**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-124-222-001**

## ISSUES

1. Whether Claimant has established by clear and convincing evidence that the DIME physician incorrectly placed Claimant at maximum medical improvement (MMI) as of June 22, 2021.

2. If Claimant overcomes the DIME physician's MMI determination, whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits.

3. If Claimant is at MMI, whether Claimant established by a preponderance of the evidence that DIME physician's permanent partial impairment ratings were incorrect.

4. Whether Claimant has established by a preponderance of the evidence that her left upper extremity scheduled impairment rating should be converted to a whole person impairment.

## FINDINGS OF FACT

1. Claimant was employed by Employer as a custodian. On November 19, 2019, Claimant sustained admitted injuries when she fell a sidewalk striking her forehead on the cement, landed on her left side. On November 21, 2019, two days after Claimant's November 18, 2019 injury, Claimant was seen at UC Health by Kelby Bethards, M.D., for evaluation of headaches, left shoulder pain, right knee abrasion, and a loose tooth. (Ex. G)

2. On November 29, 2019, Claimant began treatment at UCH Health Greeley workers' compensation clinic. Initially, she saw Micheal Deitz, PA-C, physician assistant for authorized treating physician (ATP) Oscar Sanders, M.D. Mr. Deitz diagnosed Claimant with a left shoulder strain with the possibility of left rotator cuff injury, fall with facial contusion with no loss of consciousness, and a loose tooth. LOC.

3. Over the next 19 months, Claimant saw Dr. Sanders or associated providers at UCH approximately twenty times between November 29, 2019 and June 22, 2021. During this time, Dr. Sanders referred Claimant for evaluations with multiple specialists. These included referrals to Christopher Kirkpatrick, M.D., for an ophthalmologic evaluation; Gregory Reichhardt, M.D., for electrodiagnostic testing and trigger point injections; orthopedic referrals to Joshua Snyder, M.D., and Dr. Heaston for evaluation of Claimant's left shoulder; neurology referral to Benjamin Miceli, PA-C, for evaluation of Claimant's head injury and headaches; and a

psychological referral to Majia Bruzas, Ph.D., for psychological evaluation and treatment.

4. In January 2020, Dr. Sanders diagnosed Claimant with a probable concussion with minimal post concussive symptoms, head pain, headaches, and left shoulder pain. On January 29, 2020, Dr. Sanders noted Claimant's left neck and upper extremity symptoms were unresponsive to conservative care, and ordered MRIs of Claimant's left shoulder, left elbow and cervical spine. Dr. Sanders also referred Claimant for an ophthalmologic evaluation with Dr. Kirkpatrick which was normal. (Ex. I, Ex. 12, p. 136).

5. The MRIs were performed on February 10, 2020. Claimant's left shoulder MRI showed low grade rotator cuff tearing and tendinopathy without a full thickness or high-grade tear. The cervical and elbow MRIs were normal. (Ex. J & 16).

6. On February 17, 2020, Dr. Sanders reviewed Claimant's MRIs and indicated Claimant's rotator cuff tendinopathy was likely pre-existing and not caused by her work injury, although it was possibly exacerbated. He concluded Claimant's symptoms were clinically most consistent with subacromial impingement. He referred Claimant to Dr. Snyder for evaluation and possible steroid injections, and to the UCH Neurology Clinic for evaluation for her headaches. Dr. Sanders considered neuropsychological testing, but declined to do so because Claimant's only post-concussive symptoms at that time were headaches. He also indicated he would continue to monitor Claimant for post-concussive symptoms. On March 2, 2021, Dr. Sanders indicated he would consider referring Claimant for a neuropsychological evaluation shoulder cognitive and memory issues persist. (Ex. 12)

7. On March 2, 2020, Claimant saw Benjamin Miceli, PA-C, at the UCH Neurology Clinic. He diagnosed Claimant with headaches as late effect of brain injury, hypersomnia, and cognitive dysfunction. He noted Claimant's cognitive dysfunction was reported to pre-date her November 19, 2019 injury, but was exacerbated with her head injury. He prescribed Amitriptyline for her headaches, and indicated that a neuropsychological evaluation was to be determined, because of no known Spanish language testing in the region. (Ex. K).

8. On May 13, 2020, PA Miceli noted that Claimant's headaches and cognitive issues were resolving, and he anticipated weaning Claimant off Amitriptyline. PA Miceli again indicated a neuropsychological evaluation was "TBD," because of no known Spanish language testing in the region. (Ex. K).

9. Claimant saw Dr. Snyder on March 5, 2020. Based on his examination and review of Claimant's MRI, he diagnosed Claimant with a partial thickness bursal-sided rotator cuff tear on the left. Claimant continued to experience pain despite physical therapy. Dr. Snyder performed a cortisone injection in Claimant's left shoulder and recommended she restart physical therapy. (Ex. 14) Claimant returned to Dr.

Snyder on May 1, 2020, reporting three weeks resolution of her shoulder pain before the pain returned. (Ex. H) In later follow ups on June 8, 2020 and August 10, 2020, Dr. Snyder indicated he did not see any indications for surgery, additional injections, or activity restrictions, and noted he believed Claimant's discomfort was myofascial in nature. (Ex. H).

10. In October 2020, Dr. Sanders referred Claimant for a second opinion regarding her shoulder to a Dr. Heaston. (No records from Dr. Heaston were offered or admitted into evidence). Dr. Heaston ordered a follow-up left shoulder MRI, which showed similar findings to the February 2010 MRI. Dr. Heaston performed a second left shoulder injection which provide relief, but did not recommend surgery. (Ex. 12 & O).

11. On October 20, 2020, Claimant began seeing psychologist Dr. Bruzas, on referral from Dr. Sanders. Dr. Bruzas diagnosed Claimant with pain disorder, adjustment disorder with mixed anxiety, and depressed mood. Claimant reported memory and concentration issues. Dr. Bruzas indicated she was aware of a Spanish-speaking neuropsychologist in Denver (Jose Lafosse, Ph.D.), who could see Claimant if her memory and concentration issues persisted. (Ex. 15).

12. At her visit with Dr. Sanders on November 25, 2020, Claimant was referred to Dr. Lafosse for a neuropsychological evaluation, and the referral is reflected on the WC 164 form associated with the visit. (Ex. 12). At visits on December 16, 2020 and December 28, 2020, Dr. Sanders counseled Claimant on the importance of completing the neuropsychological evaluation with Dr. Lafosse. The WC 164 form associated with the December 28, 2020 visit also reflects the referral to Dr. Lafosse. (Ex. 12).

13. Claimant continued to see Dr. Bruzas from October 20, 2020 through August 26, 2021. At the December 9, 2020 visit, Dr. Bruzas indicated Claimant was scheduled for neuropsychological testing with Dr. Lafosse. However, at Claimant's January 27, 2021 visit, Claimant indicated she had not received information on testing with Dr. Lafosse. After January 27, 2021, neuropsychological testing was not referenced in Dr. Bruzas' records. Claimant's last documented visit with Dr. Bruzas on August 26, 2021, was noted as the second of four maintenance visits. No credible evidence was presented that Claimant returned to Dr. Bruzas after August 26, 2021 to complete additional visits. (Ex. 15).

14. For reasons that are not apparent from the record, Claimant did not complete a neuropsychological evaluation with Dr. Lafosse or any other provider.

15. On February 10, 2021, Dr. Sanders completed a questionnaire submitted by Respondents' counsel regarding Claimant's status. He indicated Claimant was not at MMI, and that Claimant required further medical treatment, specifically an EMG and ophthalmology follow up examination. He also indicated once Claimant reached MMI, she would require maintenance care including coverage for

Cymbalta for headache treatment. Dr. Sanders did not reference a neuropsychological examination at that time. (Ex. 12).

16. On February 26, 2021, Dr. Sanders requested that Dr. Bruzas evaluate Claimant for a mental[1] impairment rating, indicating Claimant had TBI and adjustment disorder with depression. (Ex. 12).

17. On March 19, 2021, John Raschbacher, M.D., conducted an independent medical examination (IME) at Respondents' request. In his report (dated April 5, 2021), Dr. Raschbacher conflated a different April 18, 2019 injury[2] with Claimant's November 19, 2019 injury, and opined that Claimant reached MMI on April 1, 2020 for the November 19, 2019 injury. (April 1, 2020 was the date of MMI for Claimant's unrelated April 2019 injury to her right shoulder). Because many of Dr. Raschbacher's opinions are based on his conflation of Claimant's two injuries, the opinions expressed in his April 5, 2021 report are not persuasive or credible. Notwithstanding, based on his examination and measurements taken of Claimant's left shoulder, Dr. Raschbacher assigned Claimant an 11% left upper extremity permanent impairment rating. (Ex. N).

18. On April 19, 2021, Dr. Raschbacher issued a second report based on a "re-evaluation of previously reviewed records." In that report, Dr. Raschbacher opined that Claimant reached MMI for her November 19, 2019 injury on March 21, 2020. He further opined that Claimant did not have a ratable condition related to her November 19, 2019 injury, and Claimant required no further medical treatment. He offered no cogent explanation for reversing his prior 11% rating for Claimant's left upper extremity. (Ex. N). Dr. Raschbacher's opinions are not persuasive.

19. On June 22, 2021, Dr. Snyder placed Claimant at MMI, and provided a permanent impairment rating. The admitted records demonstrate that Dr. Sanders assigned a 6% impairment for Claimant's left upper extremity, which corresponds to a 4% whole person impairment. (Ex. 12, p. 4, and Ex. I, p. 247). Dr. Snyder also assigned a 6% mental impairment (Ex. I, p. 248-249; Ex. 12, p. 5-6). In the mental impairment rating worksheet, Dr. Sanders stated Claimant's "Total Whole Person Physical Impairment" was 9%. (Ex. I, p. 249), and assigned Claimant a 14% whole person impairment (combining mental and physical impairments). Dr. Sanders did

[1] Claimant's providers variously use the terms "psychiatric impairment," "psychological impairment" and "mental impairment" in reference to the assignment of a "mental impairment" rating permitted under § 8-41-301 (2)(a), C.R.S. Thus, for the sake of clarity, the ALJ has substituted the term "mental impairment," for "psychiatric" or "psychological" where appropriate.

[2] Claimant had a different work-related injury on April 18, 2019 when she fell sustaining injuries to her back, right shoulder, and back of her head. Claimant ultimately underwent surgery on her right shoulder, and returned to work approximately six weeks after the surgery. Over the course of the next year, Claimant received treatment for her right shoulder, until being placed at maximum medical improvement (MMI), on April 1, 2020. The injuries Claimant sustained on November 19, 2019 are separate and distinct from the injuries sustained on April 18, 2019 and are not the subject of the current dispute.

not indicate which body part or parts comprised the 9% whole person physical impairment rating, or why the "physical" impairment listed was greater than the 4% left upper extremity rating he assigned the same day. (See id.)

20. In a letter to Respondents' counsel dated June 29, 2021, Dr. Sanders opined that Claimant's had a 14% whole person impairment, and would require medical maintenance care consisting of coverage for Amitriptyline (for headaches) and psychotherapy for one year. He recommended no other medical maintenance care, and did not recommend a neuropsychological evaluation. (Ex. I).

21. On July 2, 2021, Respondents filed a Final Admission of Liability, admitting for a 6% left upper extremity impairment rating and for 12 weeks of benefits for her permanent mental impairment. (Ex. 8). Claimant timely requested a DIME and objected to the FAL. (Ex. 6 & 7).

22. On January 25, 2022, Claimant underwent a Division Independent Medical Examination (DIME) with Jade Dillon, M.D. Based on her examination and review of records, Dr. Dillon diagnosed Claimant with a partial thickness rotator cuff tear of the left shoulder, closed head injury with mild traumatic brain injury, and adjustment disorder with mixed anxiety and depressed mood. Dr. Dillon opined that each of these diagnoses are causally related to Claimant's November 19, 2019 work injury and were "ratable conditions." She placed Claimant at MMI, effective June 22, 2021 (the MMI date assigned by Dr. Sanders). She assigned Claimant a 12% left upper extremity impairment rating (which corresponds to a 7% whole person impairment), and a 2% mental impairment rating. Combined, the two impairment ratings correspond to a 9% whole person impairment. Dr. Dillon indicated apportionment was not applicable and that Claimant had no other ratable conditions. Specifically, she stated "With respect to the anatomical regions specified on the application for DIME, there is no other impairment related to the occupational injury in question." When discussing the rationale for her decision, Dr. Dillon indicated that Claimant's "degradation of memory and concentration" was addressed under the category of "thinking, concentration, and judgment," which, the ALJ notes, are components of the mental impairment rating. (Ex. O, p. 337). Dr. Dillon assigned a 10-pound left-hand lifting restriction, and no reaching or working overhead. Finally, Dr. Dillon opined that no specific maintenance care was required. (Ex. O).

23. On February 25, 2022, the Division confirmed the completion of Dr. Dillon's DIME report. (Ex. C).

24. On March 8, 2022, Respondents filed a Final Admission of Liability, admitting for a 12% scheduled left upper extremity impairment, and 2% mental impairment. (Ex. D).

25. On April 6, 2022, Claimant filed an objection to the FAL, and an Application for Hearing. (Ex. 4).

26. Dr. Raschbacher testified by deposition and was admitted as an expert in occupational medicine. He testified that he performed a second examination of Claimant on July 29, 2022, and reviewed Dr. Dillon's DIME report. Dr. Raschbacher agreed with Dr. Dillon's impairment rating for Claimant's left shoulder, and opined that she followed appropriate and correct methodologies in assigning Claimant's left upper extremity impairment rating, and opined that it should not be converted to a whole person impairment. He testified that the situs of Claimant's left upper extremity impairment is the left shoulder joint. Dr. Raschbacher also testified that he did not see any error in Dr. Dillon's determination of mental impairment.

27. Claimant testified that following her November 19, 2019 injury, she experienced headaches, left shoulder pain, and pain in her eye and tooth. Claimant returned to work the day of her injury, and went to work the following day but was sent home. Claimant has not worked since November 20, 2019. Claimant testified at hearing that she continues to experience memory issues, and problems with mental function, specifically, that she needs more time to think and forgets where she is going at times. She testified her left shoulder continues to hurt with movement. Claimant could not recall why she had not seen a specialist, from which the ALJ infers Claimant meant a neuropsychologist. She testified that Dr. Sanders released her from treatment, and that the last physician she recalled seeing for her injuries was the DIME physician, Dr. Dillon.

## 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 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 Serv.,* 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

Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant reached MMI on June 22, 2021 was incorrect. As found, Dr. Sanders and Dr. Dillon assigned an MMI date of June 22, 2021. Given Dr. Sanders' extensive involvement in Claimant's case, including numerous examinations and visits over a period of approximately 19 months, the ALJ finds his date of MMI to be reasonable and appropriate. Dr. Dillon's adoption of Dr. Sanders' MMI date is also reasonable and appropriate under the circumstances. No physician has opined that Claimant was not at MMI as of June 22, 2021.

Claimant asserts Claimant's reports of headaches and cognitive issues, and the lack of a neuropsychological evaluation render a finding of MMI incorrect. The record indicates Dr. Sanders initially referred Claimant for a neuropsychological evaluation with Dr. Lafosse in December 2020. For reasons not apparent in the record, Claimant did not complete that evaluation. As the referring physician, the ALJ infers that Dr. Sanders was aware Claimant had not completed the evaluation when he placed Claimant at MMI, and when he recommended medical maintenance care, which did not include a neuropsychological evaluation. Although Claimant testified to ongoing memory and cognitive issues, the existence of these symptoms does not constitute clear and convincing evidence that the assignment of MMI by the DIME physician was incorrect. The evidence does not establish that Dr. Dillon's MMI opinion is highly probably incorrect.

Impairment

Claimant has failed to establish by clear and convincing evidence that the permanent impairment ratings assigned by the DIME physician are incorrect. Claimant's primary contention is that Dr. Dillon failed to assign Claimant a permanent impairment rating for a closed head injury. As found, Claimant's primary symptoms from her closed head injury, and for which a neuropsychological examination was recommended, were

memory and concentration. In the DIME report, Dr. Dillon indicated these issues were addressed under the category of "Thinking, Concentration, and Judgment" which are components of Claimant's mental impairment rating. Claimant presented no credible evidence indicating that Dr. Dillon's rating of these conditions as components of Claimant's mental impairment rating was incorrect or improper, or that Dr. Dillon failed to follow appropriate standards and guidelines when assigning permanent impairment ratings.

### *Temporary Total Disability*

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). TTD benefits 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. Once a Claimant reaches MMI, entitlement to TTD benefits terminates.

Because Claimant has failed to establish that the DIME physician's MMI rating was incorrect, Claimant reached MMI on June 22, 2021. Accordingly, Claimant is not entitled to further TTD benefits after June 22, 2021. Claimant's request for TTD benefits is denied.

### *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 her scheduled impairment rating for her left upper extremity should be converted to a whole person impairment. As found, Claimant reached MMI for the November 19, 2019 left shoulder injury on June 22, 2021. The DIME physician determined Claimant sustained a left partial thickness rotator cuff tear as a result of her November 19, 2019 injury. Dr. Dillon also determined Claimant had limitations in range of motion and required work restrictions limiting her ability to lift and use her left arm overhead. 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 November 19, 2019, injury resulted in damage to the structures of the left shoulder, which are not surgical in nature. The ALJ credits Dr. Raschbacher's opinion that the situs of Claimant's impairment is her left shoulder. The ALJ concludes the Claimant's inability to fully use her left arm overhead and loss of range of motion are manifestations of an impairment of Claimant's left shoulder, beyond the arm. In other words, Claimant's shoulder does not function correctly. Accordingly, Claimant's left upper extremity impairment rating is converted from an 12% scheduled rating to a 7% whole person impairment.

## ORDER

It is therefore ordered that:

1. Claimant reached maximum medical improvement on June 22, 2021.

2. Claimant's 12% scheduled left upper extremity rating is converted to a 7% whole person impairment.

3. Claimant failed to overcome the DIME's opinion regarding permanent impairment. Claimant sustained a 7% whole person impairment for her left upper extremity and a 2% mental impairment.

4. Claimant's request for temporary total disability benefits 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: November 1, 2022

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

## ISSUES

The issues set for determination included:

- Is Claimant entitled to reopen his claim?
- If the claim is reopened, is Claimant entitled to conversion of scheduled medical impairment to whole-person rating?
- Is Claimant entitled to additional permanent partial disability (PPD) benefits?

## PROCEDURAL SUMMARY

The undersigned issued a Summary Order on May 11, 2020. Respondent filed a timely Request for Specific Findings of Fact and Conclusions of Law and Order ("FFCL&O") on May 20, 2020. Claimant filed amended proposed Findings of Fact and Conclusions of Law, which was received on May 22, 2020. The FFCLO was issued on June 23, 2020.

Respondent filed a timely Petition to Review. The Industrial Claims Appeals Office ("ICAO") affirmed the decision and Respondent appealed to the Court of Appeals.

On December 2, 2021, the Court of Appeals remanded this case to the Industrial Claims Appeals Office for additional findings to determine whether Claimant had established a basis for reopening the award. The ICAO remanded this matter to the Director or the ALJ on January 21, 2022.

On February 4, 2022, Claimant's counsel sent a letter to all parties requesting that the Director determine whether reopening in this case was appropriate as "Claimant [has] no additional evidence to present". [1]

No response was received from Respondent and in a March 3, 2022 Order, the Director stated Claimant noted in his letter that Respondents would not agree with his request. The Director also found that "while this letter is not structured as a Motion, it does appear to be a request to reconsider the Director's January 31, 2022 Order".

Claimant's Motion to Reconsider the Order referring this matter to the OAC was denied. The Director also noted that the referral to the OAC for a factual determination

[1] The letter was not filed at the Office of Administrative Courts. The information concerning the letter was taken from Director Tauriello's March 3, 2022 Order, which was lodged with the Court on September 16, 2022.

regarding the issues of closure and reopening remained in effect.

A merits hearing was held on April 11, 2022.

## FINDINGS OF FACT

1. Claimant was employed by Employer as a Deputy Sheriff, a position he has held for thirteen years.

2. Claimant's medical history was significant in that he had complaints involving his neck, upper back, and left trapezius. On August 12, 2015, Claimant saw his chiropractor at Kaiser Permanente. Claimant complained of left neck and left arm numbness and pain.[2] These were his first complaints of left arm and neck numbness and pain. There was no evidence Claimant suffered a traumatic injury to his left shoulder or had work restrictions before January 2017.

3. On January 31, 2017, Claimant was injured in a courtroom altercation with an individual who was in custody. Claimant testified he jammed his left arm, including the elbow and shoulder.

4. Claimant received medical treatment for his left shoulder, including a course of conservative treatment. After conservative treatment failed to resolve Claimant's symptoms, he underwent a left shoulder MRI which showed a posterior labral tear without evidence of a rotator cuff tear.

5. An arthroscopic labral repair, subacromial decompression (bursectomy, resection of CA ligament with resection of 7mm anterior acromial spur) and superior labral debridement performed by Michael Hewitt, M.D. The post-operative diagnoses were: left shoulder posterior-inferior labral tear (3 o'clock to 6 o'clock); superior labral fraying (type I SLAP lesion); subacromial impingement.

6. Following surgery, Claimant had complaints of myofascial irritation involving the trapezius and levator scapulae. Claimant underwent trigger point injections administered by John Aschberger, M.D. with good results. The ALJ noted these complaints were beyond the shoulder joint.

7. Claimant was placed at maximum medical improvement on January 15, 2018 by Stephen Danahey, M.D. Dr. Danahey assigned Claimant a 6% scheduled impairment rating for the left upper extremity.

8. On May 31, 2018, Claimant underwent a Division of Worker's Compensation ("DOWC") Independent Medical Examination, which was performed by John Hughes, M.D. At the time, Claimant reported symptoms of a stretch in his left posterior trapezius, with right lateral flexion and rotation of the cervical spine. Dr. Hughes noted the right shoulder ranges of motion (ROM) were full and smooth. The left shoulder

[2] Exhibit N, p. 49.

motion was restricted with flexion and extension measured at 119° and 31°, respectively. Abduction and adduction were measured at 126° and 14°, with external and internal rotation measured at 78° and 41°.

9. Dr. Hughes' assessment was: work-related fall with left shoulder sprain/strain leading to development of a labral tear and glenohumeral instability; left shoulder arthritis post arthroscopic labral repair, subacromial decompression and debridement performed by Dr. Hewitt on April 25, 2017; cervicothoracic myofascial pain syndrome, with current findings similar to what was noted in the past.

10. Dr. Hughes agreed with the date of MMI and based upon the ROM findings, assigned an 11% scheduled impairment to the shoulder. He noted crepitation and assigned a 10% severity grade for crepitation, which yielded a 16% upper extremity rating that converted to a 10% whole person medical impairment. Dr. Hughes noted Claimant had asymmetric restriction in right lateral flexion and rotation of the cervical spine, which may have been due to myofacial hypertonicity of the left posterior trapezius stemming from Claimant's surgery. The ALJ concluded this was evidence of functional impairment beyond the shoulder.

11. Respondent filed a final Admission of Liability ("FAL") on June 22, 2018, based upon Dr. Hughes' rating. admitting for, among other benefits, permanent partial disability ("PPD") benefits based on a 16% scheduled impairment. Respondent paid PPD based upon the 16% scheduled impairment rating.

12. On June 29, 2018, Claimant filed a timely objection to the FAL, including an Application for a Hearing ("AFH"). This AFH sought additional PPD benefits, based upon conversion to the whole person impairment rating. Respondent was served a copy of the AFH.

13, The ALJ concluded Respondent had notice that the issue of PPD benefits was contested by Claimant by virtue of the filing of this AFH. No hearing was set on this AFH.

14. Claimant filed a second AFH on October 12, 2018. An Unopposed Motion to Set Hearing Outside of 120-Days was granted on November 8, 2018. The case was not set for hearing on this AFH. Respondent was served a copy of the second AFH.

15. The ALJ concluded Respondent had notice that the issue of PPD benefits was contested by Claimant by virtue of the filing of this AFH.

16. On June 14, 2019, Respondent filed a Motion to Close the case, citing no activity in the case. Respondent alleged Claimant had not taken any action in furtherance of prosecution of the claim since producing Answers to Interrogatories on December 3, 2018.

17. On July 1, 2019, the Director of the Division of Worker's Compensation (Paul Tauriello) issued an Order to Show Cause ("OSC"), which set a 30-day deadline for Claimant to respond or else the claim would be closed by operation of law. The Director had authority under § 8-43-218 (1), C.R.S. (2018) to issue such an Order.

18. The deadline for the response was July 31, 2019. Claimant received the Order to Show cause, but did not file a timely response to the Director's July 1, 2019 Order.

19. On August 30, 2019, Claimant filed a third AFH on the issues of PPD benefits and whole-person conversion.

20. The ALJ found Respondent had notice of that Claimant was seeking conversion of the medical impairment rating by virtue of the three AFH-s filed.

21. On September 9, 2019, Claimant filed a Motion for Reconsideration to Set Aside Order to Show Cause and to Permit Setting of the August 30, 2019 Application of Hearing. This Motion requested that the Director set aside his July 1, 2019 Order that closed Claimant's claim for failure to prosecute. As part of the Motion, Claimant's counsel affirmed that he did not have a copy of the July 1, 2019 Order in his file.

22. Claimant's counsel then filed a Supplemental Request for Reconsideration on September 17, 2019, acknowledging that both Claimant and Claimant's counsel's office received copies of the June 14, 2019 Motion to Close and the July 1, 2019 Order; however, Claimant's counsel alleged that his legal assistant never advised Claimant's counsel of the Motion or the Order. Claimant's counsel stated similar acts of omission/malfeasance were done by this legal assistant.[3] The ALJ inferred that the was the reason that no response was filed to the OSC.

23. On September 19, 2019, Respondent filed a Response to Claimant's Motion for Reconsideration. Claimant's counsel filed a Reply Brief on September 25, 2019. That same day, the parties attended a Prehearing conference on Respondent's Motion to Strike Claimant's AFH for Ripeness. In an October 2, 2019 Order, Prehearing ALJ Martinez Tenreiro found and ordered the following:

> Respondents have shown good cause to strike the Application for Hearing in this matter as the issues are closed pursuant to the July 1, 2019 order. Should the Director reverse the prior order, Claimant may refile for hearing on the issue of conversion other issues listed on the prior Applications for Hearing.

24. On October 7, 2019, Director Tauriello issued an Extension of Time to Show Cause. The Director found, in relevant part:

[3] Exhibit F, pp.15-16. Claimant's Supplemental Request for Reconsideration was a verified pleading, signed before a notary public

> "On September 11, 2019, Claimant's counsel requested that the Order to Show Cause be set aside. Originally, Counsel stated the motion and order were not in his file and he, therefore, had failed to timely respond. However, he has since learned that his former legal assistant was aware of and received a copy of the motion and order and failed to inform Claimant's counsel. . . . The Claimant has represented that there is a need for an extension of time to show cause why this claim should not be closed".

25. The Order provided that Claimant's claim may be closed unless, within 120 days of the Order, the parties either set and attended a hearing before an Office of Administrative Courts ALJ on any outstanding issues, obtained a further extension of time, or filed a stipulation.

26. The ALJ concluded that Claimant's counsel did not respond to the Motion to Close was because of an error or mistake.

27. The ALJ concluded that sufficient facts were shown to establish the claim should be reopened based upon error or mistake.

28. The parties went to hearing on January 22, 2020 on the issue whether the Director had authority to issue the October 7, 2019 or whether reopening was required.

29. Pursuant to the Court of Appeals decision, the Director did not have authority to issue an Order extending time for the Response to the Order to Show Cause. The case was closed upon the expiration of the July 31, 2019 deadline to respond to the OSC.

30. Claimant filed an AFH on October 11, 2019, requesting conversion to the whole person medical impairment rating. In its Response, Respondent endorsed the issue of appealing the Director's October 7, 2019 Order, seeking review of the Director's Order for an abuse of discretion. This hearing followed.

31. Claimant testified he experienced pain in the shoulder, as well as between his shoulder and neck. This has caused ongoing functional problems with his left shoulder that impacted sleeping, lifting with his left arm, carrying objects on his left shoulder and dressing. The ALJ found Claimant to be a credible witness.

32. Ronald Swarsen, M.D. testified as an expert witness. He has practiced in the area of Occupational Medicine since 1984 and since 1997 has been Level II accredited pursuant to the WCRP. Dr. Swarsen reviewed Claimant's medical records, but did not examine him. Dr. Swarsen opined Claimant's injury included part of the scapula, which was proximal to the shoulder. The surgery Claimant underwent also involved structures above the glenohumeral joint, including superior aspects of the superior labrum and these anatomic structures were outside of the shoulder. Dr. Swarsen stated Claimant's deltoid and trapezius muscles were impacted by the surgery. Dr.

Swarsen demonstrated on an anatomical drawing how these structures were affected, as well as noting that the shoulder was separate from the arm.[4]

33. Dr. Swarsen opined Claimant sustained a functional loss above the shoulder. The ALJ credited Dr. Swarsen's opinion and concluded Claimant sustained a functional impairment beyond the shoulder.

34. Respondent did not present evidence which contradicted Dr. Swarsen's conclusions.

35. Claimant met his burden of proof to establish he was entitled to conversion of the extremity rating to a whole person rating.

36. Claimant is entitled to additional PPD benefits based upon the whole person rating issued by Dr. Hughes.

37. 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).

### Reopening

[4] Exhibit 13.

As set forth in both of Procedural History and Findings of Fact sections, *supra*, this case had an extensive procedural history. The Director initially issued an Order to Show Cause and set a deadline of July 31, 2019 for Claimant's Response, which was not met. (Findings of Fact 16-18). As determined in Findings of Fact 19-22, Claimant then filed an AFH and a Motion for Reconsideration; to which Respondent objected. Respondent also filed Motion to Strike the AFH. The Director then extended the time for the Response to the OSC. (Finding of Fact 23-24). A hearing on the merits was conducted and Respondent appealed the Findings of Fact, Conclusions of Law and Order. The Industrial Claim Appeals Office affirmed the FFCL&O and Respondent appealed the Final Order to the Colorado Court of Appeals.

The Court of Appeals concluded the instance case was governed by the reopening statute, as it involved an award of PPD benefits in the FAL and then held that the case was closed by the terms of the original Order to Show Cause that was issued upon the filing of the Motion to Close. Judge Gomez, who noted there was tension between the statutory authority of the Director to manage claims and the statute governing reopening, wrote for the Court of Appeals:

> "We conclude that the language in the reopening statute is broad enough to encompass claimant's award, which granted benefits pursuant to the FAL and which became final when the claim was closed for failure to prosecute. Indeed, in a similar case, a division of this court held that a claimant's receipt of temporary disability benefits based on the employer's FAL constituted an "award" subject to the reopening statute, even though the claim had been closed for failure to prosecute when the claimant failed to attend a hearing he had requested. *Burke*, 905 P.2d at 2. Thus, when the claimant later sought additional benefits due to the worsening of his condition, the division held that the award could be reopened if he satisfied the criteria in the reopening statute. *Id.*
>
> Likewise, here, claimant received PPD benefits based on the [Employer]'s FAL. That receipt of benefits constituted an "award," which became final when the claim was closed for failure to prosecute and timely respond to the Director's show cause order. And once the award had been closed, claimant could pursue further benefits only if he satisfied the criteria in the reopening statute." *City and County of Denver v. ICAO*, 2021 COA 146, p. 12 (Colo. App. 2021).

Accordingly, the Court held the reopening statute applied in this case and Claimant was required to make a factual showing that reopening was warranted.

> "So, too, does the reopening statute constrain the Director's ability to issue procedural orders that have the effect of reopening a closed award. Accordingly, the Director couldn't belatedly extend the show cause deadline, reopen the award, and grant additional benefits unless claimant satisfied the criteria in the reopening statute." *City and County of Denver v. ICAO*, 2021 COA 146, p. 15 (Colo. App. 2021).

The Court of Appeals also considered the application of *Klosterman v. Indus. Comm'n of Colorado*, *673 P.2d* (Colo. App.), which Respondent argued was similar to the facts here.

In *Klosterman v. Indus. Comm'n of Colorado*, *supra*, 694 P.2d at 873, Claimant alleged she suffered an injury and informed her employer. The employer, who was uninsured, hired defense counsel upon learning of a workers' compensation claim. The defense counsel never filed an entry of appearance and the employer changed addresses without filing a notice of change of address with the DOWC. The employer contested liability, arguing that he was a partner, but not an active participant. The defense attorney determined that the claim should be filed against the corporation and said he would advise Claimant's attorney. He did not enter an appearance in the case and took no further action. Claimant then filed an AFH to pursue indemnity benefits. Neither the employer nor the defense counsel received notice nor appeared for the hearing. Claimant prevailed and was awarded benefits.

