROM.
>
> Full thickness tears are uncommon in the 40-60 age groups. About 25% of asymptomatic patients over 60 will have a full thickness tear. Full-thickness tears greater than 1 cm, in individuals less than 60 should generally be repaired. Smaller tears appear to show less likelihood of progression (25%). Only about 10 percent of partial tears increase in size over time. The recovery rate for those with a full thickness tear without surgery is 60%. **In patients over 65 the decision to repair a full rotator cuff tear depends on the length of time since the injury, the amount of muscle or tendon that has retracted, the level of fatty infiltration and the quality of the tendon.** For patients with lack of active elevation above 90 degrees, arthroscopic biceps tenotomy may be effective in returning some elevation. The recurrence rate may be up to 50% in older patients with multiple tendon full-thickness tears. Pseudo paralysis or severe rotator cuff arthropathy are contraindications to the procedure." [Emphasis added]

The foregoing section of the DOWC MTG set forth the criteria to be evaluated in patients over the age of sixty-five when rotator cuff repair is being considered. The evidence in the form of the MRI revealed multiple structures within the shoulder joint, which had tears and degeneration. (Findings of Fact 19, 41-42). As found, Dr. Faulkner's testimony did not address these conditions in detail and also did not address the concern about atrophy, other than to say he disagreed with the radiologist's interpretation as to the degree of muscle atrophy. (Findings of Fact 35-36). Dr. Faulkner did not explicitly articulate how potential contraindications would be addressed. In fact, Dr. Faulkner stated he would have additional x-rays taken and agreed if Claimant had a high riding humeral head, a reverse shoulder arthroplasty was required. (Finding of Fact 36). The contraindications referenced by the DOWC MTG were not addressed and the conclusion that Claimant requires a different surgical procedure provide an additional basis for denial. Accordingly, Claimant's request for medical benefits will be denied.

ORDER

It is therefore ordered:

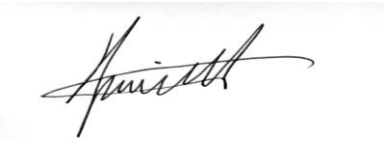
1. Claimant's request for payment of the arthroscopic repair of the torn rotator cuff in her right shoulder is denied and dismissed.

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 § 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: May 23, 2022

STATE OF COLORADO



Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-163-354-001

ISSUES

1. Whether Respondents have overcome the opinion of the Division Independent Medical Examination (DIME) physician by clear and convincing evidence with respect to maximum medical improvement (MMI).

2. Whether Claimant has proven by a preponderance of the evidence that her total knee replacement is reasonable, necessary, and related to her work injury.

3. Whether Claimant has proven that she is entitled to temporary total disability (TTD) benefits from Respondent.

FINDINGS OF FACT

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

1. Claimant is a 64 year-old woman who worked for Employer in November 2019. Her job duties included, but were not limited to, stocking shelves, taking small appliances off of pallets, and handling sales as the cashier. Claimant's typical shift was eight hours, and she was on her feet approximately seven and a half hours per shift. (Tr. 29:9-30:9)

2. On November 25, 2019, Claimant sustained an admitted injury at work when she tripped over a cord and fell on her right knee. Following the fall, Claimant experienced pain and swelling in her right knee, and she had difficulty walking. (Tr. 16:16-24).

3. Claimant credibly testified that prior to her fall at work she had never experienced these symptoms in her right knee. Claimant had never sought medical treatment for her right knee, including never seeing a doctor and never having x-rays or an MRI taken of her knee. (Tr. 31:2-11).

4. Claimant first sought medical treatment two days after her fall, on November 27, 2019, at the emergency room at Lutheran Medical Center (Lutheran). Claimant was treated by David Leventhal, M.D. Claimant reported having steady, non-radiating pain (5/10) since the fall. The pain was worse with weight bearing, and she was having difficulty walking. (Ex. 5).

5. At Lutheran, unilateral x-rays (3 views) were taken of Claimant's right knee. The impression read: "1. Within limitations of osteopenia, no evidence of an acute fracture. 2. Medial compartment predominant osteoarthritis. 3. Moderate-sized joint effusion." Dr. Leventhal concluded that Claimant had "no obvious bone injuries," and he gave Claimant

a knee mobilizer and crutches. He told Claimant to follow-up with her doctor if she continued to have significant pain, and he prescribed her pain medications. (*Id.*).

6. That same day, November 27, 2019, Claimant went to Concentra and was seen by Meryl Wolff, PA-C.[1] Claimant reported her pain level was 2/10. Ms. Wolf diagnosed Claimant with a contusion of the right knee, and released her to full duty work. She advised Claimant to take Ibuprofen and use an Ace wrap. (Ex. B).

7. On Monday, December 2, 2019, Claimant had a follow-up appointment at Concentra. She reported right anterior knee and posterior knee pain after standing for two hours. The pain was worse with flexion of the right knee. Chelsea Rasis, PA-C examined Claimant and strongly recommended physical therapy if there was no improvement in the next few weeks. Claimant had no work restrictions. (*Id.*).

8. Claimant returned to Concentra on December 31, 2019, and reported that her right knee continued to bother her. She had pain in the anterolateral aspect of her right knee. The pain became worse after an hour of walking, or when trying to bend her knee. She experienced swelling in her right knee and distal calf after a normal day of working. Ms. Rasis ordered an MRI of Claimant's right knee. Claimant was restricted to modified duty, where she would be sitting 50% of the time. (*Id.*).

9. At her follow-up appointment on January 7, 2020, Claimant reported tolerating working modified duty. Claimant, however, was having difficulty going up and down stairs, and getting in and out of the shower. Ms. Rasis referred Claimant to physical therapy. Between January 13, 2020 and February 11, 2020, Claimant attended seven physical therapy sessions. (*Id.*).

10. Claimant had an MRI of her right knee on January 14, 2020. The impression read: 1) Severe arthritis of the medial compartment of the knee with full-thickness chondral loss and evidence of eburnation; 2) Diffuse tearing of the body and posterior horn of the medial meniscus and the remnant of the anterior horn is extruded from the joint; 3) Moderate arthritis of the lateral compartment of the knee; 4) Tendinosis of the popliteus tendon; 5) Degeneration of the fibular collateral ligament; 6) The anterior cruciate ligament (ACL) is diffusely torn, and may be a chronic injury as there is no tibial torsion-type bone injury; 7) Degeneration of the posterior cruciate ligament; 8) Arthritis of the patellofemoral joint; 9) Quadriceps and patellar tendinosis; and 10) A bone lesion in the medial femoral metaphysis consistent with an enchondroma. (Ex. 6).

11. Claimant's ATP, Dr. Villavicencio, referred her to an orthopedic specialist. Claimant saw John Papilion, M.D. on February 20, 2022 for a consultation. Dr. Papilion specifically noted that Claimant "tripped over a cord and fell directly on her right knee and had a ***twisting injury***." (emphasis added) He goes on to say Claimant "vehemently

[1] Authorized treating physician (ATP) Theodore Villavicencio, M.D. was the supervising physician.

denie[d] any previous problem with her right knee [and] she has no left-sided symptoms." (Ex. 8).

12. Dr. Papilion reviewed the MRI and explained it confirmed degenerative changes in the medial compartment of Claimant's right knee with a complex tear of the mid body and posterior horn of the medial meniscus with extrusion. He also noted the moderate degenerative changes in the lateral compartment and what appeared to be a complete tear of the ACL. Dr. Papilion's assessment was "likely acute anterior cruciate ligament tear, right knee, with probable complex medial meniscus tear and underlying moderately severe degenerative arthritis." He explained that injection therapy may provide temporary relief, but his recommendation was a right total knee arthroplasty (TKA). (*Id.*).

13. At her follow-up appointment with Dr. Papilion on February 27, 2020, Claimant explained she did not want to start with surgery, and instead opted for a Synvisc injection. (Ex. 8).

14. Respondents retained Adam Farber, M.D. to conduct a Rule 16 records review. Dr. Farber opined that "[b]ased upon a reasonable degree of certainty, there is no evidence of an acute ACL injury causally related to the industrial injury." He also opined that Claimant's "osteoarthritis represents a chronic, degenerative and pre-existing condition that is not causally related to the November 25, 2019 industrial injury." Dr. Farber concluded that right TKA surgery was not reasonable, necessary or causally related. (Ex. H). On March 3, 2020, Respondents denied authorization for a right TKA based upon Dr. Farber's Rule 16 review. (Ex. 13).

15. Claimant returned to Concentra for a follow-up appointment on March 6, 2020. She reported difficulty carrying anything weighing greater than five pounds, and pushing or pulling a heavy cart. Claimant reported that she had been wearing a brace as needed. Ms. Rasis advised Claimant to refrain from further physical therapy. (Ex. 7).

16. Claimant continued treating with Dr. Villavicencio. On March 29, 2020, Claimant was released to full work duty with no restrictions. (Ex. B).

17. Claimant credibly testified that Employer continued to accommodate her previous work restrictions up until the time she was laid off, even though she had been released to full duty work. Respondents presented no evidence to controvert Claimant's testimony. (Tr. 35:1-8)

18. On April 30, 2020, Dr. Papilion again recommended that Claimant undergo the right TKA, particularly in light of the fact that she was not responding to conservative treatment. He recommended, however, that Claimant obtain a second opinion. (Ex. 8)

19. Claimant received a Synvisc injection in her right knee from Dr. Failinger at Advanced Orthopedic and Sports Medicine Specialists on June 2, 2020. Claimant was also prescribed metformin, amlodipine, aspirin, Aleve, and Tylenol for the pain. (Ex. 9).

On June 30, 2020, Claimant saw Dr. Papilion and told him that she only received two weeks' worth of relief from the Synvisc injection. (Ex. 8).

20. Claimant saw William Ciccone, M.D., an orthopedic specialist, for a second opinion. Dr. Ciccone examined Claimant on July 21, 2020. Claimant again denied any issues or restrictions with her right knee prior to the industrial injury. Dr. Ciccone noted Claimant had significant degenerative changes within her knee joint, which he believed caused her symptoms. He further explained that it was difficult to tell from the MRI whether the ACL tear with meniscal tearing was acute or chronic. Dr. Ciccone opined "given the significance of these degenerative changes, I do not believe that any surgical intervention other than a knee replacement would be beneficial to the patient." (Ex. E).

21. Under diagnostic studies, Dr. Ciccone noted, "radiographs – standing views, AP lateral, Merchant, and Rosenberg views show significant degenerative changes in bilateral knees." (Ex. E).

22. Claimant continued treating with Dr. Villavicencio. At her September 25, 2020 appointment, Dr. Villavicencio noted in the medical record that he was unclear regarding the status of an approval for the right TKA, and would follow up with the adjuster. At Claimant's December 10, 2020 appointment, Dr. Villavicencio again noted that he tried to contact the adjuster. (Ex. B).

23. Dr. Villavicencio placed Claimant at Maximum Medical Improvement (MMI) on February 23, 2021, because "no further treatment options besides the TKA are indicated, therefore, she is at MMI" and he gave her a lower extremity impairment rating of 9%, which he converted to a 4% whole person impairment rating. (Ex. C).

24. Respondents filed a Final Admission of Liability on April 30, 2021, consistent with Dr. Villavicencio's report. (Ex. A)

25. Claimant requested a DIME, and Martin Kavelik, D.O., conducted the DIME on August 26, 2021. Under "Scope of Exam" Dr. Kavelik noted he was asked to "address her right knee and consider MMI, impairment and apportionment." (Ex. 4).

26. Dr. Kavelik reviewed Claimant's medical records, including the January 14, 2020 MRI. Dr. Kavelik examined ***both*** of Claimant's knees. He noted that Claimant could ambulate without the brace, but she strongly favored her right knee with a limp. Dr. Kavelik diagnosed Claimant with a right knee contusion, right ACL tear (unknown age), right meniscus tear (probable work relatedness), and right knee osteoarthritis. (*Id.*).

27. Dr. Kavelik opined that Claimant was not at MMI because a right TKA was necessary. He concluded that Claimant suffered an industrial injury that affected her ADLs. Dr. Kavelik further opined Claimant had severe underlying arthritis, "but the injury has pushed her to a point of permanent impairment with the only surgical option being a total knee replacement." Additionally, Dr. Kavelik stated, at the end of his MMI discussion that if Claimant "chooses not to have surgical intervention, she would be at MMI." Dr.

Kavelik issued a lower extremity rating of 5%, which he converted to a 2% whole person impairment rating. (*Id.*).

28. Claimant credibly testified that she wants surgical intervention, and wants to have a right TKA. (Tr. 33:24-34:2).

29. Sometime on or around October 22, 2021, American Freight, the entity that had purchased Employer, laid off Claimant. (Tr. at 39:19-40:11).

30. Claimant testified that she started received unemployment in the amount of $329.00 per week on or around December 6, 2021. (Tr. at 37:14-24). No wage records were submitted into evidence.

31. At the time Claimant was laid off, she had been released to work full duty without any restrictions since March 29, 2020. Claimant credibly testified, however, that from March 29, 2020 until October 22, 2021, she worked full duty and Employer accommodated her prior restriction of only standing 50% of the time. (Tr. at 35:1-25). She further testified that she could not do her original job because she cannot walk or stand for hours, and she cannot lift heavy objects. Claimant credibly testified that she could not have worked for employer without the accommodations. (Tr. 36:1-19).

32. Claimant credibly testified that she has not worked since the time she was laid off. (Tr. 37:14-16).

33. On January 14, 2022, Lloyd J. Thurston, M.D., performed an Independent Medical Examination (IME) of Claimant. In his January 26, 2022 IME report, Dr. Thurston concluded that Claimant reached MMI approximately six months after the fall with no permanent impairment. According to Dr. Thurston, Claimant had "severe tricompartmental osteoarthrosis of both knees." He concluded that Claimant's issues did not stem from her fall but instead resulted from other chronic and degenerative conditions. According to Dr. Thurston, Claimant's mechanism of injury was not consistent with the typical mechanism for an acute ACL tear or an acute medial meniscus tear because, at the time of the injury, Claimant was not weight-bearing on the right leg, and there was no associated torque or twist force applied through her knee. (Ex. J.)

34. Dr. Thurston had several disagreements with Dr. Kalevik's DIME report. Dr. Thurston noted that Dr. Kalevik seemed to be unaware of Claimant's advanced osteoarthritis in her left knee. He also criticized Dr. Kalevik for not reviewing the standing x-rays that Dr. Ciccone reviewed. (*Id.*).

35. Dr. Thurston testified consistent with his report. He emphasized that Claimant's mechanism of injury did not involve twisting, again revealing that it would not result in an injury to the ACL or meniscus that Claimant has sustained. (Tr. 14:4-12).

36. While the ALJ finds Dr. Thurston's testimony regarding the mechanism of injury to be credible, it is not persuasive. At Dr. Papilion's first consultation with Claimant he notes

in the medical record, “she tripped over a cord and fell directly on her right knee and had ***a twisting injury***.” (emphasis added) (Ex. 8).

37. Dr. Thurston also testified that Claimant suffered a temporary exacerbation of a pre-existing condition. He further testified that Claimant is at her baseline. (Tr. 22:17-23:9). The ALJ does not find this testimony persuasive as Claimant credibly testified that she never had knee problems prior to her fall at work. Furthermore, Claimant credibly testified that she cannot do the same work functions as she did prior to the fall.