Employer filed his petition to reopen in March 1983, alleging error or mistake. At hearing, the officer found that "the error or mistake in this case is . . . [the employer's] neglect" because the employer had not followed up with his attorney. The hearing officer determined the failure by the employer to apprise the DOWC of its address and the failure to appear at the hearing was attributable to his own neglect. The hearing officer rejected the employer's request to reopen the claim. The ruling was upheld by the Industrial Commission.

The employer appealed, arguing that his neglect was excusable and that excusable neglect fell within the definition of "error or mistake". The Court of Appeals rejected the argument and Judge Berman concluded: "It is apparent here that the Commission did not consider Klosterman's inaction after he obtained counsel, including his failure to apprise the Division of a change of address, or at any time of an address for the registered agent of the corporate entity, to be the type of mistake which would entitle him to a reopening". This was not an abuse of discretion and the decision was affirmed. *Klosterman v. Indus. Comm'n of Colorado*, *supra*, 694 P.2d at 876.

In *City and County of Denver v. ICAO*, the Court of Appeals considered the question of whether the terms "error" or "mistake" encompassed excusable neglect and noted the division that decided Klosterman relied on the fact that, irrespective of whether Klosterman's conduct might be considered excusable neglect, the Industrial Commission had determined that it wasn't an error or mistake that warranted reopening The Court of Appeals stated:

> "We are not prepared to conclude, as a matter of law, that the facts of this case cannot support a finding of error or mistake. The City hasn't offered a definition of "error" or explained why the Director couldn't conclude that reopening was warranted on that basis. It's also not entirely clear that "mistake" has the same meaning in the reopening statute as in Rule 60(b)(1). After all, Rule 60(b)(1)

includes the terms “inadvertence,” “surprise,” and “excusable neglect” along with “mistake” as bases for ordering relief from a judgment, thus suggesting that, in that context, each term means something different”. *City and County of Denver v. ICAO*, 2021 COA 146, pp. 21-22 (Colo. App. 2021).

The Court went on to conclude that it was unable to determine whether Claimant satisfied the grounds for reopening on the grounds of error or mistake and the case was remanded for additional factual findings.

Thus, issue presented in case is governed by § 8-43-303, C.R.S. and the ALJ or Director has broad discretion to determine whether Claimant met [their] burden of proof. *Id.* The question framed in the case at bar is whether there was a sufficient showing to support reopening under these facts.

The reopening statute provides in pertinent part:

> **“Reopening.** (1) 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 ground of fraud, an overpayment involving the circumstances described in section 8-42-113.5, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all rights to reopen an award; but a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact. In cases involving the circumstances described in section 8-42-113.5, recovery of overpayments shall be ordered in accordance with said section. If an award is reopened on grounds of **an error, a mistake, or a change in condition**, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. Reopening does not affect the earlier award as to money already paid except in cases of fraud. Any order entered under this subsection (1) is subject to review in the same manner as other orders”. [Emphasis added.]

Claimant argued that reopening was warranted, specifically that the facts supported a finding of excusable neglect under C.R.C.P. Rule 60(b). This was based upon the beneficent purpose of the Workers’ Compensation Act (“Act”). Claimant asserted that the provisions of the Act was to be construed liberally to effectuate its remedial and beneficent purposes. *See ICAO v. Ray,* 145 P.3d 661 (Colo. 2006); *University of Denver v. Industrial Commission*, 335 P.2d 292 (Colo. 1959). This rule of liberal construction provides that an injured worker receives the benefit of doubt on close questions of law, i.e., issues which can be interpreted either way. See *Mountain City Meat v. Oqueda*, 919 P.2d 246 (Colo. 1996); *UAL v. ICAO*, 993 P.2d 1152 (Colo. 2002).

Claimant also asserted that doctrine of excusable neglect was addressed by the Supreme Court in *Buckmiller v. Safeway Stores, Inc.,* 727 P.2d 1112 (Colo. 1986) and applied in this context. The Court specified criteria to be considered when rleif was granted under C.R.C.P. 60(b), which included The trial court should base its decision on

the following three criteria: (1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether release from the challenged order would be consistent with consideration of equity. More particularly, Claimant alleged that the criteria set forth in *Buckmiller v. Safeway Stores, Inc.*, *supra,* were met and showing of excusable neglect was made. The ALJ noted that none of the appellate decisions which followed *Buckmiller* have adopted "excusable neglect" as a basis for reopening in a workers' compensation case.

Claimant asserted that the ALJ had authority to reinstate the Director'sFinally, Claimant also averred that since the claim should be reopened, he sustained a functional impairment beyond the shoulder and was entitled to additional PPD benefits.

Respondent asserted that Claimant failed to make a showing that the claim should be reopened, pursuant to 8-43–303, C.R.S. and there were no facts which supported a finding of "fraud, an error, a mistake or change of condition" which justified reopening under these circumstances. Respondent argued that the mistake or error presented in the instant case was not the type of mistake that would justify re-opening. Specifically, Respondent argued that the closure was not based upon a mistake or error. Respondent contended that, in fact, the mistake or error was wholly extraneous to the factual and legal basis for closure. Respondent analogized this to the situation where Claimant failed to object to a FAL or Respondent failed to file a timely Petition to Review after a scheduled impairment rating was converted to a whole person rating. Respondent also contended that in this case, Claimant had taken no action to prosecute the claim in the six months before the Director issued the Order, which closed the Claim. On this point, Respondent asserted the concept of error or mistake for reopening was distinguished from what might be considered error or mistake in "common parlance".

Respondent also argued that excusable neglect was not a basis for reopening and that the standard differed than under C.R.C.P. 60(b). Respondent reviewed the statutory history of both the reopening statute and C.R.C.P. 60(b) and asserted "mistake" was not intended to have a broader meaning in the reopening statute than what it had in C.R.C.P. 60(b). Respondent posited that the Colorado Legislature must have deliberately omitted "inadvertence," "surprise," and "excusable neglect" as bases for reopening when the reopening statute was enacted.

Respondent pointed as support for this argument the fact that the reopening statute was originally enacted in 1919 under Chapter 210, § 110, of the Session Laws of Colorado. (S.B. 19-59.) It was codified as § 4484, Compiled Laws of Colo. (1921). It included "error," "mistake," and "change in conditions" as the three bases for reopening an award. At the same time, a separate statute, § 81 of the Compiled Laws of Colorado, provided that a party could be relieved of a judgment where it arose from "mistake," "inadvertence," "surprise," or "excusable neglect" in civil cases. This was the predecessor of C.R.C.P. 60(b). Respondent argued both statutes provided means to set aside a final judgment or award but established somewhat different standards for workers' compensation than what was established for civil matters. The General Assembly is

presumed to have been aware of § 81 at the time they enacted § 4484, and their decision to use a different standard should be assumed to be deliberate.

The ALJ considered the arguments of the parties and the Court of Appeals decision in this case and concluded that "excusable neglect", as that phrase has been construed in cases in which a party sought relief under C.R.C.P. 60(b) did not apply at the case at bar. However, after considering the totality of the evidence, the ALJ determined that Claimant made a showing for relief by demonstrating that the failure to respond to the OSC was based on error or mistake. (Findings of Fact 22, 27). Accordingly, Claimant was entitled to reopen the claim. The rationale for this decision was threefold; first under these circumstances the ALJ determined the failure to respond to the OSC was the result of an error or mistake. As Respondent correctly noted in its post-April 2022 hearing brief, error and neglect are not defined in the Act. The ALJ turned to the plain meaning of words error and mistake:

> Definition of error-
>
> "Error (noun):
>
> 1a**:** an act or condition of ignorant or imprudent deviation from a code of behavior; b**:** an act involving an unintentional deviation from truth or accuracy; c**:** an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done, an *error* in judgment."[5]
>
> Definition of mistake-
>
> "Mistake (noun):
>
> 1: a wrong judgment;
> 2: a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention".[6]

The definition of mistake is apposite here, as the evidence pointed to a wrong judgment or action; i.e. Claimant's failure to respond to the OSC. The ALJ concluded this occurred because of error or mistake. (Finding of Fact 22). The error or mistake directly led to no response and the claim was closed. The ALJ specifically considered Respondent's argument that Claimant's error or mistake was "wholly extraneous" to the legal and factual basis for the closure itself and therefore could not be a rational basis for reopening. No appellate court has taken such a circumscribed view of what constitutes error or mistake and the ALJ concluded that a sufficient showing for reopening was made when the plain meaning of those terms was considered.

In the context of workers' compensation cases where reopening was sought, "mistake" has been interpreted to include mistake of fact or mistake of law. Examples of

[5] Merriam-Webster Dictionary, Sixteenth Edition.

[6] Id.

mistakes of fact supporting reopening include cases where there were instances of misdiagnosis or a more detailed diagnosis which were discovered only after the claim had closed. *See, e.g., Berg v. Indus. Claim Appeals Office of State of Colorado*, 128 P.3d 270, 273 (Colo. App. 2005) [misdiagnosis discovered during post-MMI surgery was legally sufficient mistake for purposes of reopening] and *Standard Metals Corp. v. Gallegos*, 781 P.2d 142, 146 (Colo.App.1989) [misdiagnosis discovered later only after advancement in medical technology was legally sufficient mistake for purposes of reopening].

An award may also be reopened based on mistake of law where the Order closing the claim was inconsistent with subsequent judicial interpretation. *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177, 1180-81 (Colo.App.1996). In its opinion in the case at bench, the Court of Appeals noted the *Berg* and *Renz* decisions didn't "state that the term 'mistake' is limited to those particular circumstances, nor do they elucidate what might constitute an 'error' justifying reopening". *City and County of Denver v. ICAO*, 2021 COA 146, p. 18 (Colo. App. 2021).

Accordingly, the ALJ considered the plain meaning of error or mistake as used in the statute, as well as reviewing the factual underpinnings of this case, (including the fact that Claimant had diligently prosecuted the case up to the point the Motion to Close was filed) and found that the failure to respond was the result of an error or mistake.

Second, the Court of Appeals decision in this case expressly noted that it could not conclude as a matter of law that the facts cannot support a finding of error and or mistake. Respondent characterized this as dicta, however, the view expressed by the Court indicates that other reopening for error or mistake is not limited to misdiagnosis cases or those where the law changed. The ALJ considered the extensive procedural history of the case before the Motion to Close was filed, as well as the circumstances which led to the failure to respond and concluded the basis was an error or mistake.

Third and finally, the ALJ concluded that there were equitable considerations in determining whether this claim should be reopened. Chief among these was the fact that Respondent had notice of the dispute concerning benefits by virtue of the prior AFH-s which were filed by Claimant. As found, the AFHs were filed in a timely fashion and Respondent was on notice that the issue of PPD was disputed and Claimant requesting a conversion of the shoulder impairment rating. (Findings of Fact 12-15). In addition, a trial on the merits is generally favored over default, which in this case the OSC operated as when it closed the PPD issue. These considerations weighed in favor of reopening this claim under these circumstances.

**Conversion to A Whole Person Impairment Rating**

Having concluded that the case should be reopened, the next issue to be determined was Claimant's request for PPD benefits based upon the whole person

impairment rating. If Claimant sustains an injury not found on the schedule, § 8-42-107(1)(b), C.R.S., provides Claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes, the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

The ALJ was persuaded Claimant met his burden of proof and established by a preponderance of the evidence he was entitled to PPD benefits based upon a whole person medical impairment rating. (Finding of Fact 35-36). The ALJ's conclusion was based upon the medical evidence in the form of treatment records which provided objective evidence that anatomical structures beyond the shoulder joint were involved. (Finding of Fact 6). Dr. Hughes' opinions within the DIME report also supported this conclusion. (Findings of Fact 9-10). In addition, Dr. Swarsen's expert testimony was persuasive on this subject, as well. (Findings of Fact 32-33). Claimant's testimony regarding the injury to his shoulder and its sequelae provided additional factual support for the ALJ's determination that he was entitled to a whole person rating. (Finding of Fact 31). The ALJ also found that Respondent presented no evidence to contravene the finding that structures beyond the shoulder joint were implicated. (Finding of Fact 34).

Based upon the totality of evidence presented at hearing, the ALJ determined Claimant showed he sustained functional impairment beyond the shoulder and was entitled to PPD benefits based upon a 10% whole person rating.

## ORDER

It is therefore ordered:

1. Claimant's claim is reopened.

2. Respondents shall pay PPD benefits based upon Dr. Hughes 10% whole person rating. [$939.85 X .10 X 1.26 (Age factor-47 years of age) x 400 weeks= $47,368.44].

3. Respondent is entitled to a credit for PPD benefits previously paid.

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

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

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

DATED: November 1, 2022

STATE OF COLORADO

**Digital signature**

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

## ISSUES

I. Whether Respondents have proven by a preponderance of the evidence that the doctrines of estoppel and latches apply to the claim.

II. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on June 18, 2019.

IF THE CLAIM IS COMPENSABLE, THEN:

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to authorized, reasonably necessary and related medical benefits.

IV. Whether Claimant has proven by a preponderance of the evidence he is entitled to temporary partial disability benefits.

## STIPULATIONS OF THE PARTIES

The parties stipulated that the issues of temporary total disability (TTD) benefits was withdrawn at the beginning of the hearing. In light of the stipulation, Respondents withdrew the issue of termination. Claimant agreed at the close of the evidence that the issue of temporary partial disability (TPD) was also withdrawn.

The parties further stipulated that, if the claim was found compensable, that Claimant's average weekly wage was $1,018.00, and that medical providers from Colorado Plains Medical Group and associated providers, Colorado Plains Medical Center, Colorado Rehabilitation and Occupational Medicine, Dr. Laurence Lesnak, as well as Morgan County Chiropractic, P.C., and Orthopedic and Spine Center of the Rockies were authorized treating providers.

## FINDINGS OF FACT

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

1. Claimant was a 44 year old cow hand at a dairy owned by Employer on June 18, 2019. His job included cleaning corrals, moving the cows from each corral and when necessary into the bottle neck in order to control the cow while performing the insemination, inseminating the cows, laying down bedding in the corrals and all other dairy jobs of a laborer.

2. Claimant stated that on June 18, 2019 he was corralling a cow into the chute in order to inject the cow (artificial insemination). At one point, two cows went towards him, one of the cows turned around pushing Claimant, and Claimant ended up against

the corral fence rails. Claimant stated, that when this happened he extended his left hand against the cow so he would not be shoved and his right side made contact with the rails of the fence. He alleged he injured his left arm, left rib, and shoulder and his right side, including his shoulder, arm and hand, and back.

3. Claimant was sent the next day to Colorado Plains Medical Group, where he was evaluated on June 19, 2019 by Tiffany Jorgensen, FNP. Nurse Jorgensen took a history as follows:

> 41-year-old male here with concerns of lower back pain, left forearm pain, left rib pain and lower shoulder pain in regards to being shooved [sic.] by a cow States that he was at work on 06/18/2019 when they were placing cows in a Corral in 1 cow with coming up fast and patient reports that he went to put his arms across to self to protect self and went to turn when the cow pushed him coming in contact with the cow on his rights side as he was turning to avoid the cow States that this happened about 8 00 a m In the morning States since then has had left forearm pain along with left shoulder pain left rib pain and left back pain

Claimant's physical exam was essentially normal other than the complaints of tenderness and complaints of pain with movement. She ordered x-rays of the lumbar spine, the left forearm, shoulder and ribs as well as the left ankle. Nurse Jorgensen also provided restrictions of no lifting more than 20 lbs. and no repetitive lifting, carrying, pushing, pulling, reaching overhead or reaching away from the body and prescribed a muscle relaxant. X-rays were all noted as normal findings.

4. Employer filed a First Report of Injury (FROI) on June 21, 2019 noting that they had notice of the claim on June 18, 2019, and stated that Claimant was moving cows and was pushed into the railings and had a contusion of the left hip.

5. In a follow up on July 8, 2019 Marshal Unrein, PA-C noted that Claimant did not have any obvious deformity or abnormality of the left shoulder but had mild point tenderness over the posterior aspect of the shoulder, a slightly decreased range of motion and strength of his left shoulder with resistance to flexion and abduction, and slightly decreased motion in the left arm compared to the right. He also found point tenderness over the right SI joint area, and an audible pop to the right hip area with flexion. He diagnosed strain of lumbar region, strain of left shoulder, and contusion of rib on left side. He continued muscle relaxant medications, provided restrictions of 10 lbs. and Claimant was to avoid repetitive bending of the lumbar spine.

6. By July 23, 2019 Claimant noted that he had improvement since the last visit but continued to have some low back pain with most of the pain over the right SI joint area. With regard to the left shoulder, he had some difficulty with range of motion but good strength. Mr. Unrein remarked that claimant had not started with physical therapy but was willing to for his low back symptoms. He documented that Claimant's left shoulder strain was essentially resolved and was asymptomatic regarding the rib contusion.

7. On August 22, 2019 Claimant reported he had seen good improvement over the past 2 weeks in regards to his low back pain. He reported decreasing pain in his low back. He also had decreasing pain down his right leg. He still had pain in his hips once in a while but was much better. He had been going to physical therapy 2 times a week.

Claimant reported he was pleased with progress and Mr. Unrein was hopeful that things would get better over the next 4-8 weeks. He continued taking ibuprofen, using ice and heat as well as following restrictions. On exam, Mr. Unrein found nothing remarkable but recommended continued physical therapy. After this visit Claimant continued to report improvements with physical therapy.

8. By September 27, 2019 Claimant started having worsening lumbar spine symptoms with left lower extremity radiation. Mr. Unrein recommended an MRI and prescribed continued physical therapy.

9. Claimant was unable to obtain an MRI due to his pacemaker and radiology recommended a CT scan of the lumbar spine with myelogram. Claimant continued to report radiating pain in the bilateral lower extremities, greater on the left than the right on October 24, 2019.

10. Claimant was evaluated by Nurse Jorgensen on November 1, 2019. She remarked that Claimant had another fall on dry alfalfa on October 30, 2019, injuring his bilateral arms and aggravating his low back pain. Claimant reported no numbness or tingling; just a slight hot-feeling, and thigh pain. Claimant stated he felt like his leg wanted to go out from under him. Claimant report his back was doing well, but since the fall had worsened. Ms. Jorgensen noted that Mr. Unrein had also referred Claimant to a neurosurgeon for an evaluation. She discontinued physical therapy until the neurosurgeon provided his opinion.

11. On November 6, 2019 Claimant's CT myelogram of the lumbar spine revealed only mild discogenic and facet related degenerative changes greatest at the L4-5 level without significant spinal canal or foraminal stenosis, as read by Dr. Eric Nyberg.

12. On November 12, 2019 X-rays of the ribs showed no evidence of fracture, displacement, or other acute deformity, uniform mineralization of the skeletal structures and no focal soft tissue deformity. X-rays of the left wrist and ankle were also negative.

13. Claimant reported that he had a slip and fall on ice on November 21, 2019, which aggravated his low back symptoms and was seen in the urgent care office, who took X–rays on November 21, 2019.[1] Mr. Unrein changed the referral from a neurosurgeon to a physiatrist for evaluation in light of the essentially normal CT and continuing complaints of Claimant's low back pain.

14. Claimant was evaluated by Dr. Lawrence Lesnak on December 13, 2019. Claimant, or rather his wife, provided a history of a slip and fall injury on ice on or about October 30, 2019, while at work, injuring his left side and causing low back and leg pain. He noted that he was seen at Colorado Plains clinic that day.[2] He stated that Claimant reported he had had multiple prior low back injuries, mostly at work. However, he was unable to provide Dr. Lesnak with any information regarding these multiple prior low back injuries. He stated that he had undergone significant treatments over the years as well but, again, could not state what or where.

[1] This ALJ infers that the date was a typographical error as x-rays were taken on November 12, 2019 so it is presumed that the fall happened on November 12, not November 21, 2019.
[2] Claimant was seen on November 1, 2019 with increased back pain.

15. Claimant complained to Dr. Lesnak of left greater than right low back pain, left buttock pain and less frequently left posterior leg pain extending into the left posterior heel. Dr. Lesnak made comment that Claimant was a very poor historian (multiple times throughout his report). He noted that Claimant appeared to have a flattened affect, and reported moderate to high level of somatic pain complaints, indicative of psychosocial facts affecting Claimant's symptoms, his recovery as well as his perceived function. He noted that Claimant exhibited multiple pain behaviors during his evaluation. He documented that gentle brushing of the skin overlying his left greater than right low back/superior buttock region reproduced at least a moderate amount of pain. However, there were no distinct trigger points or muscle spasms that were palpated throughout the patient's lumbar paraspinal musculature or gluteal musculature bilaterally. He recommended Claimant have an EMG test to determine whether radicular nerve injury was present.

16. Dr. Lesnak noted that the psychosocial evaluation was assessed utilizing the Distress and Risk Assessment Method (DRAM) evaluation which analyzed the Modified Zung Depression Index and the Modified Somatic Pain Questionnaire. The patient scored numerical values that placed him in the "at risk" category for psychosocial dysfunction. Dr. Lesnak further noted that Claimant reported a high level of depressive symptoms, as well as a moderate to high level of somatic pain complaints during the DRAM testing. A moderate to high level of reported somatic pain complaints suggested the presence of an underlying symptom somatic disorder/somatoform disorder and stated that patients who have these types of diagnoses frequently embellish/exaggerate their symptoms, thus causing their reported subjective complaints to be unreliable at best. Therefore, he cautioned evaluating/treating healthcare providers to rely primarily, if not solely, on reproducible objective findings in order to provide accurate medical diagnoses and especially accurate medical treatment recommendations.

17. On December 19, 2019 Claimant reported to Mr. Unrein that he continued to have low back pain with radiating pain down the left leg greater on the back than anteriorly and was scheduled for a lower extremity EMG for January 17, 2020.

18. Respondents filed a Notice of Contest on January 15, 2020 stating that the injury or illness was not work related and that they required a medical history and release returned by Claimant.

19. Claimant underwent EMG testing on January 17, 2020 which showed no electrodiagnostic evidence of left lumbar or sacral radiculopathies, plexopathies or peripheral nerve entrapments or neuropathies involving Claimant's left lower extremity or lumbar spine. He stated that given Claimant's significant past medical history, as well as his residual pain behaviors and nonphysiologic findings, Claimant did not appear to be a good candidate for any type of interventional treatments such as a trial of lower lumbar facet joint injections. However, he did recommend a brief trial of manipulative treatments, either osteopathic or chiropractic care.

20. Mr. Unrein noted that he had received the physiatrist's recommendation that Claimant be referred to a chiropractor, which he did on January 22, 2020.

21. On February 24, 2020 Mr. Unrein documented that Claimant had seen the chiropractor for six sessions without improvement and that Claimant continued with low

back pain that radiated down his left leg to his left heel areas. He stated that the symptoms wax and wane. Claimant was to finish two additional visits and then be seen by the physiatrist again.

22. Claimant returned to Dr. Lesnak on March 23, 2020 who noted he found Claimant to be at MMI without permanent impairment based on negative diagnostic workup and subjective complaints, and discharged him from care. Dr. Lesnak did not make any further recommendations for Claimant's non-objective somatic complaints.

23. On March 30, 2020 Claimant was placed at maximum medical improvement by Mr. Unrein as Claimant had exhausted all conservative care without resolution of his symptoms and diagnostic test failed to reveal any need for injections or surgical treatment. Mr. Unrein noted that Claimant had no permanent restrictions and could return to regular work. The M164 also indicated Claimant had no permanent impairment.

24. Claimant's counsel entered his appearance on July 9, 2020.

25. On July 29, 2020 a Workers' Claim for Compensation (WCC) was filed on Claimant's behalf noting he was injured on June 18, 2019, sustaining strain injuries to his upper back, low back, waist, and spine, while working for Employer.[3]

26. On February 1, 2021 Claimant presented to the emergency department at Colorado Plains with increased symptoms without any known mechanism of injury. Claimant reported it had started the day before attending the ED.[4] Claimant reported that he had pain that radiated to the right foot, left foot, right leg, and left leg. He had numbness, tingling, urinary retention, weakness, and was unable to have a bowel movement. He was examined, and he did have decreased sensation to light touch in the bilateral feet. He was complaining of weakness in his legs, although he was standing and walking around without difficulty. Following some discussion of whether he needed an MRI emergently and the facts that he was neurologically intact and was walking around, Dr. Matthew Garman determined proper course was to give him some medications and discharged him home.

27. Claimant filed an Application for Hearing on January 12, 2022 and, following an Unopposed Motion to Withdraw the Application for Hearing and an order dated June 7, 2022 allowing for the withdrawal without prejudice, filed a second Application for Hearing on July 8, 2022.

28. Claimant was seen by Dr. Alisson Fall at Respondent's request for an independent medical evaluation on April 6, 2022. She took a history which was consistent with Claimant's testimony and performed a record review. She examined Claimant, reporting Claimant had diffuse tenderness to palpation of the lumbar spine, self-limited range of motion secondary to complaints of pain, no radicular symptoms, negative straight leg raise and difficulty sitting up due to body habitus. She also found give-way weakness of the lower extremities but otherwise a negative testing. She assessed that Claimant was post left arm, ribcage, and hip contusion on June 18, 2019 which resolved. She also

[3] There was no mention of Claimant's left upper extremity or hip.
[4] Presumably meaning January 31, 2010.

noted the subsequent fall leading to low back pain and a reported fall on January 31, 2021 leading to acute back pain and leg symptoms.

29. Claimant's Supervisor with Employer testified that Claimant had quit his job in July, 2020, that he had simply stopped working. He also stated that Claimant was paid out his vacation time instead of Claimant taking any vacation time.

30. This ALJ reviewed the video footage found at Exhibit S. This ALJ concurs with Dr. Fall that, on the surveillance, Claimant could be seen easily bending to the ground to pick up a small item, getting in and out of a vehicle, and working under a Jeep including what appears to be changing a tire and even getting underneath, with prolonged squatting and awkward positions without hesitation or signs of discomfort. He was also ambulating fluidly without antalgic gait.

31. As found, Claimant admitted to having multiple subsequent falls to Dr. Lesnak when he saw him on December 13, 2019. He reported to Dr. Lesnak that he was injured on October 30, 2019. Claimant reported he had had multiple prior low back injuries, mostly at work, in the past. However, he was unable to provide Dr. Lesnak with any information regarding these multiple prior work-related low back injuries. This is borne out by the evaluation at the ED on November 1, 2019 that stated Claimant had an aggravation of his lumbar spine condition. Following this evaluation, Claimant continued to complain of worsening symptoms. However, Dr. Lesnak noted that Claimant appeared to have a flattened affect, and reported moderate to high level of somatic pain complaints, indicative of psychosocial facts affecting Claimant's symptoms, his recovery as well as his perceived function. He noted that Claimant exhibited multiple pain behaviors during his evaluation.

32. As found, the video surveillance shows that, while Claimant complained to providers and testified that he continued to have pain symptoms, he clearly is shown without visible or notable limitations while changing a tire in awkward positioning while squatted for a lengthy period of time. This ALJ was not convinced that there was an injury causing incident that occurred on June 18, 2019, as Claimant admitted to Dr. Lesnak that he had had multiple falls and multiple injuries to his low back with unknown dates of injury. While there are no records of those injuries before June 2019, Claimant's testimony was not persuasive. Further, even if there was an incident that cause some complaints on June 18, 2019 the records of August 22, 2019 persuasively indicated that Claimant's complaints were essentially resolved. Lastly, Respondents have shown that Claimant had multiple intervening events that likely caused aggravations of his lumbar spine condition, which are not related to the incident of June 18, 2019 but likely related to intervening events occurring on October 30, 2019, November 12, 2019 and January 31, 2020 or at other times of uncertain dates. Drs. Fall and Lesnak are found persuasive in this matter. Claimant has failed to show he has any injuries related to the June 18, 2019 events.

33. Testimony and evidence inconsistent with the above findings is not relevant, credible and/or not persuasive.

## CONCLUSIONS OF LAW

### A. Generally

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

Respondents counsel argued that the claim was barred under the doctrine of latches and estoppel as supported *by Hickerson v. Vessels*, 316 P.3d 620 (Colo. 2014). That case deals with a promissory note and the promise to pay said note, when the statute of limitations would have barred the recovery action because the party made a payment after the statute of limitation had run, the underlying court determined that the statutory period began anew under the partial payment doctrine. The trial court reversed itself and made a determination that the laches defense applied and recovery was not permitted. The Court of Appeals reversed stating that laches was unavailable due to the separation of powers doctrine. The Supreme Court reversed the CA decision and remanded. They cited *Lombard v. Colorado Outdoor Educ. Ctr, Inc.,* 187 P.3d 565, 570 (Colo.2008) citing that "Where the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly's authority to modify or abrogate common law, but only recognize such changes when they are clearly expressed." *Hickerson v. Vessels*, 316 P.3d 620 at 623 (Colo. 2014). Further stating that "Unless a conflict with the statute exists, the pre-existing common law continues to apply." See *Smith v. Exec. Custom Homes*, 230 P.3d 1186, 1192 (Colo.2010).

The statute of limitation under the Act states as follows:

> … the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division. This limitation shall not apply to any 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,…"

The statute of limitations as denoted in the Act, very clearly expresses the parameters for the filing of a claim. There is no doubt in the mind of this ALJ that the statute of limitations in the Act is clear, concise and states the parties' rights with regard to the filing or pursuing of a claim.

The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another. *City of Thornton v. Bijou Irrigation. Co.,* 926 P.2d 1, 73 (Colo.1996) (internal quotations omitted). Laches requires "such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery*." Loveland Camp No. 83 v. Woodmen Bldg.,* 108 Colo. 297,116 P.2d 195, 199; *Keller Cattle Co. v. Allison*, 55 P.3d 257, 260 (Colo.App.2002) ("The doctrine of laches permits a court to deny a party equitable relief."); *Hickerson v. Vessels, supra* at 623.

The Supreme court analyzed that "Since the early days of statehood, we have recognized that laches is available as a defense in some circumstances to shorten the period for filing a claim, even though the claim has been timely filed within a legislatively prescribed statute of limitations period." *Great W. Mining Co. v. Woodmas of Alston Mining Co*., 14 Colo. 90, 23 P. 908, 911 (1890); *Hickerson v. Vessels*, *supra* at 624. They further stated that it is particularly "true where witnesses have died or their memories become dim or time and long acquiescence have obscured the nature and character of the [claim] or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance." *O'Byrne v. Scofield*, 120 Colo. 572, 212 P.2d 867, 871 (1949). *Hickerson v. Vessels*, *supra* at 625.

What was not mentioned in case law, is that the Act clearly states the limitations for the filing of a claim. Nor is there mention of the Division's Rules of Procedure which provide another avenue for relief to Respondents, other than the statute of limitations or common law doctrines. Pursuant to D.O.W.C. Rule 7-1(C), Respondents may file a motion to close the claim for failure to prosecute at any time "when there is no activity in furtherance of prosecution has occurred in a claim for a period of at least six months."

In this matter, Respondents have failed to show that there was any significant prejudice to Respondents for Claimant's failure to proceed to hearing prior to the original Application for hearing dated January 12, 2022. Employer filed a First Report of Injury on June 21, 2019 and knew or should have known that Claimant had a right to file a Workers' Claim for Compensation within two years of the date of the alleged injury pursuant to statute.

An unknown individual,[5] filed a Workers' Claim for Compensation on July 29, 2020 on Claimant's behalf. Claimant filed an Application for Hearing on January 12, 2022 and, following an Unopposed Motion to Withdraw the Application for Hearing and an order dated June 7, 2022 allowing for the AFH withdrawal without prejudice, filed a second Application for Hearing on July 8, 2022. Respondents had the ability to find resolution of the claim. Respondents had to very reasonable steps to take. The first by filing a Motion to Close at any time six months after the date of the filing of the WCC. The second by filing an application for hearing to litigate the issue of laches or estoppel.

Further, Respondents had notice that Claimant had an attorney working on the case as of July 2020 when he entered his appearance. There was no credible indication that Respondents were prejudiced by the delay in Claimant's filing the AFH a year or so later. Respondents demonstrated no prejudice to Respondents when they did not oppose the withdrawal of the first AFH without prejudice. Neither did Respondents show they had relied on the fact that no AFH was filed before January 2022 by any particular actions taken by Respondents. No persuasive evidence was presented at hearing that "witnesses had died or their memories become dim or time and long acquiescence have obscured the nature and character of the [claim] or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance." In fact, providers noted particular findings in the medical records. And Claimant's supervisor did not exhibit any lack of knowledge of the events which had occurred over three years prior

[5] This ALJ infers it was an individual at Claimant's counsel's office that filed the WCC on Claimant's behalf.

to the hearing before this ALJ. Here, the argument of latches simply does not apply. Respondents have failed to show that the doctrine of latches applies in this matter as no prejudice is found.

With regard to Respondents' argument that the doctrine of estoppel applies, equitable estoppel exists where the following criteria are met: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely upon the other party's conduct. See *Johnson v. Industrial Commission*, 761 P.2d 1140, 1146 (Colo. 1988); *In re Claim of Hernandez*, WC No. 4-850-627-03, I.C.A.O. (September 20, 2013).