38. Dr. Thurston further testified that standing x-rays are particularly important because they show the significance of an individual’s osteoarthritis. (Tr. 16:4-10). He testified that Dr. Kalevik did not seem aware of Claimant’s degenerative arthritis, or these x-rays, when he issued his DIME report. *Id.* Dr. Thurston testified that when a doctor focuses solely on an injured knee and attributes all of the degenerative effects to an injury without comparing to the other knee, the physician misses critical information that reveals the degenerative condition in both sides without the presence of the injury. (Tr. 20:20-21:9). The ALJ finds Dr. Thurston’s opinion to be speculative. While there is no evidence that Dr. Kavelik reviewed these x-rays, his DIME report details his examination of ***both*** of Claimant’s knees. Dr. Kavelik’s also noted in his DIME report that Claimant had severe underlying arthritis.

39. Respondents have failed to establish by clear and convincing evidence that Dr. Kavelik’s opinion that Claimant is not at MMI is incorrect. The ALJ finds that Claimant is not at MMI.

40. Claimant credibly testified that she had no known problems with her right knee prior to her fall at work on November 25, 2019. The ALJ credits the testimony of Drs. Papilion, Kavelik, Ciccone, and Villacencio who all agree that Claimant needs a right TKA. The ALJ finds that a right TKA is reasonable, necessary and related to Claimant’s work injury on November 25, 2019.

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 MMI Finding

The Act defines MMI as "a 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. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Based on the totality of the evidence, the ALJ concludes that Respondents have failed to establish, by clear and convincing evidence, that Dr. Kavelik's opinion that Claimant is not at MMI is incorrect. (Findings of Fact (FOF) ¶ 39). Respondent's expert, Dr. Thurston, disagrees with Dr. Kavelik's opinion for multiple reasons. Dr. Thurston believes Claimant's mechanism of injury is inconsistent with an ACL tear. (*Id.* at ¶ 35). Dr. Papilion, an orthopedic specialist, noted that Claimant had a twisting injury when she fell. (*Id.* at ¶ 11). A twisting injury is consistent with a torn ACL. Dr. Thurston also speculates that Dr. Kavelik did not examine both of Claimant's knees, nor did he acknowledge her degenerative arthritis. (*Id.* at ¶ 38). As part of the DIME, however, Dr. Kavelik examined ***both*** of Claimant's knees, not just her right knee as Dr. Thurston speculated. (*Id.* at ¶ 26). Dr. Kavelik also noted Claimant's severe underlying arthritis, but opined that her only surgical option is a right TKA. (*Id.*). Ultimately, Dr. Villavicencio and Dr. Kalevik agreed with both the surgeon, Dr. Failinger, and Dr. Ciccone that Claimant's torn ACL is related to her work injury, and that she will need surgical repair to reach MMI. (*Id.* at ¶ 40).

As found, Claimant lacked symptoms or any prior treatment to her right knee before the industrial accident. Dr. Thurston, however, disregards the temporal correlation of the injury and Claimant's subsequent symptoms. While Dr. Thurston's testimony was credible, it was not persuasive. Dr. Thurston has a conflicting medical opinion from Dr. Kavelik. The evidence does not demonstrate that Dr. Kavelik's DIME opinion is incorrect. Respondents have failed to establish by clear and convincing evidence that Dr. Kavelik's opinion that Claimant is not at MMI is incorrect.

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant must prove a causal relationship between the injury and the medical treatment for which she is seeking benefits. Even if a work-related injury is compensable, there can still be questions as to whether the claimant's medical treatment is causally related to the work injury, or if proposed treatment is reasonable and necessary.

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*. The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

The ALJ credits the opinion of Dr. Kavelik that Claimant's current symptoms and need for a total right knee arthroplasty is a result of the work injury. (FOF at ¶ 40). The ALJ also credits Claimant's testimony that she never experienced any issues with her right knee prior to her fall at work. (*Id.*). Therefore, this ALJ concludes that Claimant has proved by a preponderance of the evidence that she is entitled to the recommended total right knee arthroplasty because it is related to her work injury, and is reasonable and necessary.

TTD Benefits

In order to establish eligibility for disability compensation including TTD benefits, a claimant must show a causal connection between a work-related injury and a subsequent wage loss. § 8-42-103(1), C.R.S.; *Loofbourrow v. Indus. Claims Appeals Office*, 321 P.3d 548, 555 (Colo. App. 2011). A claimant has the burden of showing that their injury contributed to a subsequent wage loss or termination. *See Warttman v. Colorado Springs*, W.C. No. 4-580-205 (April 2, 2004). When an employee returns to their job and the employer accommodates the work restrictions with no wage loss, a Claimant is not entitled to TTD. *See id.* Any subsequent loss of wages or employment must be shown to be a result of the injury. *Salgado v. The Home Depot*, W.C. No. 4-975-288-02 (June 28, 2016).

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that claimant left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* §§ 8¬42-103(a), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires 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) (citing *Ricks v. Industrial 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).

As found, Claimant is not at MMI. (FOF at ¶ 39). American Freight purchased Employer, and subsequently laid off Claimant on October 22, 2021. (*Id.* at ¶ 29). No wage records were entered into evidence. Claimant credibly testified that she has not worked since her employment was terminated, and that she is unable to work without accommodations. (*Id.* at ¶ 32). The evidence shows that Claimant was returned to full duty work with no restrictions on March 29, 2020. Claimant credibly testified, however, that Employer, accommodated her work injury by allowing her to sit 50 % of the time. (*Id.* at ¶ 31). As found, this accommodation was in place until the day Claimant's employment was terminated. (*Id.*). Claimant also credibly testified that she is not able to perform her prior job without accommodations as she is not able to walk or stand for hours at a time, and she cannot lift heavy objects. (*Id.*). Claimant has not worked since October 22, 2021. She began receiving unemployment on December 7, 2021 and receives $329 per week. Respondents presented no evidence to controvert Claimant's testimony. (*Id.* at ¶ 30). The ALJ credits Claimant's testimony that employer accommodated her, and she has not been able to work since her termination on October 22, 2021.

As found, Claimant is not at MMI, and she will not be at MMI until she has a TKA. (*Id.* at ¶ 39). As found, the TKA is reasonable, necessary and related to Claimant's work injury. (*Id.* at ¶ 40). Claimant is entitled to TTD from October 23, 2021, and continuing until terminated by law. Any TTD is subject to offsets.

Disfigurement

Claimant endorsed the issue of disfigurement in their response to the Application for Hearing. The issue of disfigurement is reserved and held in abeyance.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME opinion of Dr. Kavelik regarding MMI by clear and convincing evidence.

2. Claimant has proved by a preponderance of the evidence that she is entitled to medical expenses for her total right knee arthroplasty.

3. Respondents shall pay for TTD benefits as of October 22, 2021, subject to applicable offsets.

4. The issue of disfigurement has been reserved pending surgical intervention of Claimant's knee.

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: May 23, 2022

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that 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 he is entitled to reasonable medical treatment necessary to cure and relieve him from the effects of the work injury

3. The parties stipulated that the claimant's average weekly wage (AWW) is $673.08.

4. The parties also stipulated that the claimant has not suffered any wage loss.

FINDINGS OF FACT

1. The employer operates radio stations under the business name TM[Redacted]. The claimant began working for the employer on March 15, 2022. At all times relevant to the current claim, the claimant worked as an account executive in advertising sales at the employer's Grand Junction, Colorado location. The claimant's job duties included obtaining and maintaining advertising customers in the community. He was paid on a commission basis.

2. The claimant's supervisor is NR[Redacted], Market President and Chief Revenue Officer.

3. Latimer House is a shelter that provides emergency services and counseling for victims of domestic violence in Grand Junction, Colorado. Hilltop Community Resources operates Latimer House. Men in Heels is a community fundraising event for Latimer House. Funds collected from Men in Heels go to providing shelter services and case management.

4. The Men in Heels race involves teams of five men that participate in a relay type race while wearing high heels.

5. The employer is not affiliated with Hilltop Community Resources or Latimer House. The employer is not a sponsor of the Men in Heels race.

6. On August 17, 2021, an email was received by the employer from Hilltop Community resources about the 2021 Men in Heels race. Ms. NR[Redacted] relayed this

information to all employees at the employer's Grand Junction location. At that time, nine men worked at that location.

7. The claimant was one of four male employees that volunteered to participate in Men in Heels. The claimant also volunteered to be the "team captain". The claimant did not raise any funds for the fundraising portion of the Men in Heels event.

8. The team decided to dress as zombies for the race. On the day of the race (October 14, 2021), the claimant volunteered to go to a Halloween store and purchase supplies for the zombie theme. The employer provided a prepaid gift card to purchase these items.

9. On October 14, 2021, the claimant and his teammates donned their zombie costumes at the employer's offices and then traveled to the race location. The race was held at the local airport.

10. The claimant and his three teammates participated in their race. As their team had only four participants, the claimant opted to run an additional lap for the fifth leg of the race. By the time the claimant was to run the fifth lap, his team had already "lost" the race. Despite this, the claimant chose to run that fifth lap. When he was reaching the finish line, the claimant lost his balance and fell forward and sustained an injury to his right arm.

11. Video of the race was played during the hearing and entered into evidence as Exhibit H.

12. Ms. NR[Redacted] testified that the Men in Heels is a fun and voluntary event. Ms. NR[Redacted] also testified that the employer gained no benefit from the claimant's participation in the event. Ms. NR[Redacted] credibly testified that there was no pressure placed on the claimant, or any employee, to participate in Men in Heels. In addition, the claimant was not asked or expected to run the fifth and final lap.

13. The claimant testified that he did not feel comfortable participating in the Men in Heels race. The claimant further testified that as a new employee, he felt pressure to participate. The ALJ does not find the claimant's testimony to be credible or persuasive.

14. After his fall, the claimant was initially assessed by a physician that was also present at the race. The claimant was then transported to Community Hospital by Ms. NR[Redacted] and her spouse.

15. At Community Hospital, the claimant was seen by Dr. Rohn McCune. The claimant reported pain in his right elbow. The claimant also reported that he was "running in a race and tripped falling forward on outstretched arms."

16. The claimant was diagnosed with a coronoid fracture, radial head fracture, and dislocation of the right elbow. The claimant underwent surgery on October 15,

2021. Specifically, Dr. Duwayne Carlson performed an open reduction internal fixation (ORIF) procedure on the claimant's right elbow.

17. On October 18, 2021, the claimant began treatment with his authorized treating physician (ATP) Dr. Theodore Sofish, with Grand Valley Occupational Medicine. At that time, the claimant reported that he injured his right elbow when he was participating in a race for a local fundraiser.

18. On November 1, 2021, the respondents filed a Notice of Contest. The reasons listed for the respondents' contest/denial of the claim are identified as "[t]his is not a work related injury, the cause of injury is related to a voluntary participated event."

19. On February 10, 2022, the claimant returned to Dr. Carlson. At that time, the claimant reported he had started to return to his normal activities (including bowling and golf), which caused a flare of pain from his neck, down the shoulder, and to his elbow.

20. On April 14, 2022, the claimant underwent a second surgery. The purpose of that surgery was to remove hardware from his right elbow, to relieve his pain. The cost of the April 14, 2022 surgery was paid for by the claimant's private health insurance.

21. It is undisputed that the claimant suffered an injury at the Men in Heels race on October 14, 2021. The issue before the ALJ is whether the claimant's participation in that event constitutes "employment". The ALJ credits the testimony of Ms. NR[Redacted] over the contrary testimony of the claimant. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury arising out of and in the course and scope of his employment with the employer.

22. In reaching this conclusion the ALJ notes that the event, Men in Heels is a fundraising event for Latimer House. The employer is not affiliated with Latimer House or Hilltop Community Services. In addition, the employer did not sponsor the event. The ALJ also notes that the claimant volunteered to participate in the event, to be team captain, and to purchase items for the zombie themed costumes.

23. The event occurred off of the employer's premises and outside of the claimant's normal duties. As a commission employee, the claimant was not compensated for his time at the event. The claimant was not required to participate. The employer derived no benefit from the claimant's participation It was the claimant's decision to participate in the race, and to run the fifth lap.

24. The ALJ finds, as a matter of fact, that the claimant voluntarily participated in the Men in Heels race. The ALJ finds that the Men in Heels race is a voluntary and recreational event. The ALJ finds no persuasive evidence that the claimant was forced or coerced to participate in this voluntary event.

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).

5. Section 8-41-301(1)(b), C.R.S., provides that the right to compensation is subject to the condition that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-40-201(8), C.R.S., provides that the term "employment" shall not "include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Similarly, Section 8-40-301(1), C.R.S., defines the term "employee" to exclude any person employed by an employer "while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment."

6. In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning as an activity that "has a refreshing effect on either the mind or the

body." Determining whether an activity is "recreational" depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity, and whether the employer stood to benefit from the employee's participation in the activity. The question of whether an activity was "recreational" is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (I.C.A.O. Oct. 29, 2003).

7. Determination of whether the claimant's participation in a recreational activity was "voluntary" requires consideration of the claimant's "motive" for participation in the activity. Compensability must be denied if participation in the activity was voluntary, even though the employer promoted, sponsored or supported the activity. When determining whether the claimant's participation was voluntary the ALJ may consider various factors. Those factors include: whether the activity occurred during working hours, whether the activity occurred on or off the employer's premises, whether the employer initiated, organized, sponsored or financially supported the activity[1], whether the employer derived benefit from the activity. *Dover Elevator* Co. *v. Industrial Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). Ultimately, the question of whether the claimant's participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *Kvale v. Infinity Systems Engineering,* W.C. No. 4-588-521 (1.C.A.O. March 23, 2005).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. The claimant was injured while participating in the voluntary and recreational Men in Heels race. As noted above, Section 8-40-201(8), C.R.S. specifically excludes voluntary recreational activities from employment.

ORDER

It is therefore ordered that the claimant's claim related to an October 14, 2021 injury is denied and dismissed.

Dated May 24, 2022.

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

[1] The current version of Section 8-40-201(8) C.R.S. specifically states that employment does not include participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program."

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

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his August 25, 2015 Workers' Compensation claim based on mistake or error, or change of condition pursuant to §8-43-303(1), C.R.S.

2. Whether Respondents have established by a preponderance of the evidence that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a vehicle repossession agent. On August 26, 2015 he sustained an admitted bilateral arm injury while trying to lift a dolly bar out of a truck.

2. Claimant initially visited Concentra Medical Centers for bilateral arm pain. On November 29, 2016 Authorized Treating Physician (ATP) Albert Hattem, M.D. reported that Claimant had undergone a comprehensive course of conservative treatment including occupational therapy, massage therapy, acupuncture and injections.

3. On February 14, 2017 Dr. Hattem expressed concerns about Claimant's significant pain behaviors with minimal objective findings and recommended diagnostic testing for Chronic Regional Pain Syndrome (CRPS). Claimant ultimately was diagnosed with upper extremity CRPS after a March 16, 2017 thermogram and May 4, 2017 quantitative sudomotor axon reflex test (QSART) by George Schakaraschwili, M.D. were consistent with left greater than right CRPS. Dr. Schakaraschwili remarked that Claimant might benefit from bilateral stellate ganglion blocks, but Claimant declined them.

4. Dr. Hattem referred Claimant to psychiatrist Ronald Carbaugh, Psy.D. for perceived pain. On April 28, 2017 Dr. Carbaugh reported that Claimant was in an intense emotional state, had a tendency to catastrophize his injury and was angry because his CRPS diagnosis was "missed." Dr. Carbaugh diagnosed adjustment disorder. He recommended biofeedback and cognitive behavioral therapy. Claimant did not follow up with Dr. Carbaugh.

5. On May 24, 2017 Claimant visited John Sacha, M.D. for an examination. Dr. Sacha recommended a trial stellate ganglion block and, if Claimant declined the procedure, he would be placed at Maximum Medical Improvement (MMI). Claimant declined the block.

6. On July 13, 2017 Dr. Hattem placed claimant at MMI. He noted that Claimant was not interested in stellate ganglion blocks or psychological follow-up. Dr.

Hattem assigned a 15% whole person impairment rating and recommended six months of maintenance care to refill and taper Gabapentin.

7. On August 21, 2017 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Hattem's opinions. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

8. On January 17, 2018 Claimant underwent a DIME with David Yamamoto, M.D. Dr. Yamamoto determined that Claimant was not at MMI because he needed to undergo the following: an evaluation by a specialist familiar with spinal cord stimulators; a psychiatric evaluation to help with medication management; a second opinion by a psychologist to address depression and anxiety; and a functional capacity evaluation.

9. Based on Respondents' application to overcome the DIME, the parties conducted a hearing before ALJ Spencer on July 20, 2018. ALJ Spencer determined that Respondents overcame Dr. Yamamoto's opinion and Claimant reached MMI on July 13, 2017 for his physical injuries. He cited surveillance of Claimant from December 2017 noting that "[c]laimant's appearance in the video was incongruous and raises concerns that claimant may be exaggerating the severity of his condition." ALJ Spencer also found that Respondents failed to overcome Dr. Yamamoto's opinion that Claimant was not at MMI for his psychological condition. Even though Claimant had not followed through with Dr. Carbaugh's recommendations, ALJ Spencer gave Claimant the benefit of the doubt that he did not "connect" with Dr. Carbaugh.

10. On September 7, 2018 Respondents filed a General Admission of Liability (GAL), recognized that Claimant was not at MMI for his psychological condition and reinstated Temporary Total Disability (TTD) benefits.

11. ATP Dr. Hattem referred Claimant to psychiatrist Stephen Moe, M.D. and psychologist Joel Cohen, Ph.D. Both doctors recommended Cymbalta. On January 15, 2019, Dr. Moe reported that Claimant was not interested in psychiatric treatment apart from maintenance Cymbalta and had reached MMI for his psychological condition. Having complied with ALJ Spencer's Order and Dr. Yamamoto's DIME treatment recommendations to reach psychological MMI, Respondents returned Claimant to Dr. Yamamoto.

12. Partway through Claimant's treatment, Dr. Hattem changed medical facilities and became unable to treat Workers' Compensation claimants. On January 21, 2019, Dr. Hattem referred Claimant for a transfer of care to either John Sacha, M.D., Kathy McCranie, M.D., or Allison Fall, M.D. Claimant chose Dr. Sacha.

13. On February 6, 2019 Dr. Sacha noted that Claimant had a history of a mild Workers' Compensation repetitive motion injury of the upper extremity that developed into a mild case of CRPS. He also remarked that Claimant had significant psychological dysfunction and preexisting psychological issues. During this first and only visit, Dr. Sacha reported that Claimant became hostile in the office with him, nursing staff, and the office

administrator. Dr. Sacha remarked that Claimant was asked to leave and would not be allowed to return to the clinic.

14. Dr. Yamamoto performed a follow-up DIME and determined that Claimant reached MMI on March 4, 2019 with a 15% whole person permanent impairment. On April 3, 2019 Insurer filed a FAL consistent with Dr. Yamamoto's DIME opinion and acknowledging that Claimant was entitled to reasonable and necessary medical maintenance benefits. Claimant filed an application for hearing seeking to overcome Dr. Yamamoto's follow-up DIME opinion.

15. On June 17, 2019 Claimant visited George Schakaraschwili, M.D. for an evaluation. Dr. Schakaraschwili explained that CRPS can resolve over time and while diagnostic testing "could" be useful to see if Claimant still had CRPS, Claimant was at MMI "whether repeat testing is positive or not." Moreover, he remarked that "[i]f further testing were to confirm CRPS in either the upper or the lower extremities, this would justify maintenance treatment." On August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant thus had no signs of lower extremity CRPS other than hypersensitivity to touch.

16. Surveillance video from July 11, 21, 26 and 27, 2019 shows Claimant opening the door with his right hand, opening the door of a car with his right and left hands, using his left arm to raise a water bottle to his mouth, putting on his seat belt, driving a vehicle with both hands, walking without any apparent difficulty, lifting his arm and bending his elbows and getting into a SUV without assistance. September 20, 2018, video shows Claimant walking back and forth with his hands in his pocket, holding a newspaper in his right hand and opening the front door of a house with his right hand.

17. On August 24, 2019 ALJ Turnbow conducted a hearing on Claimant's application to overcome Dr. Yamamoto's follow-up DIME opinion regarding MMI and medical benefits, including stellate ganglion blocks and additional CRPS testing. Claimant also sought reimbursement for prescription medication, including Lyrica and penalties against Insurer for dictating medical care by designating Dr. Raschbacher as the ATP when he accepted a transfer of care after Dr. Hattem left his practice. Claimant asserted that he has "never been at MMI" because on August 18, 2019, nine-days prior to the hearing, he changed his mind and was "willing" to undergo bilateral stellate ganglion blocks that he had declined when placed at MMI.

18. On January 23, 2020 ALJ Turnbow found that Claimant failed to overcome Dr. Yamamoto's DIME opinion that he reached MMI on March 4, 2019. She rejected Claimant's assertion that he was not at MMI because he had changed his mind and wanted to undergo the stellate ganglion blocks he had declined before reaching MMI. ALJ Turnbow noted that no ATP had recommended blocks since MMI. She also rejected Claimant's request for medical benefits including a spinal cord stimulator, CRPS testing and stellate ganglion blocks. ALJ Turnbow denied penalties and reimbursement for Lyrica because it was prescribed by unauthorized physicians outside of the claim. The Industrial Claims Appeals Office affirmed ALJ Turnbow's Order on January 27, 2021 and the claim closed except for maintenance benefits.

19. On August 18, 2020 Respondents filed another FAL. Respondents' acknowledged that Claimant was entitled to receive reasonable, necessary and related medical maintenance treatment.

20. On September 8, 2020 unauthorized physician Daniel Koontz, M.D. prescribed Lyrica to Claimant. However, he did not document why he prescribed Lyrica and made no reference to Claimant's work injury.

21. On October 1, 2020 unauthorized provider David R. Conway, M.D., who identified himself as Claimant's primary care physician, prescribed Lyrica and a wheelchair on October 1, 2020. He recommended that Claimant play billiards to help treat balance issues and anxiety.

22. Unauthorized provider Hani Saeed, DPM from the Red Rocks Foot and Ankle Center, evaluated Claimant on October 22, 2020 for soreness of both feet. Based on Claimant's self-report, Dr. Saeed documented that Claimant "has a history of CRPS of the whole body," "has been experiencing CRPS since 2015," and recently had a ganglion injection to help with his CRPS. He also documented Claimant's subjective claims of improvement. Dr. Saeed did not offer an opinion that Claimant's work-related condition objectively changed or improved.

23. Unauthorized physician Andrew Wendahl, D.O. is an anesthesiologist, trained in pain management, who saw Claimant and his mother on February 24, 2021 for evaluation of what "has been previously diagnosed as a severe spreading case of CRPS in all four extremities." Dr. Wendahl referred Claimant for physical therapy and bilateral staged lumbar stellate blocks for CRPS of the lower limb and to Mental Health Center of Denver for coping with pain.

24. Drs. Koontz, Conway, Saeed and Wendahl are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and that he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, did not discuss whether any treatment they provided was work related, did not contend that Claimant's work related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer.

25. On November 9, 2021 Claimant underwent an independent medical examination with Scott Primack, D.O. After reviewing Claimant's medical records, considering surveillance video and conducting a physical examination, Dr. Primack determined that Claimant does not suffer from CRPS. He specified that a workup of Claimant did not reveal CRPS in the lower extremities and no physical diagnosis would correlate to Claimant's bizarre gait pattern on examination. He reasoned that Claimant suffers from significant psychological issues. In fact, Dr. Primack noted that Claimant has far more non-work-related psychiatric symptoms than work-related issues. He concluded that, "[w]ithout question, [Claimant] is still at MMI."

26. On January 14, 2022 the parties conducted the pre-hearing evidentiary deposition of John Raschbacher, M.D. Dr. Raschbacher noted that he became Claimant's ATP on June 10, 2019. He remarked that Claimant had a diagnosis of upper extremity CRPS at the time and had attained MMI. Although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations.

27. Dr. Raschbacher commented that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to self-reported pain to the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. He attributed Claimant's subjective complaints to pain behavior that could constitute malingering for secondary gain.

28. Claimant obtained two lumbar sympathetic blocks of his right side on February 5, 2021, a stellate ganglion block on his left side on April 9, 2021, and a stellate ganglion block on his right side on April 23, 2021. Dr. Raschbacher testified that none of the preceding blocks were related to Claimant's work injury. He summarized that Claimant's condition has not worsened and no additional medical treatment is reasonable, necessary, or related to the August 5, 2015 work injury.

29. Dr. Primack testified at the hearing in the present matter. He maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS. Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

30. Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. Moreover, there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 5, 2015 industrial injury and no ATP has recommended additional treatment.

31. Claimant testified at the hearing in this matter. He explained that he continually suffers pain that varies in intensity over time. Claimant noted that he also suffers psychologically in dealing with his intense pain and difficulties moving. He remarked that on April 23, 2021 he underwent stellate ganglion branch block injections regarding his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. Claimant's father, Richard Laughlin, also commented that Claimant has suffered changing levels of pain since he was diagnosed with CRPS in 2017.

32. Claimant seeks to reopen his claim based on the mistake or error of ALJ Turnbow in denying his request to overcome Dr. Yamamoto's DIME opinion. Claimant claims that he was placed at MMI solely because he initially denied stellate ganglion branch blocks. However, he later stated he wanted to undergo the treatment. He asserts that ALJ Turnbow's determination constituted a mistake because he not only wanted the block, but underwent the procedure and it improved his condition. Claimant remarked that the April 23, 2021 block into his upper extremities reduced his CRPS pain symptoms and improved his arm movement. He thus contends that getting the block completely negated the sole reason he was placed at MMI.

33. On January 27, 2021 the Industrial Claim Appeals Office (ICAO) affirmed ALJ Turnbow's decision that Claimant had failed to overcome Dr. Yamamoto's DIME opinion. The ICAO noted that ALJ Turnbow found that no ATP had requested authorization for Claimant to undergo stellate ganglion blocks. Moreover, Dr. Yamamoto did not recommend stellate ganglion blocks, but instead determined that Claimant was at MMI.

34. ALJ Turnbow's determination did not constitute a mistake or error because neither any ATP nor the DIME physician had requested authorization for Claimant to undergo stellate ganglion blocks. Claimant's decision to subsequently obtain stellate ganglion blocks does not render ALJ Turnbow's determination erroneous. Claimant simply decided, after his claim closed, to pursue treatment outside of the Workers' Compensation system and proceed with stellate ganglion blocks.

35. In *Sadaghiani v. Impressive Cleaners & Laundry*, W.C. No. 4-133-911 (ICAO, Apr. 18, 1997), aff'd *Sadaghiani v. Impressive Cleaners & Laundry*, 97 CA 0820 (Colo. App., Nov. 13, 1997) (not selected for publication) an ATP placed the claimant at MMI after she had refused to appear for multiple medical appointments, A DIME physician agreed that the claimant had reached MMI. Subsequently, the claimant was willing to undergo treatment. However, the ALJ found that the claimant failed to overcome the DIME physician's opinion regarding MMI. The Panel and Court of Appeals, upheld the ALJ's conclusion that the DIME physician's opinion was not overcome by clear and convincing evidence. Regardless of whether further treatment "could have" improved the claimant's condition, the evidence supported the ALJ's finding that the claimant did not demonstrate a willingness to participate in the treatment until a significant time after the determination of MMI. Consequently, the Panel determined there was substantial evidence that the claimant was at MMI as determined by the DIME without regard to whether she needed additional treatment for her neck and psychological conditions.

36. Based on the reasoning of *Sadaghiani*, Claimant here reached MMI on March 4, 2019 regardless of whether he wished to pursue stellate ganglion blocks outside the Workers' Compensation system. Claimant could have chosen to undergo stellate ganglion blocks prior to reaching MMI, but instead waited a significant time after attaining MMI to undergo the treatment. Furthermore, Dr. Raschbacher testified that none of Claimant's blocks were related to his work injury. Drs. Raschbacher and Primack also agreed that no additional medical care, including stellate ganglion blocks, is reasonable, necessary or work related. Accordingly, ALJ Turnbow's decision did not constitute a mistake that justifies reopening Claimant's claim.

37. Claimant contends that his condition has worsened because his CRPS has spread to his lower extremities since he reached MMI on March 4, 2019. He also asserts that, following stellate ganglion blocks in 2021, his condition improved and opened the door to additional work-related treatment modalities. Despite Claimant's contentions', the record reveals that he has failed to demonstrate by a preponderance of the evidence that his condition has changed and he is entitled to additional benefits.

38. The record reflects that Claimant does not suffer from lower body CRPS. Initially, on August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant had no signs of lower extremity CRPS other than hypersensitivity to touch. Dr. Raschbacher explained that, although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing the CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations. Finally, Dr. Primack maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS.

39. Claimant obtained medical treatment from Drs. Koontz, Conway, Saeed and Wendahl. However, they are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. Moreover, Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon specific criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

40. Claimant remarked that on April 23, 2021 he underwent a stellate ganglion branch block injection involving his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. However, Claimant's testimony that his symptoms subjectively improved after undergoing stellate ganglion blocks from an unauthorized physician outside of the claim is not reliable based on his history of pain behavior as documented in the record. Dr. Raschbacher specifically characterized Claimant's pain behavior as possible malingering for secondary gain. Dr. Primack noted that Claimant has far more non-work-related psychiatric issues than "work-related ones." Moreover, Claimant does not meet the criteria for stellate ganglion blocks. Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. He also remarked that there is no need for a stellate ganglion block for Claimant's work injury. Dr. Raschbacher agreed that the blocks were not work-related.

41. Claimant has thus failed to establish that it is more probably true than not that his work related medical condition has changed since he reached MMI on March 4, 2019. The record reveals that his CRPS has not spread to his lower extremities and stellate ganglion blocks through unauthorized physicians have not changed his condition. As Dr. Primack summarized, "[w]ithout question, [Claimant] is still at MMI." Based on a review of the record and persuasive opinions of Drs. Schakaraschwili, Raschbacher and Primack, Claimant's condition has not changed since he reached MMI on March 4, 2019. Consequently, Claimant's request to reopen his claim is denied and dismissed.

42. Respondents have established that it is more probably true than not that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury. Initially, Insurer filed a FAL acknowledging that Claimant reached MMI on March 4, 2019 with a 15% whole person impairment rating and noting that he was entitled to reasonable and necessary medical maintenance benefits. Because Respondents now seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's August 25, 2015 industrial injury or prevent further deterioration of his condition.