Respondents failed to show that Claimant's conduct was such that it incited Respondents to act in a certain manner. Claimant did not in any way show that they intended to relinquish the right to proceed to hearing on the issue of compensability. Claimant hired counsel and counsel filed an entry of appearance with opposing counsel and the court. This ALJ presumes that Claimant's counsel was gathering the facts and evidence necessary to proceed with the claim and any records obtained by Claimant's counsel should have been exchanged with Respondents pursuant to the rules. There is a lack of persuasive evidence that Claimant was doing nothing or that Claimant had all of the relevant and necessary facts at his disposal before filing the AFH. Respondents have failed to show that the doctrine of estoppel applies in this matter.

### C. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999*); Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result*. City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. E.g., *Montgomery v. HSS, Inc.,* W.C. No. 4-989-682-01 (August 17, 2016).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the

injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). The questions of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury or a worsened condition are ones of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant failed to prove that it is more likely than not that he suffered a compensable injury to his lumbar spine on June 18, 2019. As an initial matter, it is not readily apparent how the accident described in testimony and medical records would have been sufficient to cause a lumbar spine injury. Furthermore, all diagnostic testing, including the CT scan, the EMG and nerve conduction study, the x-rays, the DRAM psychosocial evaluation as well as multiple examinations by multiple providers, including Mr. Unrein, Dr. Lesnak and Dr. Fall, failed to show any acute pathology of a lumbar spine injury. In fact the CT scan only revealed mild degenerative pathology at the L4-L5 level. Further, by Claimant's own admission, Claimant told Dr. Lesnak that he had had multiple falls that aggravated his lumbar spine condition, including one on October 30, 2019. The records of Nurse Jorgensen on November 1, 2019, Mr. Unrein on November 21, 2019 and Dr. Garman on February 1, 2021 identified a fall in the hay, a unknown mechanism as well as a slip and fall on ice. This ALJ concludes that it was more likely than not that Claimant had multiple incidents, including but not limited to dates on October 30, 2019, November 12, 2019 and and another on January 31, 2020. This ALJ specifically concludes that these were aggravations of the underlying degenerative process, which are considered intervening events, and not any injury caused on June 18, 2019. Claimant has failed to show that he had a compensable work related injury to the low back on June 18, 2019.

All other issues are moot in light of this finding and will not be addressed.

## ORDER

IT IS THEREFORE ORDERED:

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

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

DATED this 2nd day of November, 2022.

Digital Signature

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

## ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered an allergic reaction to the COVID-19 vaccine causing a need for medical care and thus a compensable injury.

II. If Claimant established that she suffered a compensable allergic reaction to the COVID-19 vaccine, whether she also established, by a preponderance of the evidence, that her emergency room visit on October 14, 2021 was reasonable, necessary, and related to that reaction such that Respondent must pay for the visit.

Because the ALJ concludes that Claimant failed to establish that she suffered a compensable injury, this order does not address issue II outlined above.

## FINDINGS OF FACT

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

1. Claimant is a former correctional worker who contracted Covid-19 on September 25, 2021. She was taken off work as a consequence. She described the symptoms associated with her Covid infection as mild and lasting for approximately three (3) days. According to Claimant, her Covid symptoms consisted primarily of fevers and sinus congestion.

2. Upon recovery from her Covid infection, Claimant returned to full duty work in her usual capacity as a correctional officer on the graveyard shift on October 6, 2021. She testified that she resumed her duties completing rounds, counts and escorting inmates without difficulty. In conjunction with her duties, Claimant testified that she could be on her feet for six of her 8 hour shift.

3. On October 13, 2021, Claimant received a first dose of the Pfizer Covid-19 vaccine. She testified that she did not want to be vaccinated because she had underlying medical conditions[1] and was concerned about any associated interaction risks between the vaccine and her pre-existing conditions. She also felt that because she had recently recovered from a bout of Covid, that she had some natural immunity from the virus. However, the injection was mandatory and because she had already passed the compulsory date to be vaccinated, Claimant testified she was afraid that she would lose her job if she did not comply with Employer's directive to get vaccinated. Thus, Claimant presented for her required first dose of the vaccine as scheduled.

[1] Claimant has diabetes and thalassemia, an inherited blood disorder that is occasionally confused with cancer.

4. Following an injection to the left shoulder, Claimant waited 15 minutes without issue then drove home to rest before reporting for her work shift that evening. Claimant testified that while she was laying down she developed difficulty swallowing. According to Claimant, she got up and immediately noticed right sided facial swelling severe enough to prevent her from opening her right eye completely. After speaking with the pharmacist in the clinic where she received her vaccination, Claimant elected to proceed to the emergency room (ER) at Parkview hospital.

5. Claimant presented to the ER at 7:50 p.m. (1950) complaining of an "allergic reaction". (Resp. Ex. B, p. 8). She reported that she had received an injection of the Pfizer Covid-19 vaccine in her left arm and approximately 30 minutes later "noted an onset of [a] sore throat and swelling of her throat". *Id.* She also reported an onset of right sided facial swelling approximately one-hour post injection. *Id.* While in the ER, Claimant denied dysphagia (difficulty or discomfort swallowing), tongue swelling, stridor, nausea, vomiting, diarrhea, wheezing, difficulty breathing, rash, chest pain, palpitations or edema among other symptoms. However, she complained of a sore throat, nasal congestion, a mild dry cough and "lots" of left sided abdominal pain. *Id*. at p. 8-9.

6. Physical examination revealed a well-developed, well-nourished 21 year old female in no acute distress who was nontoxic in appearance. Her face was symmetrical on examination. (Resp. Ex. B, p. 9). There was no lip or tongue swelling noted; however, examination of the throat (oropharynx) was significant for "erythema and bilateral tonsillar swelling with exudates or tonsillar stones present in the left tonsil. *Id.* Claimant's lungs were clear to auscultation and she demonstrated no respiratory distress. Furthermore, she had a regular heart rate and rhythm with a pulse ox saturation of reading of 95%. *Id.* at p. 9-10.

7. Lab testing revealed a positive monoscreen and an elevated blood sugar (glucose) reading of 313. (Resp. Ex. B, p. 13). There was no "evidence of life-threatening allergic reaction". *Id*. at p. 14. Claimant was diagnosed with infectious mononucleosis as the most likely "etiology" for her symptoms. *Id.* Indeed, the ER doctor noted that this was "causing a degree of splenomegaly, leading to [Claimant's] onset of left-sided abdominal pain and tenderness to the left upper quadrant on exam". *Id*. at p. 14-15. Claimant was treated for her hyperglycemia and given IV Benadryl, Famotidine and Dexamethasone as a precaution to address any "possible allergic reaction" and to treat her pharyngitis. *Id*. Following her medical workup, Claimant was advised that her "symptoms [were] likely unrelated to Covid vaccine" and discharged home. *Id*. at p. 16. Based upon the evidence presented, specifically the objective findings on examination, the ALJ is convinced that Claimant's report of severe facial swelling was overstated. Moreover, the October 13, 2021 ER report supports a finding that Claimant's throat swelling and alleged difficulty swallowing were probably emanating from tonsillar swelling caused by her mononucleosis rather than an allergic reaction to her vaccine injection.

8. Claimant returned to the ER approximately 24 hours later. Indeed, she presented to the ER at Parkview on October 14, 2021 at 10:31 p.m. (22:31). (Resp. Ex.

B, p. 2). Upon presentation, Claimant's symptoms had evolved to include sharp chest pain radiating to the back. *Id.* Although she told the ER staff on October 13, 2021 that she had "difficulty swallowing/breathing", she denied any swelling of the throat or mouth during her October 14, 2021 ER visit. Rather, she reported that she woke on the morning of October 14, 2021 with "left-sided chest wall pain that went through to her back". *Id.* Even though the doctor had advised Claimant that her symptoms on October 13, 2021 were likely unrelated to her Covid-19 vaccine, Claimant's reported primary complaint was "allergic reaction". *Id.* In fact, Claimant persisted in reporting that she "might be having an allergic reaction" and that she was seen in the ER the day prior "for the same", despite being advised the day before that her "symptoms were likely unrelated to her Covid vaccine injection. *Id.* at p. 4.

9. During her October 14, 2021 ER encounter, Claimant denied any shortness of breath, her lungs were clear, she had a normal heart rate and rhythm and a pulse ox reading of 97-98%. (Resp. Ex. B, p. 3-4). Claimant's physical examination was noted to be completely normal except for pain with palpation of her left pectoralis muscle area. *Id.* at p. 3. The ER physician was unable to "appreciate any significant swelling at the injection site in her left deltoid region" and "[did] not appreciate any axillary or supraclavicular adenopathy" leading Claimant's provider to conclude that she was having "typical post vaccine muscle discomfort and malaise". *Id*. at p. 5. Nonetheless, a chest x-ray and an EKG were obtained. The x-ray demonstrated "no acute findings" and the EKG revealed a "[s]inus rhythm rate in the 70s, normal axis, normal conduction and no ST or T wave abnormality". *Id.* at p. 4. Claimant was diagnosed with "[a]cute muscle pain after Covid injection", which was felt to be a "normal reaction to the Covid vaccine" *Id*. Claimant was provided with a Toradol injection for her muscle pain and discharged home with instruction to take Motrin or Aleve as necessary. *Id.* p. 6.

10. On October 15, 2021, Claimant presented to UC Health for her third emergency visit in three days. There is no indication that the physician who evaluated Claimant during this encounter had access to the prior ER records from October 13 and 14th, 2021. Upon presentation, Claimant told the intake technician, Erik Waalkes that "[She] got the Covid shot and . . . has a rash that has developed on the back of her scalp". (Clmt's Ex. 6, p. 97). Claimant told the evaluating physician, Ian Tullberg that she "had [a] Pfizer Covid shot Wednesday and had a reaction". *Id*. at p. 95. Indeed, she told him that following her injection her "face and neck were swollen" and that she went to the ER for this and that she returned to the ER the next day for chest pain.

11. As noted, the content of Dr. Tullberg's record leads the ALJ to find that the he did not corroborate Claimant's allegations of having facial and throat swelling consistent with an allergic reaction by reviewing the ER records from October 13 and 14th. If he had, he would have noted that the ER records from October 13 and 14th are devoid of any objective indication that Claimant had swelling of her face, lips or tongue consistent with an allergic reaction. Furthermore, he would have discovered that Claimant had been diagnosed with infectious mononucleosis and that her oropharynx swelling was likely caused by tonsillar inflammation. Finally, he would have noted that two other ER

physicians opined that the most likely etiology for Claimant's symptoms was her mononucleosis and an expected response to the Covid vaccine injection.

12. Despite reporting no issues with her breathing while in the ER on October 13 and 14th and none being found on exam or through pulse ox monitoring, Dr. Tullberg reported, "[Claimant] states that she **still** has difficulty breathing." *Id.* at p. 95 (emphasis added). Regardless, Claimant's primary complaint while in the ER on October 15, 2021, was the presence of a "[d]iffuse pink blanching, macular rash on her back, otherwise her physical examination was completely normal. (Clmt's Ex. 6, p. 95-96). Following an inspection of her rash, Dr. Tullberg documented that Claimant's "symptoms" were consistent with allergic reaction, but he noted a differential diagnosis list that included but was not limited to "infection" and/or "contact dermatitis". *Id.* at p. 94. Claimant was sent home with a prescription for prednisone.

13. On October 20, 2021, Claimant presented to Family Care Specialists for a post ER appointment. (Resp. Ex. D, p. 2). She was evaluated by Physician Assistant (PA) Micaela Gale during this encounter. In contrast to Dr. Tullberg, PA Gale appears to have had access to and reviewed Claimant's prior ER records. Indeed, she repeatedly referred to specific diagnoses and quoted the records from October 13 and 14th as part of her medical report. *Id.* She noted Claimant's chest muscle pain had resolved, that she and Claimant discussed Claimant's prior ER course in full, and that mononucleosis and a normal post vaccine response were the likely cause of her complaints rather than an allergic reaction to the vaccine injection. *Id.* at p. 3. PA Gale completed FMLA paperwork for work missed "**due to mono**." *Id.* (emphasis added). Moreover, she advised Claimant that she could discontinue the Famotidine and Benadryl for purposes of possible allergic reaction. Finally, she did not include among her assessments a diagnosis of allergic reaction. *Id.*

14. On October 22, 2021, Claimant posted the following message to her social media page:

> Just got a call from my new doc that they received the er visit transcripts and found out that they edited the reason I was in there as having "mono" and I had never had an allergic reaction at all and that the ivs I was hooked up with was to lower my blood sugar when the discharge papers they gave me say something completely different. This vaccine is being covered up by the government and so are the allergic reactions I don't even know how legal it was of them to edit my diagnosis after the fact that has to be illegal". (Resp. Ex. F, p. 5).

15. The evidence presented persuades the ALJ that Claimant's allegation that her medical records were "edited" is unfounded. She did not provide the discharge papers that she claims were inconsistent and provide "something different" than what was documented in the medical records from her ER visits. Furthermore, she acknowledged during cross-examination that at the time she was discharged from the ER on October

13, 2021, she understood that she had symptoms associated with mono rather than any indication that she suffered an allergic reaction to the Pfizer vaccine. She also testified that the discussions she had with the ER physician gave her the impression that her symptoms were not related to the Covid vaccine. Finally, Claimant testified that she posted the October 22, 2021 Facebook statement out of emotional distress leading her to retract her accusation that her ER records were edited.

16. Claimant presented to the Walmart clinic on October 25, 2021, her fourth different provider for this condition within 12 days. (Resp. Ex. C, p. 7). Claimant was evaluated by PA Melanie McCoy for the purpose of addressing her "concerns and ongoing side-effects" from her Covid-19 vaccine. *Id*. Claimant advised PA McCoy that she went to the "ER for a **severe allergic reaction** that included many symptoms: SOB, body aches, HA, rash, and diffuse swelling." *Id.* (emphasis added). Claimant's physical examination was completely normal despite claims of shooting pains in her chest, shortness of breath, migraines, and muscle spasms. *Id.* During this appointment, Claimant also told PA McCoy, despite knowing it was untrue and without any basis in fact, that the ER doctor "changed the documentation to state that it was not an allergic reaction", which led to a dispute that caused her to change her PCP. Finally, Claimant advised PA McCoy that she worked for the DOC and that she was "being required to get her second vaccine next week" before adding that she continued to have "shooting chest pains on both side (sic) with muscle spasms in her neck and back along with shortness of breath (SOB) and migraine headaches. *Id.*

17. Based upon the content of the October 25, 2021 report of PA McCoy, the ALJ finds that Claimant was probably seeking an exemption from the clinic on October 25th to getting the second required Covid injection. Indeed, PA McCoy documented that she explained to Claimant that the clinic did not give vaccine exemptions (supporting a reasonable inference that Claimant asked for one); noting further that she would need to "follow up with her PCP for further evaluation and treatment". (Resp. Ex. C, p. 7). It is also reasonable to infer, based upon the totality of the evidence presented, that Claimant advised PA McCoy that her medical records had been edited in an effort to impress upon her that, contrary to the medical records, she and an allergic reaction to the first injection so as to improve her chances of securing an exemption from getting the second shot.

18. On October 28, 2021, Claimant sought a second opinion from the providers at Walmart. (Resp. Ex. C, p. 5). Although the medical record indicates that Claimant was seen at Family Care Specialists on October 27, 2021, for continued episodes of diffuse chest pain radiating into her back, it is not clear from the October 28, 2021 report why Claimant was seeking a second opinion. Nonetheless, she was evaluated by Nurse Practitioner (NP) Kathy Boyd. Again, Claimant reported, that she had suffered an "allergic reaction" with face and throat swelling and trouble breathing. *Id*. She complained of ongoing headaches and nausea and continued to propagate the narrative that her ER records had been edited by reporting that "[h]er mother was getting an attorney because they (ER) changed her medical records". *Id.* Claimant also made it clear that she did not want to take the second Covid injection but knew that failing to do so could mean losing her job. Claimant would go on to testify at hearing that she rejected the second injection

and was subsequently terminated from her employment after she exhausted her leave. The physical examination from this date of visit was normal. *Id*.

19. Claimant was seen by an unknown medical provider on November 9, 2021.[2] During this visit, Claimant reported shin pain and left leg swelling, migraine headaches and blurry vision. (Resp. Ex. A, p. 4). Claimant reported that she had recently returned to work and was walking "all" day. She was diagnosed with shin splints. *Id.* Claimant also reported that she had been under a lot of stress and had been in the hospital due to an "anaphylactic reaction" to her Covid vaccination. *Id.*

20. Claimant testified that having to submit to the injection or lose her employment was "quite stressful" for her. She acknowledged that she can get stress related rashes. Indeed, in a social media post from October 9, 2020, Claimant stated that she was "allergic" to stress and posted a picture of her arm with a rash that she claimed was stress hives "[a]fter everything [she] went through last month and all the stress [she] was put under". (Resp. Ex. F p. 6).

21. Claimant underwent an initial workers' compensation medical evaluation on November 16, 2021, with Dr. Lisa Baron. (Clmt's Ex. 4, p. 42). Once again, the history obtained reflects that Claimant told Dr. Baron that one hour after her vaccine, her throat and face started to swell and she went to the ER for treatment. The record from this date of visit also reflects Claimant's continued baseless reporting that her ER records were "altered to remove the allergic reaction diagnosis and leave only a mono diagnosis". *Id.* During this appointment, Claimant reported suffering from "intermittent chest pain (CP), palpitations [and] jerking muscles". *Id*. at p. 45. Despite her claim of shortness of breath, Claimant's oxygen saturation was 99%. *Id.* at p. 44. While Dr. Baron conducted a review of systems, the record from this date of visit is devoid of any indication that she completed a directed physical examination, yet she included "adverse effect of vaccine" among her assessments for Claimant's symptoms. *Id*. at p. 45. Concerning Claimant's palpitations, Dr. Baron noted that Claimant had a scheduled appointment with cardiology.

22. Claimant saw cardiologist, Dr. Alexander Simon Ross on November 22, 2021. (Clmt's Ex. 6, p. 104). During this appointment, Claimant reported having random sharp chest pains, palpitations, an elevated resting heart rate, and dyspnea at low workloads since her Covid-19 vaccination, which she "reported" caused an "anaphylactic reaction". *Id.* Claimant's physical examination was again normal. She also had a normal 12 lead EKG, a normal heart rate, and 1+ non-pitting edema in the left leg. *Id*. at p. 104-109. Dr. Ross recommended a 3 day zio patch (Holter) monitor, a metabolic panel and a Doppler study to exclude DVT, given her complaints of lower extremity swelling. *Id*. at p. 104. Dr. Ross stated, "Assuming these tests are unremarkable, I would presume this to be autonomic dysfunction. If that is the case, it should improve with conservative therapies including aggressive hydration and slowly increasing aerobic exercise." *Id.*

23. During cross-examination Claimant denied telling Dr. Ross that she had an anaphylactic response to the vaccine. Instead, she testified that she told Dr. Ross that

[2] See the Respondent requested medical records review report of Dr. Mogyoros. (Resp. Ex. A, p. 4).

she had an allergic reaction. During re-direct, Claimant admitted to knowing that an anaphylactic reaction meant a "severe, life-threatening reaction to an allergen". She again denied ever using the phrase anaphylactic reaction to any medical doctor and instead used only the terms "allergies" and "allergic reaction" when discussing her condition with her providers. She then testified that if any doctor wrote down "anaphylactic reaction" in the medical reports, that was their choice of words, not hers. The ALJ is not persuaded. Review of the content of Dr. Ross' medical records supports a finding that he attributed the terms "anaphylactic reaction" and "anaphylaxis" to verbal reports Claimant made to him about her condition after her October 13, 2021 injection. (See Clmt's Ex. 6, pp. 104-105). The ALJ credits the medical records of Dr. Ross to find that Claimant probably reported that she experienced an "anaphylactic reaction" to the Pfizer vaccine and was treated in the ER for "anaphylaxis" for several hours after her injection.

24. Claimant returned to Dr. Baron on December 13, 2021. (Clmt's Ex. 4, p. 58). During this encounter, Claimant reported continued "episodes of left sided chest pain, palpitations, shin-splint type lower leg pain, [and] lower leg swelling". *Id.* Claimant also reported seeing the cardiologist "who ordered a Holter monitor that she [was] to receive in the mail". Because Claimant had not received the Holter monitor, she indicated she would call her doctor's office to see if she could pick it up or have one re-mailed. *Id.*

25. Claimant attended a follow-up appointment at Concentra Medical Centers on January 17, 2022 where she was evaluated by NP Jennifer Livingstone. (Clmt's Ex. 4, p. 67). During this appointment, Claimant reported that she was able to complete her Holter monitor testing and send the monitor back for interpretation of the results. No results were available as of this appointment. Claimant reported continued frequent palpitations throughout the day and less frequent and random chest pain. She reported that her lowers legs felt swollen, but no appreciable swelling was noted on examination. She also expressed a desire to try Omega 3 and CoQ10 for her ongoing palpitations. Despite Claimant's report of having completed her Holter monitoring, she did not submit the results of such testing as evidence of her alleged arrhythmias.

26. Respondents sought an opinion from Dr. Daniel Mogyoros, a fellowship trained, Board Certified expert in the specialty of infectious diseases, regarding the likelihood that Claimant's vaccination caused her to experience an allergic reaction requiring medical treatment. Dr. Mogyoros completed a medical records review and issued a causality opinion on August 25, 2022. (Resp. Ex. A).

27. In analyzing causality, Dr. Mogyoros noted that Claimant had two "clusters" of symptoms, with one set occurring immediately after the vaccination and one occurring at least a couple of weeks after the injection. Moreover, he noted that these symptom clusters occurred in close temporal relation to three specific events, specifically a pre-vaccine Covid infection occurring around September 25, 2021, a mononucleosis infection and the administration of the Covid-19 vaccine on October 13, 2021. (Resp. Ex. A, p. 7). Thus, he opined that it was necessary to determine which symptoms Claimant began reporting after the administration of her vaccine correlate with which of the above noted events. *Id.*

28. In concluding that Claimant did not suffer an "allergic reaction" to her Pfizer Covid-19 vaccination injection, Dr. Mogyoros noted that the vaccine has multiple known "normal" side effects which do not constitute evidence of an allergic reaction. (Resp. Ex. A, p. 7). These include local reactions at the injection site, including pain, swelling, tenderness, warmth, and redness. *Id.* Additional normal systemic reactions include, headache, fatigue, chills, fever, joint pain, muscle aches and nausea. *Id.* Women were more likely to report adverse events than men by an odds ratio of 1.89%. *Id*. at p. 8.

29. Dr. Mogyoros noted that at the time of her initial ER visit on October 13, 2021, Claimant was diagnosed with infectious mononucleosis (mono), which is caused by infection from the Epstein-Barr Virus (EBV). (Resp. Ex. A, p. 8). Symptoms associated with mono include headache, fatigue, sore throat, abdominal pain, nausea, rash, fever, enlarged lymph nodes and enlarged liver and/or spleen. *Id.* Additional diagnostic findings consistent with mono include elevated liver function tests and white blood cell counts. *Id.*

30. As noted throughout the medical record, Claimant reported symptoms consistent with a normal response to the Covid vaccine, namely pain and tenderness with palpation to the left chest, body aches, malaise, headaches and chills following her injection on October 13, 2021. According to Dr. Mogyoros, these known normal vaccine reactions resolved in Claimant within days of her vaccine. (Resp. Ex. A. p. 8). Claimant also reported symptoms consistent with primary EBV infection causing mono while in the ER on October 13, 2021. These symptoms included a sensation of swelling in the throat, difficulty swallowing, a sore throat, nasal congestion, a mild dry cough and "lots" of left sided abdominal pain. As found above, physical examination of the oropharynx on October 13, 2021, was noteworthy for erythema and bilateral tonsillar swelling with exudates or tonsillar stones present in the left tonsil. Moreover, Claimant had a slightly elevated white blood cell count and an elevated liver enzyme consistent with an EBV infection. Accordingly, Claimant was tested for mono and her Monoscreen was later found to be positive. Based upon Claimant's reported symptoms, her ER findings and her medical progress, Dr. Mogyoros opined that all of Claimant's "symptoms in the first week (following her October 13, 2021, injection) can be explained by either normal vaccine adverse effects (not allergic reaction) or primary EBV infection". *Id*. at p.8.

31. Dr. Mogyoros defined "anaphylactic reaction" in accordance with the World Health Organization as a "[S]evere life-threatening systemic hyper sensitivity reaction characterized by rapid onset of potentially life-threatening airway, breathing, or circulatory problems, usually but not always associated with skin and mucosal changes". (Resp. Ex. A, p. 8). In order to qualify as an anaphylactic reaction, there must be an acute onset (minutes to hours) of illness with involvement of the skin, mucosal tissue or both. *Id*. This includes the generalized presence of hive, puritus or flushing and/or swelling of the lips-tongue or uvula. *Id.* Moreover, there must be accompanying respiratory compromise, including dyspnea, wheezing, bronchospasm, stridor reduced peak expiratory flow or hypoxemia or reduced blood pressure or associated symptoms of end organ dysfunction. Following review of the medical records, Dr. Mogyoros found no evidence to support a finding that Claimant met any of the criteria for anaphylaxis as she claimed. (Resp. Ex.

A, p. 9). The only evidence that Dr. Mogyoros found that could be compatible with a delayed allergic reaction was the presence of a rash, which he noted could be from her mono. *Id.* Noting that elevated eosinophil counts often accompany allergic reactions and these were normal for Claimant on both October 13 and October 20, 20121, Dr. Mogyoros concluded that there was "very little data in the medical record to support the notion that [Claimant] had an allergic reaction to the Covid vaccine" despite the presence of a rash. *Id.*

32. Based upon the evidence presented, the ALJ credits the opinion of Dr. Mogyoros to find that Claimant's rash, as described in the ER report from October 15, 2021, was probably caused by her mononucleosis or something other than an allergic response to her Covid-19 vaccination. Simply put, the ALJ is not convinced that the presence of a diffuse rash localized to Claimant's back provides sufficient evidence to support a finding/conclusion that she had an allergic reaction to her Covid-19 vaccination, especially in light of her mono diagnosis and her self-reported reactions to stress.

33. Dr. Mogyoros also addressed the cause of the new cluster of symptoms Claimant developed around October 27, 2021, which Dr. Baron referenced in her November 16, 2021 report. These symptoms include Claimant's diffuse chest pain, cardiac palpitations, leg swelling, jaw pain and uncontrolled muscle jerking. According to Dr. Mogyoros, these "symptoms are not described as adverse effects of the Pfizer vaccine", and the timing for their development was "much later than the expected timeframe for vaccine induced adverse events" i.e., side effects/symptoms). (Resp. Ex. A, p. 9). Dr. Mogyoros attributed these symptoms to Claimant's development of "long Covid" following her September 25, 2021 Covid infection. Long Covid can cause symptoms consistent with a condition known as autonomic dysfunction. According to Dr. Mogyoros, a reported manifestation of autonomic dysfunction includes a condition known as Postural Orthostatic Tachycardia Syndrome (POTS), which causes cardiac symptoms, including heart palpitations, chest pain, shortness of breath, and decreased exercise tolerance. It can also cause non-cardiac symptoms such as "mental clouding, headaches, lightheadedness, fatigue, muscle weakness, gastrointestinal symptoms, sleep disturbances, and chronic pain (including temporomandibular joint disorder). . ." *Id*. at p. 10. Dr. Mogyoros noted that while it is known that this syndrome is caused by acute Covid infection, it has also been reported "following infections with EBV, influenza, and Borrelia burgdoferi (Lyme disease)". *Id.* Based upon Claimant's clinical picture, Dr. Mogyoros agreed with Dr. Ross that Claimant likely had autonomic dysfunction but he disagreed that this was caused by an allergic reaction to the Covid-19 vaccine but rather by her initial September 25, 2021 Covid infection causing Long Covid or her subsequent EBV infection causing mono. *Id.* at pp. 10-11. He reiterated that there were no clinic "signs or symptoms" consistent with anaphylaxis and little information to suggest that she had an allergic reaction to the vaccine. Consequently, he opined that "other diagnoses predicated on the idea that [Claimant] had an anaphylactic reaction (to the vaccine), [were] incorrect". Id. at p. 9.

34. Dr. Mogyoros testified as an expert in infectious disease. He noted that vaccine reactions are part of his practice and that he was familiar with the Pfizer Covid-

19 vaccine and its expected side-effects. He noted that anaphylactic reactions rise very quickly, i.e. within minutes to hours and perhaps up to one day following exposure to an allergen and are dramatic in their presentation.

35. Dr. Mogyoros testified that Claimant did not give accurate information about her history to her providers on October 13, 2021. At no point during any of Claimant's treatment was facial swelling, throat or airway swelling, breathing difficulty, or a rapid heart rate found on examination. He also testified that Claimant was not having an allergic reaction upon presentation to the ER on October 13, 2021. Rather, he testified that Claimant presentation to and treatment in the ER on this date was related to her EBV infection and that she was given steroids, not for an allergic reaction but rather pharyngitis (sore throat). He reiterated his opinion that Claimant's muscle pain was an expected reaction to the vaccine injection and that her treatment, including a Toradol injection was palliative in nature. He opined that while Claimant's prior Covid infection may have resulted in "more pronounced" chest pain upon vaccination, that pain was no more dangerous and no longer lasting than someone who had not had Covid previously, and this response did not constitute an allergic reaction.

36. Regarding Claimant's October 15 back rash, Dr. Mogyoros testified that an allergic vaccine reaction is typically "diffuse" and "reacting throughout the body." As a result, he opined Claimant's rash was not typical of an allergic reaction and that with a vaccine reaction he would "expect a very different looking rash than what's described." He also said he would expect to see a vaccine rash sooner than the third day after the vaccine. He repeated his belief that Claimant's EBV infection, i.e. her mononucleosis or another cause was an equally (50/50) likely explanation of her rash. Supporting Dr. Mogyoros' opinions concerning Claimant's rash are the studies he cited to in his report. First, an analysis of the vaccine found that only around 2% of individuals developed a rash after their first injection (See Resp. Ex. A p. 6-7; Clmt's Ex. 7 p. 125), and that these reactions usually occurred within a day of the vaccination and only lasted 1-2 days. *Id.* In comparison, the mononucleosis study cited by Dr. Mogyoros demonstrated that rashes were present in 19% of positive patients – a rate nearly 10 times higher than that of the vaccine.

37. During his testimony, Dr. Mogyoros explained the lack of a causal connection between the myriad of symptoms Claimant reported and her Covid-19 vaccination. He testified that headaches in response to the vaccine typically appear within 24 hours, and are not the late onset, week in week out, migraines Claimant described. Therefore he concluded that Claimant's migraine headaches were not related to her injection. He added that leg/shin pain was more probably than not related to Claimant's return to work, deconditioning from her mono or a case of Long Covid rather than her October 13, 2021 injection. As explained in his medical records review report, Dr. Mogyoros reiterated his opinion that Claimant's jaw pain, muscle jerking, palpitations and alleged chest pain and fast heart rate were not related to her vaccine injection.

38. Dr. Mogyoros addressed Claimant's suggestion that because she had a "mild" case of Covid-19 preceding her vaccine she could not get a case of Long Covid.

He testified that Claimant's unsubstantiated argument that a mild case of Covid could not cause a case of Long Covid was incorrect. He explained that those who are fully vaccinated, unlike Claimant, are less likely to get Long Covid and while there have not been definitive studies, up to 25% of people infected with the delta variant, which Claimant presumably had due to the timing of her infection, suffer from Long Covid. Finally, he testified that it was typical for patients with Long Covid to get better and then for symptoms to reappear 4-6 week later, much as it did for Claimant.

39. Ultimately, Dr. Mogyoros testified that Claimant did not need any care related to her October 13, 2021 vaccine nor did she require any work restrictions in the first 72 hours after taking the vaccine. Further, he opined that the care she received during this time, i.e. Famotidine and Dexamethasone, Toradol, prednisone, Benadryl and IV fluids ) did not change her outcome, and that without this care, she would have enjoyed the same outcome. Claimant did not present expert testimony or any medical opinion or theory explaining how her mixed bag of late onset symptoms is related to her injection. Rather, she seemingly relies on her claim that correlation is causation based on the timing of her symptoms in relationship to taking the vaccine.

40. The ALJ finds the opinions/conclusions of Dr. Mogyoros to be supported by the medical records and the materials cited. As noted, the ALJ credits the opinions of Dr. Mogyoros to find that the myriad of symptoms reported by Claimant following her October 13, 2021 injection are either expected responses to the injection and do not constitute an "injury" or are related to her mononucleosis diagnosis or a case of Long Covid. Based upon the evidence presented, the ALJ is not convinced that Claimant experienced an allergic reaction to her Covid-19 vaccination. Because Claimant failed to establish a causal connection between her symptoms and need for treatment and her October 13, 2021 injection, her claim for benefits must be denied and dismissed.