43. The medical records as well as persuasive opinions of Drs. Raschbacher and Primack reflect that additional medical maintenance benefits are no longer reasonable, necessary or related to Claimant's industrial injury. Dr. Raschbacher testified that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to the self-reporting of pain with the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. Dr. Schakaraschwili also explained that CRPS can resolve over time. Dr. Primack emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time. He testified that

there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 25, 2015 industrial injury. Furthermore, no ATP has recommended additional treatment.

44. Notably, unauthorized physicians Drs. Koontz, Conway, Saeed and Wendahl did not appear aware that Claimant's work related diagnosis is mild CRPS of the upper extremities and he suffers from significant non-work related psychological issues. The preceding physicians did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. The opinions of the unauthorized providers are thus not persuasive. The preceding chronology and persuasive opinions of ATP Dr. Raschbacher and Dr. Primack reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's work injury. Instead, Claimant's continuing symptoms are attributable to his subjective complaints that do not correlate with objective findings as documented in the medical records. Accordingly, Respondents' request to terminate Claimant's medical maintenance benefits as a result of his August 25, 2015 industrial injury is granted.

CONCLUSIONS OF LAW

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

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

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

Reopening

4. At any time within six years of the date of injury, an ALJ may reopen any award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. Claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Off.*, 996 P.2d. 756, 758 (Colo. App. 2000).

Error or Mistake

5. Reopening of a closed claim may be granted based on any mistake of fact §8-43-303(1), C.R.S. Error or mistake refers to a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. *Renz v. Larimer Cty. School Dist.,* 924 P.2d 1177 (Colo. App. 1996). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Insurance Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening the ALJ may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Klosterman v. Indus. Comm'n*, 694 P.2d 873, 876 (Colo. App.1984). The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 189 (Colo. App. 2002).

6. As found, Claimant seeks to reopen his claim based on the mistake or error of ALJ Turnbow in denying his request to overcome Dr. Yamamoto's DIME opinion. Claimant claims that he was placed at MMI solely because he initially denied stellate ganglion branch blocks. However, he later stated he wanted to undergo the treatment. He asserts that ALJ Turnbow's determination constituted a mistake because he not only wanted the block, but underwent the procedure and it improved his condition. Claimant remarked that the April 23, 2021 block into his upper extremities reduced his CRPS pain symptoms and improved his arm movement. He thus contends that getting the block completely negated the sole reason he was placed at MMI.

7. As found, on January 27, 2021 the Industrial Claim Appeals Office (ICAO) affirmed ALJ Turnbow's decision that Claimant had failed to overcome Dr. Yamamoto's DIME opinion. The ICAO noted that ALJ Turnbow found that no ATP had requested authorization for Claimant to undergo stellate ganglion blocks. Moreover, Dr. Yamamoto did not recommend stellate ganglion blocks, but instead determined that Claimant was at MMI.

8. As found, ALJ Turnbow's determination did not constitute a mistake or error because neither any ATP nor the DIME physician had requested authorization for Claimant to undergo stellate ganglion blocks. Claimant's decision to subsequently obtain stellate ganglion blocks does not render ALJ Turnbow's determination erroneous. Claimant simply decided, after his claim closed, to pursue treatment outside of the Workers' Compensation system and proceed with stellate ganglion blocks.

9. As found, in *Sadaghiani v. Impressive Cleaners & Laundry*, W.C. No. 4-133-911 (ICAO, Apr. 18, 1997), aff'd *Sadaghiani v. Impressive Cleaners & Laundry*, 97 CA 0820 (Colo. App., Nov. 13, 1997) (not selected for publication) an ATP placed the claimant at MMI after she had refused to appear for multiple medical appointments, A DIME physician agreed that the claimant had reached MMI. Subsequently, the claimant was willing to undergo treatment. However, the ALJ found that the claimant failed to overcome the DIME physician's opinion regarding MMI. The Panel and Court of Appeals, upheld the ALJ's conclusion that the DIME physician's opinion was not overcome by clear and convincing evidence. Regardless of whether further treatment "could have" improved the claimant's condition, the evidence supported the ALJ's finding that the claimant did not demonstrate a willingness to participate in the treatment until a significant time after the determination of MMI. Consequently, the Panel determined there was substantial evidence that the claimant was at MMI as determined by the DIME without regard to whether she needed additional treatment for her neck and psychological conditions.

10. As found, based on the reasoning of *Sadaghiani*, Claimant here reached MMI on March 4, 2019 regardless of whether he wished to pursue stellate ganglion blocks outside the Workers' Compensation system. Claimant could have chosen to undergo stellate ganglion blocks prior to reaching MMI, but instead waited a significant time after attaining MMI to undergo the treatment. Furthermore, Dr. Raschbacher testified that none of Claimant's blocks were related to his work injury. Drs. Raschbacher and Primack also agreed that no additional medical care, including stellate ganglion blocks, is reasonable, necessary or work related. Accordingly, ALJ Turnbow's decision did not constitute a mistake that justifies reopening Claimant's claim. *See Indus. Claim Appeals Off. v. Cutshall*, 433 P.2d. 765 (Colo. 1967) (noting that ALJ may consider whether the mistake could have been rectified by the timely exercise of a party's rights prior to closure of the claim, not where it is used as a method of circumventing the ordinary adjudicative processes available prior to closure).

Change in Condition

11. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

12. As found, Claimant contends that his condition has worsened because his CRPS has spread to his lower extremities since he reached MMI on March 4, 2019. He also asserts that, following stellate ganglion blocks in 2021, his condition improved and opened the door to additional work-related treatment modalities. Despite Claimant's contentions, the record reveals that he has failed to demonstrate by a preponderance of the evidence that his condition has changed and he is entitled to additional benefits.

13. As found, the record reflects that Claimant does not suffer from lower body CRPS. Initially, on August 6, 2020 Dr. Schakaraschwili reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Claimant had no signs of lower extremity CRPS other than hypersensitivity to touch. Dr. Raschbacher explained that, although Claimant expressed concerns of spreading CRPS to his lower extremities at a June 11, 2019 visit, there was no evidence that CRPS was expanding. In reviewing the CRPS testing performed by Dr. Schakaraschwili on August 6, 2020, Dr. Raschbacher reported that a Thermogram, QSART and autonomic tests were all negative for lower extremity CRPS. Dr. Raschbacher agreed with Dr. Schakaraschwili and also noted that Claimant did not exhibit symptoms of lower extremity CRPS such as allodynia, swelling, abnormal skin coloration or shiny skin during his clinical examinations. Finally, Dr. Primack maintained that there has been no change in Claimant's condition since he reached MMI. He commented that Claimant's complaints cannot be correlated with the objective, negative CRPS testing for lower extremity CRPS.

14. As found, Claimant obtained medical treatment from Drs. Koontz, Conway, Saeed and Wendahl. However, they are not authorized treating physicians. None of them appear aware that Claimant's work-related diagnosis is mild CRPS of the upper extremities and he has significant non-work related psychological issues. The preceding physicians did not report that they have reviewed any of Claimant's medical records, including negative CRPS testing for the lower extremities. Moreover, they did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. Moreover, Dr. Primack explained that Drs. Saeed, Wendahl and Conway have not diagnosed CRPS based upon anything other than Claimant's subjective complaints and response to stellate ganglion blocks. However, a diagnosis of CRPS is based upon specific criteria including a clinical examination. He emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time.

15. As found, Claimant remarked that on April 23, 2021 he underwent a stellate ganglion branch block injection involving his upper extremities. He received some reduction in his CRPS pain symptoms and improved his arm movement. However, Claimant's testimony that his symptoms subjectively improved after undergoing stellate ganglion blocks from an unauthorized physician outside of the claim is not reliable based on his history of pain behavior as documented in the record. Dr. Raschbacher specifically characterized Claimant's pain behavior as possible malingering for secondary gain. Dr. Primack noted that Claimant has far more non-work-related psychiatric issues than "work-related ones." Moreover, Claimant does not meet the criteria for stellate ganglion blocks.

Dr. Primack testified that no ATP has prescribed a stellate ganglion block for Claimant since 2017. He also remarked that there is no need for a stellate ganglion block for Claimant's work injury. Dr. Raschbacher agreed that the blocks were not work-related.

16. As found, Claimant has thus failed to establish by a preponderance of the evidence that his work related medical condition has changed since he reached MMI on March 4, 2019. The record reveals that his CRPS has not spread to his lower extremities and stellate ganglion blocks through unauthorized physicians have not changed his condition. As Dr. Primack summarized, "[w]ithout question, [Claimant] is still at MMI." Based on a review of the record and persuasive opinions of Drs. Schakaraschwili, Raschbacher and Primack, Claimant's condition has not changed since he reached MMI on March 4, 2019. Consequently, Claimant's request to reopen his claim is denied and dismissed.

Medical Maintenance Benefits

17. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.") Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

18. As found, Respondents have established by a preponderance of the evidence that additional medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's August 25, 2015 industrial injury. Initially, Insurer filed a FAL acknowledging that Claimant reached MMI on March 4, 2019 with a 15% whole person impairment rating and noting that he was entitled to reasonable and necessary medical maintenance benefits. Because Respondents now seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's August 25, 2015 industrial injury or prevent further deterioration of his condition.

19. As found, the medical records as well as persuasive opinions of Drs. Raschbacher and Primack reflect that additional medical maintenance benefits are no longer reasonable, necessary or related to Claimant's industrial injury. Dr. Raschbacher testified that, based on medical literature, most cases of CRPS are not permanent and resolve after 2-3 years. He discussed repeated CRPS testing with Claimant including the upper extremities. However, Dr. Raschbacher perceived that, if the testing was negative, it would not make a difference to Claimant. He testified that additional CRPS testing was not reasonable or necessary for Claimant's work injury because it was unlikely Claimant would accept the negative results. Moreover, Claimant would not let Dr. Raschbacher touch him due to the self-reporting of pain with the slightest touch, but there were no objective findings to suggest a diagnosis of upper or lower extremity CRPS. Dr. Schakaraschwili also explained that CRPS can resolve over time. Dr. Primack emphasized that Claimant has never been diagnosed with severe, complete body CRPS or lower extremity CRPS and 50% of CRPS conditions resolve over time. He testified that there is no need for a stellate ganglion block for Claimant's work injury and he is not a candidate for a spinal cord stimulator. More generally, Dr. Primack maintained that no further medical treatment is reasonable, necessary or related to Claimant's August 25, 2015 industrial injury. Furthermore, no ATP has recommended additional treatment.

20. As found, notably, unauthorized physicians Drs. Koontz, Conway, Saeed and Wendahl did not appear aware that Claimant's work related diagnosis is mild CRPS of the upper extremities and he suffers from significant non-work related psychological issues. The preceding physicians did not document any of their own CRPS testing, have not discussed that any treatment they provided was work related, did not contend that Claimant's work-related condition has changed since MMI and have not requested authorization for any medical treatment from Insurer. The opinions of the unauthorized providers are thus not persuasive. The preceding chronology and persuasive opinions of ATP Dr. Raschbacher and Dr. Primack reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's work injury. Instead, Claimant's continuing symptoms are attributable to his subjective complaints that do not correlate with objective findings as documented in the medical records. Accordingly, Respondents' request to terminate Claimant's medical maintenance benefits as a result of his August 25, 2015 industrial injury is granted.

ORDER

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

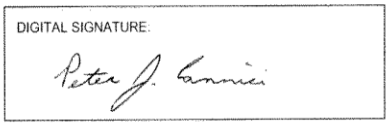
1. Claimant's request to reopen his August 25, 2015 Workers' Compensation claim based on mistake or error, or change of condition is denied and dismissed.

2. Respondents' request to terminate Claimant's medical maintenance benefits is granted.

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

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

DATED: May 25, 2022.



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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the surgery he underwent with Kerry G. Perloff, M.D. at Kaiser Permanente on October 14, 2021 was authorized as emergency care.

2. Whether Claimant has established by a preponderance of the evidence that the follow-up care he received with Dr. Perloff at Kaiser was authorized.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a disfigurement award for his left forearm pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant began working with Employer's police department during June 2016 and transferred to the fire department as a paramedic in January 2019. Shortly before the end of his shift on the morning of October 6, 2021 Claimant suffered an admitted industrial injury. While carrying two large medical kits he felt a "small pop" in his left elbow. Because his shift had ended for the week, Claimant did not immediately report the injury and decided to see if his condition improved during his time off. Claimant engaged in normal day-to-day activities during October 7-9, 2021.

2. On Sunday October 10, 2021 while working in his garage, Claimant extended his arm, lifted it and heard a loud pop that necessitated medical care. Claimant sought treatment at Kaiser Permanente at 2:11 p.m. The Kaiser records reflect that its urgent care department was not an emergency room, emergency department or hospital. The urgent care department characterized the acuity of Claimant's condition as "4 Non-urgent." He was examined by Donna M. Benton, PA. Claimant's examination revealed no edema, deformity, or bony tenderness and he displayed good grip strength, full extension of the elbow, and was neurovascularly intact. PA Benton diagnosed Claimant with left arm pain and a left biceps strain. He underwent an x-ray, received 12 tablets of oxycodone and was discharged to return home. PA Benton recommended "follow-up with the acute orthopedic clinic in the next week or so."

3. After Claimant left the Kaiser offices on October 10, 2021, he reported an on-the-job injury to his supervisor. On Monday, October 11, 2021 he completed a First Report of Injury for Employer.

4. On October 11, 2021 Claimant was evaluated by Employer's designated Authorized Treating Physician (ATP) Jennifer Briggs, PA, at Rocky Mountain Medical Group (RMMG). PA Briggs obtained a patient history and conducted a physical examination. She recommended an MRI of the left upper arm and elbow. PA Briggs assessed the injury as moderate, acute and uncomplicated.

5. On October 12, 2021 Claimant returned to Kaiser where Christopher R. Jockel, M.D. diagnosed a left distal bicep tendon tear. One of the indicators for the repair was whether the date of injury was less than 28 days. Dr. Jockel recommended an MRI to confirm whether the distal biceps tear was partial or complete. He noted "we discussed ongoing treatment options based on this injury including operative and non-operative care."

6. After his visit with Kaiser on October 12, 2021, Claimant had a 45 minute to one hour conversation with Respondent's adjuster BO[Redacted]. Claimant explained that Mr. BO[Redacted] informed him that he could not approve anything until he received medical records from Kaiser. Claimant testified that Mr. BO[Redacted] stated that if it was him "he would do surgery" and not wait for the Workers' Compensation system to determine compensability. Claimant told Mr. BO[Redacted] he had an MRI scheduled through Kaiser.

7. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Kerry G. Perloff, M.D. at Kaiser.

8. Claimant testified that he was very unhappy with the care he had received from ATP Briggs at RMMG. His care was subsequently transferred to Annu Ramaswamy, M.D.

9. Claimant spoke with Mr. BO[Redacted] on October 21, 2021. Mr. BO[Redacted] informed him that his claim had been accepted.

10. On October 21, 2021 Claimant visited ATP Dr. Ramaswamy for an evaluation. He told Dr. Ramaswamy that an MRI had been ordered at RMMG on October 11, 2021. Claimant remarked that "he was told" that the repair had to occur quickly or might not be successful. Dr. Ramaswamy noted that Claimant decided to see Dr. Perloff "on his own." One week later, Dr. Ramaswamy noted Claimant "states that he will see Dr. Perloff probably in 2 weeks as he is noticing more pain."