## CONCLUSIONS OF LAW

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

### *Generally*

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that she is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor

of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Mogyoros are supported by the medical record and the available medical literature. He had the opportunity to draw conclusions after reviewing the entire medical record in this case; whereas, the evidence presented supports a finding that Dr. Ross and Dr. Baron did not. Rather, they seemingly accepted Claimant's statements that she had an allergic reaction and/or anaphylaxis in response to her October 13, 2021 injection at face value. Accordingly, the ALJ concludes that Dr. Mogyoros' opinions are credible and more convincing than those of Drs. Ross or Baron. While the ALJ is convinced that Claimant was experiencing symptoms on October 13, 2021, following her injection and after, the evidence presented persuades the ALJ that her symptoms and need for treatment were/are not related to an alleged allergic response to her Covid-19 vaccination.

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

*Compensability*

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she 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.*

E. 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).

F. 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 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 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). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

G. In this case, Claimant contends that she suffered an allergic reaction to the Covid-19 vaccination resulting in the need for emergency treatment on October 13, 14 and 15, 2021. Because she was healthy and allegedly asymptomatic prior to taking the Pfizer Covid-19 vaccination and she developed varied symptoms after her injection, Claimant contends that it is logical to conclude that there was "some kind" of injury due to the vaccine. Accordingly, Claimant urges the ALJ to conclude that she has established the requisite causal connection between her vaccination and the treatment in the ER and find the claim compensable. The ALJ is not persuaded.

H. When viewed in its totality, the ALJ concludes that the evidence presented supports Dr. Mogyoros' expert medical opinion that Claimant experienced a typical response to her Covid-19 vaccination, i.e. muscle pain and malaise. The ALJ is convinced that this response was not allergic in nature and did not cause Claimant's need for treatment. Rather, the ALJ concludes that Claimant's need for treatment is likely causally related to an EBV infection, i.e. mononucleosis causing symptoms, which Claimant and some of her providers have mistaken for an allergic response. Moreover, the ALJ is persuaded that Claimants continued symptoms, including her cardiac palpitations, chest pain, perceived shortness of breath, persistent headaches, fatigue,

and muscle jerking are more probably than not related to a case of Long Covid which Dr. Ross noted would improve with conservative therapies including aggressive hydration and slowly increasing aerobic exercise.

I. While it is possible that some of Claimant's more troublesome symptoms, e.g. her rash may be related to an allergic response to her Covid-19 vaccination, the ALJ credits the opinions and testimony of Dr. Mogyoros to find and conclude that Claimant's overall clinical picture and the more likely causes of her symptoms, including her rash, render it medically improbable. A coincidental correlation between a claimant's work and his/her 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". In crediting the opinion of Dr. Mogyoros, the ALJ concludes that objective medical evidence is important to making an allergic reaction diagnosis. In this case there is a paucity of objective findings, outside of a diffuse rash, to suggest that Claimant had such a reaction. Indeed, Claimant appeared in no acute distress and was non-toxic upon presentation to the ER shortly after her injection. Her face was symmetrical and she had no lip or tongue swelling consistent with an allergic response. Moreover, she consistently had pulse ox readings greater than 90% and there was no wheezing, bronchospasm or stridor to suggest that she was suffering from anaphylaxis. Accordingly, the ALJ concludes that Claimant's subjective perception that she was having an allergic reaction to her vaccine, which was carried through in documentation in her subsequent appointments, was/is probably incorrect and fails to establish the necessary causal connection to establish that she suffered a compensable injury. Her reporting of symptoms consistent with an allergic response is even more questionable/unreliable when one considers the presence of a patent motivation to report such symptoms as support to secure an exemption from having to submit to the second injection.

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

reaction to her vaccine injection she has failed to establish she suffered a compensable "injury" as defined by the aforementioned legal opinions. Consequently, her claim must be denied and dismissed and her remaining claim for medical benefits need not be addressed.

## ORDER

It is therefore ordered that:

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

**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: November 3, 2022

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-198-798-002**

## ISSUES

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

2. Determination of Claimant's average weekly wage.

## FINDINGS OF FACT

1. Employer is a temporary labor staffing company. Claimant has been employed by Employer since 2018, performing primarily day-laborer work at a variety of locations. Employer's employees, including Claimant, are not obligated to work a set number of day, and instead request work from Employer on days of the employees' choosing. Employees are not guaranteed the ability to work on any given day or shift, nor are they guaranteed any hours, shifts, or rate of pay. The minimum pay Employer pays employees is one dollar per hour over minimum wage.

2. On January 1, 2022, Claimant sustained injuries to his hands arising out of the course of his employment with Employer. Specifically, Claimant sustained frostbite to his fingers while shoveling snow.

3. The following day, Claimant was seen at the Denver Health Emergency Department with finger swelling and pain, and diagnosed frostbite. Claimant was discharged with care instructions and no work restrictions. (Ex. F).

4. Claimant returned to work for a shift on or about January 3, 2022, and worked a position indoors. Claimant also worked a shift on January 10, 2022.

5. On January 9, 2022, Claimant was seen at the Longmont United emergency department due to increasing pain and tingling in both hands as a result of frostbite. Claimant was diagnosed with frostbite of fingers of both hands and discharged without work restrictions. (Ex. G).

6. On January 17, 2022, Claimant called Employer's office looking for work and spoke to "Nelson." Nelson told Claimant that due to the fact that he was still injured, he needed to see one of Employer's doctors and return with a doctor's note clearing him to work. Nelson instructed Claimant to go to a designated clinic, and return with a doctor's note before he could return to work. (Ex. J).

7. On January 19, 2022, Claimant was seen at Denver Health' Occupational Health, and reported continued pain and numbness in the fingers of both hands. Examination of Claimant's hands showed hardened skin and black discoloration of the right thumb tip, and the tips of his third through fifth fingers, with swelling, decreased sensation, and

decreased range of movement. On the left side, Claimant had discoloration of the left third finger, and hardened skin on the thumb and fifth finger with decreased sensation. He was diagnosed with frostbite with tissue necrosis of the right hand. Claimant was assigned work restrictions to include no use of the right hand, no use of power tools, no climbing, no push/pull of more than two pounds with the left hand, no work in cold environments, and indoor work only. (Ex. H).

8. Claimant's work restrictions remained in place until he was discharged at maximum medical improvement (MMI) on April 14, 2022 by authorized treating physician Douglas Scott, M.D. At discharge, Claimant was authorized to return to work at full duty. (Ex. H).

9. Given Employer's January 17, 2022 directive to Claimant that he could not work until being cleared by a physician, the ALJ finds Claimant became entitled to temporary disability benefits on that date, continuing until April 14, 2022.

10. Claimant returned to work for Employer on April 22, 2022, and worked approximately 46 days between April 22, 2022 and August 5, 2022, earning gross wages of $5,719.29.

11. Claimant's pre-injury employment records admitted into evidence cover the period from April 21, 2020 through December 31, 2021. The records demonstrate Claimant did not work a set schedule, and his hours, days and weeks worked were inconsistent and varied. During some periods, Claimant worked a full-time schedule (*i.e.*, 5 days per week). During other periods, Claimant worked one to four days, and other times Claimant did not work for Employer for several consecutive weeks. During 2021, Claimant worked all or part of 39 weeks, and did not work at all for Employer for 13 weeks interspersed throughout the year. Claimant worked the first 13 weeks of 2021, but after the week of March 27, 2022, Claimant did not work more than eight consecutive weeks, and did not work more than 4 days in any week. Based on Claimant's work history, the ALJ finds it more likely than not that had Claimant not been injured, he would likely would have worked 75% of the weeks between January 17, 2022 and April 14, 2022, consistent with his work history.

12. The ALJ finds it reasonable to base Claimant's average weekly wage at the time of injury on his wages earned during the entire calendar year 2021. During 2021, Claimant earned $14,778.97 in gross wages working for Employer. Claimant's AWW during 2021 was $284.21 ($14,778.97 ÷ 52 weeks = $284.21). This figure accounts for the intermittent nature of Claimant's employment, including the likelihood that Claimant would not have worked every week during the period of his disability.

13. Claimant is entitled to temporary total disability benefits for the period of January 12, 2022 until April 14, 2022.

## CONCLUSIONS OF LAW
### *Generally*

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

Assessing weight, credibility, and sufficiency of evidence in 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 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).

## TEMPORARY DISABILTY 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).

Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits. The evidence demonstrates Claimant was medically incapacitated due to his work-related injury, and sustained a loss of earning capacity for more than three work shifts. The primary dispute in this matter is the period of time for which Claimant is entitled to temporary disability benefits. As found, on January 17, 2022, Employer instructed Claimant that he could not return to work until a physician medically cleared him. No credible evidence was presented that Claimant was unable to work prior to that date, as Claimant worked two shifts after his injury. The ALJ finds Claimant's entitlement to temporary disability benefits began on January 17, 2022, and continued until Claimant was placed at MMI and work restrictions were removed on April 14, 2022. Accordingly, the ALJ determines that Claimant is entitled to temporary total disability benefits from January 17, 2022 until April 14, 2022.

## AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is

vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

As found, Claimant's AWW at the time of injury was $284.21. Due to the nature of Claimant's employment with Employer, including the variations in hourly wage, hours, days, and weeks worked, the ALJ concludes a fair approximation of Claimant's AWW is the total wages Claimant earned from Employer in 2021 divided by 52 weeks, (*i.e.*, $14,778.97 ÷ 52 weeks = $284.21). This accounts for the intermittent nature of Claimant's work shifts, variations in hours, and the likelihood that Claimant would not have worked every week between January 17, 2022 and April 14, 2022.

The ALJ notes that using 39 weeks *(i.e.*, the number of weeks Claimant worked in 2021) as the denominator for Claimant's AWW would not be a fair approximation of Claimant's AWW. Based on his work history, Claimant worked 75% of the weeks during 2021 (*i.e.*, 39/52 = 75%). The ALJ finds it more likely than not Claimant would have worked a similar pattern during the period of his disability, had he not been injured. Basing Claimant's AWW on the entire 52-weeks of 2021 incorporates and accounts for the 25% of the time Claimant would not likely have worked during his period of disability by including the weeks he earned no wages in his AWW. A calculation based on 39 weeks fails to account for the 25% of the weeks Claimant did not work, and results in artificially inflated AWW and TTD benefits.

## ORDER

It is therefore ordered that:

1. Claimant's average weekly wage at the time of his January 1, 2022 work-related injury was $284.21.

2. Respondents shall pay Claimant temporary total disability benefits from January 17, 2022 to April 14, 2022 based on an average weekly wage of $284.21.

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: November 7, 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 platelet rich plasma (PRP) injection recommended by Dr. Tomas Pevny is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 21, 2021 work injury.

## FINDINGS OF FACT

1. The claimant suffered an admitted injury to his right knee on April 21, 2021. The claimant initially underwent conservative treatment for his injury. On August 20, 2021, Dr. Tomas Pevney performed a right knee arthroscopy with partial medial meniscectomy.

2. The claimant testified that initially following the surgery he had relief of his right knee symptoms. However, approximately one month later, the pain returned.

3. On January 6, 2022, the claimant was seen by Dr. Pevny and reported persistent medial sided pain in his right knee. The claimant also reported pain with extension, when walking down stairs, and with driving. Dr. Penvy recommended magnetic resonance imaging (MRI) of the claimant's right knee.

4. On February 7, 2022, an MRI of the claimant's right knee was performed. The MRI showed, *inter alia,* a new area of mild subchondral marrow edema; an adjacent grade two chondral defect; post-surgical changes from the prior medial meniscal repair; a small region of fluid intensity signal along the undersurface of the medial meniscus at the posterior horn body, (which suggested a small recurrent undersurface tear).

5. On February 10, 2022, the claimant was seen by Dr. Pevny. At that time, the claimant reported intermittent pain on the medial aspect of his right knee. The claimant also reported tightness and pain with extension. Dr. Pevny recommended a platelet rich plasma (PRP) injection.

6. At the request of the respondents, on February 22, 2022, Dr. William Ciccone authored a report following his review of the claimant's medical records. In his report, Dr. Ciccone noted that PRP injections are generally not recommended in workers' compensation cases, with the occasional exception of treating osteoarthritis. Dr. Ciccone noted that the pain in the claimant's right knee is due to spontaneous osteonecrosis, which is not work related. Therefore, it was Dr. Ciccone's opinion that the recommended PRP injection is not appropriate treatment for the claimant. Based upon

Dr. Ciccone's report, the respondents denied authorization for the recommended PRP injection.

7. On March 10, 2022, the claimant was seen by Dr. Pevny. On that date, Dr. Pevny opined that the recent MRI showed a stress reaction of the medial femoral condyle. Dr. Pevny noted that if the claimant did not improve, he would be a candidate for a right knee arthroscopy and a possible PRP injection. On that same date, Dr. Pevny recommended and administered a corticosteroid injection.

8. On April 7, 2022, the claimant returned to Dr. Pevny and reported initial relief from the recent cortisone injection, but his pain returned after approximately three weeks. The claimant described his pain as being on the medial and posterior aspect of his knee and that the knee felt better overall since the injection. Dr. Pevny noted that although the claimant was not approved for the PRP injection, he continued to opine that it would be the best next step for the claimant. Dr. Pevny further noted that the claimant was not a surgical candidate at that time and referred the claimant to Dr. Mark Purnell for a second opinion.

9. On April 13, 2022, the claimant was seen by Dr. Purnell. The claimant reported to Dr. Purnell that after his August 2021 surgery, symptoms of locking and catching resolved, but he had persistent medial pain. The claimant also reported recurrent pain with prolonged ambulation, kneeling, and squatting. Dr. Purnell opined that the clamant has a recurrent tear of the undersurface of the posterior horn of the medial meniscus. Dr. Purnell opined that best option for the claimant would be to undergo a repeat arthroscopy and debridement of the recurrent tear.

10. Dr. Pevny examined the claimant again on April 18, 2022. Dr. Pevny assessed a recurrent tear of right knee medical meniscus and opined that a meniscectomy and arthroscopic revision meniscectomy[1] would be indicated. Dr. Purnell again stated that an intra-articular PRP injection would also be helpful to the claimant.

11. The ALJ credits the medical records and the opinions of Dr. Pevny over the conflicting opinions of Dr. Ciccone. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the recommended PRP injection is reasonable, necessary, and related to the admitted work injury.

## CONCLUSIONS OF LAW

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

[1] While it would appear that the claimant may benefit from an additional knee surgery as noted by Ors. Pevny and Purnell, that specific medical treatment is not currently before this ALJ.

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 successfully demonstrated, by a preponderance of the evidence, that the PRP injection recommended by Dr. Pevny is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 21, 2021 work injury. As found, the medical records and the opinions of Dr. Pevny are credible and persuasive.

## ORDER

It is therefore ordered that the respondents shall pay for the platelet rich plasma (PRP) injection recommended by Dr. Tomas Pevny, pursuant to the Colorado Medical Fee Schedule.

Dated November 9th, 2022.

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

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

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

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 5-119-993-002**

## ISSUES

I. Whether Claimant established by a preponderance of the evidence that her 11% scheduled impairment rating should be converted to a 7% whole person impairment rating.

II. Whether Claimant established that she is entitled to a disfigurement award, and if so, how much.

## FINDINGS OF FACT

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

1. On July 1, 2019, Claimant suffered an injury to her right shoulder-rotator cuff-while lifting about 23 pounds of lances above shoulder height at work. (Ex. X, p. 12.)
2. On July 3, 2019, Claimant went to emergency department at Banner Health. At this appointment, she complained of right shoulder and arm pain as well as numbness in her arm going down to her 4th and 5th fingers.
3. On July 10, 2019, Claimant was seen at Workwell by Amber Payne, PAC, for continued right shoulder pain and numbness and tingling down her right arm.
4. On July 18, 2019, Claimant returned to Workwell where she also complained of some popping around her bicep tendon and sharp pain with reaching.
5. On July 18, 2019, Claimant started physical therapy and continued, without improvement, until August 22, 2019.
6. Because of ongoing shoulder pain, Claimant underwent an MRI on August 28, 2019. The MRI revealed, among other things, a full-thickness rotator cuff tear. The MRI showed the following:
    - moderate right supraspinatus tendinosis with a high grade articular surface tear of the tendon at the insertion measuring 7 mm AT diameter;
    - moderate infraspinatus tendinosis with a mild interstitial tear within the tendon 2 cm proximal to the insertion;
    - mild biceps tendinosis;
    - mild subacromial/subdeltoid bursitis;
    - lateral acromial downsloping and subacromial spurs which could predispose to subacromial impingement.

7. Based on the MRI findings, Claimant was referred to David Beard, M.D., an orthopedic surgeon. (Ex. K, p. 47.)
8. On September 10, 2019, Claimant saw Dr. Beard for an evaluation of her shoulder. At this appointment, Dr. Beard recommended surgery to fix Claimant's right shoulder full-thickness rotator cuff tear.
9. On October 21, 2019, Claimant underwent a right shoulder arthroscopy with arthroscopic acromioplasty and right shoulder mini open rotator cuff repair. (Ex. 5.)
10. After undergoing surgery, Claimant underwent physical therapy.
11. By November 15, 2019, Claimant was doing well and performing light duty, but was still using an immobilizer for her right arm. (Ex. K, p. 48.)
12. On December 4, 2019, Claimant had a follow up appointment with Dr. Beard. At this appointment, he discontinued her immobilizer and cautioned her about doing anything that might put her at risk for reinjuring her shoulder. (Ex. K, p. 48.)
13. Claimant continued with physical therapy through December 2019.
14. On December 31, 2019, Claimant complained of increased shoulder pain in the morning-after sleeping. Therefore, she was prescribed Lidoderm patches.
15. On January 2, 2020, Claimant returned to Dr. Beard. At this appointment, Dr. Beard noted that her range of motion was not where it should be. Therefore, he recommended additional physical therapy to reduce Claimant's shoulder symptoms and increase her range of motion. (Ex. K, p. 48.)
16. On January 14, 2020, Claimant was seen by Dr. Downs. Because of ongoing shoulder pain, he prescribed massage therapy. (Ex. 48, p. 49.)
17. On January 31, 2020, Claimant returned to Dr. Downs and reported slight improvement. (Ex. 48, p. 49.)
18. On May 15, 2020, Claimant followed up with Dr. Beard. At this point, it had been about 7 months since her shoulder surgery to repair her torn rotator cuff. Claimant still had limited range of motion of her shoulder and discomfort. At first, Dr. Beard considered manipulation under anesthesia, but based on her improvement, he did not recommend it. Nevertheless, his assessment at that time included postoperative adhesive capsulitis. (Ex. A, p. 4.)
19. On May 22, 2020, Claimant went to physical therapy. At this appointment, Claimant stated that her shoulder felt almost normal at work, except for some random bone pain. The physical therapist concluded that despite her improvement, Claimant still had limitations with her right shoulder range of motion, limitations in strength, and ongoing pain. The physical therapist noted that Claimant's functional goals included using her right arm to put her dishes away and reaching up overhead with her right arm since Claimant still needed help at work with overhead tasks. (Ex. B, pp. 6-8.)
20. On May 28, 2020, Claimant returned for additional physical therapy. At this appointment, it is noted that Claimant stated that she felt good and did not have any pain, but still did not feel like she had fully recovered since she rated her improvement at 80-85%. But, at this appointment, it was noted that Claimant had achieved 90% of her goals, which

included putting dishes away with her right arm and reaching overhead. (Ex. D, pp. 16, 17.)

21. On May 28, 2020, Claimant was evaluated by Dr. Luke, via a telemedicine appointment. At this appointment, her primary problem was sharp and throbbing pain located in her shoulder, which she rated at 2/10. Despite being a telemedicine visit it is noted that on physical examination, she had tenderness at the posterior deltoid, bicipital notch, and the AC joint. It was also noted that Claimant had normal range of motion, but there is no indication he actually measured her range of motion since this was a telemedicine visit. In the end, he recommended that Claimant return to regular duty-without restrictions and indicated that he would consider whether Claimant was at MMI in three weeks. (Ex. B, pp. 12-14.)

22. On June 15, 2020, Claimant returned to physical therapy. At this appointment, it is noted that Claimant "has no pain," but then indicates Claimant "did have some bone pain this weekend, but nothing more than usual."

23. On June 17, 2020, Claimant returned to Dr. Luke, via a telemedicine appointment, and was placed at MMI. At this appointment, Claimant still had "the same discomfort in flexion, abduction, and IR [internal rotation]." Claimant's pain continued to be in her right shoulder, and she rated her pain at this visit at 4/10. But, despite ongoing symptoms, Dr. Luke placed Claimant at MMI without any restrictions, and told her to finish her remaining physical therapy sessions. (Ex. F, p. 80.)

24. On June 19, 2020, Claimant underwent additional physical therapy. At this appointment, Claimant noted that her shoulder "is doing good" but with occasional pain at work. The remaining goals for therapy consisted of improving Claimant's right shoulder ROM and strength. (Ex. G, pp. 26, 27.)

25. On July 7, 2020, Claimant returned to physical therapy and stated that she felt her shoulder was about 85% better. At this appointment, Claimant had some random bone pain, but "no pain with a specific movement or activity," but she still had limited range of motion and was tight with shoulder flexion and external rotation. (Ex. H, p. 29.)

26. On July 14, 2020, Claimant saw Dr. Watson. At this appointment, her primary problem still consisted of aching, sharp, and throbbing pain in her right shoulder, which she rated at 3/10. Claimant also completed a questionnaire that had a pain diagram. Claimant noted that her right shoulder hurt, but she did not complete the pain diagram. On physical examination, Claimant had full range of motion of her cervical spine and did not have any neck pain that day. Dr. Watson performed an impairment rating and provided Claimant an 8% scheduled impairment rating, which converts to a 5% whole person impairment rating. (Ex. J, pp. 35-39.)

27. On December 23, 2020, Claimant underwent a Division Independent Medical Examination (DIME) with Bradley Abrahamson, M.D. In his report, Dr. Abrahamson noted that Claimant stated that she has occasional sharp pains across her right collar bone and tightness in her right trapezius that is causing migraines. Claimant stated that these migraines start in the shoulder and continue up into the right side of her neck and forward into her head, settling behind her eyes. Claimant stated that these migraines started around August 2020. Claimant also stated that she started to develop tingling down her

entire right arm to her fingers when lifting overhead and that these symptoms started around July 2020. Claimant also stated that she did not think she got much out of physical therapy. She complained that she often had different therapists and there was a lack of continuity. Claimant also stated that her sleep is still affected by her shoulder pain and it causes her to wake up a couple of times a night. Claimant also stated that her shoulder injury precludes her from making quilts, blankets, and comforters and also precludes her from picking up her grandson. Lastly, she stated that after working a 12-hour shift at work, she cannot do household chores due to shoulder discomfort. (Ex. K.)

28. Dr. Abramson performed a physical examination and measured Claimant's right shoulder range of motion and found decreased range of motion. He also concluded that Claimant developed a brachial plexopathy possibly due to tightness in the pectoralis minor post-operatively. He also concluded that Claimant' elbow disability is a side effect of the treatment for her work injury. (Ex. K.)

29. During the IME Claimant stated that she felt she could regain more shoulder function with better physical therapy. As a result, Dr. Abrahamson concluded that Claimant was not at MMI and recommended additional physical therapy in the form of:

> 1-on-1 PT with a DPT well-versed in movement-based therapy such as what would be seen in a gym-like setting. I estimate that she will need a course of focused PT twice a week until she reaches her plateau in therapy, at which time she could be at MMI.

(Ex. K.)

30. On February 24, 2021, Claimant returned to Dr. Luke. Based on his physical examination, he found the following: Tenderness at the posterior deltoid, bicipital notch, AC joint, medial scapular border, anterior deltoid, supraspinatus, and bicipital groove. He also noted that her range of motion was limited and that there was weakness with external rotation, flexion, and internal rotation. (Ex. K, pp. 58, 59.)

31. Based on Dr. Abrahamson's DIME, Claimant underwent eight additional physical therapy sessions from March 4, 2021, through April 5, 2021. Treatment focused on Claimant's chief complaints about her shoulder that consisted of:

- Awakening due to pain.
- Difficulty dressing.
- Loss of function.
- Loss of motion–pain.
- Loss of motion–stiffness.
- Swelling.
- Weakness.

(Ex. M, pp.61-63.)

32. After her additional physical therapy sessions, Claimant's shoulder pain ranged from 1/10 to 4/10. As for her functional status before and after her second round of physical therapy

Claimant's activities of daily living, dressing her upper body, recreational sports, sleeping, and work activities were limited by 50%, but after the new round of physical therapy each increased to 70% of normal. That said, even after undergoing additional physical therapy, Claimant still had functional impairment of her shoulder that consisted of weakness, loss of range of motion, and pain. (Ex. M, pp. 61-63).

33. On January 12, 2022, Claimant returned to Dr. Abrahamson for her follow up DIME. At this appointment, Claimant continued to have 3-5/10 pain around the anterior portion of her right shoulder when she wakes up each morning. Claimant also had an increase in symptoms during increased computer use. Dr. Abrahamson performed range of motion measurements of Claimant's shoulder and provided Claimant an 11% scheduled impairment rating which converts to an 7% whole person impairment rating.

34. On March 7, 2022, Respondents filed a Final Admission of Liability and admitted for an 11% scheduled impairment rating.

35. Claimant testified at hearing. Claimant testified that she continues to have pain across her collar bone, pain around her shoulder blade, and pain that goes into her neck and results in headaches. Claimant also testified that she continues to have tightness in her right trapezius. The ALJ finds Claimant's testimony to be credible and persuasive regarding her ongoing symptoms.

36. Based on Claimant's testimony, and the medical records submitted at hearing, it is found that Claimant's right shoulder injury, a torn rotator cuff, and subsequent surgery, has resulted in permanent sharp pain across her collarbone, tightness in her right trapezius and pectoralis, as well as pain around her shoulder blade, and pain into her neck and head. The injury to her shoulder-rotator cuff-has also caused a decrease in Claimant's range of motion of her arm due to the functional impairment of her shoulder. Moreover, the pain and limited range of motion limits and interferes with many of Claimant's activities of daily living, such as getting dressed, sleeping, and reaching overhead. These symptoms are manifestations of functional and medical impairment of Claimant's right shoulder injury and involve physiological structures that are beyond the proximal termination of the arm at the shoulder and extend into her shoulder, torso and neck. As a result, Claimant has functional and medical impairment that extends beyond the proximal termination of the arm at the shoulder and extends into the shoulder, neck, and torso. Consequently, Claimant has functional and medical impairment that is not on the schedule of listed impairments.

37. As a result of her work injury and subsequent shoulder surgery, Claimant has a visible disfigurement to the body that is normally exposed to public view consisting of surgical scars on her right shoulder. One scar is approximately 3 inches long and about 1/8$^{th}$ of an inch wide. Claimant also has an arthroscopic surgical scar that is approximately ¼ of an inch long and approximately 1/16$^{th}$ of an inch wide. The color of each scar is different from the surrounding skin.

## 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 Claimant nor in favor of the rights of Respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

**I. Whether Claimant established by a preponderance of the evidence that her 11% scheduled impairment rating should be converted to a 7% whole person impairment rating.**

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in § 8-42-107(2), C.R.S. when a Claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of 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).

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.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether 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 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).

The ALJ must thus determine the situs of 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 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).

Based on Respondents' filing their final admission for an 11% scheduled impairment rating, there is no dispute about the extent of Claimant's impairment. The dispute is whether the 11% impairment rating should be converted to a 7% whole person impairment rating.

The ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her right upper extremity rating should be converted to a whole

person impairment. Section 8-42-107(2)(a), C.R.S., provides that a loss of use of the "arm at the shoulder" is a scheduled impairment, but does not include the shoulder itself. In other words, section 8-42-107(2)(a) defines the anatomical extent of the arm. If an impairment extends beyond the proximal termination of the arm at the shoulder, Claimant is entitled to whole person impairment.

In this case, Claimant's medical records and her testimony establishes that due to her shoulder injury-rotator cuff injury-Claimant has the following symptoms and limitations that demonstrate the manifestations of Claimant's functional and medical impairment of her shoulder, portions of her torso, and neck. These symptoms and limitations include:

- Shoulder pain.
- Pain across her collarbone.
- Tightness in her right pectoralis.
- Tightness in her right trapezius.
- Tenderness of her right scapula.
- Pain into her neck.
- Trouble using her shoulder to move her arm, which has caused a decrease in her range of motion.
- Trouble getting dressed.
- Intermittent sleeping problems due to shoulder pain and discomfort.

Claimant's symptoms and limitations demonstrate the manifestations of Claimant's functional and medical impairment of her shoulder, portions of her torso, and neck. As a result, the ALJ finds and concludes that the situs of these functional and medical impairments extend beyond the arm at the shoulder, and extend into the shoulder, collar bone, trapezius, pectoralis, neck, and scapular areas. Thus, the ALJ finds and concludes that Claimant has impairment that is not on the schedule of listed impairments.

Accordingly, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her scheduled right upper extremity permanent impairment rating should be converted from an 11% extremity rating to a 7% whole person impairment.

**II. Whether Claimant established that she is entitled to a disfigurement award, and if so, how much.**

As found, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. As found, Claimant has a visible disfigurement to the body that is normally exposed to public view consisting of surgical scars on her right shoulder. One scar is approximately 3 inches long and about 1/8th of an inch wide. Claimant also has an arthroscopic surgical scar that is approximately ¼ of an inch long and approximately 1/16th of an inch wide. The color of each scar is different from the surrounding skin.

As a result, the ALJ finds and concludes that Claimant is entitled to $1,200.00 in disfigurement benefits.

## ORDER

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

1. Claimant's 11% scheduled impairment rating is converted to a 7% whole person impairment rating.
2. Claimant is entitled to $1,200.00 in disfigurement benefits.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 9, 2022

/s/ Glen Goldman

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

## PROCEDURAL HISTORY

Claimant filed an Application for Hearing on June 7, 2022 listing issues of compensability, reasonably necessary medical benefits that are authorized, average weekly wage.

Respondents filed a Response to the Application for Hearing on June 8, 2022 listing as issues that the injury/illness did not occur in the course and scope of, or arise out of work, and that Claimant had a pre-existing condition. Further, Respondents alleged that there was an efficient intervening event. Issues listed but no longer being pursued by Respondents were apportionment, if applicable; responsibility for termination, if applicable; unrelated/unauthorized treatment; all applicable offsets including but not limited to SSDI, unemployment; STD/LTD, §8-42-112, and §8-42-112.5.

During the hearing Claimant sought to introduce a medical report provided by Claimant's ATP, which had not been previously exchanged in accordance with W.C.R.P. Rule 5-4(A)(5) nor pursuant to W.C.R.P. Rule 9-1(E). Claimant argued that Claimant's counsel was unaware that Claimant had such document in her possession, only received the medical record on the date of hearing and that it was relevant to the issues set for hearing. Respondents objected to the tendered exhibit as Respondents was unaware of the exhibit. After consideration of the parties' arguments, this ALJ sustained Respondents' objection and held that the sanction for failure to comply with the provisions of the rules was to not admit the medical record into evidence.

## ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment on October 26, 2021.

ONLY IF CLAIMANT HAS PROVEN COMPENSABILITY,

II. Whether Claimant has proven that she is entitled to reasonably necessary medical benefits related to the October 26, 2021 incident.

III. If medical benefits are reasonably necessary, whether Claimant has proven that the treatment she obtained was authorized within the chain of referral and/or by a provider on a designated provider list.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits as a consequence of the injuries sustained.

V. Whether Respondents have proven by a preponderance of the evidence that there was an efficient intervening event.

## STIPULATIONS OF THE PARTIES

The parties agreed that, should compensability be awarded and if Claimant is entitled to temporary partial disability benefits, the parties would calculate the amounts due and owing or litigate the issue at a further time. The Stipulation of the parties is approved and is part of the order, if applicable.

## FINDINGS OF FACT

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

1. Claimant was a 42 year old employee, working for Employer as a stocker for approximately 19 years. Claimant worked from approximately 4 a.m. to 12:30 p.m. The job required Claimant to stock various products and merchandize, including boxed products, to the show room throughout the store and unloading them to the appropriate display or shelving units on the sales floor. Claimant would utilize a jack which was loaded in the warehouse area and transported to the floor.

2. On October 26, 2021 Claimant was assigned to the furniture department. Claimant and her two co-workers went to the warehouse area and took a pallet of furniture with the pallet jack, taking it to the area where they needed to restock the floor. One of the co-workers was Claimant's sister. At approximately 4:10 a.m. the co-workers teamed up to lift a box containing a desk (unassembled) from the pallet. When the product shifted in the box, it caused Claimant to have to support a large portion of the weight of the desk. Claimant twisted and felt a strain in her low back. The boxed desk weighed approximately 80 lbs. She felt a pulling sensation in her low back. She told her coworkers right away and she rested for a few minutes then returned to work, despite the pain.

3. Claimant went home after a full day of work and took some Tylenol for the pain. She discussed the low back pain with her daughter but did not disclose the injury to Employer that day.

4. On October 27, 2021 she returned to work. During the 6:00 a.m. break, Claimant informed her supervisor about the injury she sustained, as the symptoms did not go away. She let him know she had been injured the prior day and was continuing to have pain in her low back. He did not send her to a doctor, but advised her that it would probably go away and to take it easy in the meantime.

5. Claimant had hoped that she would feel better with activities of daily living and work and did not demand medical evaluation at that time. As she continued to work, her back pain continued to worsen. Claimant told her supervisor that she continued have pain and had to take over the counter medications. Her supervisor did not provide her with any instructions. She reported the injury to her store manager a few days later, after he had returned from time away from work. The store manager advised Claimant that her symptoms would likely resolve in a few days. The manager instructed Claimant to take more OTC meds and continue working. Claimant felt ignored and sought medical attention on her own from her primary care provider (PCP). She contacted her physician,

scheduling an appointment, though she was not able to obtain any immediate appointments.

6. Claimant was first evaluated on November 9, 2021 by Dr. Joseph A. Murphy at the GME Bruner Family Medicine clinic for acute left-sided low back pain without sciatica, and IT band syndrome on the right. He noted that the IT band problem was atraumatic and started approximately three days before. He took a history that the lumbar spine problem was chronic with an acute flair several weeks before as Claimant had a physical job and later in his report stated it was three to four weeks prior, without numbness or tingling and no weakness.[1] On physical exam he found no edema, full strength, and normal range of motion, though tenderness to palpation on the left SI joint.

7. Claimant stated that she was scheduled for a follow up appointment at the Bruner clinic and provided with work restrictions. She stated that, following the November 9, 2021 appointment, Claimant took the work restrictions provided by Dr. Murphy, to her supervisor, who ignored the restrictions. When she could no longer stand the low back pain, she went to the HR department to advise them that she thought there was something seriously wrong with her. That is when she was sent to Concentra. She was seen at Concentra some days later.

8. Claimant first saw Dr. Autumn Schwed at Concentra Medical Center on December 1, 2021. Dr. Schwed noted that Claimant presented with the chief complaint of low back pain which started October 26, 2021 while at work. She was lifting a piece of furniture onto a shelf with a co-worker when it slipped back down and she caught it. She had pain in her left lower back, radiating into her thighs and described an aching sensation. She saw her PCP and was taking Diclofenac. Some days she felt better, some days worse and noted no prior occurrences. On physical exam, Dr. Schwed noted only the reported back pain. Dr. Schwed diagnosed a lumbar strain and started Claimant on medications[2], recommended physical therapy, provided light duty work restrictions, and set a follow up in one week.

9. Claimant followed up at the Bruner clinic with Brandon M**.** Teska, D.O., Ph.D., on December 3, 2021 for the acute left-sided low back pain, which he noted was likely secondary to her work injury. He particularly noted that Claimant presented "with a long history[3] of acute back pain. She was injured at work while moving a large item approximately 5 weeks ago." Dr. Teska noted that she was better since the injury and had no further injuries, however she discontinued the medicine that was prescribed at her last visit (diclofenac) as it had not been working. She still had occasional episodes of acute to severe pain with movements. She noted that flexing or extending her back were particularly painful. On exam she was tender to palpation in the bilateral SI joints, PSIS[4]

[1] Dr. Murphy made mention that Claimant worked cleaning houses. Claimant emphatically denied she had worked in housekeeping and denied she had a second job during the hearing and this ALJ found Claimant credible.

[2] Lidocaine patches, methocarbamol, and prednisone.

[3] This ALJ infers that the long history refers to the long account by Claimant not to the length of time Claimant has had acute back pain.

[4] This ALJ infers that the PSIS is the posterior superior iliac spine, immediately below the hip crest.

and lumbar paraspinals from L3-L5, as well as tender with extension, flexion and rotation with a positive straight leg test. Otherwise, her exam was within normal limits.[5]

10. Claimant was seen by Dr. Schwed on December 8, 2022. She presented for re-evaluation of low back pain and reported some worsening low back pain with radiating pain into her thighs, noting that the pain in the low back was greater on the left side, and worse with twisting and extension. She described it as cramping. The M-164 states that Claimant was able to return to modified activities, which included maximum 10 lbs. lifting, pushing/pulling up to 10 lbs., no forward bending and no squatting. She was to continue her therapy and rehabilitation as well as medications as prescribed. Dr. Schwed noted that the objective findings were consistent with the work related mechanisms of injury for October 26, 2021.

11. Dr. Schwed noted that Claimant presented for re-evaluation of low back pain on December 14, 2021. She noted that Claimant had been doing well with the work restrictions overall, but one supervisor forced her to work outside her restrictions, which caused increased pain in both sides of her lower back. Claimant reported difficulty sleeping due to pain, stated PT was helpful, especially with use of the TENS unit. Claimant had no numbness, weakness, or paresthesias on exam, but found that there was tenderness present in the left paraspinal and right paraspinal. Dr. Schwed provided the same work restrictions but noted that "If unable to accommodate those restrictions, patient must be sent home from work."

12. On December 16, 2021 Claimant was seen at Saint Joseph Hospital Emergency (Good Samaritan Medical Center) for acute low back pain. She provided a history that the original injury occurred at work on October 26, 2021 while carrying furniture. She reported intermittent paresthesias in the bilateral lower extremities, no weakness, incontinence, or other issues. Claimant reported she continued to work a very physical job and had periods where she was incapacitated by her pain. On exam PA Christopher North found paraspinous spasm with diffuse tenderness in a band-like region across the sacrum, no midline tenderness, decreased rotation, negative straight leg raise bilaterally, sensation was intact to light touch to the bilateral lower extremities with deep tendon reflexes symmetrical; good range of motion and no concerning findings. PA North ordered a CT of the lumbar spine and reviewed the results with Claimant. These notes were cosigned by Dr. Ryan Patterson.

13. Eric Wannamaker, M.D. Neuroradiologist of Diversified Radiology of Colorado, PC, noted that the CT of the lumbar spine from December 16, 2021 showed a disc bulge at the L3-L4 level, and a broad based disc bulge at the L4-L5 level with mild to moderate spinal canal stenosis with the thecal sac measuring 8.2 mm, and moderate left facet arthropathy resulting in mild to moderate neuroforaminal stenosis with possible contact extending into the exiting L4 nerve root. At the L5-S1 level it showed a shallow disc bulge, severe right sided facet arthropathy with moderate canal stenosis and a facet osteophyte contacting the right L5 nerve root. He recommended an MRI to more accurately assess the degenerative spinal canal and stenosis.

[5] The report does not mention Claimant's visit to Concentra. This ALJ does not give this any significant or relevant meaning as medical reports frequently do not report everything that is conveyed during an appointment.

14. Claimant was seen multiple times by Dr. Schwed including January 4, 2022, January 11, 2022, March 1, 2022, March 22, 2022, all of which read substantially the same.

15. On January 11, 2022 Samuel Y. Chan, M.D., a physiatrist, initially evaluated Claimant.[6] He noted a history consistent with Claimant's testimony. Dr. Chan documented the following:

> Despite 2-1/2 months of diagnostic and therapeutic intervention including physical therapy program, chiropractic care, the patient finds that the pain complaint continues to be rather significant, and examinations today shows that there is some listing noted in the lumbar spine area to left side. The concern is whether if there are any type of discogenic issues that might account for the patient's ongoing symptoms. Therefore, I am in agreement with Dr. Schwed that further imaging studies would be indicated at this juncture. By the patient's report , an MRI has been scheduled for the upcoming week. Thus, I would like to follow up with the patient after this is completed in order to review the MRI findings. Depending on the MRI findings, further treatment modalities and plan may then be developed. Meanwhile, for pain management, the patient is to continue with the use of anti-inflammatory medications that has been provided by Dr. Schwed's office. The addition of lidocaine patches may be of benefit as well, and hopefully, this will continue to maintain the patient's ongoing functional level and she is to continue with gentle core stabilization exercise program and thus she will follow through in current work status as per Dr. Schwed's office.

16. Claimant filed a Workers' Claim for Compensation on January 10, 2022. Claimant was stocking unassembled furniture boxes and when she was lifting a box with coworkers, the weight shifted to her and she injured her low back. She noted that she was first treated at SCL Health and then was transferred to Concentra.

17. The first notes showing Claimant was attended by Dr. Theodore Villavicencio were from January 11, 2022 at Concentra. Dr. Villavicencio assessed a lumbar strain and stated Claimant would see a specialist that day. He noted that objective findings were consistent with the mechanism of work related injury and ordered an MRI. He stated Claimant should return to modified work activities which included that Claimant must be sitting 50% of the time, and if restrictions could not be accommodated, then she should be sent home from work.

18. Claimant was seen by Dr. Teska on January 11, 2022 for a follow-up on her Graves disease due to her hyperthyroidism, which was being followed by an endocrinologist. Dr. Teska also noted Claimant had a probable impingement syndrome, of two to three weeks, on the left shoulder. On exam he documented that Claimant was tender palpation on the lateral aspect of the deltoid down into the mid upper arm, with a positive Neer's and Hawkins. He stated that Claimant was being treated with NSAID's, but he recommended steroid injections and physical therapy. He also listed an iron deficiency.

19. Claimant was evaluated by Dr. Chan on February 1, 2022. He took a history that three coworkers were moving a piece of furniture to place it on a shelf above shoulder height when it started to slip, and she tried to save it from falling. She pulled all the weight of the furniture herself, straining herself and had been dealing with pain complaints in the lumbar areas ever since. He noted Claimant continued to be symptomatic following

[6] Pages 22-25 of Claimant's Exhibit 8.

physical therapy and massage therapy. Claimant also was reporting radiating bilateral lower extremity complaints, numbness and burning sensation. Dr. Chan made the following findings:

> Lumbar Spine: Axial loading, trunk rotation, minimal skinfold did not exacerbate her tenderness. There is no tenderness to palpate about PSIS and sacral sulcus. Bilateral SI joints engaged symmetrically with lumbar forward flexion. Straight leg raising is somewhat positive in the seated and supine position at about 70 degrees. Patrick, Gaenslen, FABER's, Yeoman's are grossly positive bilaterally.
>
> Neurologic: Manual muscle testings are 5/5 throughout. Sensory is grossly intact to light touch and pinprick. Deep tendon reflexes 1+ throughout and downgoing toes bilaterally.
>
> DIAGNOSES:
>
> 1. Lumbosacral spine.
>
> a. Rule out discogenic disease.
>
> b. Essentially normal neurologic examination.
>
> c. Rule out bilateral sacroiliac joint dysfunction.
>
> d. There is no clinical evidence of facetogenic complaints.

Dr. Chan recommended the MRI as well and noted that, if the MRI findings were unrevealing, he would consider some SI joint injections, but that Claimant should continue with core stabilization exercises, isometric strengthening, range of motion exercises and refilled her lidocaine patches.

20. PA Chelsea Rasis attended Claimant at Concentra on February 15, 2022. He noted on exam that Claimant had abnormal range of motion of the lumbar spine as well as the thoracic spine but otherwise not remarkable. He documented that Claimant was not doing well, with pain worse with prolonged walking, better with sitting down, that she was going to PT, the MRI was still pending and that she saw Dr. Chan that day, who was recommending lumbar injections, pending authorization.

21. Dr. Chan reevaluated Claimant again on February 15, 2022 and, upon further examination, concluded Claimant did have bilateral sacroiliac joint disfunction but was not able to rule out discogenic issues as the MRI has not taken place yet. He recommended proceeding with SI joint injections. Dr. Chan also stated that objective findings were consistent with the history and/or work related mechanism of injury.

22. Respondents filed a Notice of Contest on February 25, 2022 for further investigation.

23. Claimant followed up with Dr. Chan on March 15, 2022 following a March 3, 2021 SI joint injection and he noted that Claimant had significant diagnostic and therapeutic benefits from the procedure. He recommended that Claimant continue with an active exercise routine and suspected that the majority of Claimant complaints were related to the SI disfunction vs. the discogenic component. Even though Claimant continued to complain of pain at 5/10 to 6/10, the pain was no longer constant in the region, she was able to obtain much better sleep pattern at night and was able to lift much greater weight. Claimant continued to use Celebrex as well as lidocaine patches.

24. The MRI was completed on March 21, 2022 pursuant to Dr. Chan’s referral and was interpreted by Chelsea Jeranko, D.O. at Diversified Radiologist. The MRI

showed findings consistent with the prior CT scan with the exception that the MRI read showed disc height loss with disc space unroofing due to anterolisthesis and superimposed canal zone disc protrusion at the L4-5 level. It also showed bone marrow edema on the left at this level in addition to the moderate to advanced facet arthropathy and bilateral facet joint effusion. It also showed mild paraspinal muscle atrophy was chronic and symmetric at the L5-S1 level with advanced facet arthropathy with ligamentum flavum thickening and bony hypertrophy.

25. The March 23, 2022 medical records from Bruner noted a motor vehicle accident on March 13, 2022. Claimant was complaining of neck pain since the accident with residual neck and upper back pain. Dr. Teska also noted that Claimant had chronic low back pain which may have had a slight flair up (0.2).[7] Radiographs of the neck and ribs were negative. Claimant had no tenderness to palpation of the cervical spine in the midline but had tenderness in the paraspinals bilaterally, and full range of motion but pain at extremes of range of motion. There was no examination of the lumbar spine. Dr. Teska diagnosed acute neck and upper back pain with diagnosis codes for cervicalgia and dorsalgia respectively.

26. On April 5, 2022 Claimant followed up with Dr. Chan. Given the positive response to the SI joint injection as being both diagnostic and therapeutic, he recommended a follow up injection. On the same day he sent a request for prior authorization.

27. Claimant reported to Dr. Gina Phillips on April 8, 2022 that she had improvement of the neck pain, was being controlled with Naproxen and stopped meloxicam. She found mild loss of ROM of the neck, with improvement.

28. Dr. Chan reevaluated Claimant on May 3, 2022. Dr. Chan reported that Claimant had repeat SI joint injections on April 22nd. Claimant described that when she left the surgery center, the pain complaint was 1/10. She noted that the pain complaint was slightly returning but had moments when she was actually pain free. On exam he found that Claimant had a negative straight leg test but Patrick's, Gaenslen's, Faber's and Yeoman's were positive bilaterally.[8] He had the chance to review the MRI which showed anterolisthesis at the L4-5 level, with facet arthrosis and bilateral facet effusions.

29. On May 10, 2022 Nurse Practitioner Jennifer Brown of Bruner, noted that Claimant continued to have neck and muscle pain since the MVA on March 13, 2022, with negative x-rays from the ED. Claimant was to follow up with physical therapy and continue with Tylenol and naproxen. On exam nurse Brown notice that she was positive for neck pain with tenderness in the cervical spine musculature. She mentioned associated symptoms included leg pain but nothing further to elucidate on this issue.

30. Dr. William M. Barreto, on May 18, 2022 indicated that lidocaine ointment was authorized on March 22, 2022 and that he found it not medically necessary based on the records he was provided as well as based on the Medical Treatment Guidelines, Rule 17, Exhibit B. There was a very short list of records provided to Dr. Barreto.

[7] This ALJ infers that this 0.2 is referencing a pain scale of 0-10, with a two decimal points of one on the scale, ergo the reference to the "slight flair."
[8] Patrick's, Gaenslen's, Faber's and Yeoman's are all tests confirming the SI joint involvement.

31. Dr. Nicole Huntress of Concentra assessed Claimant on May 31, 2022 stating that Claimant was returning for checkup, noting no improvement since the last visit, still had pain, moderate aching of the bilateral and central low back, exacerbated by most activities. She noted that Claimant continued with injections with Dr. Chan and was expecting a third SI joint injection, and continued with massage therapy, which had been helpful.

32. On June 28, 2022 Claimant reported to Dr. Megan Keane of Bruner Family Medicine that she had improvement with injections into the SI joint but that the pain returned. She was investigating the possibility that Claimant may have a component of fibromyalgia.

33. Claimant returned to Dr. Chan on June 28, 2022 with a rather excellent short term diagnostic response to SI injections. In light of the continued spine pain he recommended an L5 medial branch block and sacral lateral branch blocks. He stated that if these were successful, Claimant could then proceed with lateral branch radiofrequency ablations. Claimant was reporting increased pain radiating down into her hamstrings and some ankle swelling. She continued to use ibuprofen and lidocaine patches. Dr. Chan noted frustration that Insurer continued to deny the recommended injections, in light of Claimant's continued pain complaints.

34. On July 5, 2022 Dr. Chan requested authorization to proceed with bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine. The parties did not provide any information on whether this was authorized or not.

35. Dr. Siva Ayyar, issued a denial report on July 20, 2022 of both the bilateral L5 medial branch block and the bilateral S1, S2 and S3 lateral branch block with lidocaine. This was based on the records Dr. Ayyar was provided, which were limited to one medical report.

36. John Burris, M.D. conducted an independent medical evaluation at Respondents request on July 19, 2022. The mechanism of injury described by Dr. Burris was consistent with Claimant's hearing testimony. He obtained a history of medical care and reviewed medical records going back to 2018. Dr. Burris' ultimate opinion was as follows:

> [Claimant]'s clinical course has not followed a typical physiologic pattern associated with an acute injury on 10/26/2021, given random waxing and waning, and expanding complaints, which have not correlated with the passage of time and appropriately directed treatment. It is noted that her subjective complaints acutely worsened after the intervening 3/15/2022 MVA reported by her PCP (not acknowledged by the WC providers).
>
> Her subjective complaints today are out of proportion to her examination which exhibits no objective findings, and she exhibits clear psychosomatic overlay. Overall, her presentation is nonphysiologic. All examinations have documented intact range of motion and normal neurologic function, and all diagnostic testing has been negative for acute abnormalities. Based on the totality of the information provided, the described 10/26/2021 workplace event represents an incident without injury or need for treatment. Thus, no treatment within the WC system is reasonable, necessary, or related. [Redacted Claimant's name]'s subjective complaints today, 9 months after the reported workplace event, cannot be causally related to the described workplace event.

37. The last Work Status Activity form completed by Dr. Villavicencio was dated July 27, 2022 and showed the same sedentary work restrictions as previous.

38. On August 9, 2022 Claimant was evaluated by Dr. Huntress, returning for follow-up from specialist, Dr. Chan. She ordered Claimant to continue with the specialist, stated that objective findings were consistent with the history and mechanism of the work related injury and ordered continued restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time.

39. Dr. Burris also testified at hearing. He was accepted as an expert in occupational medicine and as a Level II accredited physician. His testimony was consistent with his report. He testified that Claimant did not have any objective findings on exam and that the diagnostic evaluations were consistent with preexisting pathology and not consistent with the mechanism of injury after so many months after the incident. Dr. Burris opined that Claimant's symptoms following her injury were unrelated to the October 26, 2021 incident.

40. Wage records provided showed Claimant was earning $23.00 per hour at the time of her injury.[9] The wage records are hard to understand and neither party provided testimony or arguments on how to calculate the appropriate average weekly wage. It is clear that the pay period ending (PPE) dates show that Claimant was paid every two weeks. However, the pay period ending October 2, 2021, shows Claimant earning $611.66 but working 87.3 hours, which would provide a pay rate of $7.28 per hour, and $21.36 per hour for the PPE July 10, 2021. Therefore, this ALJ determined that Claimant's fair approximation of her average weekly wage should be calculated by Claimant's total number of hours worked. Taking PPE October 31, 2020 through PPE October 16, 2021, a period of 52 weeks, Claimant worked 1,881.66 regular hours and 79.02 overtime hours. Which, when multiplied by her rate of pay, provides an average weekly wage of $884.73.[10]

41. The record shows that Claimant clearly was at work within the course and scope of her employment when she lifted the boxed desk with her coworkers and strained her low back when she twisted after the weight shifted to her. Claimant has injuries to her lumbar spine and sequelae causing radicular symptoms into her bilateral lower extremities. Medical providers have documented the strain, and the CT and MRI findings showed Claimant has disc herniations more likely than not caused by or aggravated by the work place injury. Claimant testified that she did not have problems with her lumbar spine or lower extremities before the accident on October 26, 2021. Claimant was credible and persuasive. Further, Drs. Teska, Schwed, Villavicencio and other Concentra providers noted that Claimant's injuries were consistent with the mechanism of injury and this ALJ infers from these statements that they were causally related to the October 26, 2021 work injury. These providers were credible and persuasive, over the contrary opinionw of Dr. Burris. Claimant has shown that the proximate cause of Claimant's

[9] The last pay period ending before Claimant's date of injury was October 16, 2021, showing that Claimant earned $560.05, which divided by the 24.35 hours worked, provides a rate of $23.00 per hour.
[10] Total regular hours of 1881.69 divided by 52 is 36.19 regular hours a week, which multiplied by $23.00 per hour results in $832.37 per week. Total overtime hours of 79.02 divided by 52 is 1.52 hours, which multiplied by $34.5, the overtime per hour rate, results in $52.44 per week. [$832.29+$52.44=$884.73]

injuries was the accident of October 26, 2021. Claimant's injuries arose from the accident at work in the course and scope of her employment on October 26, 2021.

42. The Claimant reported her injury to her supervisor and the store manager and they failed to designate a medical provider. Claimant finally chose her personal care providers at GME Bruner Family Medicine including Dr. Murphy and Dr. Teska. When Claimant's supervisor failed to follow the restrictions provided by her PCP, Claimant went to the Human Resources office to report what was happening. The HR office sent Claimant to Concentra Medical Center within two days, where Claimant was seen by multiple providers beginning December 1, 2021. Claimant continued with care at Bruner for her lumbar spine injury, as well as with Concentra. Claimant demonstrated her acquiescence to the change of provider to Concentra by continuing to treat with Concentra. As found, Bruner was authorized until December 1, 2021, at which time her care was transferred to Concentra. Bruner is was the authorized provider from until the change occurred.

43. Claimant has shown that she requires ongoing medical care that is reasonably necessary and related to the October 26, 2021 work injury, including the injections and medications, such as the lidocaine ointment, recommended by Claimant's providers, including Dr. Chan. Claimant has shown that she is entitled to reasonably necessary medical benefits that are authorized, including GME Bruner Family Medicine, Concentra, and medical providers within the chain of referral, as well as the lidocaine ointment and the bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine recommended by Dr. Chan.

44. Claimant has been provided with restrictions from her first medical visit with Dr. Murphy at Bruner and her providers have continued to note restrictions through on August 9, 2022, when Dr. Huntress stated that Claimant continued with restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time. Claimant has shown that she is entitled to temporary disability benefits, if she has lost wages. The parties stipulated that they would calculate any outstanding temporary disability and that stipulation is approved.

45. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive.

## CONCLUSIONS OF LAW

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

### A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor

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

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

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

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

## B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from an aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial*

*Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Drs. Teska, Schwed, Villavicencio and other Concentra providers are more persuasive than the contrary opinions of Dr. Burris. The record shows that Claimant clearly was at work, within the course and scope of her employment, when she lifted the boxed desk with her coworkers and strained her low back when the weight shifted to her. As found, Claimant injured to her lumbar spine and causing the sequelae of radicular symptoms into her bilateral lower extremities. Medical providers have documented the strain, and the CT and MRI findings show Claimant has disc herniations more likely than not caused by or aggravated by the work place injury. Claimant testified that she did not have problems with her lumbar spine or lower extremities before the accident on October 26, 2021. Claimant is credible and persuasive. Claimant has shown that the proximate cause of Claimant's injuries to her lumbar spine and bilateral lower extremities was the accident of October 26, 2021. Claimant's injuries arose from the accident at work in the course and scope of her employment on October 26, 2021.

### C. Authorized, Reasonably Necessary Medical Benefits

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

Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable and necessary medical care related to the injuries or aggravations of the preexisting condition. As found, Claimant reported her injury to her supervisor and the store manager and they failed to designate a medical provider. Claimant finally chose her personal care providers at GME Bruner Family Medicine including Dr. Murphy and

Dr. Teska. When Claimant's employer failed to follow the restrictions provided by her PCP, Claimant went to the Human Resources office to report what was happening. The HR office sent Claimant to Concentra Medical Center where Claimant has seen multiple providers. Claimant continued with care at Bruner for some time as well as Concentra. Claimant has shown that she requires ongoing medical care, including the injections and medications, such as the lidocaine ointment, recommended by Claimant's providers, including Dr. Chan. Claimant has shown that she is entitled to reasonably necessary medical benefits that are authorized, including GME Bruner Family Medicine through December 1, 2021, Concentra, and medical providers within the chain of referral, as well as the lidocaine ointment and the bilateral L5 medial branch blocks and bilateral S1, S2 and S3 lateral branch blocks with lidocaine.

## D. Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires 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). 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. Sec. 8-42-105(3)(a)-(d), C.R.S. Claimant alleges impaired earning capacity from October 27, 2021 through the present.

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive temporary disability benefits. Claimant has been provided with restrictions from her first medical visit with Dr. Murphy at Bruner and restrictions have continued through at least August 9, by Dr. Huntress, who stated that Claimant continued with restrictions in the sedentary to light work category, working only three days a week up to 4 hours a day. She noted that MMI was unknown at that time. Claimant has shown that she is entitled to

temporary disability benefits, if she has lost wages. The parties stipulated that they would calculate any outstanding temporary disability and that stipulation is approved.

## E. Average weekly wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But 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. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). In calculating the fair approximation of Claimant's average weekly wage, wages were considered from pay period ending October 31, 2020 through October 16, 2021, a period of 52 weeks. Based on the average hours worked of 1881.69 regular hours and 79.02 overtime hours for the 52 week period, earning $23.00 per hour, provides an average weekly wage of $884.73. As found, the fair approximation of Claimant's average weekly wage is $884.73 per week.

## F. Intervening Event

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)*. However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Post Printing & Publishing Co. v. Erickson, 94 Colo. 382, 30 P.2d 327 (1934)*. "If the need for treatment results from an intervening injury or disease unrelated to the industrial injury, then treatment of the subsequent condition is not compensable. This…is a question of fact for resolution by the ALJ." *See Merrill v. Pulte Mortgage Corp.*¸ W.C. No. 4-635-705-02 (ICAO May 10, 2013) (citing *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002).

Here, it is clear from the persuasive medical records, that Claimant was involved in a motor vehicle accident (MVA) in March 2022. However, as found, Claimant only had a very slight temporary flair of her work related condition as noted by Dr. Teska. The Bruner records indicate that Claimant injured her neck in the MVA and she treated for that at Bruner. Respondents failed to show that Claimant had an intervening event that broke the causal link between the October 26, 2021 work related injury to her lumbar back and lower extremities and her need for treatment for those injuries.

## ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work related injury to her lumbar spine and lower extremities on October 26, 2021.

2. Respondents shall pay for the authorized care Claimant received at the Bruner clinic through December 1, 2021.

3. Respondents shall pay for the reasonably necessary and related medical care Claimant received from Concentra and the providers within the chain of referral.

4. The stipulation of the parties is approved and part of this order. Respondents shall pay temporary disability benefits from November 9, 2021 until terminated by law.

5. Claimant's average weekly wage is $884.73.

6. 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 15th day of November, 2022.

Digital Signature

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-120-768-004**

## ISSUES

1. Did Claimant prove by a preponderance of the evidence that his ongoing physical therapy appointments at Flicker Physical Therapy and ISU Physical Therapy are reasonable, necessary and related medical treatment for his October 17, 2019 work injury?

2. Did Claimant prove by a preponderance of the evidence that he is entitled to repayment for out-of-pocket expenses associated with the physical therapy he received at Flicker Physical Therapy and ISU Physical Therapy?

## FINDINGS OF FACT

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

1. Claimant is a 24 year-old male who sustained a compensable work injury on October 17, 2019 while working for Employer in Wyoming. Claimant fell from a power line pole and sustained a compression fracture at L1 that progressed to a spinal cord infarction up to T6. Claimant has paraplegia at the T6 level and is confined to a wheelchair. Claimant has no sense of feeling in his lower extremities, but has full use of his upper extremities.

2. Prior to the accident, Claimant enjoyed outdoor activities including, camping, riding dirt bikes, and playing sports. Claimant testified that he is no longer able to engage in these hobbies due to his injury (Tr. 41:7-42:25).

3. Claimant underwent spine surgery at Wyoming Medical Center. He was subsequently transferred to Salt Lake City, Utah, where he participated in an in-patient rehabilitation program. Claimant then transitioned to an out-patient physical and occupational therapy program. In late December 2019, once he completed the program, Claimant was discharged and he returned to his parent's home in Blackfoot, Idaho.

4. On December 20, 2019, Gary Walker, M.D., a specialist in physical medicine and rehabilitation (PMR) and Claimant's authorized treating physician (ATP), evaluated Claimant. Dr. Walker noted that Claimant had been doing physical therapy daily. The recommendation from the University of Utah was for Claimant to continue with two hours a day with a combination of physical and occupational therapy. Dr. Walker noted Claimant had been working on strengthening, sitting and standing/balance in the frame. He noted Claimant's "biggest primary issue right now is outpatient physical therapy and occupational therapy," and he was trying to get approval for the therapy. (Ex. T pp. 203-206).

5. Claimant had a follow-up appointment with Dr. Walker on January 20, 2020. Dr. Walker noted Claimant was going to Idaho State University Physical Therapy (ISU), and working with Cindy Seiger, PT, on Tuesdays and Thursdays. Claimant was going to Flicker Physical Therapy (Flicker) on Mondays, Wednesdays, and Fridays, and working with Tim Flicker, PT. Claimant reported that he felt like he was getting a little bit stronger with the therapies. Dr. Walker ordered physical therapy five days a week, between the two locations, for an additional four weeks. (Ex. T pp. 207-208).

6. On February 20, 2020, Ms. Seiger wrote to Dr. Walker regarding Claimant's progress to date, and to request additional therapy through the end of October 2020. She explained "recovery of function 1-2 levels inferior to a complete SCI is possible for the first 6 months post injury and decreases from months 6 to 12." Ms. Seiger felt that Claimant's physical therapy frequency would decrease around the end of April 2020, and she encouraged community activity participation such as exercising at the gym. (Ex. 10 pp. 56-58). At Claimant's February 20, 2020 appointment, Ms. Seiger recommended Claimant exercise at the gym in his home town. She volunteered to go with Claimant to assist him in knowing what equipment to use. According to the medical records, Claimant was not interested, and wanted to continue with physical therapy. (Ex. GG p. 421).

7. At Claimant's February 25, 2020 appointment, Dr. Walker reviewed the progress notes from each of the physical therapists working with Claimant. According to the progress notes, Claimant showed subtle improvement. Further, each location and therapist was working on different modalities. Dr. Walker ordered additional physical therapy for Claimant for the next four weeks, and he requested progress notes and a Functional Independent Measure (FIM) score from the therapists. Dr. Walker and Claimant discussed a psychotherapy referral, and Claimant was receptive to the idea. (Ex. T pp.214-215).

8. Mr. Flicker prepared a progress note on March 9, 2020 after Claimant's 32nd visit. Mr. Flicker noted that Claimant had excellent upper body strength and range of motion, and he needed to work on his dynamic balance and transfers. Claimant's FIM score was 107. (Ex. HH p. 730).

9. On March 24, 2020, Dr. Walker rewrote prescriptions for physical therapy at Flicker and ISU. Claimant had met with psychologist, Donald Whitley, PHd, the previous day. Dr. Walker recommended that Claimant continue seeing Dr. Whitley and he wrote Claimant a prescription for weekly psychotherapy with Dr. Whitely for the next four to six weeks. (Ex. T p. 220).

10. Insurer denied authorization of additional physical therapy, and Dr. Walker appealed this decision on April 7, 2020. He explained that he reviewed the therapy notes and spoke with Mr. Flicker. Claimant had made very mild progress in physical therapy, but the goal was to get him more stable with balance and transfers to help him become more independent. Dr. Walker recommended four more weeks of physical therapy, three times a week. In light of the coronavirus pandemic, Dr. Walker recommended resuming physical therapy with Mr. Flicker in four to six weeks. Dr. Walker did not see a reason for Claimant to have telephysical therapy with ISU. (Ex. T p. 235).

11. Claimant continued to go to physical therapy at Flicker, three days a week for about an hour and a half to two hours each session. Dr. Walker continued to reorder physical therapy, and to appeal Insurer's decision to deny authorization. (Ex. T p. 242-243).

12. On June 29, 2020, Claimant saw Matthew Fackrell, D.O. for an evaluation. Dr. Fackrell is Claimant's family physician, and he cared for Claimant as he was growing up. The medical records note that Claimant was there "for a workman comp claim and is needing some referrals." Dr. Fackrell noted that Claimant was going to physical therapy and had been seeing Dr. Walker. He also noted that according to Claimant, Insurer had stopped paying for physical therapy, so Claimant was paying out-of-pocket for the therapy. Dr. Fackrell opined that physical therapy was medically necessary. (Ex. FF pp. 349-350).

13. Dr. Walker evaluated Claimant on July 2, 2020, via video. At the appointment, Claimant asked if his treatment could be transferred to Dr. Meyers, a physiatrist in Twin Falls, associated with St. Luke's Hospital. Dr. Walker said he would make a referral to change all care to Dr. Meyers, and no further follow up with him would be necessary. (Ex. T p. 254).