11. On December 9, 2021 Dr. Ramaswamy noted "patient states the surgeon recommended an EMG which he will have on Monday 12-13-21." Dr. Ramaswamy concluded his notes with the observation that "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic."

12. On January 13, 2022 Dr. Ramaswamy placed Claimant on modified duty effective January 31, 2022 noting that he could return to full duty once he was "able to lift heavy weight without noticing significant neuropathic pain." On January 28, 2022 Dr. Ramaswamy tested Claimant's capacity to lift and determined he was safe to return to work.

13. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel. Dr. Perloff acquiesced to Claimant's request on February 7, 2022. The note specifically provides:

> [Claimant] was seen at Kaiser Orthopedics on October 12/2021. Exam and MRI at that time showed a left distal biceps tendon rupture. Recommendations were made with distal biceps tendon repair in the next week or 2 as the longer post injury 1 waits the more difficult the repair is as the tendon will retract proximally. Surgery was performed on 10/14/2021 with a distal biceps tendon repair.

None of the records submitted by the parties contain any statements from Dr. Jockel regarding the need for surgery within a specific time frame.

14. On March 31, 2022 Dr. Ramaswamy determined that Claimant had reached Maximum Medical Improvement (MMI). He recounted the following:

> The patient was concerned that treatment through the Worker's Compensation system was taking some time and he was concerned about a ruptured biceps tendon. The patient apparently was told that the repair has to occur quickly or the repair may not be successful. He indicates today that he was told that if the repair did not occur within 7-10 days, then he could lose 40% of his arm function. A graft would then have to be performed and he would never reach 100% functional level. Therefore, he started treating with Kaiser.

15. On April 15, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Ramaswamy. Dr. Ramaswamy noted that he treated Claimant for a torn biceps tendon. He remarked that Claimant's torn biceps tendon was not a life-threatening, acute emergency. Dr. Ramaswamy commented that patients "rarely" visit an urgent care facility in an emergent situation. Instead, they tend to go directly to an emergency room.

16. Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering repairing a distal bicep rupture, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021 diagnosis of the retraction. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 injury.

17. Dr. Ramaswamy testified that, if Claimant had followed through with RMMG, an MRI would likely have been obtained within one week. Surgery would likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

18. Dr. Ramaswamy could have requested a stat MRI that would have been performed within 24 hours. Alternatively, an MRI could have been requested through normal channels with Respondent. In his experience, Respondent never gave him problems with delayed authorization and usually approved MRI requests within five days.

19. Dr. Ramaswamy explained that he never referred Claimant to a Kaiser physician. He wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. Dr. Ramaswamy specified that it did not make sense to refer Claimant to a different surgeon who did not perform the surgery. Furthermore, he would not defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. Finally, assuming the presence of a medical emergency, Kaiser treatment would have ended with the surgery.

20. BO[Redacted] testified at the hearing in this matter. He has been employed by Respondent to handle Workers' Compensation claims for the last six years and has a total of 16 years of experience. Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] said he understood Claimant's position, but advised that Kaiser was not an authorized provider for Respondent. He also noted that Kaiser does not handle Workers' Compensation injuries. According to Mr. BO[Redacted], Claimant said that he was proceeding with surgery and the attorneys could sort things out. He specifically recalled the statement because it is unusual for an injured worker to make a reference to litigation in the first call on a claim.

21. On October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant that there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

22. Mr. BO[Redacted] noted that Claimant's claim was not under a full denial, but was instead denied pending investigation. Under a denial pending investigation, conservative medical care, including MRIs, are usually paid. Mr. BO[Redacted] strives to respond to prior authorization requests within a few days.

23. Claimant testified that he was of the understanding and belief that the distal biceps tendon had to be repaired on a timely basis. Moreover, Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, he never discussed retaining an attorney during the October 12, 2021 phone conversation, he took the effort to get the Kaiser records to Mr. BO[Redacted], and he was not notified until October 21, 2021 that the claim had been accepted.

24. Claimant underwent surgery to his left upper extremity on October 14, 2021. The upper extremity surgery resulted in a single, unraised, horizontal, thin white scar of between 2½ and three inches in length and approximately ¼ inch in width across the bicep. Despite much of Claimant's arm being covered in tattoos, the scar is visible and

constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $600.00.

25. Claimant has failed to demonstrate that it is more probably true than not that the surgery he underwent with Dr. Perloff at Kaiser on October 14, 2021 was authorized as emergency care. Initially, Claimant testified that he suffered an injury near the end of his work shift on October 6, 2021. He did not immediately report the injury and engaged in normal day-to-day activities at home on October 7-9, 2021. On October 10, 2021 Claimant extended his arm, lifted it and heard a loud pop, which necessitated medical care. Claimant did not visit an emergency room or hospital. Rather, he sought medical attention through a Kaiser urgent care facility. While Claimant reported pain and discomfort, the x-rays were negative, he displayed good grip strength, was able to fully extend his elbow, and had no physical signs of edema or deformity that suggested a need for medical care. Kaiser assessed his condition as "non-urgent."

26. After being discharged by PA Benton at Kaiser, Claimant documented and reported his injury to Employer. He then scheduled follow-up appointments with Kaiser, attended an initial appointment with PA Briggs at RMMG and had a lengthy conversation with Mr. BO[Redacted]. Claimant met with Dr. Jockel at Kaiser on October 12, 2021. Contrary to Claimant's testimony, Dr. Jockel noted that he discussed operative and non-operative treatment options. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Dr. Perloff at Kaiser.

27. Based on the issue of timeliness in repairing his biceps rupture, Claimant asserts the existence of an emergency. Claimant specifically argues that surgery needed to be performed within 10-14 days from the date of injury. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel and Dr. Perloff acquiesced to Claimant's request on February 7, 2022. Claimant contends that, because he could not have had the surgery within 10-14 days of October 6, 2021 in the Workers' Compensation system, the Kaiser surgery was authorized under the emergency doctrine.

28. In contrast, Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering a distal bicep rupture repair, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 incident according to Dr. Ramaswamy.

29. Dr. Ramaswamy testified that, if Claimant had followed through with authorized provider RMMG, an MRI would likely have been obtained within one week. Surgery would then likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that

window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

30. On October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

31. Although a claimant is not required to seek authorization before obtaining medical treatment from an unauthorized medical provider in a medical emergency, the record reveals that Claimant's need for biceps rupture repair surgery did not constitute a *bona fide* emergency. The medical records and persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted] reflect that Claimant did not immediately require surgery through Kaiser rather than proceeding through the Workers' Compensation system. In reviewing the particular facts and circumstances of the present claim, Claimant could have obtained surgery within two to three weeks of his injury by proceeding through authorized provider RMGG. Accordingly, because Claimant's surgery through Kaiser was unauthorized, his request for reimbursement for the costs of emergency treatment is denied and dismissed.

32. Claimant has failed to establish that it is more probably true than not that the follow-up care he received with Dr. Perloff at Kaiser Permanente was authorized. Dr. Ramaswamy testified that he did not refer Claimant to Dr. Perloff or any provider at Kaiser. He specifically sent Claimant for physical therapy with a provider outside the Kaiser network. Furthermore, Dr. Ramaswamy prescribed medication rather than leaving prescriptions to other providers. He also refused to defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. In the absence of medical records from Kaiser, Dr. Ramaswamy exercised his independent medical judgment in terms of directing physical therapy and the imposition of work restrictions.

33. Dr. Ramaswamy acknowledged that he wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. He specified that it did not make sense to refer Claimant to another surgeon who did not operate on Claimant. Dr. Ramaswamy summarized the situation in his December 9, 2021 note when he stated "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic." The record thus reflects that Dr. Ramaswamy did not refer Claimant to Kaiser physicians for treatment.

34. Furthermore, Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] noted he understood Claimant's position, but advised that Kaiser was not an authorized provider. He also remarked that Kaiser does not handle Workers' Compensation injuries. Although Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, the persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted], as well as the medical records, reflect that Claimant's treatment through Kaiser was not authorized. Because Kaiser was not an

authorized provider, Claimant is not entitled to reimbursement for any expenses. Accordingly, Claimant's request for reimbursement for medical costs through Kaiser is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Medical Benefits

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Emergency Doctrine

5. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP. However, medical services provided in a *bona fide* emergency are an exception to the requirement to obtain prior authorization. *Sims v. Indus. Claim Appeals Off.,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a *bona fide* medical emergency, it is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005); *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 384 (Colo. App. 2006).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the surgery he underwent with Dr. Perloff at Kaiser on October 14, 2021 was authorized as emergency care. Initially, Claimant testified that he suffered an injury near the end of his work shift on October 6, 2021. He did not immediately report the injury and engaged in normal day-to-day activities at home on October 7-9, 2021. On October 10, 2021 Claimant extended his arm, lifted it and heard a loud pop, which necessitated medical care. Claimant did not visit an emergency room or hospital. Rather, he sought medical attention through a Kaiser urgent care facility. While Claimant reported pain and discomfort, the x-rays were negative, he displayed good grip strength, was able to fully extend his elbow, and had no physical signs of edema or deformity that suggested a need for medical care. Kaiser assessed his condition as "non-urgent."

7. As found, after being discharged by PA Benton at Kaiser, Claimant documented and reported his injury to Employer. He then scheduled follow-up appointments with Kaiser, attended an initial appointment with PA Briggs at RMMG and had a lengthy conversation with Mr. BO[Redacted]. Claimant met with Dr. Jockel at Kaiser on October 12, 2021. Contrary to Claimant's testimony, Dr. Jockel noted that he discussed operative and non-operative treatment options. On October 14, 2021 Claimant underwent a repair of his left elbow distal biceps rupture with Dr. Perloff at Kaiser

8. As found, based on the issue of timeliness in repairing his biceps rupture, Claimant asserts the existence of an emergency. Claimant specifically argues that surgery needed to be performed within 10-14 days from the date of injury. On February 2, 2022 Claimant represented to Dr. Perloff that Dr. Jockel said he needed surgery to be completed within 10-14 days after the MRI. Claimant requested documentation of the conversation he had with Dr. Jockel and Dr. Perloff acquiesced to Claimant's request on February 7, 2022. Claimant contends that, because he could not have had the surgery within 10-14 days of October 6, 2021 in the Workers' Compensation system, the Kaiser surgery was authorized under the emergency doctrine.

9. As found, in contrast, Dr. Ramaswamy explained that a distal bicep rupture at the left elbow is not a life-threatening emergency that requires surgery at the moment it is diagnosed. Rather, surgery should be timely. When considering a distal bicep rupture repair, the surgery should be performed within two to three weeks of the tear in order to prevent complete retraction of the tendon. Dr. Ramaswamy commented that Claimant

was first diagnosed with a seven millimeter tendon retraction on October 12, 2021. Surgery should thus have been performed within two to three weeks of the October 12, 2021. Even under a "conservative" estimate, surgery should have been performed within two to three weeks of the October 6, 2021 incident according to Dr. Ramaswamy.

10. As found, Dr. Ramaswamy testified that, if Claimant had followed through with authorized provider RMMG, an MRI would likely have been obtained within one week. Surgery would then likely have been performed within two to three weeks of the injury. A delay of two to three weeks between a bicep tendon rupture and surgical repair is "in that window of being reasonable to get a good result." Even if surgery had been delayed more than three weeks, the rupture could have been repaired using a different procedure.

11. As found, on October 12, 2021 Mr. BO[Redacted] also mentioned to Claimant there was an MRI scheduled outside of Kaiser for October 16, 2021. Claimant told Mr. BO[Redacted] not to worry about it because he was proceeding with surgery at Kaiser. Mr. BO[Redacted] also told Claimant that surgery could be scheduled within one to two weeks, but Claimant replied that he wanted to continue with the Kaiser surgeon.

12. As found, although a claimant is not required to seek authorization before obtaining medical treatment from an unauthorized medical provider in a medical emergency, the record reveals that Claimant's need for biceps rupture repair surgery did not constitute a *bona fide* emergency. The medical records and persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted] reflect that Claimant did not immediately require surgery through Kaiser rather than proceeding through the Workers' Compensation system. In reviewing the particular facts and circumstances of the present claim, Claimant could have obtained surgery within two to three weeks of his injury by proceeding through authorized provider RMGG. Accordingly, because Claimant's surgery through Kaiser was unauthorized, his request for reimbursement for the costs of emergency treatment is denied and dismissed. *See Delfosse v. Home Services Heroes, Inc.*, WC 5-075-625 (ICAO, Apr. 26, 2021) (denying the claimant's request for authorization under the emergency doctrine because there was no persuasive evidence of acute issues or that the need for surgery was emergent and there was evidence that other treatment options were available and discussed between the patient and unauthorized provider); *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004) (determining that ALJ reasonably inferred the claimant failed to prove the need for treatment was so urgent that the claimant could not notify the employer of the injury before proceeding to emergency room for treatment).

Authorization

13. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized

treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. S*ee Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

14. As found, Claimant has failed to establish by a preponderance of the evidence that the follow-up care he received with Dr. Perloff at Kaiser Permanente was authorized. Dr. Ramaswamy testified that he did not refer Claimant to Dr. Perloff or any provider at Kaiser. He specifically sent Claimant for physical therapy with a provider outside the Kaiser network. Furthermore, Dr. Ramaswamy prescribed medication rather than leaving prescriptions to other providers. He also refused to defer to Dr. Perloff regarding physical therapy because of a potential lack of communication with the Kaiser system. In the absence of medical records from Kaiser, Dr. Ramaswamy exercised his independent medical judgment in terms of directing physical therapy and the imposition of work restrictions.

15. As found, Dr. Ramaswamy acknowledged that he wanted Claimant to continue following up with Dr. Perloff, but never made a formal referral. He specified that it did not make sense to refer Claimant to another surgeon who did not operate on Claimant. Dr. Ramaswamy summarized the situation in his December 9, 2021 note when he stated "the case has been a difficult [one] as the patient is treating with Kaiser and treating with our clinic." The record thus reflects that Dr. Ramaswamy did not refer Claimant to Kaiser physicians for treatment.

16. As found, furthermore, Mr. BO[Redacted] recalled speaking with Claimant on the afternoon of October 12, 2021. Claimant was anxious to have surgery with Kaiser. Mr. BO[Redacted] noted he understood Claimant's position, but advised that Kaiser was not an authorized provider. He also remarked that Kaiser does not handle Workers' Compensation injuries. Although Claimant explained that he was never told by Mr. BO[Redacted] that his Kaiser treatment would not be covered, the persuasive testimony of Dr. Ramaswamy and Mr. BO[Redacted], as well as the medical records, reflect that Claimant's treatment through Kaiser was not authorized. Because Kaiser was not an authorized provider, Claimant is not entitled to reimbursement for any expenses. Accordingly, Claimant's request for reimbursement for medical costs through Kaiser is denied and dismissed.

Disfigurement

17. Section 8-42-108 (1), C.R.S. states that if a claimant "is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view" he may receive a disfigurement award "in addition to all other compensation benefits provided in this article." As found, Claimant underwent surgery to his left upper extremity on October 14, 2021. The upper extremity surgery resulted in a single, unraised,

horizontal, thin white scar of between 2 ½ and three inches in length and approximately ¼ inch in width across the biceps. Despite much of Claimant's arm being covered in tattoos, the scar is visible and constitutes serious permanent disfigurement about a part of the body normally exposed to public view. Claimant has met his burden of proving entitlement to a disfigurement award in the amount of $600.00.