14. On July 24, 2020, Claimant's FIM score, per Mr. Flicker, was still 107. (Ex. HH p. 107)

15. On July 30, 2020, Dr. Walker provided an addendum to his July 2, 2020 medical record stating Claimant "is referred to Dr. Kevin Hill for long term physiatric/rehab. Dr. Matthew Fackrell." (Ex. 8 at 8-40). Claimant, however, had already seen Dr. Fackrell nearly a month prior to this addendum, and four days prior to July 2, 2020, when he asked that his care be transferred to Dr. Meyers.

16. Kevin Hill, M.D.[1] evaluated Claimant the morning of July 30, 2020. Dr. Hill noted in the medical record that Claimant had originally been referred to Dr. Walker, and he was not sure why Claimant did not want to continue treating with Dr. Walker. Dr. Hill suggested, however, that Claimant see a rehabilitation physician who was board certified in spinal cord injuries, as he was a generalist. Dr. Hill renewed Claimant's medications and wrote him several referrals. (Ex. Y and Ex. 17).

17. Insurer continued to deny any authorizations for physical therapy on the basis that the records showed "no significant long-term gains have been made." (Ex. Y p. 282).

18. On September 2, 2020, Claimant's FIM score, per Mr. Flicker, was still 107. (Ex. HH p. 906).

19. On October 26, 2020, Portneuf Medical Group notified Insurer that Dr. Hill was no longer in the group, and there was no other provider in the office to continue Claimant's care. (Ex. Y p. 284).

[1] Dr. Hill and Dr. Meyers were colleagues at Portneuf Medical Group, Neuroscience and Rehab Clinic/Physical Medicine and Rehabilitation.

20. Claimant was evaluated by Ahren O. Geilenfeldt, D.O.[2], on November 24, 2020. Dr. Geilenfeldt noted that Claimant was a year out from his injury and "recovery had slowed down." Claimant was doing physical therapy three times a week, but other than using a stander at home, Claimant did not have any other home exercise program (HEP). Dr. Geilenfeldt noted it was "reasonable to continue with therapy," but encouraged Claimant to work on establishing a regular HEP. Dr. Fackrell is listed in the medical record as Claimant's primary care physician. (Ex. T pp. 293-297).

21. After multiple cancellations, Claimant had a follow-up appointment with Dr. Geilenfeldt on February 16, 2021. Claimant was still going to physical therapy three times a week, and the therapy was prescribed by Dr. Fackrell. Claimant was not engaged in a HEP and he told Dr. Geilenfeldt he was not interested in doing one, but preferred to go to physical therapy for exercise. The medical record states that Claimant was "resistant to any short–term goal setting for physical activity which is concerning." In his plan, Dr. Geilenfeldt reported that he would defer management of ongoing therapy to the prescribing physician, Dr. Fackrell. (Ex. BB pp. 305-306).

22. Claimant testified that he does some at-home exercises. He uses his standing frame and an electric motor pedal system. When asked if he was following the recommendations of his providers with respect to at-home exercises, Claimant said "more or less, yes [but] they would encourage more." He also testified he gets depressed and secluded at home to a point he does not want to do anything. Going to physical therapy motivates Claimant. (Tr. 52:2-53:7).

23. Claimant is no longer seeing Dr. Whitley despite recommendations he do so. Claimant testified he gets more benefit out of going to physical therapy as opposed to a psychologist. (Tr. 56:4-57:23).

24. The ALJ finds that Claimant does some at-home exercises, but he is not participating in a formal HEP as recommended by his providers.

25. On March 3, 2021, Claimant had over 150 physical therapy visits with Mr. Flicker. Claimant's FIM score had not changed from what it was a year prior – it was still 107. (Ex. HH p. 1044).

26. On March 9, 2021, Dr. Fackrell wanted Claimant to continue physical therapy because it was a "medical necessity." Dr. Fackrell, did not elaborate but stated "as far as the paraplegia, spinal cord injury, and weakness that he has now, I do recommend continuing with both [in] physical therapy and a chiropractor." (Ex. FF pp. 361-362). Dr. Fackrell consistently recommended physical therapy for Claimant through March 2022, and referred to it as a medical necessity. (Ex 13, Ex. GG and Ex. HH).

27. On May 4, 2021, Claimant resumed physical therapy with ISU. (Ex. GG).

[2] In July 2020, Dr. Meyers recommended that Claimant schedule an appointment with Dr. Geilenfeldt. Claimant said he was going to think about it. Insurer had scheduled a new patient visit with D. Geilenfeldt on Claimant's behalf. (Ex. BB p. 291).

28. Claimant saw Clark Allen, M.D., a neurosurgeon, on August 30, 2021. Dr. Allen noted in the medical record that it was "obvious that [Claimant] is hopeful for return of function and is looking for improvement on the films as a sign of the possibility of function return." After reviewing the films and examining Claimant, Dr. Allen concluded Claimant was well decompressed and had a stable fusion. He told Claimant he did not see any options for intervention, and any change or improvements in his MRI scan really had no meaning for a return to function. Dr. Allen concluded that based on Claimant's clinical course and how far out he was from the injury, the return of any meaningful function was unlikely. (Ex. DD).

29. At Claimant's follow-up appointment with Dr. Geilenfeldt on September 7, 2021, Claimant reported Dr. Fackrell was still prescribing physical therapy four times a week. According to the medical record, Claimant told Dr. Geilenfeldt he was not doing a HEP, just physical therapy. Claimant was using his standing frame and electric motor pedal system. Dr. Geilenfeldt recommended that Claimant start a HEP. (Ex. BB pp. 317-318).

30. At Claimant's December 16, 2021 physical therapy visit at ISU, Claimant requested a letter of medical necessity for bilateral knee-ankle-foot orthoses (KAFOs). Ms. Seiger sent a letter to Claimant's doctor regarding the medical necessity for bilateral KAFOs. (Ex. 10 pp. 174-175).

31. Claimant stopped treating with Dr. Geilenfeldt because he wanted to establish care with a physiatrist closer to his home. Tyler Hedin, M.D., began treating Claimant on December 17, 2021. Dr. Hedin noted that Claimant continues to work with physical therapists at ISU and they are advocating for bilateral KAFOs to aid with functional tasks at home. Dr. Hedin believed "training with bilateral KAFOs to be reasonable given some mild motor return in the proximal hips according to PT." (Ex. EE. pp. 333-334).

32. On January 3, 2022, Dr. Hedin ordered custom fabricated bilateral KAFOs for Claimant. (Ex. EE p. 336).

33. Claimant had a follow-up appointment with Dr. Hedin on February 15, 2022. Dr. Hedin noted that Claimant had not yet received his KAFOs, but continued to work with his physical therapists at ISU and Flicker on transfers and gait. Dr. Hedin specifically noted that Claimant was to use the KAFOs in physical therapy to aid with standing. (Ex. EE p. 338).

34. Claimant testified that he goes to Flicker, two to three times per week, and to ISU about two times per week for physical therapy. Claimant pays out-of-pocket for the therapy because Insurer has denied authorization. (Tr. 43:23-21). Claimant testified that going to physical therapy helps him because it forces him to get out of the house. It gives him more of a social life, as well as improving his muscles, spinal cord, core muscles, hip flexors and balance. (Tr. 45:20-46:4).

35. Claimant has been diagnosed with depression, and he credibly testified that going to physical therapy has a positive effect on his depression. (Tr. 47:13-48:1).

36. Claimant credibly testified that physical therapy has also aided him in being able to get around generally. Therapy has helped strengthen his core and upper extremities, enabling him to get around the house, balance in his chair, transfer from his chair and balance in vehicles. Claimant testified he would be driving soon. (Tr. 48:2-19).

37. Due to the pandemic, Claimant did not attend physical therapy at ISU from March 24, 2020 to May 4, 2021. At the May 4, 2021 appointment, Ms. Seiger noted that Claimant's static balance, when compared to his previous course of treatment, demonstrated improved ability to maintain balance against resistance, suggesting recovery of some voluntary motor control of his trunk muscles. She also noted Claimant's goal to walk was unlikely without external devices or significant advances in medical treatment. The plan was for Claimant to attend therapy, one to two times a week, for 12 weeks. (Ex. GG pp. 495-496).

38. As of January 2022, Claimant has had over 90 physical therapy sessions at ISU. Claimant's ISU treatment records from May 4, 2021 to January 28, 2022, consistently state that Claimant is not interested in exercising at a gym. (Ex. GG).

39. Claimant consistently attended physical therapy at Flicker from December 30, 2019 to the time of hearing. As of March 2022, Claimant had attended over 287 sessions at Flicker. Throughout this time, Claimant's FIM remained at 107. (Ex. HH).

40. Rachel L. Basse, M.D. conducted an independent medical evaluation (IME) of Claimant on August 18, 2020, and issued a report on September 25, 2020. Dr. Basse is board certified in PMR as well as chronic pain, and is Level II accredited. With respect to Claimant's physical therapy, Dr. Basse noted that ISU seemed more familiar with spinal cord injury patients. At ISU, Claimant worked on core activation, hands and knees, very functionally based activities including balance, and mat activities. Flicker also worked on balance and strength, and they used a treadmill where Claimant was in a harness and cable suspension that held his weight. Dr. Basse opined that Claimant should have already transitioned to a HEP, and he did not require any further formal physical therapy sessions. Dr. Basse referenced Ms. Seiger's February 20, 2020 letter regarding the timeline for recovery of function with spinal cord injuries, and specifically that recovery of function is possible for the first six months post injury, but decreases six to 12 months out. (Ex. 10 pp.56-58). Dr. Basse noted that Claimant would require regular re-evaluations by a physical therapist with a specialty in spinal cord injuries to reassess Claimant's functional status. (Ex. O).

41. Dr. Basse issued a supplemental report the following year, on October 19, 2021, after reviewing extensive medical records. Dr. Basse explained that the medical records consistently noted that Claimant is resistant to any HEP, despite its benefit to his overall health and well-being. Dr. Basse referenced the opinion of Dr. Allen that the return of any function was unlikely. She opined that there was no documentation to demonstrate that the physical therapy Claimant had received resulted in any clear functional gains over the past year. In her opinion, Claimant should have transitioned to a HEP the year prior (2020). (Ex. O).

42. Dr. Basse testified at the hearing in accordance with her IME report and supplemental report. She credibly testified that Claimant's physical therapy records, as recent as January 2022, do not show any significant functional gains. Dr. Basse testified that for continued physical therapy to be deemed reasonably necessary, there needs to be documentation of functional gains, and that is not present here. (Tr. 103:1-104:4).

43. Dr. Basse was present throughout the hearing and listened to Claimant's testimony. When asked whether she had any concerns regarding Claimant's description of the role that physical therapy provides him, she responded: "[the] other concern I have is, back to your question to me about Mr. Worthington saying the physical therapy gets him out of the house; it forces him have a schedule; it gives him more of a social life. And that is just not really the role of a physical therapist. A physical therapist is a formal, trained health care provider. They are not there to be your friend. They are not there to be a personal trainer. And it is not how physical therapists are utilized." (Tr. 106:19-108:4). Dr. Basse further expressed concern that Claimant's use of ongoing regular physical therapy may be hindering his overall medical management and independence because some of his providers were not being completely forthright with respect to what was a reasonable and functional outcome, particularly regarding his gait. (Tr. 107:5-25).

44. Michael Miller, M.D., saw Claimant for a 24-month DIME on March 15, 2022. Dr. Miller opined that Claimant reached MMI on October 17, 2020, and gave him a 94% whole person impairment rating. Dr. Miller noted that Claimant's FIM score had been static at 107 since at least February 26, 2020, primarily due to the absence of home accommodations. He opined "functional gain is not dependent on changes in medical condition or additional rehabilitation, but rather is dependent on changes in [Claimant's] living environment." (Ex. N. pp. 100-101).

45. Dr. Miller noted that Claimant had been managed by four different physiatrists: Dr. Walker, Dr. Hill, Dr. Geilenfeldt, and most recently Dr. Hedin. He noted Claimant continues with physical therapy four times a week, and KAFOs had been ordered for Claimant, but were not available as of the time of the DIME. Claimant uses his standing frame for three to four hours a day, and his electric pedaling machine daily. Claimant's parents perform stretching exercises on his legs every evening. With respect to maintenance care, Dr. Miller opined that additional physical therapy would be upon the recommendation of Claimant's PMR specialist. Claimant's current PMR specialist is Dr. Hedin. (Ex. N).

46. Claimant's counsel deposed Dr. Miller on June 13, 2022. Dr. Miller was asked if he saw Claimant experiencing any functional gains based upon his review of the records. Dr. Miller testified that Claimant experienced functional gains early on, but at a certain point they seemed to plateau. (Dep. Tr. 12:23-13:4).

47. According to Dr. Miller, FIM is a measure that looks at 18 different items, including motor and cognitive subcategories, and rates each area of function on a seven point scale ranging from total assistance to total independence. (Miller Dep. Tr. 45:3-9). As of February 2, 2022, Claimant's FIM score was still 107, which is what is was approximately two years prior. (Ex. HH p, 1311).

48. Dr. Miller credibly testified that it "would be reasonable" for Claimant to have physical therapy specifically addressed to the KAFOs he is to receive. (Dep. Tr. 14:19-15:9). He opined, however, that Claimant going to physical therapy four to five times a week seemed excessive in the context of no demonstrable functional gains. (Dep. Tr. 48:1-9). Dr. Miller agreed with Dr. Basse that the physical therapy records from 2021 on do not document any clear functional gains for Claimant. (Dep. Tr. 35:10-15).

49. The ALJ finds the testimony of Dr. Basse and Dr. Miller to be credible and persuasive. The ALJ finds that Claimant has not demonstrated any clear functional gains from physical therapy from 2021 to present.

50. Debra Curfman is a complex claims representative for Insurer, and she has worked on Claimant's matter since the inception of his claim. Ms. Curfman credibly testified that Insurer authorized Claimant's physical therapy with ISU from January 9, 2020 through March 24, 2020. (Tr. 87:2-13). Ms. Curfman further testified that Insurer initially authorized and paid for Claimant's physical therapy at Flicker from December 19, 1999 through August 11, 2020, but after reviewing Dr. Basse's IME report and her recommendation for three more months of physical therapy, Insurer retroactively authorized physical therapy from August 11, 2010 through December 24, 2020. (Tr. 88:24-89:25).

51. Dr. Fackrell referred Claimant for physical therapy from July 24, 2020 to March 14, 2022. (Ex. FF, GG and HH). Dr. Fackrell is a family physician, and there is no evidence in the record that he has expertise in spinal cord injuries.

52. Ms. Curfman credibly testified that Dr. Fackrell, Claimant's family physician, is not an authorized treating physician in this case. (Tr. 88:5-14).

53. The ALJ finds that Dr. Fackrell is not Claimant's authorized treating physician.

54. Based on the totality of the evidence, the ALJ finds that Claimant's physical therapy with Flicker and ISU after December 24, 2020 was not reasonable, necessary or related to Claimant's admitted injury. The ALJ further finds that Claimant is not entitled to repayment of out-of-pocket expenses associated with physical therapy at Flicker and ISU.

## 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).

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. § 8-42-101, C.R.S.; *see Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S.

Since July 2020, Dr. Fackrell, Claimant's family physician, has referred Claimant to physical therapy at Flicker and ISU, and has said physical therapy is a medical necessity. As found, Dr. Fackrell is not Claimant's ATP in this case, and he does not have any specific expertise in spinal cord injuries. (Findings of Fact ¶¶ 51 and 53).

The ALJ finds the opinions and testimony of Drs. Basse and Miller are credible and persuasive. Dr. Basse credibly testified that the medical records do not show any evidence that Claimant has received any clear functional gains from physical therapy from 2021 to present. (Findings of Fact ¶ 42). Dr. Miller credibly testified that Claimant experienced functional gains early on, but at a certain point they plateaued. Dr. Miller noted that Claimant's FIM score has been has been static at 107 since February 26, 2020. (Findings of Fact ¶ 44). Since 2020, Claimant's PMR physicians and his physical therapists have encouraged him to utilize a HEP, but Claimant has repeatedly declined to engage in a formal HEP. Claimant uses his standing frame and electric motor pedal system at home regularly, but he prefers going to physical therapy as opposed to

engaging in a HEP. (Findings of Fact ¶ 22).

Claimant credibly testified that going to physical therapy helps with his depression, and it motivates him to get out of the house. (Findings of Fact ¶ 35). But as Dr. Basse credibly testified, this is not the role of physical therapy. (Findings of Fact ¶ 43).

As found, based on the totality of the evidence, Claimant failed to demonstrate by a preponderance of the evidence that physical therapy sessions with ISU from May 2021 through present, physical therapy sessions with Flicker from December 24, 2020 through present, and any ongoing formal physical therapy is reasonably necessary to cure and relieve Claimant from the effects of the October 17, 2019 work injury.[3] (Findings of Fact ¶ 54).

## ORDER

It is therefore ordered that:

1. Claimant's request for retroactive authorization of physical therapy sessions with ISU from May 2021 through the present is denied and dismissed. Any request by Claimant for reimbursement of any out-of-pocket expenses associated with physical therapy at ISU during the time frame of May 2021 forward is likewise denied and dismissed.

2. Claimant's request for retroactive authorization of physical therapy sessions with Flicker Physical Therapy since December 24, 2020 through the present is denied and dismissed. Any request by Claimant for reimbursement of out-of-pocket expenses associated with physical therapy at Flicker Physical Therapy during this time frame is likewise 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

[3] Dr. Hedin, Claimant's ATP, who is also a PMR, found that Claimant will need physical therapy once he receives his KAFOs. Dr. Miller agreed that this limited type of physical therapy would be reasonable. The ALJ credits the opinion of Dr. Basse that Claimant will require regular physical therapy re-evaluations by a physical therapist with a specialty in spinal cord injuries to reassess Claimant's functional status.

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: November 15, 2022

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

## ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the Horizant medication recommended by authorized treating physician (ATP) Yusuke Wakeshima, M.D. is reasonable, necessary and causally related to Claimant's admitted November 29, 2017 work injury.

II. Whether Claimant proved by a preponderance of the evidence that the bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima are reasonable, necessary and causally related to Claimant's admitted November 29, 2017 work related injury.

III. Whether Claimant is entitled to an award of costs under Section 8-42-101(5), C.R.S.

## FINDINGS OF FACT

1. Claimant worked for Employer for approximately 9.5 years as a Principal Secretary.

2. Records from Claimant's primary care providers at Kaiser Permanente document Claimant's prior history of neck pain, left shoulder joint pain, and left hip joint pain in 2015. The records do not indicate Claimant was undergoing treatment to her left hip leading up to the work injury.

3. Claimant sustained an admitted industrial injury to her low back and right hip on November 29, 2017. Claimant tripped and fell forward onto her knees and hands, then rolled onto her back.

4. Claimant subsequently treated with authorized provider SCL Physicians and saw Elizabeth Harris, N.P. on December 1, 2017. Claimant reported bilateral knee and lower back pain. On examination, NP Harris noted tenderness to palpation to the right sacroiliac (SI) joint region. No left hip complaints or findings were documented. NP Harris assessed Claimant with acute right-sided low back pain, bilateral knee abrasions, and a left elbow abrasion. She referred Claimant for physical therapy.

5. Claimant presented to ATP Hiep Lelourdes Ritzer, M.D. on February 21, 2018. Claimant complained of low back, right hip and bilateral knee pain. The medical note contains no mention of left-sided complaints. On examination, Claimant was tender bilaterally over the SI joint. Dr. Ritzter referred Claimant to Samuel L. Chan, M.D. for evaluation.

6. Claimant subsequently underwent work-related SI injections, right hip intra-articular injections, and a right hip labral reconstruction in 2018.

7. On April 3, 2019 ATP Chan performed right L5 primary dorsal ramus percutaneous rhizotomy and right S1, S2 and S3 primary dorsal ramus percutaneous lateral branch radiofrequency rhizotomies for diagnosis of chronic low back pain and right sacroiliac joint dysfunction. Dr. Chan noted Claimant had a positive diagnostic and therapeutic response to SI injections in the past.

8. On April 8, 2019 Claimant presented to ATP Haley Burke, M.D. with complaints of ongoing discomfort mainly on the right side but also across the bilateral lumbosacral spine. Dr. Burke documented worsening symptoms and a new onset of numbness with history of diffuse right lower extremity pain, bilateral lumbosacral pain and bilateral lumbar pain affecting the right lower extremity after a recent SI joint radio frequency ablation performed within the last week. Dr. Burke remarked that Claimant's symptoms did not fit a dermatomal pattern and that Claimant did not have objective findings on exam. She nonetheless prescribed Claimant Gabapentin for post-procedure neuritis, which she stated is a commonly known occurrence after radiofrequency ablation (RFA). She cautioned Claimant regarding drowsiness and not to drive or pursue any potentially dangerous activities with the use of Gabapentin until Claimant knew how it affected her.

9. Claimant presented to ATP Yusuke Wakeshima, M.D. on April 16, 2019. She reported right greater than left low back pain and right lower extremity pain. Dr. Wakeshima noted that Dr. Chan performed a SI injection which reportedly only helped for a few days. He further noted that Claimant also underwent radiofrequency neurotomy by Dr. Chan on April 3, 2019, and that since then her SI pain profoundly worsened. Claimant reported that the Gabapentin medication was making her somewhat sedated but that she otherwise seemed to be tolerating her medication regimen. Dr. Wakeshima initially opined that Claimant's symptoms may be related to potential piriformis syndrome on the right after the SI joint radiofrequency neurotomy procedure. He continued Claimant on Gabapentin, increasing her dosage.

10. Dr. Wakeshima performed an EMG of Claimant's right lower extremity on May 6, 2019, which demonstrated peroneal motor neuropathy on the right distal to tibalis anterior. There was no evidence of lumbar radiculopathy or lumbosacral plexopathy on the right.

11. On August 27, 2019 Claimant reported to Dr. Wakeshima that she experienced no further improvements following her SI joint injections. Dr. Wakeshima concluded that Claimant's SI joint dysfunction is not her pain generator, as she did not demonstrate further benefit from the SI joint injections. Claimant reported that she experienced a big difference in her pain with the increase of Gabapentin, but also a significant increase in her sedation level. Claimant requested a change in her neuropathic medication to something that may not be as sedating. Dr. Wakeshima thus prescribed Claimant Horizant, noting, "We will therefore have patient undergo a trial of Horizant which is gabapentin enacarbil which is absorbed better than current gabapentin and also sustained release, and thus should cause less sedation, and achieve higher plasma levels than generic gabapentin." (Cl. Ex. 12, p. 76).

12. Claimant underwent a lumbar spine MRI on October 7, 2019. The radiologist's impression was:

> No significant change since 10/12/2018 in mild central canal stenosis at L4-L5, mostly due to bilateral facet and ligamentum flavum hypertrophic changes. Partial sacralization of left L5. Upper sacrum only incidentally imaged on sagittal sequences. Lower sacrum not included on this study. No MR evidence of right S1 nerve root impingement. Consider dedicated MRI of sacrum to evaluate lower sacral nerve roots.

(R. Ex. K, p. 90).

13. Claimant returned to Dr. Wakeshima on December 10, 2019 with complaints of continued right-sided low back pain and right posterior thigh and leg region pain symptoms. He continued Claimant on Horizant, which Claimant reported made her somewhat sedated. Claimant anticipated that she would begin to get used to the sedation.

14. On December 26, 2019 Claimant underwent a right hip arthroscopic labral repair versus reconstruction and femoral acetabular osteoplasty, performed by ATP Brian White, M.D.

15. On June 17, 2020 Claimant saw Dr. Ritzer with complaints of persistent chronic right hip and lower back pain with right leg numbness. She also reported persistent left hip pain.

16. On June 26, 2020 Dr. Wakeshima reviewed both the report and film from the October 7, 2019 lumbar MRI. He noted that the film demonstrated facet arthrosis not only at the L4-5 level, which was noted in the radiologist report, but also at level L5-S1, left greater than right, which was not mentioned in the radiology report. Dr. Wakeshima did not appreciate any L-5 foraminal stenosis or any nerve root impingement. Based on his review of the MRI film, Claimant's clinical presentation, and Claimant's lack of beneficial response from her previous SI joint injections, Dr. Wakeshima concluded that Claimant's pain generator was most likely bilateral L4-5 and L5-S1 facet arthropathy. He requested bilateral facet injections at L4-5 and L5-S1 to address Claimant's facetogenic low back pain.

17. At a follow-up evaluation on July 29, 2020 Dr. Wakeshima noted that the facet injections were on hold pending an Independent Medical Examination (IME) by Respondent. He explained,

> Patient clinical presentation still is most consistent with lumbar facet joint arthropathy. While she does demonstrate provocative sacral joint dysfunction, and tenderness over the sacroiliac joint region she has not demonstrated resolution of her pain symptoms after radiofrequency neurotomy of the sacroiliac joint. Her MRI studies did demonstrate facet arthrosis at the L4-5 and L5-S1 level.

(Cl. Ex. 16 at p. 98).

Dr. Wakeshima recommended additional chiropractic treatment and continued Claimant on Horizant.

18. Claimant underwent an MRI of her left hip on August 10, 2020 which revealed a nondisplaced linear contrast-filled tearing of the anterior left acetabular labrum with mild to moderate underlying anterior superior labral attenuation and fraying; high-grade attenuation and mild fraying of the superior posterior superior portions of the left labrum; and small areas of isolated high-grade chondral fissuring in the periphery of the superior left acetabulum without chondral delamination or subchondral edema.

19. On August 20, 2020 Carlos Cebrian, M.D. performed an IME at the request of Respondent. Dr. Cebrian concluded that Claimant did have left femoroacetabular impingement secondary to Cam type morphology with a labral tear, but that it was unrelated to Claimant November 29, 2017 work injury. He noted temporal delay in Claimant's development of left hip symptoms and disagreed that Claimant's gait abnormality aggravated or caused Claimant's pre-existing femoroacetabular impingement with labral pathology. Dr. Cebrian opined that Dr. Wakeshima's request for bilateral facet joint injections at L4-5 and L5-S1 should be denied as not reasonable, necessary or related. He explained that it was not probable Claimant would have a positive response to the facet injections. He noted that Claimant's initial lumbar spine findings after her injury were specific to the right SI joint and that she underwent SI joint injections with questionable responses with subsequent expansion of lumbar spine complaints. Dr. Cebrian opined that Claimant's examination was non-specific and not suggestive of facet-mediated pain. He further opined that Claimant reached maximum medical improvement (MMI) as of August 20, 2020 with a 12% whole person impairment. Dr. Cebrian concluded that Claimant did not require any medications as maintenance treatment, as the Horizant was being prescribed for non-claim related neuropathy.

20. On September 30, 2020 Dr. White noted that imaging showed left sided CAM and pincer-type femoroacetabular impingement with labral tear. He recommended that Claimant undergo a left hip arthroscopy with femoral and acetabular osteoplasty, and labral construction.

21. Dr. Wakeshima addressed his review of Dr. Cebrian's IME report in an October 6, 2020 medical note. He agreed with Dr. Cebrian that Claimant's peroneal neuropathy was not work-related. Regarding medication he stated,

> [h]owever her Horizant may be addressing a neuropathic component to her low back and right hip pain with subsequent surgeries not appreciated on electrodiagnostic study. We will try a weaning program on the Horizant at our next appointment to see if her pain about the hip or low back worsens with weaning down and off this medication.

(Cl. Ex. 17, p, 104).

Dr. Wakeshima noted that it was important Claimant be tapered off of the Horizant, instead of abruptly stopping it.

22. At a follow-up evaluation on October 26, 2020 Claimant reported to Dr. Wakeshima that Insurer did not authorize refills on Horizant per her last appointment. Claimant reported 4/10 pain level with pain in the low back radiating down right lower extremity, as well as hip pain. Dr. Wakeshima reiterated,

> …the Horizant was written more for addressing any neuropathic component to her low back and hip pain, rather than the peroneal neuropathy which was appreciated on her electrodiagnostic studies in the past, which appears to be the basis of Dr. Cebrian's denial of the Horizant (ie that the Horizant was to treat the peroneal neuropathy).

(Cl. Ex. 18, p. 110).

23. Dr. Wakeshima provided Claimant enough samples of Horizant to wean her off by the time of his next follow-up appointment. He explained,

> If she notices no change in her pain symptoms, this medication will then not be resumed. If, however, her low back pain, hip pain or radicular type symptoms reexacerbate being off the Horizant, then I would conclude that this medication is directly related to her work injury, and Dr. Cebrian was incorrect on his RIME in assuming that this was strictly for peroneal neuropathy, and should therefore be authorized for reinitiation and continuation. If she only notices worsening of her pain about her right lateral leg in the peroneal nerve distribution, then this will be related to peroneal neuropathy, and would need to be resumed and continued under her private health insurance.

(Id.).

24. On November 13, 2020 Claimant reported to Dr. Wakeshima that the weaning off Horizant was not well-tolerated, noting a profound increase in her overall pain. Dr. Wakeshima noted that Claimant had made a detailed pain log documenting her response to weaning off the medication from October 26 to November 9. He further noted that, during this timeframe, Claimant's pain increased not only in her back, but also in her bilateral lower extremities. By November 9, when off the Horizant, Claimant's pain increased from 4/10 at the beginning of the wean to 7/10. Dr. Wakeshima concluded that the tapering down and off of Horizant led to profound worsening of Claimant's pain in locations outside of the peroneal neuropathy region. He explained that this demonstrated that the medication was "helping more than just the peroneal neuropathy symptoms that was reported in her electrodiagnostic studies on the right lower extremity, that Dr. Cebrian incorrectly assumed that was the only reason why she was on the Horizant." (Cl. Ex. 19, p. 116). Dr. Wakeshima further explained that Horizant was to address Claimant's neuropathic pain as related to her work injury for her back and lower extremity and opined that it was medically appropriate and indicated to address Claimant's work-related neuropathic pain issues.

25. On November 23, 2020 Dr. Wakeshima prescribed Claimant Gabapentin instead of Horizant because Insurer had not yet authorized Horizant.

26. At a follow-up evaluation on December 10, 2020 Claimant reported to Dr. Wakeshima that the Horizant was finally authorized and had been helping with her pain symptoms. Claimant reported that she tried the generic Gabapentin and felt continuously sedated and tired and the Horizant was much better tolerated.

27. Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Richard M. Gordon, M.D. on February 17, 2021. Dr. Gordon diagnosed Claimant with work-related right hip pain, right sacroiliac joint dysfunction, multilevel lumbar spondylosis and low back pain. He opined that Claimant's left hip pain was unrelated to the November 29, 2017 work injury. Dr. Gordon concluded that Claimant reached MMI on September 1, 2020. He assigned an impairment rating for Claimant's low back and right hip. For maintenance care, Dr. Gordon recommended that Claimant continue Horizant 600 mg BID for right lower extremity neuropathic type pain which he "feels is due largely to the above documented right L5-S3 ablation procedure. Expected duration of medication is indefinite." (R. Ex. Q, p. 241). He opined that further physical therapy, chiropractic care, massage therapy, acupuncture or other type of passive modality would not benefit Claimant. Dr. Gordon did not specifically address Dr. Wakeshima's recommendation for bilateral facet injections.

28. Respondent filed a Final Admission of Liability (FAL) on March 30, 2021 admitting for post-MMI maintenance treatment pursuant to Dr. Gordon's DIME opinion.

29. Claimant subsequently sought treatment for her left hip with her primary care providers at Kaiser Permanente.

30. At an April 7, 2021 evaluation at Kaiser Permanente, Claimant reported that she had confirmed left labral tearing and that she had not been able to obtain treatment for her left hip through the worker's compensation claim. Claimant was referred to a hip specialist at Kaiser Permanente.

31. On May 12, 2021 Dr. Wakeshima noted Claimant experienced another delay in receiving her Horizant. Claimant reported increased neuropathic, low back, and hip region pain while off of the medication. Dr. Wakeshima noted that the DIME physician placed Claimant at MMI. He continued Claimant on Horizant, remarking that it helped with the neuropathic component of Claimant's pain symptoms.

32. Dr. Wakeshima attended a telephone conference with Claimant's counsel on December 14, 2021 and issued a note on the same date. He explained that Claimant's mechanism of injury could have put force on her the lumbar facets and in turn caused facetogenic low back pain. Dr. Wakeshima reiterated that the MRI films showed L4-5 and L5-S1 facet arthrosis. He suspected that Claimant's pain generator was most consistent with L4-5 and L5-S1 joint arthropathy pain, which he stated would be in a similar location as the SI joint, and, at times, could potentially mimic SI joint symptoms. He noted that it appeared that Dr. Gordon and Dr. Cebrian reviewed the MRI report, but not the actual

MRI film. Dr. Wakeshima explained that, on his last physical examination, Claimant demonstrated left greater than right lumbar region pain and tenderness with pain greatest with lumbar extension and lumbar rotation. Dr. Wakeshima continued to opine that Claimant's current back pain complaints are more consistent with facetogenic low back pain based on her most recent MRI films as well as her clinical presentation. He resubmitted his request for authorization of therapeutic bilateral L4-5 and L5-S1 facet joint injection to address facetogenic low back pain.