ORDER

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

1. Claimant's request for reimbursement for the costs of emergency surgery through Kaiser is denied and dismissed.

2. Claimant's request for reimbursement for the costs of medical treatment through Kaiser is denied and dismissed.

3. Claimant shall receive an award of $600.00 in disfigurement benefits.

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

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

DATED: May 27, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she is entitled to receive reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (Colo. App. 1988).

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her back arising out of the course of her employment as a pre-school teacher with Employer on October 11, 2018.

2. Following her injury, Claimant underwent a variety of conservative treatments with her authorized treating physicians (ATPs) and others. Claimant's initial ATP was Bruce Cazden, M.D., at Workwell. (Ex. C). Claimant remained under his care until she transferred to UCH where James Rafferty, D.O., assumed the role of ATP in July 2019. (Ex. D). In September 2019, Dr. Rafferty referred Claimant to John Tobey, M.D., at Spine West for evaluation of her lower back pain. (Ex. E). Ultimately, Claimant was diagnosed with a lumbar strain and facet syndrome. Claimant received facet joint injections in March 2020, which gave immediate relief but without a lasting response. (Ex. E). Later, in August 2020, Dr. Tobey recommended facet joint medial branch blocks to assess candidacy for possible radiofrequency ablation (RFA) procedures. (Ex. E).

3. On September 24, 2020, Claimant underwent a radiofrequency ablation (RFA) procedure on her lower back performed by Dr. Tobey. Claimant initially did not have improvement with the RFA procedure during the first week, but reported significant improvement after approximately two months. (Ex. D).

4. On December 31, 2020, Claimant saw her ATP, Dr. Rafferty. Dr. Rafferty placed Claimant at MMI effective that date. On January 26, 2021, Dr. Rafferty performed range of motion measurements and assigned Claimant a 14% spinal impairment rating. When discussing maintenance care, Dr. Rafferty stated: "No need for scheduled maintenance care at this time although she may require repeat radiofrequency ablation in the future if her medial branches regenerate." Thus, while Dr. Rafferty did not recommend immediate and ongoing maintenance care, he did acknowledge that maintenance care would be reasonably necessary if the effects of Claimant's RFA subsequently abated.

5. Claimant testified that prior to undergoing the RFA, her back pain level was 7/10, and that she had difficulty with standing, sitting, bending, and lifting. Claimant credibly testified that after the RFA, her pain was reduced to a 3/10, and that the length of time she could stand and sit improved, that she could bend more easily and lift greater amounts. Although these activities were improved, they were not resolved. Claimant

credibly testified that the RFA relieved her symptoms as described, but that the effects were not permanent and "wore off" after approximately seven months. Claimant also believes that the RFA increased her range of motion. She testified that by the time Dr. Feldman performed the DIME, the effects of the RFA had worn off, and her back pain had increased. Claimant currently has difficulty bending, sitting, standing, which she testified are now similar to her condition prior to undergoing the RFA. Since being placed at MMI Claimant has self-referred to acupuncture, chiropractic care, and massage, to address her condition, and which she has paid for herself. Claimant testified that she would like to return to Dr. Rafferty to determine if any additional treatment or modalities could improve her condition.

6. On July 7, 2021, Claimant saw Alicia Feldman, M.D., for a DIME. Dr. Feldman placed Claimant at MMI and assigned Claimant a permanent impairment rating. Dr. Feldman agreed that Dr. Rafferty's assignment of December 31, 2020 as the date of MMI was correct. During the course of the DIME, Dr. Feldman conducted range of motion measurements. Dr. Feldman's range of motion measurements demonstrated that Claimant's lumbar flexion range of motion had decreased since her December 31, 2020 visit with Dr. Rafferty. Although her measurements resulted in a greater impairment rating, Dr. Feldman elected to use Dr. Rafferty's range of motion measurements when assigning Claimant's permanent impairment rating. Dr. Feldman indicated she believed Dr. Rafferty's rating was a true reflection of Claimant's physiologic impairment. Dr. Feldman did not indicate that the range of motion measurements she obtained were invalid, only that she felt Dr. Rafferty's measurements "more accurately reflect her impairment." She also indicated she did not believe Claimant's RFA was successful because Claimant should have experienced a decrease in symptoms within 2-3 weeks, rather than two months as she reported to Dr. Rafferty. Consequently, she indicated that she did not believe a maintenance care was needed.

7. On July 19, 2021, Respondents filed a Final Admission of Liability, in which they admitted for a 14% whole person impairment and medical. Respondents specifically denied liability for maintenance care after MMI.

8. Respondents presented the testimony of John Burris, M.D., by deposition. Dr. Burris was admitted as an expert in occupational medicine. Dr. Burris performed a Rule 8 independent medical examination of Claimant at Respondent's request on November 3, 2020. He opined that Claimant had non-specific low back pain and no objective findings on examination. He further opined that Claimant reached MMI on May 24, 2019, with no basis for an impairment rating. On March 1, 2022, Dr. Burris issued an addendum to his November 3, 2020 report addressing whether Claimant required any post-MMI care. Dr. Burris indicated in his report and testimony that he does not believe Claimant requires maintenance care. In expressing this opinion, Dr. Burris primarily relied on the fact that Dr. Feldman did not recommend maintenance care, and that Dr. Rafferty did not recommend immediate maintenance treatment. Dr. Burris' opinion regarding the need for maintenance medical care is not persuasive. He testified that after an RFA procedure, a patient's nerves may regenerate within six to twelve months after the procedure.

9. On March 15, 2022, Sander Orent, M.D., performed a record review at Claimant's request and issued a report. (Ex. 1). Dr. Orent opined that it would be reasonable for Claimant to continue chiropractic and massage treatments, and to have repeat RFA's available to her.

CONCLUSIONS OF LAW

Generally

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

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

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

MEDICAL MAINTENANCE BENEFITS

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Claimant reached MMI on December 31, 2020, approximately three months after undergoing an RFA with Dr. Tobey on September 24, 2020. When he placed Claimant at MMI, Dr. Rafferty opined that Claimant may require maintenance treatment if the effects of the RFA abated and should be permitted to consult with Dr. Tobey to determine if additional RFAs would be appropriate. Both Dr. Rafferty and Dr. Burris acknowledged that the effects of the RFA could lessen if Claimant's nerves

regenerated. Dr. Burris credibly testified that this could occur approximately six to twelve months after an RFA. Claimant credibly testified that approximately seven months after undergoing the RFA (*i.e.*, approximately April 2021), her symptoms returned to the level she experienced prior to the RFA.

When Dr. Rafferty performed range of motion measurements in January 2021, (four months after the RFA) Claimant was still experiencing the benefits of the RFA. Approximately five months later, when Dr. Feldman evaluated Claimant, her range of motion measurements were valid and reflected a greater impairment than her condition at MMI. The credible evidence thus demonstrates that Claimant's condition deteriorated after January 25, 2021, more likely than not because the effects of the RFA lessened. Claimant also credibly testified that she continues to experience symptoms and that she has received acupuncture, massage, and chiropractic to help her back issues, although her condition has not improved significantly.

The pain relief and functional improvement Claimant experienced as a result of the RFA resulted in her being placed at MMI on December 31, 2020. When the effects of the RFA abated, Claimant's condition deteriorated to the same level as before the RFA. Moreover, Claimant credibly testified that she has benefited from the additional treatment she has procured on her own (*i.e*., acupuncture, chiropractic, massage, gym exercise). The evidence demonstrates it is more likely than not that additional medical treatment will aid in returning Claimant to the same functional status she experienced when she was placed at MMI, or to prevent further deterioration. The ALJ concludes that further medical treatment is reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of her condition.

Because no specific medical treatment has been requested by Claimant's ATP, the issue of whether any specific medical treatment should be authorized as medical maintenance benefits the ALJ is without jurisdiction to authorize any specific treatment. *See Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). The ALJ makes no findings or conclusions regarding the reasonableness, necessity, or relatedness of any specific treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all authorized medical treatment that is reasonably necessary to relieve the effects of Claimant's October 11, 2018 industrial injury or to prevent further deterioration of her condition.

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: May 27, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-005-672-002

ISSUES

The issues set for determination included:

- Did Claimant prove his condition worsened, which supported reopening his claim?
- Did Claimant prove by a preponderance of the evidence that he is entitled medical benefits, namely a L4-L5 decompression with fusion, requested by authorized treating physician Brian Reiss, M.D.

PROCEDURAL SUMMARY

A Summary Order was issued on March 16, 2022. Claimant requested a full Order on or about March 21, 2021. After an extension of time was granted, Respondents filed amended proposed Findings of Fact, Conclusions of Law and Order on April 5, 2022. This Order follows.

FINDINGS OF FACT

1. Claimant worked as a principal for Employer, a position he has held for four years.

2. Claimant's medical history was significant in that he had extensive treatment for lumbar pain. Prior to Claimant's admitted industrial injury in 2015, he received conservative treatment for low back pain from 2009-12. On November 3, 2009 Claimant was evaluated by C. Deno Pappas, M.D. at Denver Spine and reported a long history of back pain predating 2009 by many years. Claimant reported that two weeks prior to the evaluation he woke up with low back pain radiating into his right lower extremity with pain complaints at level 8-9/10. Dr. Pappas noted that Claimant's MRI of his lumbar spine revealed a large right sided L5-S1 disc extrusion and a bulge at L4-5. Dr. Pappas' assessment was: acute right S1 radiculopathy associated with large paracentral L5-S1 disc herniation.

3. Claimant had a follow-up evaluation with at Denver Spine with Gary Ghiselli, M.D. on September 3, 2010, at which time an injection was ordered for low back pain, that was performed on September 9, 2010. Dr. Ghiselli continued to follow Claimant, who received repeat injections in December 2010. Dr. Ghiselli recommended facet injections at the L4-5 and L5-S1 levels on December 7, 2011.

4. The ALJ found that the medical records reflected objective evidence of pathology at L5-S1, along with a disc bulge at L4-5 and degenerative changes at that level. Claimant reported bilateral lower extremity symptoms and received treatment for this pain.

5. Claimant continued to experience pain and Dr. Ghiselli's note on November 8, 2012 reflected increased symptoms in the lumbar spine. Dr. Ghiselli's assessments included: worsening back and bilateral posterior thigh pain; degeneration of lumbar or lumbosacral disc; lumbago; lumbosacral spondylosis without myelopathy; radiculitis.

6. An MRI of the lumbar spine done on November 15, 2012 showed interval development of a left-sided L5-S1 extrusion which contacted the left descending never roots in the subarticular zone. Samuel Scutchfield, M.D. compared the MRI films with the previous MRI and noted the previous right-sided disc herniation had subsided. Claimant had less degenerative changes at the L4-5 level.

7. Claimant underwent a L5-S1 right-sided microdiscectomy on December 5, 2012, which was performed by Dr. Ghiselli. The pre- and post-operative diagnoses were: herniated disc at the L5-S1 level; left-sided radiculopathy with associated weakness; right sided radiculitis and weakness.

8. Following the surgery, Dr. Ghiselli noted an improvement in symptoms, including that Claimant's right-sided extremity pain was gone. He initially had radiating pain in the left buttock and thigh, which was noted to have resolved in 2013. Claimant returned to Dr. Ghiselli on May 3, 2013, at which time Claimant reported his low back had intensified and significant degeneration was noted at L5-S1. Bilateral pain into both lower extremities was noted in Dr. Ghiselli's evaluation on December 12, 2013.

9. On January 11, 2014, Claimant underwent an MRI of the lumbar spine and the films were read by Vernon Chapman, M.D. Dr. Chapman's impression was: lower lumbar spine degenerative changes, which included posterior disc bulging and mild bilateral facet degenerative changes at L4-L5, with no significant central canal narrowing. The lateral recesses were partially effaced, with mild left and moderate right foraminal narrowing. Claimant had no residual disc protrusion at L5-S1, however, posterior disc bulging was present with endplate osteophyte formation and no significant spinal canal narrowing. Dr. Chapman stated the degenerative changes were most severe at L5-S1, with moderate to severe bilateral foraminal narrowing at that level; interval L5-S1 discectomy, no residual protrusion evident.

10. Claimant was evaluated by Dr. Ghiselli on January 14, 2014 for significant lower back pain and bilateral hip pain. Dr. Ghiselli's assessments were: status post L5-S1 microdiscectomy with complete resolution of leg pain-severe spondylosis at the L5-S1 level, with disk space collapse; degeneration of lumbar or lumbosacral intervertebral disc; lumbago; lumbosacral spondylosis without myelopathy; radiculitis, thoracic or lumbar sacral neuritis and radiculitis. Dr. Ghiselli recommended an anterior lumbar interbody fusion at L5-S1.

11. On January 22, 2014, Claimant underwent the anterior lumbar fusion, which was performed by Dr. Ghiselli. The pre- and post-operative diagnoses were the same: recurrent disc herniation at L5-S1; previous L5-S1 decompression; degenerative disc disease at L5-S1.

12. After the lumbar fusion surgery, Claimant initially had some pain in his right leg and then reported bilateral pain and weakness in his legs when he was evaluated at Kaiser on June 22, 2015. The MRI done on June 25, 2015 showed disc bulging above L4-5, as well as degenerative changes at L5-S1.[1] A CT scan confirmed that the fusion was intact. On October 8, 2015, Claimant underwent a lumbar epidural steroid injection at L4-5 to treat bilateral radicular pain. The medical records reflected a reduction in Claimant's symptom after the procedure, which led the ALJ to infer there was an anatomic basis for these complaints.

13. On December 14, 2015, Claimant suffered an admitted industrial injury while working for Employer and occurred when he was removing a disruptive student with another teacher. Claimant fell to the ground and felt pain in his low back. The ALJ found this injury was an aggravation of his pre-existing back condition.[2]

14. As a result of the injury, Claimant received conservative treatment for pain in his lower back, on both the left and right side that was documented in the medical records. Claimant testified the December 14, 2015 incident caused an increase of left-sided low back and leg symptoms.

15. Claimant underwent an MRI of the lumbar spine on January 22, 2016 and the indication was left-sided sciatica. The films were read by Kim Baker, M.D., whose impression was: post-operative changes at L5-S1 without evidence of complication; left paracentral disc protrusion with inferiorly extruded fragment at L4-5 that caused significant compression of the left L5 nerve root; no pathologic enhancement following contrast material. The ALJ found this MRI provided objective evidence of injury at the L4-5 level.

16. Following the MRI, Claimant was evaluated by Dr. Reiss on January 27, 2016. At that time, he was complaining of left-sided radiculopathy and numbness in his leg. Dr. Reiss noted the most significant finding on the MRI was a herniated disc at L4-5 centrally and left with an extruded fragment behind the body of L5, which affected the L5 nerve root. Dr. Reiss recommended an L4-L5 microdiscectomy on the left.

17. In the interim, Claimant was evaluated at Kaiser Permanente on April 26, 2016, at which a lumbar ESI, was recommended.

18. Dr. Reiss performed the microdiscectomy on June 7, 2016. The level of the surgery was L4-L5.

---

[1] Exhibit CC, pp. 96-97.

[2] The parties agreed the aggravation of Claimant's low back condition was compensable and entered into a Stipulation, dated June 10, 2016. The Stipulation specifically provided that the claim was limited to the herniated disc at L4-5 and Respondent agreed to authorize a microdiscectomy at this level with Dr. Reiss. [Exhibit A].

19. Claimant received rehabilitative treatment, including physical therapy ("PT") after the surgery.[3]

20. Tomm Vanderhorst, M.D., concluded Claimant reached MMI on March 13, 2017. At that time, Claimant was working his regular job, was increasing his level of activity and not taking medications. Claimant reported occasional aching in his left calf when he walked up hill. Dr. Vanderhorst's assessment was L4-5 disc rupture with L5 radiculopathy/myelopathy, status post L4-5 discectomy; prior L5-S1 discectomy with subsequent anterior interbody fusion; history of C6-7 discectomy with anterior fusion and intermittent cervicalgia; history of gout; history of exercise-induced asthma; prediabetes; hyperlipidemia.

21. Dr. Vanderhorst assigned a 23% whole person impairment for the lumbar spine, which included a Table 53 II (e) diagnosis and loss of range of motion. Dr. Vanderhorst recommended maintenance treatment, which included chiropractic manipulation and massage.

22. Although Claimant had significant improvement in his symptoms, there was no evidence in the record he was completely symptom-free from the date of MMI forward.

23. On April 13, 2017, a Final Admission of Liability ("FAL") was filed on behalf of Respondent. Respondent admitted to a 18% whole person impairment rating person pursuant to a Stipulation of the parties. Respondent admitted to post-MMI medical treatment, which was reasonable, necessary and related in accordance with Dr. Vanderhorst's report.

24. Claimant filed a response to the FAL on April 25, 2017, in which he accepted the *Grover* medical benefits admitted to in the FAL.

25. Claimant received treatment for low back pain and right sciatica at Kaiser on March 27, 2018. This note reflected increased symptoms after a motor vehicle accident in November 2017. Claimant was referred for PT. Claimant had increased right lateral hip and thigh, as well as low back pain. Neurosurgeon Christopher Kudron, M.D.'s assessment at the time of the May 21, 2018 evaluation was: lumbar spondylosis, arthropathy of lumbar facet and greater trochanteric pain syndrome. An MRI of the lumbar spine was done on June 7, 2018, which showed left hemilaminectomy post-surgical changes at L4-5, with a circumferential disc bulge with superimposed small left paracentral disk protrusion.

26. After MMI, Claimant was referred to Dr. Zimmerman for injections for low back symptoms. In the June 25, 2018 report, Dr. Zimmerman noted Claimant was allowed re-evaluation, chiropractic, epidural injections or other procedures as needed for the next

[3] Dr. Vanderhorst noted the Dr. Reiss' notes reflected that the surgery resolved Claimant's left lower extremity symptoms of pain weakness and parasthesias. Claimant had no work restrictions as of September 15, 2016. (Exhibit NN, p.127.)

five years. The ALJ inferred Dr. Zimmerman was of the belief Claimant would continue to require maintenance treatment for his low back related to the work injury.

27. Claimant received maintenance treatment in the form of massage therapy, chiropractic treatment and injections in 2018-2019. Dr. Zimmerman performed bilateral medial L4-5 medial branch block injections on July 3, 2018 and noted Claimant had a diagnostic response. Repeat bilateral L4-5 medial branch blocks of the facet joints were performed on August 1, 2018. The evaluation on August 6, 2018 noted a diagnostic response and Claimant reported no significant pain. The bilateral injections were evidence that Claimant required treatment on the right and left side. The ALJ inferred at least some of the treatment provided by Dr. Zimmerman was paid for by Respondent.

28. Dr. Zimmerman performed bilateral L4-5 radio frequency neurotomy on September 5, 2018, which resolved left-sided pain. Claimant had persistent right low back pain and radiation to the thigh and posterior calf. Dr. Zimmerman performed a right L5-S1 medial branch block of the facet joint, with no post-procedural pain and increased mobility documented in the report.

29. On or about June 14, 2019, ALJ Felter issued Findings of Fact, Conclusions of Law and Order for a hearing which took place on May 29, 2019. The issue was whether Claimant waived his right to seek medical benefits for treatment of his L5–S1 disc. ALJ Felter concluded Claimant did not waive his right to receive treatment in that area. ALJ Felter ordered Respondent to pay the cost of treatment recommended by ATP Rick Zimmerman, D.O.[4]

30. There was no evidence in the record that the June 14, 2019 Order was appealed.

31. Dr. Zimmerman performed radio frequency ablation of L4-5 and L5-S1 levels on July 29, 2019. The report said this procedure provided relief of Claimant's symptoms and was considered diagnostic.

32. On December 11, 2019, Claimant underwent a lumbar MRI. The films were read by Jeffrey Weingardt, M.D. Dr. Weingardt's impression was: multifactorial mild to moderate central canal stenosis at L4-L5, with lateral foraminal stenosis; slight retrolisthesis of L4 upon L5; moderately advanced spondylosis at L4-L5 with early changes of spondylolysis in the upper and mid lumbar spine as described; posterior paraspinous and psoas muscles atrophy; osseus interbody fusion at L5–S1.

33. Claimant returned to Dr. Reiss on February 19, 2020 at which time Claimant reported that most of his right lower extremity pain was relieved after the L4 injection (performed by Dr. Zimmerman on February 5, 2020) and with time his pain returned. Dr. Reiss stated Claimant could live with the situation or consider surgical intervention. The ALJ inferred Claimant did not have intractable pain at this point in time and did not provide

[4] Exhibit 3.

a rationale as to why the surgery was necessary at this time. The ALJ also inferred that the evaluation by Dr. Reiss was paid for by Respondent.

34. Dr. Reiss issued a report (WCM-164), dated February 20, 2020 in which he noted authorization would be sought for surgery. The ALJ found Dr. Reiss did not say surgery was required to maintain MMI or that Claimant was no longer at MMI. Dr. Reiss did not specify that how the proposed surgery would increase Claimant's level of functioning or reduce symptoms.

35. Based upon Claimant's post-MMI treatment with ATP-s Drs. Zimmerman and Reiss, the ALJ inferred at least some of the treatment was paid for by Respondent. The evidence is unclear that medical benefits were ever closed in this case.

36. Carlos Cebrian, M.D. completed a supplemental record review, dated March 13, 2020. Dr. Cebrian's diagnoses that were claim-related included: lumbar strain with new left paracentral disc protrusion at L4-5 with an inferiorly extruded fragment. The fragment extended downward 15 mm in the lateral recess and there was significant compression on the left L5 nerve root and the June 7, 2016 surgery was referenced.

37. Dr. Cebrian opined that Claimant's complaints were left-sided and secondary to a left-sided nerve root compression, which was treated surgically by Dr. Reiss. Dr. Cebrian stated Claimant had an intervening injury on November 20, 2017 in which he was rear ended and he had primarily right sided complaints, as documented in the Kaiser records. Dr. Cebrian stated that it was medically probable that Dr. Reiss' request for the L4-5 fusion, with decompression of the right sided L4 and L5 nerve roots should be denied as the right sided nerve roots were not causally related to the December 14, 2015 claim.

38. Dr. Cebrian testified as an expert at hearing. His testimony was consistent with the conclusions in his reports. Dr. Cebrian testified that the recommended surgery is an elective procedure and that it was not medically probable that the fusion will cure and relieve Claimant from his chronic back pain or to make him more functional. This particular opinion was persuasive to the ALJ. In support of his opinion that the fusion is not medically reasonable and necessary, Dr. Cebrian opined that the Claimant's pre-diabetic status and morbid obesity rendered him less likely to have a positive outcome from the fusion. He said Claimant's prior history of failed back surgeries was further evidence that the fusion is less likely to successfully relieve Claimant's pain complaints. Dr. Cebrian recommended that for the Claimant to relieve his back pain he should focus on weight loss, a directed exercise program and get his pre-diabetes under control. Dr. Cebrian testified that he would expect Claimant to experience some pain relief with weight loss.

39. On or about March 16, 2020, Respondent denied the requested authorization for surgery based upon the report of Dr. Cebrian.

40. Claimant was evaluated by Dr. Vanderhorst on June 11, 2020, at which time he reported persistent right radicular symptoms, as well as a recurrence of left radicular symptoms. At that time, Claimant sat with a good posture and moved with a normal gait. Increased pain was noted with extension and lateral flexion ROM testing. Dr. Vanderhorst's assessment was: lumbar facet joint pain; bilateral low back pain with bilateral sciatica; lumbar radiculopathy. Claimant was referred for massage/chiropractic treatments and the prescription for Gabapentin was refilled. Dr. Vanderhorst did not definitively state Claimant was no longer at MMI. Dr. Vanderhorst did not offer an opinion whether Claimant required additional treatment in the form of the proposed surgery.

41. Evidence of surveillance video taken of Claimant on August 1 and 2, 2020 was admitted into evidence. The video showed various activities in which Claimant sat at a table in a restaurant, performed various chores outside and rode an ATV. The video showed Claimant able to do the following:

- August 1, 2020 at 10:11 a.m.: kneeling, bending, working in yard.
- August 1, 2020 at 12:05 p.m.: walked around hardware store, carried box in right hand what appears to be hose or wire in left.
- August 1, 2020 at 12:40 p.m.: walking up a hill with bucket, kneeling.
- August 1, 2020 at 1:16 p.m.: working on fence, including pulling with pliers.
- August 1, 2020 at 1:32 p.m.: riding ATV, able to get off and on the ATV.
- August 2, 2020 at 8:38 a.m.: carrying a box taken out of truck bed.
- August 2, 2020 at 8:57 a.m.: casting a fishing pole with dog toy on end, throwing dog toy into pond.
- August 2, 2020 at 12:47 p.m.: walking around Costco, pushing cart.
- August 2, 2020 at 1:28 p.m.: walking around Walmart, carried plastic basket to truck.

42. The ALJ found Claimant was able to do the activities depicted in the surveillance video on August 1 and 2, 2020 without observable difficulty.

43. Claimant testified that he now uses an ATV more to get around his property because walking is more difficult due to increased pain. Claimant said he wants to undergo the fusion surgery.

44. Claimant did not prove that the proposed lumbar fusion surgery was reasonable and necessary.

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

CONCLUSIONS OF LAW

General

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of whether Claimant was entitled to medical benefits turned on the opinions offered by the physicians in the case.

Reopening

Section 8-43-303(1), C.R.S. (2020), provides that an ALJ may reopen any award within six years on the grounds of error, mistake, or a change in condition. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008) ["change in condition" refers either to a change in condition of original compensable injury or to change in claimant's physical or mental condition which can be causally connected to original compensable injury].

As determined in Findings of Fact 2-12, Claimant had an extensive history of treatment for his lumbar spine, including treatment for pain at the L4-5 and L5-S1 levels. The treatment Claimant received included a microdiscectomy performed by Dr. Ghiselli, on December 5, 2012 for a herniated disc at L5-S1 and radiculopathy with associated weakness. (Finding of Fact 7). Claimant underwent a lumbar fusion on January 22, 2014, also at the L5-S1 level. (Finding of Fact 11). Claimant treated for bilateral radicular pain and received a lumbar epidural steroid injection in October 2015. (Finding of Fact 12). The bilateral leg pain (post-surgery) was evidence from which the ALJ could infer there was an anatomic basis for these complaints. *Id.*

The admitted injury Claimant suffered to his low back on December 14, 2015 was superimposed on this complicated medical history. (Finding of Fact 13). The ALJ determined that the 2015 injury aggravated the condition of his low back, which required treatment. *Id.* The medical records admitted at hearing documented Claimant initially

received conservative treatment for this injury. (Finding of Fact 14). Clamant then underwent a microdiscectomy, which was performed by Dr. Reiss. (Finding of Fact 18).

As found, Claimant reached MMI in 2017 and Respondent admitted for *Grover* medical benefits in the FAL. (Findings of Fact 20, 23). The medical records admitted into evidence established Claimant had increased symptoms in the lumbar spine which required treatment after MMI. (Findings of Fact 25-32). The records admitted into evidence reflected Claimant continued to receive treatment in 2018-2019, which included bilateral medial L4-5 medial branch block injections. Evidence of symptoms on both the right and left side was found in Dr. Vanderhorst's June 11, 2020 report. (Finding of Fact 40). Although the record was not completely clear, the ALJ inferred that because Claimant continued to receive treatment from ATP-s in the worker's compensation claim, including Drs. Zimmerman and Vanderhorst, Respondent most probably paid for those benefits. (Findings of Fact 27, 33). Under the evidence in the record, it is more probable than not that the medical benefits portion of the claim was never "closed".

Even assuming *arguendo* the claim was closed, Claimant's ATP-s recommended the treatment he received for increased low back symptoms. (Finding of Fact 27-28). Claimant's testimony also supported this conclusion. To the extent the claim was closed, the ALJ concluded Claimant proved by the preponderance of the evidence that his condition worsened over time and he was entitled to additional maintenance treatment.

Medical Benefits

The question presented in this case was whether Claimant satisfied his burden of proof that the proposed surgery was reasonable and necessary, as well was related to the 2015 injury. Claimant argued his condition worsened and the request for the fusion at L4-L5 was related to the natural degeneration of Claimant's admitted December 14, 2015 injury. Claimant also asserted that he has had the same treating physician since 2015, was on medical maintenance care at the direction of ATP Vanderhorst and has been receiving injections through ATP Zimmerman. Claimant pointed to the fact it was a referral from ATP Zimmerman to ATP Reiss that resulted in the request for a fusion at L4-L5. On this basis, Claimant argued the surgery should be authorized.

Respondent contended that the proposed L4-5 fusion surgery was not reasonable, necessary and/or causally related for treatment of Claimant's December 14, 2015 work injury, which aggravated his low back condition. Respondent argued the December 14, 2015 industrial accident caused Claimant's L4-5 disc to suffer a left sided herniation and Claimant did not prove the left sided herniation to the L4-5 disc caused a resulting worsening resulting in the current need for the fusion surgery. Respondent relied upon Dr. Cebrian's opinion that the need for the fusion procedure was more likely causally related to the pre-existing fusion which has caused adjacent segment disease, pre-existing degenerative disc disease, and/or the intervening MVA, than to the December 14, 2015.

Respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. (2020); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When Respondent has admitted for maintenance treatment, it is may still contest liability for particular medical benefit. *Id.* Claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *Grover v. Industrial Commission,* 759 P.2d 705, 721 (Colo. 1988).

In the case at bench, that ALJ determined Claimant did not meet his burden of proof to show the proposed fusion surgery was reasonable and necessary. (Finding of Fact 44). The ALJ's rationale was two-fold when concluding Claimant did not meet this burden. First, the medical records, including the report of Dr. Reiss did not establish that the surgery was reasonable and necessary at this time. (Findings of Fact 33-34). As found, Dr. Reiss did not provide explication or in detail as to why he believed Claimant required surgery at that point in time. *Id.* Nor was there evidence that Claimant's pain was intractable at that time. *Id.* The ALJ credited Dr. Cebrian's opinion on whether the surgery was reasonable and necessary. (Finding of Fact 38). In addition, Claimant had received injections and other treatment as part of maintenance, which provided symptom relief. In addition, there was evidence in the record that Claimant was able to perform different activities, including work around his property, which showed a level of functionality. (Findings of Fact 27, 33). On this basis, Claimant did not demonstrate the proposed surgery was reasonable and necessary.

Second, the ALJ reviewed the DOWC MTG when coming to this decision. The DOWC Medical Treatment Guidelines applicable to this procedure provide as follows:

> "G. THERAPEUTIC PROCEDURES – OPERATIVE
>
> In order to justify operative interventions, clinical findings, clinical course, and diagnostic tests must **all** be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions and in most cases a specific site of nerve root compression, spinal cord compression, or spinal instability… [Emphasis in original].[5]
>
> 4. SPINAL FUSION (USUALLY COMBINED WITH DECOMPRESSION): a.
>
> Description: Use of bone grafts, sometimes combined with instrumentation, to produce a rigid connection between two or more adjacent vertebrae.
>
> …

[5] DOWC MTG Rule 17 Exhibit 1-Low Back Pain, p. 93. [The MTG in effect were Revised: February 3, 2014, Effective: March 30, 2014].

d. Diagnostic Indications: Diagnostic indications for spinal fusion may include the following:

i. Neural Arch Defect usually with stenosis or instability: Spondylolytic spondylolisthesis, congenital unilateral neural arch hypoplasia. It should be noted that the highest level of success for spinal fusions is when spondylolisthesis grade 2 or higher is present.

ii. Segmental Instability: Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability.

iii. Primary Mechanical Back Pain/Functional Spinal Unit Failure: Multiple pain generators objectively involving two or more of the following: (a) internal disc disruption (poor success rate if more than one disc involved), (b) painful motion segment, as in annular tears, (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. Because surgical outcomes are less successful when there is neither stenosis nor instability, the requirements for pre-operative indications must be strictly adhered to for this category of patients.

iv. Revision surgery for failed previous operation(s) if significant functional gains are anticipated.

v. Other diagnoses: Infection, tumor, or deformity of the lumbosacral spine that cause intractable pain, neurological deficit, and/or functional disability."

In this regard, the ALJ found Claimant did not prove that the proposed surgery would increase his functionality and reduce symptoms. (Finding of Fact 34). Claimant did not prove that he had severe symptoms due to lumbar stenosis and spondylolisthesis, specifically at the L4-5 level. *Id.* As found, Dr. Reiss' surgery recommendation did not establish that that surgery was necessary at that point in time, rather he left it up to Claimant. (Finding of Fact 33). The treatment records admitted at hearing showed that conservative treatment such as injections, provided relief to Claimant. Accordingly, the request for authorization of the proposed lumbar fusion and decompression will be denied.

ORDER

It is therefore ordered:

1. To the extent the claim was closed, it is reopened, pursuant to Section 8-43-303(1), C.R.S. (2020).

2. Claimant’s request for authorization of the proposed lumbar fusion with decompression 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 § 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: May 31, 2022

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-140-466-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that his low back condition, and spinal surgery, are causally related to his admitted September 3, 2020 industrial accident.

STIPULATION

After the hearing, the parties conferred and stipulated that Claimant's average weekly wage (AWW) is $1,423.76.

FINDINGS OF FACT

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

1. Claimant is a 45 year-old male who worked for Employer as a Water Distribution Operator, Level 2. His job duties included maintaining and repairing municipal and fire water systems, in commercial and residential buildings. Claimant's job was physically demanding, and it required a lot of lifting and bending.

2. Claimant suffered an admitted industrial accident on September 3, 2020. He was in a crawl space under a residential property repairing a water meter. Claimant testified he had finished repairing the meter and was "army crawling" out of the space when his left leg slipped causing him to twist. Claimant testified he heard a "pop" somewhere in his body. Claimant testified he immediately felt pain in his low back shooting down his left leg.

3. Claimant was able to get out of the crawl space on his own, and he immediately reported the incident to Employer. GD[Redacted] prepared a first report of injury that same day. The mechanism of injury in the report is recorded as, "Slipped in crawl space and twisted knee." The body part affected is listed as "L Knee." (Ex. E). Claimant's back injury is not listed in the report. Claimant credibly testified, however, that he notified Ms. GD[Redacted] that the industrial accident also affected his back.

4. Claimant was first treated at Memorial Regional Hospital (Memorial) Urgent Care, on September 3, 2020. Cameron Miller, PA-C treated Claimant. According to Claimant, he had left knee pain and low back pain with "shooting" pains down his left side. Claimant reported being on his hands and knees maneuvering over materials when he twisted to his left side. He initially felt a sharp pain in his knee. He also reported some low back pain after the injury. According to the medical record, Claimant has a "history of low back pain for which he had injections and PT in the past and feels as though this exacerbated the issue." (Ex. 15).

5. Mr. Miller diagnosed Claimant with a "left patella subluxation versus an MCL sprain." He also noted that Claimant's "low back pain resembles potential disc bulge given radicular symptoms and appears to be an acute exacerbation of a chronic issue he has been treated for prior." (Ex. 15).

6. Respondents have accepted liability for Claimant's knee injury, but dispute liability for his back condition. (Ex. G).

7. Claimant testified that he had low back issues and injuries prior to September 3, 2020. In the 1990's, Claimant fell off a ladder and injured his left leg and low back. In 2003, he suffered a slip and fall at work and injured his back. Claimant received a 10% permanent partial disability rating due to this injury, and attended physical therapy for over six months. Claimant testified he has received chiropractic treatment for his back since he was a teenager.

8. Claimant testified that prior to September 3, 2020, he would have flare ups that he primarily treated with chiropractic care. Claimant also had injections into his lower back in 2016 and 2019. Claimant testified that although he had low back pain and flare ups prior to September 3, 2020, he never had trouble performing his job duties and never missed work due to back pain. He was able to work full duty and was not on any physical restrictions.

9. Claimant returned to Memorial on September 9, 2020 for a follow-up appointment and was treated by Mr. Miller. Claimant report a worsening of his back pain, now with bilateral radicular symptoms. Mr. Miller referred Claimant to a spinal surgeon, and provided pain medication and muscle relaxers for muscle spasms. (Ex. 15).

10. On September 17, 2020, Claimant went to the Orthopedic Surgery Department at Memorial, and was evaluated by Jessica Nyquist, PA-C. Ms. Nyquist noted Claimant's past history of multiple back injuries. Claimant reported that in the past, he got better after his injuries, but this time he was getting worse. Ms. Nyquist examined Claimant and took X-rays. Ms. Nyquist suspected a herniated disk and ordered an MRI given the severity of Claimant's symptoms. They discussed the possibility of injections, but Claimant was hesitant to pursue this option. Ms. Nyquist and Claimant agreed to see the results of the MRI before making any decisions going forward. (Ex. J).

11. On September 24, 2020, claimant underwent an MRI of his low back. The radiologist's report documents "at L5-S1, there is a central disc extrusion abutting the descending S1 nerve roots" and a "broad based disc bulge at L4-5." (Ex. 19).

12. Claimant underwent a prior MRI of his low back in August 2016. According to the history in the 2016 medical record, Claimant reported having "lower back pain for 1 decade. Worsening pain and bilateral lower extremity pain, left greater than right." The radiologist's impressions were: 1) Mild, multilevel degenerative disc and hypertrophic facet changes throughout the mid and lower lumbar spine without central canal narrowing; 2) L5-S1 small paracentral disc protrusion with likely contact with the descending right

S1 nerve roots; 3) L4-L5 mild bilateral neural foraminal narrowing; and 4) L3-L4 mild left neural foraminal narrowing. (Ex. B).

13. Claimant was referred to Clint Devin, M.D., at Steamboat Orthopedics. Dr. Devin, an orthopedic surgeon, evaluated Claimant on October 19, 2020. As documented in the record, Claimant described his mechanism of injury. Dr. Devin reviewed Claimant's MRI and recommended a bilateral L5-S1 microdiscectomy and decompression. (Ex. 22).

14. At Claimant's request, Dr. Devin compared Claimant's 2016 MRI with his September 24, 2020 MRI. Dr. Devin opined, "[w]e were able to obtain an MRI of the lumbar spine from August 5, 2016 at Memorial Hospital. This shows a very mild L5-S1 disc bulge with equivocal contact to the descending S1 nerve roots. This is supported in the radiology reports as well. On both of these tests, the patient has had significant progression of the L5-S1 from a disc protrusion, not really contacting any nerve roots to now, a disc herniation with extruded disc material causing moderate bilateral recess stenosis in contact to bilateral S1 traversing nerve roots. It is our opinion that this is correlative with the patient's new onset of symptoms as that this likely herniated at the time of crawling within a crawl space at work on September 3, 2020. This mechanism does support the findings on this updated MRI". (*Id.*)

15. On November 2, 2020, Dr. Devin requested authorization of spine surgery, but Insurer denied the request. (Ex. 23). On February 8, 2021, Dr. Devin appealed the decision and again provided his opinion that Claimant's need for surgery is related to claimant's occupational injury on September 3, 2020. (Ex. 24). Insurer denied the request.

16. Claimant decided to proceed with the surgery using his own insurance. On April 7, 2021, Claimant underwent a bilateral L5-S1 microdiscectomy and laminar foraminotomy with Dr. Devin. (Ex. 26).

17. Tashof Bernton, M.D. conducted an Independent Medical Evaluation (IME) of Claimant on September 9, 2021. Dr. Bernton opined that Claimant suffered an occupational injury to his low back on September 3, 2020. In reaching this opinion, Dr. Bernton took into account Claimant's pre-existing history of lumbar complaints and a prior lumbar occupational injury with permanent impairment. Dr. Bernton, however, opined that the incident on September 3, 2020, was a work-related exacerbation of a pre-existing condition. Dr. Bernton noted the marked decline in Claimant's function, the increase in pain complaints, and the evidence of structural change in comparing the pre-injury and post-injury MRIs of claimant's lumbar spine. Dr. Bernton opined that the surgery required for Claimant's condition was reasonable and medically necessary treatment for his September 3, 2020, occupational injury. (Ex. 17).

18. Respondents sent Claimant to Kathleen D'Angelo, M.D., for an IME. Dr. D'Angelo evaluated Claimant on September 21, 2021. Dr. D'Angelo opined that she was unable to render an opinion as to whether claimant suffered a work-related low back injury on September 3, 2020 until she was able to obtain other medical records. (Ex. M).

19. Dr. D'Angelo was provided with additional medical records to review, and she authored an addendum to her IME report. Based on the additional records, Dr. D'Angelo opined that Claimant's ongoing low back complaints and need for surgery were not related to his September 3, 2020 work injury. Dr. D'Angelo opined that Claimant's ongoing low back issues and need for surgery were the natural progression of his prior low back problems, and not related to his September 3, 2020 injury. (Ex. N).

20. At the hearing, Dr. D'Angelo testified consistent with her report and addendum. Dr. D'Angelo acknowledged that after Claimant's injury on September 3, 2020 he was placed on restrictions that were not in place prior to the September 3, 2020 work injury. Dr. D'Angelo testified that prior to claimant's injury on September 3, 2020, there was no surgical recommendation. Dr. D'Angelo testified that the medical treatment on September 3, 2020 for claimant's low back was reasonable, but she disagreed that the herniation on the September 24, 2020 MRI is related to the September 3, 2020 work injury.

21. Dr. Bernton was also provided with additional medical records, and a copy of Dr. D'Angelo's addendum. On March 23, 2022, Dr. Bernton issued a rebuttal report. He disagreed with Dr. D'Angelo's opinion that Claimant's disc pathology on MRI was a natural progression of his disc pathology. Dr. Bernton again asserted that the evidence indicates that Claimant suffered a low back injury on September 3, 2020 and that the fact that Claimant had prior low back complaints does not mean the current low back symptoms are unrelated to the documented injury that occurred. Dr. Bernton opines that this particular situation "essentially defines an occupational/work related exacerbation of a pre-existing condition". (Ex. 35).

22. Claimant testified at the hearing, consistent with the medical records, that he sustained an injury to his low back and left knee in a residential crawl space while working for Employer. Claimant testified that prior to his injury on September 3, 2020, he had prior low back treatment that included chiropractic care, medications, and injections. Claimant testified that although he had some prior low back issues, he never had any difficulty during his regular job. He testified that prior to his injury on September 3, 2020, he was not on any restrictions and he did not need lumbar surgery. Claimant testified after his injury on September 3, 2020, everything changed. Claimant could not perform his regular job, was put on restrictions and lumbar surgery was recommended by Dr. Devin. Claimant also testified that the surgery by Dr. Devin helped with both the back pain and the left leg symptoms.

23. Claimant testified that he was terminated by Employer because there was not a light duty position available and Employer could not accommodate his restrictions.

24. The ALJ finds that Claimant has proved by a preponderance of the evidence that he sustained a compensable injury to his back in the course of his employment on September 3, 2020.

25. The ALJ finds that the L5-S1 microdiskectomy and laminar foraminotomy performed by Dr. Devin was reasonable, necessary and related to his industrial injury on September 3, 2020.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Act, he

was performing a service arising out of and in the course of his 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).

Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). While 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, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. *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). Rather, the occurrence of the symptoms may be the result of, or the natural progression of, a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Whether the claimant's condition is due to the natural progression of the pre-existing condition or a new industrial accident is a question of fact for resolution by the ALJ. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant suffered an admitted industrial accident on September 3, 2020, injuring his left knee and lower back. (Findings of Fact ¶ 2). Claimant has a long history of lower back pain. He injured his back in the 1990s and in 2003. (*Id*. at ¶ 7). Claimant credibly testified that he was able to manage any flare ups with primarily chiropractic care. (*Id*. at ¶ 8). The ALJ credits Claimant's testimony that even with his prior back issues, he was able to fully work, and had no restrictions, but he could not perform his regular job duties after the September 3, 2020 injury.

Both experts, Dr. D'Angelo and Dr. Bernton concluded that Claimant's surgery performed by Dr. Devin was reasonable. The experts have differing viewpoints, however, regarding the relatedness of the September 3, 2020 accident. Dr. D'Angelo conducted an IME and reviewed additional records regarding Claimant's past medical issues with his lower back. Dr. D'Angelo opined that Claimant's surgery was not related to the September 3, 2020 injury because Claimant's ongoing back issues were the natural progression of his prior back problems. (*Id*. at ¶¶ 19-20). While the ALJ finds her opinion to be credible, it is not persuasive. The ALJ credits Dr. Bernton's opinion that Claimant's September 3, 2020 injury exacerbated his back issues. (*Id.* at ¶ 17). Mr. Miller agreed with this position that Claimant's injury exacerbated his previous back problems. (*Id*. at ¶ 5). Dr. Bernton noted the marked decline in Claimant's function, the increase in pain complaints, and the evidence of structural change in comparing the pre-injury and post-injury MRIs of claimant's lumbar spine. As Dr. Bernton stated, this case "essentially defines an occupational/work related exacerbation of a pre-existing injury." (*Id*. at ¶¶ 17 and 21). Claimant had pre-existing back issues, but he had no problem performing his

job prior to the September 3, 2020 work injury. (*Id*. at ¶¶ 7 and 22). Claimant has proved by a preponderance of the evidence that he sustained a compensable injury to his back in the course of his employment on September 3, 2020.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that his low back condition is causally related to his admitted September 3, 2002 work injury.

2. Claimant's April 7, 2021 spine surgery was causally related to his September 3, 2020, admitted work injury.

3. Claimant has established by a preponderance of the evidence an entitlement to medical treatment that is reasonable, necessary and causally related to treat his low back condition.

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: May 31, 2022

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