33. On January 10, 2022 Dr. Wakeshima explained that he wrote Claimant a prescription for Gabapentin to hold Claimant over until the Horizant was again authorized. He noted that Claimant had tried generic Gabapentin in the past, which was too sedating for Claimant compared to Horizant.

34. On January 21, 2022 Claimant reported to Dr. Wakeshima that she had been tolerating the Gabapentin without any adverse side effects, but that it had not been as effective as the Horizant in controlling her neuropathic pain symptoms. Dr. Wakeshima continued Claimant on Gabapentin as it was currently being authorized by Insurer. Dr. Wakeshima noted that the bilateral facet joint injections had been denied by Insurer. He disputed Dr. Cebrian's argument that it is common for pain in the hip secondary to femoroacetublar impingement to present with lumbar spine complaints, again stating that Claimant has radiologic findings of facet joint arthrosis as well as clinical findings suggestive of facetogenic low back pain in clinical examination.

35. On March 16, 2022 Claimant reported to Dr. Wakeshima that the Gabapentin was making her very sedated. She complained of 8/10 low back pain and right posterior lateral thigh and leg region pain. Dr. Wakeshima noted that he would refill Claimant's Gabapentin and switch to Horizant when authorized by Insurer. He noted that the Gabapentin was not as effective as Horizant for the Claimant, but was better than having no neuropathic pain medication at all. Dr. Wakeshima opined that Horizant use is related to Claimant's work injury and should be continued indefinitely under maintenance care.

36. Claimant returned to Dr. Wakeshima on April 18, 2022 reporting increased sedation issues with the Gabapentin compared to the Horizant. Claimant requested that Dr. Wakeshima resubmit his request for bilateral facet joint injections. Dr. Wakeshima informed Claimant that his request was denied and that she should discuss it with her attorney. Dr. Wakeshima again stated he would switch Claimant back to Horizant if authorized by Insurer.

37. On June 28, 2022 Claimant complained to Dr. Wakeshima of some knee swelling. Dr. Wakeshima informed Claimant that the fluid retention may be related to the Gabapentin and, if so, he would decrease the dosage.

38. On June 30, 2022 Claimant was evaluated at Kaiser Permanente and described that her left hip pain limited her ability to exercise. Claimant's primary care provider noted that Claimant had received an injection in her left hip in August 2021 and that Claimant was supposed to have had a three-month follow-up, which was recommended to have

occurred ten months prior. Claimant's Kaiser physician discussed the role of orthopedic follow-up and noted that Claimant had longstanding issues with hip pain.

39. Dr. Cebrian reviewed additional medical records and issued a second IME report dated January 13, 2022. He specifically addressed whether the prescription for Horizant and the request for bilateral facet injections at L4-5 and L5-S1 are medically reasonable, necessary and related. Dr. Cebrian opined that the recommended bilateral facet injections are not reasonably necessary or related. He again explained that Claimant's initial lumbar spine findings after the injury were specific to the right SI joint, she had a questionable response to the SI joint injections, there was subsequent expansion of lumbar spine complaints, and that examination was non-specific and not suggestive of facet-mediated pain. Dr. Cebrian noted that, on examination, Claimant had more prominent left-sided lumbar spine pain, which she did not have after her initial injury. Since the injury, Claimant has developed left-sided hip pain which he concluded is not causally related to the injury. He explained that it is common for pain in the hip secondary to femoral acetabular impingement (FAI) to present with lumbar spine complaints. Dr. Cebrian further noted that DIME physician Dr. Gordon did not recommend any facet injections. Dr. Cebrian continued to opine that Horizant should also be denied as there is not a claim-related neuropathic lesion. He noted that Horizant was being prescribed to Claimant in 2020 for non-claim related peroneal neuropathy, and that there have not been any new claim-related conditions which warrant its utilization under this claim.

40. Claimant testified at hearing that, while both the Gabapentin and the Horizant work for her symptoms, the Gabapentin makes her significantly more sedated and lethargic compared to the Horizant. Claimant wants to continue to take the Horizant as recommended by Dr. Wakeshima and Dr. Gordon. Claimant also wants to undergo the bilateral lumbar facet injections recommended by Dr. Wakeshima. Claimant testified that she has continuing left hip symptoms for which she has treated with her primary care providers. Claimant has not undergone left hip surgery.

41. Dr. Cebrian testified at hearing on behalf of Respondents as a Level II accredited expert in occupational medicine. Dr. Cebrian testified consistent with his IME reports and continued to opine that the recommended bilateral lumbar facet joint injections and the Horizant medication are not reasonable, necessary and related to Claimant's November 29, 2017 work injury. Dr. Cebrian testified that it does not make sense to perform bilateral lumbar injections when Claimant's initial complaints were to the SI joint. He further stated that Claimant has significant left hip complaints and pathology. He explained that left hip FAI can present with low back pain, groin pain, and abdominal pain, and that Claimant's left hip condition would result in pain radiating form the left hip to the lumbar spine, further confusing Claimant's presentation. Dr. Cebrian testified that his examination of Claimant was not consistent with facet-mediated pain. He testified that the recommended injections would not improve Claimant's pain complaints, even if such complaints were due to facet-mediated pain, as Claimant's left hip would continue to cause Claimant pain.

42. Dr. Cebrian explained that Horizant is a slow-release form of Gabapentin used to address nerve pain. He opined that the recommendation for Horizant is not reasonable, necessary or related to Claimant's work injury. He explained that Claimant was on a low

dose of Gabapentin in September 2018 for nerve pain that did not help her symptoms. Dr. Cebrian testified that the neurotomy would not result in leg complaints, and that Claimant's symptoms instead correlate with the peroneal nerve issue that is unrelated to this claim. He stated that a May 2019 EMG demonstrated a peroneal nerve issue in the lower leg, not the back. Dr. Cebrian testified that Claimant's symptoms do not follow the correct nerve patterns. He further opined that Claimant's medical records did not adequately document any improved function with Horizant. Dr. Cebrian acknowledged that Gabapentin is usually more sedating than Horizant. Dr. Cebrian further testified that numerous medications Claimant takes outside of her worker's compensation claim, including Wellbutrin, Buspar, Effexor, Imitrex, Amitryptiline and Trazadone, can cause fatigue and drowsiness.

43. The ALJ finds the testimony of Claimant and opinions of Drs. Wakeshima, Burke and Gordon, as supported by the medical records, more credible and persuasive than the testimony and opinion of Dr. Cebrian.

44. Claimant proved it is more probably true than not the Horizant medication and bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima, are reasonable, necessary and causally related to Claimant's November 29, 2017 work related injury.

45. Claimant proved entitlement to reasonable costs incurred in pursuing the Horizant and bilateral L4-5 and L5-S1 facet joint injections recommended by ATP Wakeshima. Respondent contested the medical benefits by denying authorization of such medical maintenance treatment. As Claimant has not received the Horizant or bilateral facet joint injections, the treatment as of the date of hearing is unpaid.

## CONCLUSIONS OF LAW

### Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

**Medical Treatment**

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). 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 v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When 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 District 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 v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

As found, Claimant proved it is more probably true than not that both the Horizant and the bilateral injections recommended by ATP Wakeshima are reasonably necessary and causally related to her industrial injury. Dr. Cebrian opined that Horizant is not reasonably necessary and causally related to Claimant's work injury because it is used to treat the symptoms of Claimant's peroneal injury, which is unrelated to the current claim. His opinion is credibly contradicted by ATPs Wakeshima and Burke, as well as DIME physician Gordon. The medical records document that Claimant reported increased low back and nerve pain after undergoing her work-related RFA procedure. Dr. Burke noted that experiencing neuritis after a RFA procedure is a common known occurrence, and prescribed Claimant Gabapentin to address the associated symptoms. Claimant was subsequently prescribed Horizant in lieu of Gabapentin to address those same symptoms. Dr. Gordon credibly opined that Horizant should be continued as maintenance medication for Claimant's right lower extremity neuropathic pain, which he felt was largely caused by the ablation procedure. Dr. Wakeshima specifically addressed Dr. Cebrian's IME report and credibly explained that the Horizant is being prescribed for Claimant work-related neuropathic pain. Dr. Wakeshima confirmed his conclusion by tapering Claimant off of Horizant, which ultimately resulted in a significant increase in Claimant's neuropathic pain.

Claimant consistently reported and credibly testified that, while effective for her pain at certain dosages, the Gabapentin has a significantly sedating effect. In comparison, the Horizant medication is as effective in treating her pain and has a less sedating effect on Claimant. Dr. Cebrian acknowledged that Gabapentin is usually more sedating than Horizant. While Dr. Cebrian noted that other medications Claimant is taking outside of the worker's compensation system can also have a sedative effect, there was no evidence that Claimant reported or experienced similar side effects from those medications when not taking the Gabapentin. Claimant demonstrated that she is able to identify the difference in the sedating effects of different medications, as she did with Gabapentin and Horizant. Dr. Wakeshima explained that he continues to prescribe Claimant Gabapentin for her work-related neuropathic pain specifically because Insurer ceased to authorize Horizant. As Horizant is used to address Claimant's work-related neuropathic condition and results in less severe side effects than Gabapentin, the preponderant evidence demonstrates that Horizant is reasonable, necessary and causally-related maintenance treatment.

The preponderant evidence also establishes that the bilateral L4-L5 and L5-S1 facet joint injections recommended by Dr. Wakeshima are reasonable, necessary and

causally-related maintenance treatment. Dr. Cebrian opined that the recommended injections are not reasonable, necessary or related due to Claimant's initial complaints regarding the SI joint, her current left hip complaints and pathology, and lack of exam findings. Dr. Wakeshima addressed these concerns, credibly disputing Dr. Cebrian's position. Claimant's initial complaints and treatment were focused on the SI joint and right hip. However, subsequent imaging revealed facet arthrosis at the L4-5 and L5-S1 levels, which was confirmed by Dr. Wakeshima's review of the MRI film. Contrary to Dr. Cebrian, who opined there were no findings of facet mediated pain on his examination, Dr. Wakeshima has credibly opined that, on his exam, Claimant had findings consistent with facet mediated pain. He credibly explained that L4-5 and L5-S1 joint arthropathy pain can potentially mimic SI joint symptoms, explaining why Claimant's initial complaints and treatment focused on the SI joint without much relief.

While, as stated by Dr. Cebrian, hip pain may present with lumbar spine complaints, the ALJ is persuaded by Dr. Wakeshima's credible opinion that the pain generator here is most likely bilateral L4-5 and L5-S1 facet arthropathy, for which there is objective evidence. Dr. Wakeshima has consistently recommended bilateral facet injections for therapeutic purposes as related to Claimant's work injury. Based on the totality of the evidence, bilateral L4-L5 and L5-S1 facet joint injections are reasonable, necessary and related treatment to relieve the effects of Claimant's work injury.

**Costs Under Section 8-42-101(5), C.R.S.**

Section 8-42-101(5), C.R.S. provides,

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

Respondent argues that Claimant failed to prove entitlement to reasonable costs under Section 8-42-101(5), C.R.S. because Claimant did not submit any bills or testimony into evidence to substantiate that Respondent received medical bills for the requested treatment and denied these bills, or that the bills were received and not paid by Respondent.

Respondent relies on *Regina Van Meter v. Dillion Companies, Inc.*, WC No. 4-781-504-01 (ICAO, Aug. 17, 2017). In *Van Meter*, the Panel affirmed an order that denied Claimant's request for costs under Section 8-42-101(5), C.R.S. At hearing, the Claimant submitted unpaid medical bills from her authorized provider related to maintenance medical treatment that she had obtained in the claim. The ALJ found that the treatment was reasonable and necessary, but denied the payment of incurred costs. The panel

agreed with the ALJ, finding that the bills submitted at hearing by the Claimant did not prove that the benefits were unpaid and contested. First, there was no evidence that the bills were received by Respondents and denied. Second, the bills were not overdue yet, meaning that they had not yet been unpaid.

The circumstances here are distinguishable from *Van Meter* and more similar to those in *William Fox v. The Kroger Company*, WC 4-144-756-002 (ICAO, July 19, 2021). In *Fox,* the ALJ concluded that a stimulator and psychological evaluation were reasonably necessary and related medical treatment. The ALJ further concluded that, pursuant to §8-42-101(5), C.R.S., the claimant was entitled to costs incurred in pursuing a psychiatric evaluation associated with evaluation of the appropriateness of a stimulator. On appeal to the Panel, the respondent argued that the ALJ erred in awarding costs under § 8-42-101(5), C.R.S., since there were no findings of fact that the psychological evaluation was "unpaid" at the time of the hearing. The respondent contended that the ALJ made no findings that a bill had been submitted to it by a provider for the psychological evaluation or that the respondent had failed to timely pay any bills related to the psychological evaluation.

The Panel disagreed, reasoning that the ALJ implicitly found that the psychiatric evaluation was both "unpaid" and "contested" by the respondent. The Panel reasoned,

> Based on the respondent's denial for authorization of the psychiatric examination, however, we conclude that the ALJ reasonably could infer that the respondent would not pay for such examination. That is, when a self-insured employer or insurer refuses to authorize maintenance medical treatment, then it also is stating that it is refusing to pay for such treatment, thereby resulting in any such treatment being "unpaid." The statute does not expressly require the claimant prove that bills are "unpaid," as is argued by the respondent. To require the claimant to show an "unpaid" bill, as the respondent is arguing here, would be to force him to undergo the contested treatment at his own expense with the potential of never recovering such payment. Thus, while the claimant here could have proved "unpaid" maintenance medical benefits by introducing "unpaid" bills for such treatment, nowhere in the plain language of § 8-42-101(5), C.R.S., is this expressly required. Further, while § 8-42-101(5), C.R.S., clearly places the burden on the claimant in this case to prove that the medical maintenance benefits are "unpaid," to limit him to only doing so by introducing "unpaid" bills would be to frustrate the efforts of injured workers in quickly resolving disputes over maintenance medical benefits, contrary to the clear intent of the statute.

(Id.).

The Panel in *Fox* distinguished *Van Meter*, noting that in *Van Meter*, while the claimant presented invoices showing outstanding amounts owed, the invoices showed a date of April 27, 2016. The Panel in *Van Meter* thus ruled that if these bills were not

received until April 27, 2016, then payment was not due until 30 days after receipt of the bill pursuant to WCRP 16-12 (A)(2) and (3), which was after the May 3, 2016, hearing in that case. The Panel in *Van Meter* further noted that while the respondent contested the claimant's entitlement to future Oxycodone prescriptions, there was no evidence in the record that the respondent contested prior prescriptions or failed to timely pay for Oxycodone, since payment for the only prescription in dispute was not due until after the date of the hearing. The Panel in *Fox* distinguished *Van Meter*, reasoning that in *Fox,* the claimant never underwent the requested psychiatric evaluation because respondent would not authorize it.

Here, Dr. Wakeshima, an ATP, recommended Horizant and bilateral facet injections as medical maintenance treatment. The record establishes, and Respondent does not dispute, that such treatment was denied by Respondent. Accordingly, the medical benefits have been contested. Claimant has not yet undergone the bilateral facet injections or received the Horizant prescription, meaning such unperformed treatment is unpaid. *See Fox*, *supra* (§8-42-101(5), C.R.S. could reasonably include in the category of an "unpaid" maintenance medical benefit a procedure that had not yet been performed and an ALJ under certain circumstances could reasonably could infer that since the respondent would not authorize the psychiatric evaluation, then it also would not pay for such a benefit).

This analysis is in line with the legislative intent of §8-42-101(5), C.R.S., as discussed by the Panel in *Fox*,

> Similarly, based on the plain and ordinary meaning of the statutory language contained in § 8-42-101(5), C.R.S., its intent is to address or include disputes surrounding a common type of maintenance medical benefit that occurs due to a contest. For example, a maintenance medical procedure that is requested but denied through a respondent's contest typically will remain unperformed until the contest is resolved. It also is typical that a medical treatment that remains unperformed will not be subject to being paid. However, the respondent's proposed reading of § 8-42-101(5), C.R.S., attempts to exclude all such medical benefit contests of this type on the basis that because the medical procedure was not yet performed and, therefore, not billed, then it is not covered by the statutory reference to "unpaid." In such a circumstance, the respondent could proceed to contest requests for maintenance medical authorization with little need to worry over the "reasonable costs" referenced in the statute. In this regard, the legislative intent of § 8-42-101(5), C.R.S., would not be achieved.

(Id.).

Here, the preponderant evidence establishes that Claimant is entitled to the reasonable costs incurred in pursuing the Horizant medication and L4-5 and L5-S1 bilateral facet injections that are unpaid and contested by Respondent.

## ORDER

It is therefore ordered that:

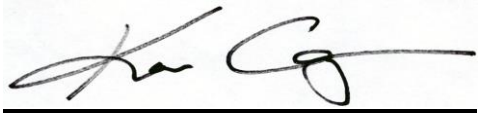
1. Respondents shall authorize and pay for the Horizant medication and bilateral L4-L5 and L5-S1 facet joint injections recommended by ATP Wakeshima.

2. Pursuant to §8-42-101(5), C.R.S., Claimant is entitled to reasonable costs incurred in pursuing the Horizant medication and L4-5 and L5-S1 bilateral facet injections. Claimant shall submit a bill of costs itemizing the incurred costs incurred within 30 days of the date of this order.

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: November 16, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

## ISSUE

- Whether Respondents proved by clear and convincing evidence that Dr. Bissell's impairment rating was incorrect with respect to non-scheduled impairment and by a preponderance of evidence with respect to scheduled impairment.

## FINDINGS OF FACT

1. Claimant worked for Employer as a farm laborer/mill operator for Granada Feeders. The Employer operated a feedlot.

2. Claimant suffered an admitted injury to his left ankle on July 2, 2019 when he fell from a rotted building beam and fell 14 to 15 feet fracturing his left ankle. The Claimant also had low back pain immediately following the incident.

3. Claimant was taken by ambulance to Lamar emergency room where he had x-rays and scans showing a fracture of his ankle. He was then transferred to Parkview Hospital. He was diagnosed with a compression fracture of L-4 and a fracture of the talar head in his ankle.

4. He was seen by Dr. Moore, a podiatrist and put in a cast for three months. He then started physical therapy and utilized a walking cast.

5. Claimant came under the care of Dr. Hudson at High Plains Community Health Center. The initial records with Dr. Hudson are mostly illegible. However, in reviewing the later records from his office, they consistently document the compression fraction and the fracture in the ankle, which he treated with Diclofenac, 75 mg and physical therapy.

6. After conservative care failed, he ultimately underwent a subtalar joint arthrodesis on February 5, 2021, which was performed by Dr. Maurer.

7. On May 25, 2021, Dr. Mauer noted that Claimant had resumed physical therapy and he released him from care to follow up in one year, post-op. Claimant next saw Dr. Mauer on February 7, 2022. At that time, Claimant stated that he had improved 50% since the time of surgery. He experienced sudden sharp pains in his ankle had had swelling. At the time of the visit, he had pain of 2 out of 10.

8. With respect to Claimant's L4 compression fracture, he was seen by physician's assistant Andrew Glass at Parkview Neurological Services between September 11, 2019 and January 10, 2020. On January 10, 2020 it was noted that overall, the claimant was doing well. He did have a "small amount" of pain when leaning forward, otherwise he was largely asymptomatic. Mr. Glass did note that there was no radiating leg pain. He was discharged as of that date.

9. He was referred to Dr. Raschbacher for an IME on October 15, 2021 by Respondents. Dr. Raschbacher determined that Claimant was at MMI as of that date. He determined that his rating was 9% based on loss of range of motion impairment for the ankle. With respect to the lumbar range of motion, he determined that the measurements he took were non-physiologic and should not be including in the rating. He did assign a table 53 rating of 5% and he assumed a reasonable amount of loss of range of motion for the lumbar spine would be 1% for a total of 6% for the lumbar spine.

10. After review of Dr. Raschbacher's IME report, Dr. Hudson, in a questionnaire dated November 23, 2021, agreed with the MMI date that Dr. Raschbacher assigned. Since Dr. Hudson was not level II accredited, he was referred to Dr. Kurz for an impairment rating.

11. Dr. Kurz did a rating on December 30, 2021. He determined that his rating was 6% based on loss of range of motion impairment for the ankle. With respect to the lumbar range of motion, he determined since the Claimant had full range of motion in all directions, that he had no impairment for loss of range of motion. He did have a table 53, I. A. impairment based on the compression fracture in the category of 0% to 25% which equates to 5% whole person impairment. This part of the rating was based on the CT scan that was performed on July 2, 2019 that showed disc height loss of 20% to 30% of L4.

12. Dr. John Bissell performed a DIME on April 8, 2022. His ankle range of motion measurements were very different from Dr. Kurz. He noted that the Claimant was probably having a "bad day" on the date of the IME. He found that claimant had 17% for loss of range of motion. He also added on 5% lower extremity impairment for subtalar arthritis based on CDLE Impairment Rating Tips #11 for moderate subtalar arthritis. Combining the impairments he arrived at a 21% impairment rating for the lower extremity.

13. With respect to his back impairment, Dr. Bissell gave Claimant a 7% impairment for table 53 impairment instead of 5% for 0% – 25% compression fracture of L4. For this measurement, he references the CT scan for the abdomen and pelvis. However, in reviewing that CT scan, there is no specific reference to loss of disc height. (Claimant exhibit C, pp. 65 – 66). The accurate reference to the disc height is contained in the Lumbar CT scan. (Claimant's Exhibit 6, p. 61). The accurate reference in that report is 20% to 30% loss of height of L4. Instead of discussing this range, he utilized the higher end of the range, giving the Claimant a 7% impairment rating instead of a 5% impairment rating. He also gave him impairment for loss of range of motion of 14% for a total whole person rating of 20% for the lumbar spine. This is quite different than the normal range of motion measured by Dr. Kurz.

14. As testified by Dr. Raschbacher, Dr. Bissell did not explain why he accepted the very limited range of motion as compared to the range of motion as measured by Dr. Kurz. This was an error in the opinion of Dr. Raschbacher.

15. Similarly, there is a discrepancy between the range of motion measurements of the ankle taken by Dr. Bissell as compared to the measurements taken

by Dr. Hudson and Dr. Mauer, post-surgery. Dr. Hudson noted full range of motion of the ankle on February 23, 2022. (Respondents' Exhibit B, p. 59). Dr. Mauer also noted normal non-painful range of motion on February 7, 2022. (Respondents' Exhibit D, p. 119). Dr. Bissell instead found Claimant had 17% impairment due to abnormal motion of the hind food and an additional 5% for subtalar arthritis. (Respondents Exhibit A, p. 10). Dr. Bissell does not reconcile his findings with that of either Dr. Kurz or Dr. Raschbacher's range of motion findings. Nor does he explain why he applied the rating tip for arthritis impairment other than to note he was applying it to this rating. Without providing an explanation for inclusion of this additional impairment, the ALJ is unable to determine if it is appropriate. However, it light of the other deficiencies of Dr. Bissell's impairment determinations, the ALJ finds that Dr. Bissell's overall impairment determinations including the inclusion of arthritis pursuant to the rating tips are not credible.

## CONCLUSIONS OF LAW

### A. Burdens of Proof regarding impairment

Whether a Claimant's impairment represents a scheduled or whole person impairment is a threshold issue that must be addressed before one can determine the weight to be accorded to the DIME's rating. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance. The Claimant did not assert that the ankle injury was a non-scheduled impairment and therefore any challenge to Dr. Bissell's ankle impairment is subject to a preponderance burden of proof.

The Claimant's lumbar spine impairment clearly is not on the schedule and Respondent's burden of proof to overcome the DIME impairment for the spine is by clear and convincing evidence.

### B. Respondent overcame the DIME's whole person impairment rating.

A DIME's determinations regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Respondents have met their burden to overcome DIME physician Dr. Bissell's opinions on Claimant's lumbar spine permanent impairment by clear and convincing evidence.

Respondents' evidence clearly establishes and proves that it is highly probable that Dr. Bissell erred in reaching his determination that the Claimant had a 20% whole person impairment rating. Dr. Bissell documented in his DIME report his review of the records for Dr. Hudson, Parkview Neurosurgical Services, Dr. Maurer, Dr. Raschbacher, and Dr. Kurz. Dr. Bissell acknowledges that his range of motion measurements are vastly different than those of Dr. Kurz. He also acknowledges that the range of motion measurements taken by Dr. Raschbacher were determined to be non-physiologic. He even acknowledges the opinion of Dr. Hudson that claimant is malingering. However, nowhere in his report does Dr. Bissell address or reconcile the differences in the findings of the authorized providers, who examined and treatment claimant on multiple occasions and following his healing progress from the date of injury through his placement at MMI, with the drastically different findings at the DIME appointment. Nor does Dr. Bissell provide any objective medical basis or reasoning to explain the dramatic difference, other than speculation that Claimant was having a "bad day" on the date of the Division IME and a "good day" when he was examined by Dr. Kurz. As testified to by Dr. Raschbacher, the loss of range of motion that he obtained as well as obtained by Dr. Bissell was non-physiologic. The ALJ find's Dr. Raschbacher's opinions to be credible and persuasive. Dr. Bissell's whole person impairment is clearly incorrect.

**C. Respondents proved by a preponderance of evidence that the Claimant's scheduled impairment was accurately determined by Dr. Kurz.**

As discussed above, Dr. Bissell's range of motion for the Claimant's ankle also differed greatly from Dr. Raschbacher's measurements, as well as Dr. Kurz'. There was no attempt to reconcile the differences in the discrepancies by Dr. Bissell. I conclude that the range of motion for the ankle was correctly determined by Dr. Kurz to be 6% of the lower extremity.

## ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on Dr. Kurz' 5% whole person rating. Insurer shall also pay Claimant based on a scheduled rating of 6%. Insurer may take credit for any PPD benefits previously paid to Claimant on this claim.

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 this order is 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: November 16, 2021

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

## PROCEDURAL BACKGROUND

W.C. No. 5-153-633-003 involves an admitted injury claim for a date of injury of October 23, 2020 with the Employer. A Petition for Reopening was previously heard in this case by ALJ Lamphere on March 10, 2022. The Petition was denied by Order issued on April 13, 2022. (Respondent's Exhibit L). W.C. No. 5-202-731-001 involves a new claim for an injury to his right shoulder for a date of injury of April 7, 2022 when he turned his head to cover the speaker on his radio with his cheek and reached around his back to turn down the volume on the radio.The claims were consolidated for hearing in a prehearing order dated August 15, 2022.

## ISSUES

- Did Claimant prove the claim 5-153-633 should be reopened based on a change of condition?
- In the alternative, did Claimant suffer a new compensable injury on April 7, 2022 in W.C. No. 5-202-731.
- Did Claimant prove entitlement to medical benefits including the surgery recommended by Dr. Weinstein?

## FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer. Claimant sustained an admitted injury on October 23, 2020 to his right shoulder. This is the subject matter of W.C. No. 5-153-633. The claim was admitted and the Claimant underwent an arthroscopic subacromial decompression and right rotator cuff repair with Dr. David Weinstein on January 2, 2021. The claim was closed by final admission on September 28, 2021.

2. Claimant applied for a hearing to reopen this claim and the hearing was held on March 10, 2022. The reopening was denied by order of Judge Lamphere dated April 13, 2022. (Respondent's Exhibit L). The ALJ concluded there was insufficient objective evidence to substantiate that Claimant had experienced a worsening of condition. This was based on the medical records of Dr. Weinstein and Dr. Bradley that it was well established that Claimant had popping in the right shoulder at the time he was discharged from Dr. Weinstein's care on June 2, 2022.

3. At the time of the prior hearing with Judge Lamphere, Dr. Castrejon had prepared an IME report dated February 2, 2022, which was submitted by Claimant. The report was considered by the ALJ. In that report Dr. Castrejon noted in the physical examination portion that there was a painful pop appreciated with elevation of the shoulder and internal or external rotation. Dr. Castrejon concluded that the Claimant was

experiencing a significant worsening. However, as noted above, the Administrative Law Judge did not find this opinion to be persuasive.

4. Dr. Castrejon also opined that the Claimant should be limited to no use of the right upper limb. (Respondent's Exhibit 1, p. 7).

5. Subsequent to the hearing with Judge Lamphere, Claimant was again evaluated by Dr. Castrejon on August 29, 2022, via telemedicine. (Claimant's Exhibit 1). In this new report, Dr. Castrejon, contrary to his opinion regarding the Claimant's worsening in February, opines that "In fact, over time the claimant admitted the popping was becoming less of a problem." (Claimant's Exhibit 1, p. 7). In this report, Dr. Castrejon now focuses on the new incident on April 7, 2022 when the claimant slightly elevated then internally rotated his right shoulder in order to reach the volume button on his two way radio an reported having experienced a substantially more prominent "pop" to the superior and anterior aspect of his right shoulder that was accompanied by severe pain. After analyzing the mechanism of injury, Dr. Castrejon stated "This movement resulting in an aggravation to the rotator cuff mechanism of the right shoulder that has left claimant with pain that is contributing to severe loss of function to the right upper limb". (Id. p. 8).

6. The Claimant testified at hearing that on April 7, 2022 he was performing his usual job duties, checking on inmates during the night, when a call came over his radio. It was very loud, so he covered the speaker with his cheek and reached behind his back with his right hand to turn down the volume on his radio. At that time he felt an immediate onset of pain and heard a pop in his right shoulder. He also testified that although he was in pain, he had a duty to complete his job duties and did so before he reported to lunch. At that time, Officer Casillas saw the Claimant and escorted him to Captain Vogan's office to report the injury.

7. He was seen at the ER at Parkview Health System on April 7, 2022. He gave a history to the doctor that he had an "ongoing "pop" in his shoulder when he lifts and move in certain ways. Tonight he states he moved to talk into his radio microphone and felt a pop in his R shoulder that has radiated to base of neck and R shoulder that has radiated to base of neck an R shoulder with numbness in arm/hand. He states this has happened several times but seems more intense than in the past." (Respondent's Exhibit B, p. 10).

8. After x-rays were taken, Claimant was reassessed by Dr. Ostrand. He was improved. He had increased range of motion, was able to abduct and adduct his shoulder and stated that his paresthesias were essentially gone.

9. Claimant was next seen by at Concentra on April 8, 2022 by Physician's Assistant Daniel Czarniawski. He took a history that Claimant had a new work injury to his right shoulder. Mr. Czarniawski states: "Wearing a radio and he turned his head towards his shoulder, reached behind his back and felt a pop in his shoulder. Severe pain. Limited ROM. Went to ED and XR done. Requested records. Has been off work since." (Claimant Exhibit 3, p. 17).

10. Claimant was seen by Dr. Jon Erickson for an IME at the request of Respondent. (Respondent's Exhibit C). Claimant reported that on April 7, 2022 he was working the midnight shift and attempted to adjust the volume on his belt radio, which was clipped over his right rear pocket. Claimant reported he twisted with his right arm and felt a pop with the onset of severe pain. Claimant reported that this is a maneuver he does frequently. Dr. Erickson opined that the overall conclusion of the April 19, 2022 MRI, was there was no evidence of any acute trauma and the noted pathology was mild. Dr. Erickson opined that "reaching behind one's back is a motion that most individuals likely do several times each day, most often during bathing or dressing. This motion does not require any significant tensile loads on the tissues of the shoulder and should not, under normal circumstances, cause an injury." Dr. Erickson stated he reviewed three surveillance videos of the alleged event and saw no incident where Mr. Romero suffered an incapacitating injury. (Ex. C, p. 28).

11. I find that the opinions of Dr. Erickson regarding the incident of April 7, 2022 to be more persuasive than the opinions of Dr. Castrejon as to whether the Claimant sustained a new injury to his right shoulder on that date. Based on Dr. Erickson's opinions I find that the Claimant did not sustain a new work injury on April 7, 2022.

12. I further find that the Claimant did not sustain a worsening due to the natural progression of his admitted and closed work injury of October 23, 2020 (W.C. 5-153-633). While Claimant may have experienced a temporary flare-up of his symptoms due to the "pop" that occurred on April 7, 2022, I find that Claimant's current symptoms/condition and restrictions are consistent with and similar to his symptoms/condition and restrictions as they existed at the time of the prior March 10, 2022 hearing. Claimant's symptoms on February 1, 2022 were documented to include mild atrophy of the supraspinatus, severe disabling "pops" followed by pain for days, with pain extending to his right side of his neck and into the shoulder blade, pain of 6-7/10 despite no use of his limb, shoulder girdle muscle weakness, positive impingement and drop arm testing. These symptoms and Claimant's examination resulted in a concern for internal derangement (retear) in February 2022, and resulted in Claimant being provided work restrictions of no use of his right upper limb and the recommendation for additional evaluation and treatment by Dr. Weinstein, to include probable surgery. This evidence was presented at and Claimant's complaints adjudicated at the prior March 10, 2022 hearing. As such, I find that Claimant has failed to prove a worsening of his condition.

## CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Renz v. Larimer County, 924 P.2d 1091 Colo.App. 1996).* The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate

consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

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

A claimant suffers a compensable injury if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove a compensable aggravation. A purely symptomatic aggravation is sufficient for an award of benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition. If the pain triggers the need for medical treatment or causes a disability, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). However, the mere fact that a claimant experiences symptoms during or after work activities does not necessarily establish a compensable injury. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). Where, as here, the pre-existing condition results from a prior industrial injury, the ALJ must determine whether the recurrent pain is "a logical and recurrent consequence of the original injury," or a compensable "aggravation" giving rise to a new claim. *F.R. Orr Construction, supra,* at 968.

Based on the opinions of Dr. Erickson, whose opinions are credible, there has been no change in Claimant's condition since MMI or since the time of the hearing before Judge Lamphere, due to the natural progression of Claimant's injury. As such, the request to reopen that claim is denied. Similarly, the Claimant has failed to sustain his burden of proof that he sustained a compensable injury on April 7, 2022 arising out of and in the course and scope of his employment.

## ORDER

It is therefore ordered that:

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

2. Claimant's claim in W.C. No. 5-164-953 for a February 17, 2021 injury is denied and dismissed.

3. Claimant's request for surgery with Dr. Weinstein is denied and dismissed.

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

DATED: November 18, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

## ISSUES

- Did Claimant suffer a compensable injury arising out of employment on February 1, 2022?

- If the claim is compensable, was the treatment provided by Brendon Madrid, NP at Concentra on April 18, 2022 reasonably necessary and authorized?

## FINDINGS OF FACT

1. Claimant worked as a parts sales manager at one of Employer's retail stores.

2. Claimant suffered multiple injuries in a fall at work on February 1, 2022. At the time of the accident, Claimant was unpacking inventory from a pallet of inventory items that had been delivered earlier that day.

3. The store receives weekly deliveries, typically consisting of 1-4 pallets of goods. Each delivery usually includes a mix of vehicle parts and other automotive-related items such as batteries, fluids, and cleaning supplies. Most items are packed inside a metal cage, but occasionally totes or boxes are stacked on top of the cage. Each cage and any associated items are wrapped with an industrial-strength plastic wrap and placed on a pallet.

4. Claimant is a veteran with a service-connected disability. She previously underwent a right leg above-the-knee amputation and now utilizes a prosthesis for ambulation. Claimant has had problems with the fit and function of the prosthesis and has been involved in a lengthy conflict with the Veterans Administration (VA) to have it corrected. A desire to obtain better treatment for the residual limb and prosthesis was a major factor in Claimant's decision to relocate to Colorado in 2021.

5. Employer provided job modifications to account for Claimant's physical limitations. The modifications were formalized on January 3, 2022 as follows: "no climbing ladders, needs to take a break when business allows, no lifting batteries." The store management informally provided similar accommodations before January 3, 2022.

6. There is no question Claimant fell at work on February 1, 2022 and suffered injuries. The dispute centers on whether the fall "arose out of" Claimant's employment.

7. The parties have substantially different theories about how the fall occurred. Claimant testified she was unpacking items from a pallet after a coworker had cut and removed the plastic wrap. Claimant reached for a box that was stacked atop the cage. When she tried to step forward on her right leg (the leg with the prosthesis), she "felt something pull" and fell. Claimant hit her head and briefly lost consciousness. She awoke

on the floor, surrounding by automotive parts. When she regained consciousness, her manager (Mr. B[Redacted]) was shaking her shoulder and asking if she was okay. Claimant tried to get up but "I felt my right leg get pulled again. And that's when I saw the plastic wrap, and I had to untangle my leg." Mr. B[Redacted] then helped Claimant get up and into a nearby chair. Claimant then noticed the foot on her prosthetic leg was angled inward.

8. Mr. B[Redacted] was working in an adjacent area of the store when Claimant fell. He heard "a big bang, like a bunch of totes hit the floor." Mr. B[Redacted] ran to the back of the store and saw Claimant "laying on the ground with a bunch of parts laying on the floor." An overturned chair was next to her. Claimant appeared unconscious. Mr. B[Redacted] quickly knelt down, shook Claimant's shoulder, and asked if she was okay. Claimant opened her eyes, and Mr. B[Redacted] helped her to the chair. Claimant mentioned her foot was twisted. Mr. B[Redacted] looked at Claimant's foot, which he had not noticed up to that point. Mr. B[Redacted] agreed it appeared twisted inward.

9. Mr. B[Redacted] testified he saw no plastic wrap on the floor or on Claimant's prosthesis after the accident.

10. Mr. B[Redacted] helped Claimant to her car so she could go to the VA clinic and have the prosthesis evaluated. He took photographs of Claimant's prosthesis, although they were not saved to his phone, for unknown reasons.

11. The store manager, JQ[Redacted], was on the road returning from another store at the time of the accident. Mr. B[Redacted] spoke with Mr. JQ[Redacted] about the accident after Claimant had left. Mr. JQ[Redacted] completed an Employer's First Report of Injury based on the information he received from Mr. B[Redacted]. The report described the accident as "The EE was in the back stock room pulling items off a pallet. [She] was found on the floor. [She] was unresponsive for approximately 20 seconds." Mr. JQ[Redacted] did not contact Claimant to discuss the accident.

12. Claimant was seen at the VA clinic in Pueblo the afternoon of February 1, 2022. He was referred to physical therapy and given temporary parts until the prosthesis could be fully repaired or replaced. In the meantime, the provider recommended Claimant limit any work duties involving standing and walking.

13. Claimant spoke to an adjuster with Insurer's TPA by telephone on February 2, 2022. The adjuster documented Claimant's description of the accident as: "Unloading the truck and the person prior who cut the wrap. He did not know wire[1] had wrapped around prosthetic. He fell with boxes and snapped knee joint and bruising of left hip." Claimant stated the VA was willing to treat his injuries, but the adjuster told Claimant "to hold at this time."

14. Claimant saw NP Brendon Madrid at Concentra on March 11, 2022. Based on documents completed at the initial appointment, the ALJ infers Concentra is a

[1] The term "wire" is probably a typographical error, as Claimant credibly testified he described plastic wrap rather than wire.

designated provider for Employer. When asked how the injury occurred, Claimant stated, "On 02/01/2022 was unloading a shipment when coworker took wrap off and then got caught up in [her] prosthesis [sic] leg. Fell with three boxes of auto parts and was knocked unconscious." Claimant reported ongoing injury-related symptoms including headaches, low back pain, and left wrist pain. Mr. Madrid took Claimant off work and made several referrals for evaluations and treatment.

15. Claimant saw Mr. Madrid again on April 18, 2022. Mr. Madrid maintained Claimant's work restrictions and scheduled a follow-up appointment after additional tests were completed.

16. Employer's store manager, JQ[Redacted], testified he observed Claimant fall on one prior occasion at work. Claimant actually started to fall but Mr. JQ[Redacted] caught her. Mr. JQ[Redacted] testified Claimant stated her prosthesis gave out. On rebuttal, Claimant testified her leg had become caught up on a floor mat, which caused the fall.

17. There was no persuasive evidence of another episode of Claimant's leg "giving out" or causing her to stumble or fall during her employment dating to May 6, 2021.

18. Employer's district manager, RC[Redacted], confirmed that Claimant's formal job duties include unpacking pallets of inventory. Because the only specific accommodations approved by HR were no lifting over 50 pounds and no ladders, Mr. RC[Redacted] "would expect [Claimant] to work truck other than 50 pounds and put things on ladders."

19. The persuasive evidence shows unloading pallets was a part of Claimant's job, notwithstanding the parties' disagreements about whether she "should" have been doing it or was "ordered" to do so.

20. Claimant proved the February 1, 2022 fall "arose out of" her employment. Claimant's description of the accident is generally credible. Specifically, the ALJ credits Claimant's testimony that a small piece of plastic wrap was on her prosthesis immediately after the accident. The credibility of Claimant's testimony is bolstered by her consistent description of being caught up in wrapping from the pallet of inventory, including to the adjuster the next day. Claimant's foot probably became tangled or she slipped on the plastic wrap, which caused her to fall. The ALJ by no means intends to suggest that Mr. B[Redacted]'s testimony was untruthful. Rather, the ALJ infers he simply did not notice the small piece of plastic wrap on Claimant's leg in the brief period while Claimant was lying on the floor and he was helping her up.

21. Respondents' argument that Claimant's fall was precipitated by a purely personal condition*, i.e.*, the defective prosthesis, is speculative and not probable based on the evidence presented.

**22.** Claimant proved the treatment provided by Brendon Madrid, NPC at Concentra was reasonably needed and authorized, including the April 18, 2022 appointment.

## CONCLUSIONS OF LAW

### A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "course of employment" merely requires that an injury occur within the time and place limits of the employment and during an activity that had "some connection" with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The "arising out of" element is narrower, and requires a sufficient causal nexus between the injury and the job. An injury "arises out of" the employment when it originates in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is not essential that the claimant be performing an obligatory job function or an activity that provides a specific benefit to the employer at the time of the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Rather, the question is whether the activity "is sufficiently interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996).

The mere fact that a claimant suffers an injury at work does not automatically mean the injury "arose out of" their employment. *City of Brighton*, *supra*. When an injury is precipitated by a pre-existing, nonwork-related condition, the injury is only compensable if a "special hazard" of employment combines with the pre-existing condition to cause or increase the degree of injury. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Whether an injury arises out of and in the course of employment are questions of fact for the ALJ, based on the totality of circumstances. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

As found, Claimant proved the February 1, 2020 tissue accident "arose out of" her employment. Claimant's description of the accident is generally credible. Specifically, the ALJ credits Claimant's testimony that a small piece of plastic wrap was on her prosthesis immediately after the accident. The credibility of Claimant's testimony is bolstered by her consistent description of being caught up in wrapping from the load of inventory. Her foot probably became tangled or slipped on the plastic wrap, which caused her to fall. This is by no means intended to suggest that Mr. B[Redacted]'s testimony was untruthful. Rather, the ALJ infers he simply did not notice the small piece of plastic wrap on Claimant's leg in the brief period while Claimant was lying on the floor.

Respondents' theory that Claimant's fall was precipitated by a purely personal condition, *i.e.*, her prosthesis, is speculative and not probable based on the evidence presented. Accordingly, the "special hazard" rule is inapplicable.

## B. Medical benefits

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of a compensable injury or occupational disease. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant proved the treatment received from Mr. Madrid at Concentra, including the April 18, 2022 office visit, was reasonably needed to cure and relieve the effects of the compensable injury. Mr. Madrid is also authorized, as Concentra is a designated provider for Employer.

## ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits based for injuries sustained on February 1, 2022 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the April 18, 2022 office visit with Brendon Madrid, NP at Concentra.

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

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

DATED: November 18, 2022

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

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury.

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

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period August 11, 2021 through March 15, 2022.

5. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 16, 2022 through May 4, 2022.

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

7. Whether Insurer is a proper party for Claimant's claim based upon the effective coverage date of the Workers' Compensation insurance policy with Employer.

8. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on August 10, 2021.

## FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Driver of medical marijuana. On July 27, 2021 Claimant suffered an infection in his right elbow and visited the emergency department. He underwent treatment for cellulitis, but was not diagnosed with any fracture. Claimant received an antibiotic in the form of cephalexin.

2. On August 10, 2021 Claimant planned to use a power washer to clean vans at Employer's warehouse in preparation for the following day's deliveries. Claimant remarked that he had to pull a cord to start the power washer. He commented that he has consistently had trouble starting the machine without assistance. Claimant pulled the cord

numerous times but could not start the equipment. On his final attempt he "gave a real big pull" and heard a loud pop in his right elbow.

3. Claimant mentioned the incident to a warehouse employee named Colin and went to the SCL Emergency Room for treatment. He was diagnosed with a closed fracture of the olecranon process of the right ulna. On August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021. He assigned restrictions of "no right arm work until cleared by ortho or work comp."

4. Claimant sent a text message to his manager JG[Redacted] stating that he had broken his elbow at work. He inquired whether Employer had Workers' Compensation insurance coverage. Mr. JG[Redacted] directed Claimant to contact Employer's Human Resources employee VD[Redacted] about the matter.

5. On August 11, 2021 Claimant reported his right elbow injury to Ms. VD[Redacted]. She directed him to Dee Jay Beach, D.O. at Colorado Occupational Medicine Physicians. Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. After a physical examination, Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He limited Claimant to modified duty work with no use of the right upper extremity. Dr. Beach recommended an MRI and referred Claimant to surgeon Lucas G. Schnell, D.O. for a consultation.

6. On August 11, 2021 Claimant also completed an Incident Report for Employer. He reported that he was pulling a cord to start a power washer in an attempt to clean his work van. As Claimant pulled the cord, he experienced a pop in his right elbow. The Incident Report specified that Claimant contacted Mr. JG[Redacted] and went to an emergency room for treatment.

7. On August 18, 2021 Claimant visited Dr. Schnell at the Center for Spine & Orthopedics. Dr. Schnell assigned restrictions of "desk work only." He ordered an MRI of Claimant's right elbow. On the following day, Dr. Beach concurred with the assigned work restrictions.

8. On August 21, 2021 Claimant underwent an MRI of his right elbow. The MRI revealed "complete to near complete detachment of the triceps tendon from its olecranon insertion with 4mm proximal retraction."

9. On August 23, 2021 Claimant visited Dr. Schnell for an examination. Dr. Schnell reviewed Claimant's MRI and conducted a physical examination. He diagnosed Claimant with a right complete distal triceps tendon insertion rupture. Dr. Schnell recommended surgery in the form of a left open distal triceps tendon repair. He prohibited Claimant from using his right arm until after surgical intervention.

10. On September 2, 2021 Dr. Beach noted that Dr. Schnell recommended surgical repair of Claimant's torn right triceps tendon. However, insurance had not authorized the surgery and was contesting the claim. Dr. Beach continued Claimant's

work restrictions of "computer/desk work only." He also directed Claimant to continue wearing a right arm sling.

11. On September 14, 2021 Insurer filed a Notice of Contest denying Claimant's Workers' Compensation claim. The denial was based on "pre-existing active condition same body part."

12. Claimant was unable to obtain coverage for the surgery recommended by Dr. Schnell. He thus procured Medicaid through the Colorado Department of Health Care Policy & Financing.

13. Subsequent to the Notice of Contest, Employer provided modified work for Claimant. However, Claimant explained that some of his duties exceeded the medical restrictions that essentially required desk work. Employer decreased Claimant's work hours.

14. On September 15, 2021 Dr. Beach advised Claimant to continue his current work restrictions. He noted there would be no follow-up appointments until Insurer approved the claim.

15. On November 2, 2021 Dr. Schnell performed an open distal triceps repair on Claimant's right upper extremity. Dr. Schnell noted that Claimant had suffered a work-related injury to his right elbow in August, 2021. An MRI had confirmed a small, full-thickness tear of the distal triceps.

16. On November 29, 2021 Claimant began receiving physical therapy through Select Physical Therapy for his right upper extremity. The notes reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow. He was assessed with a spontaneous rupture of other tendons of the right elbow. The record reveals that Claimant continued to undergo physical therapy through May 3, 2022. Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00.

17. On January 19, 2022 Dr. Schnell's assistant, Kandace Hudson, PA-C continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. On March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

18. On March 15, 2022 Employer terminated Claimant's employment. Employer explained that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

19. In response, Claimant explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked

that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant generally denied the truth of the allegations in Employer's Termination Letter and stated that he has not been pursued by any person from Coda with charges of sexual harassment.

20. Since his termination, Claimant has not sustained regular employment. He remarked that he is still limited by his right arm because it is less functional than it was before his work injury.

21. On May 4, 2022 Dr. Beach issued a closing report regarding Claimant's right elbow injury. Although he noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Dr. Beach also discharged Claimant from care and determined that he reached Maximum Medical Improvement (MMI) on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

22. Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his treatment. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totaled $6,725.83 as of August 16, 2022.

23. For the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an Average Weekly Wage (AWW) of $757.79.

24. For the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The period August 13, 2021 through March 11, 2022 totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Indemnity benefits of $5,216.38 at a TPD rate of 66.66% totals $3479.33.

25. Multiplying an AWW of $757.79 by the seven-week period from March 16, 2022 through May 4, 2022 yields a total of $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% equals $3538.12 for the period.

26. Workers' Compensation Program Manager for Insurer MC[Redacted] also testified at the hearing in this matter. He explained that the bulk of his job duties involve providing oversight of the Third-Party Administrators (TPA's) that handle Insurer's Workers' Compensation claims. Mr. MC[Redacted] remarked that Employer had a Workers' Compensation policy with Insurer for the period August 11, 2021 through August 11, 2022. However, no policy was in effect on Claimant's August 10, 2021 date of injury.

27. Based on a review of the policy number for the period August 11, 2021 through August 11, 2022, Mr. MC[Redacted] verified that Employer did not have a prior

Workers' Compensation insurance policy through Insurer. Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

28. Claimant has established that it is more probably true than not that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021. Claimant's testimony and the persuasive medical records reveal that Claimant injured his right elbow while working for Employer. Initially, Claimant credibly testified that on August 10, 2021 he was using a power washer to clean vans. He remarked that he had to pull a cord to start the power washer. After pulling the cord numerous times without starting the machine, he "gave a real big pull" and heard a loud pop in his right elbow.

29. On August 11, 2022 Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. On the same day, Claimant completed an Incident Report in which he stated that, while pulling a cord to start a power washer, he experienced a pop in his right elbow.

30. Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He recommended an MRI and referred Claimant to surgeon Dr. Schnell for further evaluation. Dr. Schnell diagnosed Claimant with a right complete distal triceps tendon insertion rupture and performed an open distal triceps repair on Claimant's right upper extremity. Subsequent notes from Select Physical Therapy reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow.

31. Based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right elbow injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right elbow injury at work on August 10, 2021.

32. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury. Claimant initially visited the SCL emergency room for medical treatment and was diagnosed with a closed fracture of the olecranon process of the right ulna. He subsequently obtained care through Dr. Beach and underwent right elbow surgery with Dr. Schnell. Because Claimant was unable to obtain coverage for the surgery

recommended by Dr. Schnell, he procured Medicaid through the Colorado Department of Health Care Policy & Financing. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. He subsequently received physical therapy from Select Physical Therapy for the period November 29, 2021 through May 3, 2022. Dr. Beach ultimately discharged Claimant from care and determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

33. Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his care. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totals $6,725.83 as of August 16, 2022. Moreover, Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00. The record reveals that all of Claimant's medical treatment for his right elbow injury was reasonable, necessary and related to the August 10, 2021 industrial incident. Employer is thus financially responsible for the payment of Claimant's medical expenses, including the outstanding lien from the Colorado Department of Health Care Policy & Financing and any balance due to Select Physical Therapy. Combining the outstanding lien and the Select physical therapy balance yields total medical payments due of $7,292.83.

34. Employer's wage records reflect that for the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an AWW of $757.79. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

35. Claimant has proven that it is more probably true than not that he is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The record reveals that Claimant was limited to modified duty after his August 10, 2021 work injury until his termination on March 15, 2022. Specifically, on August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021, but assigned restrictions of "no right arm work until cleared by ortho or work comp." On August 11, 2021 Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow and restricted him to modified duty work with no use of the right upper extremity. By September 2, 2021 Dr. Beach continued Claimant's work restrictions of "computer/desk work only." He also directed Claimant to continue to wear a right arm sling. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. By January 19, 2022 PA-C Hudson continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. Finally, on March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

36. For the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The record thus reveals that Claimant's work restrictions because of his right elbow injury decreased his ability to earn wages.

Claimant has established that his August 10, 2021 injury caused the disability and consequent partial wage loss. Accordingly, Claimant is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The period totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Claimant's indemnity benefits of $5,216.38 at a TPD rate of 66.66% total $3479.33.

37. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period March 16, 2022 through May 4, 2022. The record reveals that Claimant worked modified duty and earned reduced wages until he was terminated on March 15, 2021. Claimant explained that subsequent to the termination he has been unable to sustain regular employment. Notably, he is still limited by his right arm because it is less functional than it was before his August 10, 2021 work injury. The record thus reveals that Claimant's right elbow 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. Although Dr. Beach issued a closing report on May 4, 2022 and noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Claimant's TTD benefits thus continued until Dr. Beach determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating. Claimant is entitled to TTD benefits for the period March 16, 2022 through May 4, 2022. The period totals 49 days or seven weeks. An AWW of $757.79 times seven weeks equals $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% total $3538.12.

38. Employer has failed to demonstrate it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Employer contends that Claimant is not entitled to receive TTD benefits because he was responsible for his March 15, 2022 termination from employment. Employer noted that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

39. in response to Employer's assertion, Claimant credibly explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant also stated that he has not been pursued by any person from Coda with charges of sexual harassment. Although Claimant acknowledged that he contacted a woman at Coda after business hours, the record reveals that he did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Employer has thus not proven that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period March 15, 2022 until he reached MMI on May 4, 2022.

40. Employer did not have an active Worker's Compensation insurance policy with Insurer effective on or prior to Claimant's August 10, 2021 date of injury. The Workers' Compensation policy obtained by Employer through Insurer became effective on August 11, 2021 or one day after Claimant's date of injury.

41. Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

42. The record reveals that Claimant's date of injury preceded the effective date of Employer's Workers' Compensation insurance coverage through Insurer. Claimant's August 10, 2021 injury is thus not subject to coverage under the policy. Insurer had no insurance relationship or contract with Employer that would properly warrant Insurer's inclusion in the present matter. As a result, Insurer is not a proper party to this claim and is dismissed with prejudice.

43. Employer was not insured on Claimant's August 10, 2021 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $3479.33 in TPD benefits and $3538.12 in TTD benefits. The total compensation awarded thus equals $7017.45. Twenty-five percent of $7017.45 is $1754.36. Accordingly, Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

44. This Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $7,292.83, indemnity benefits of $7,017.45, and penalties of $1,754.36, for total compensation of $16,064.64. Employer is thus required to pay the trustee of the Division a total amount of $16054.64. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

## CONCLUSIONS OF LAW

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

entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

*Compensability*

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

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that he injured his right elbow during the course and scope of his employment with Employer on August 10, 2021. Claimant's testimony and the persuasive medical records reveal that Claimant injured his right elbow while working for Employer. Initially, Claimant credibly testified that on August 10, 2021 he was using a power washer to clean vans. He remarked that he had to pull a cord to start the power washer. After pulling the cord numerous times without starting the machine, he "gave a real big pull" and heard a loud pop in his right elbow.

8. As found, on August 11, 2022 Claimant reported to Dr. Beach that he was pulling a cord in an attempt to start a power washer when he heard a pop in his right elbow. On the same day, Claimant completed an Incident Report in which he stated that, while pulling a cord to start a power washer, he experienced a pop in his right elbow.

9. As found, Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow. He recommended an MRI and referred Claimant to surgeon Dr. Schnell for further evaluation. Dr. Schnell diagnosed Claimant with a right complete distal triceps tendon insertion rupture and performed an open distal triceps repair on Claimant's right upper extremity. Subsequent notes from Select Physical Therapy reflect that Claimant was using a power washer "that requires you to start like a lawn mower" and suffered immediate sharp pain in his right elbow.

10. As found, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right elbow injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right elbow injury at work on August 10, 2021.

*Medical Benefits*

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

factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his August 10, 2021 industrial injury. Claimant initially visited the SCL emergency room for medical treatment and was diagnosed with a closed fracture of the olecranon process of the right ulna. He subsequently obtained care through Dr. Beach and underwent right elbow surgery with Dr. Schnell. Because Claimant was unable to obtain coverage for the surgery recommended by Dr. Schnell, he procured Medicaid through the Colorado Department of Health Care Policy & Financing. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. He subsequently received physical therapy from Select Physical Therapy for the period November 29, 2021 through May 3, 2022. Dr. Beach ultimately discharged Claimant from care and determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating.

14. As found, Medicaid paid for Claimant's surgery with Dr. Schnell and otherwise financed his care. The Colorado Department of Health Care Policy & Financing thus has a lien on its payments. The lien covers the period from Claimant's initial emergency department visit through the conclusion of physical therapy and totals $6,725.83 as of August 16, 2022. Moreover, Select Physical Therapy received some payments from Medicaid, but still asserts a balance due of $567.00. The record reveals that all of Claimant's medical treatment for his right elbow injury was reasonable, necessary and related to the August 10, 2021 industrial incident. Employer is thus financially responsible for the payment of Claimant's medical expenses, including the outstanding lien from the Colorado Department of Health Care Policy & Financing and any balance due to Select Physical Therapy. Combining the outstanding lien and the Select physical therapy balance yields total medical payments due of $7,292.83.

*Average Weekly Wage*

15. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the

injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82.

16. As found, Employer's wage records reflect that for the 16-week period from April 23, 2021 through July 30, 2021 Claimant earned total wages of $12,124.62. Dividing $12,124.62 by 16 yields an AWW of $757.79. Applying the default provision yields a fair approximation of Claimant's wage loss and diminished earning capacity.

*Temporary Partial Disability Benefits*

17. Section 8-42-106(1), C.R.S. provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and 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) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). 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). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

18. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The record reveals that Claimant was limited to modified duty after his August 10, 2021 work injury until his termination on March 15, 2022. Specifically, on August 10, 2021 Dr. Stackpool at SCL Health permitted Claimant to return to work on August 11, 2021, but assigned restrictions of "no right arm work until cleared by ortho or work comp." On August 11, 2021 Dr. Beach diagnosed Claimant with a displaced fracture of the olecran process of the right elbow and restricted him to modified duty work with no use of the right upper extremity. By September 2, 2021 Dr. Beach continued Claimant's work restrictions of "computer/desk work only." He also directed Claimant to continue to wear a right arm

sling. On November 2, 2021 Claimant underwent right elbow surgery with Dr. Schnell. By January 19, 2022 PA-C Hudson continued Claimant's medical restrictions of light duty with no pushing, lifting or carrying greater than five pounds with his right arm for an additional six weeks. Finally, on March 2, 2022 Dr. Schnell ordered an additional four weeks of physical therapy and modified Claimant's restrictions to no lifting in excess of 25 pounds.

19. As found, for the 32-week period from August 13, 2021 through March 11, 2022 Claimant earned total wages of $18,839.70. Dividing $18,839.70 by 32 yields an AWW of $588.74. Subtracting $588.74 from Claimant's 757.79 AWW prior to his August 11, 2021 work injury yields a loss of $169.05 per week. The record thus reveals that Claimant's work restrictions because of his right elbow injury decreased his ability to earn wages. Claimant has established that his August 10, 2021 injury caused the disability and consequent partial wage loss. Accordingly, Claimant is entitled to receive TPD benefits for the period August 11, 2021 through March 15, 2022. The period totals 216 days or 30.857 weeks. A wage loss of $169.05 per week times 30.857 weeks equals $5216.38. Claimant's indemnity benefits of $5,216.38 at a TPD rate of 66.66% total $3479.33.

*Temporary Total Disability Benefits*

20. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, 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.

21. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period March 16, 2022 through May 4, 2022. The record reveals that Claimant worked modified duty and earned reduced wages

until he was terminated on March 15, 2021. Claimant explained that subsequent to the termination he has been unable to sustain regular employment. Notably, he is still limited by his right arm because it is less functional than it was before his August 10, 2021 work injury. The record thus reveals that Claimant's right elbow 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. Although Dr. Beach issued a closing report on May 4, 2022 and noted that he had released Claimant to full duty work on April 12, 2022 with no restrictions, there is no written release dated April 12, 2022 in the record. Claimant's TTD benefits thus continued until Dr. Beach determined that he reached MMI on May 4, 2022 with a 1% right upper extremity permanent impairment rating. Claimant is entitled to TTD benefits for the period March 16, 2022 through May 4, 2022. The period totals 49 days or seven weeks. An AWW of $757.79 times seven weeks equals $5304.53. Indemnity benefits of $5304.53 at a TTD rate of 66.66% total $3538.12.

*Responsible for Termination*

22. Under the termination statutes in §8-42-105(4) C.R.S and §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. Indus. Claim Appeals Off.*, 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*, W.C. No. 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,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, the 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,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

23. As found, Employer has failed to demonstrate by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Employer contends that Claimant is not entitled to receive TTD benefits because he was responsible for his March 15, 2022 termination from employment. Employer noted that on March 14, 2022 it had received an official complaint of sexual harassment from a client (Coda Signature). After conducting an investigation, Employer determined that one or more female employees wanted to file charges against Claimant. Claimant allegedly contacted a female employee of Coda after business hours on a matter unrelated to Employer's business.

24. As found, in response to Employer's assertion, Claimant credibly explained that he complimented a woman at Coda, whom he regularly met in the course of business, on her custom finger nails. He remarked that he contacted her one time after business hours to inquire about her latest nail fashion and obtain a picture of her nails. However, he did not receive a response or proceed any further. Claimant also stated that he has not been pursued by any person from Coda with charges of sexual harassment. Although Claimant acknowledged that he contacted a woman at Coda after business hours, the record reveals that he did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Employer has thus not proven by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits for the period March 15, 2022 until he reached MMI on May 4, 2022.

*Insurance Coverage*

25. Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. §8-44-101, C.R.S. As found, Employer did not have an active Worker's Compensation insurance policy with Insurer effective on or prior to Claimant's August 10, 2021 date of injury. The Workers' Compensation policy obtained by Employer through Insurer became effective on August 11, 2021 or one day after Claimant's date of injury.

26. As found, Mr. MC[Redacted] detailed the implications of the Workers' Compensation insurance policy number for the policy effective August 11, 2021 through August 11, 2022. Specifically, Mr. MC[Redacted] explained that the policy's middle numbers "00" (full policy number NXTTFMO6MK-00-WC) have a special significance because the characters in an insurance coverage policy through Insurer reflect the policy's status as the first of its kind issued to an individual or entity. If a prior policy had been renewed, the August 11, 2021 through August 11, 2022 policy would not have begun with the designation "00." Mr. MC[Redacted] also explained that Employer currently has, and previously had, a general liability insurance policy through Insurer. However, general liability policies specifically exclude Workers' Compensation coverage.

27. As found, the record reveals that Claimant's date of injury preceded the effective date of Employer's Workers' Compensation insurance coverage through Insurer. Claimant's August 10, 2021 injury is thus not subject to coverage under the policy. Insurer had no insurance relationship or contract with Employer that would properly warrant Insurer's inclusion in the present matter. As a result, Insurer is not a proper party to this claim and is dismissed with prejudice.

*Penalties for Employer's Failure to Carry Worker's Compensation Insurance*

28. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective

July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant's August 10, 2021 injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

29. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

30. As found, Employer was not insured on Claimant's August 10, 2021 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $3479.33 in TPD benefits and $3538.12 in TTD benefits. The total compensation awarded thus equals $7017.45. Twenty-five percent of $7017.45 is $1754.36. Accordingly, Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

*Payment to Trustee or Posting of Bond*

31. Under §8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado."

32. As found, this Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $7,292.83, indemnity benefits of $7,017.45, and penalties of $1,754.36, for total compensation of $16,064.64. Employer is thus required to pay the trustee of the Division a total amount of $16054.64. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

## ORDER

1. Claimant suffered a compensable right elbow injury on August 10, 2021 during the course and scope of his employment with Employer.

2. Employer is financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his right elbow injury.

3. Claimant earned an AWW of $757.79.

4. Claimant shall receive TPD benefits for the period August 11, 2021 through March 15, 2022 in the amount of $3479.33.

5. Claimant shall receive TTD benefits for the period March 16, 2022 through May 4, 2022 in the amount of $3538.12.

6. Employer has failed to establish that Claimant was responsible for his termination from employment.

7. Insurer is not a proper party to the matter and is thus dismissed with prejudice.

8. Employer shall pay $1754.36 in penalties to the Colorado uninsured employer fund created in §8-67-105, C.R.S.

9. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $16054.64, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $16,054.64 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

12. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

13. 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: November 18, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 4-867-720-002**

## ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the medial branch blocks and the radiofrequency ablations (a/k/a rhizotomies) for his lumbar spine are reasonable, necessary, and related to his industrial injury.

II. Whether Claimant has proven by a preponderance of the evidence that the referrals for medical treatment for his posttraumatic nasal deformity, nasal obstruction, septal deviation, and breathing problems are reasonable, necessary, and related to his industrial injury.

III. Whether Claimant has proven by a preponderance of the evidence that the Botox injections to the TMJ area of his jaw are reasonable, necessary, and related to his industrial injury.

IV. Whether Claimant has established that he is entitled to his preferred nurse case manager.

## STIPULATIONS

- Respondents agreed to authorize the right knee injections as recommended by Dr. Mason.[1]
- The parties stated at the beginning of the hearing that the feeding tube issue was not before the court. Therefore, the ALJ has not addressed that issue.

## FINDINGS OF FACT

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

Claimant Assaulted and Sustained Numerous Injuries

1. On September 28, 2011, Claimant suffered a work-related accident in the form of an assault that resulted in numerous injuries. At the time of the assault, Claimant was providing security for Employer. On the night of the assault, there was a concern that one of the building alarms had not armed. As a result, Claimant went to investigate why the alarm was not arming. While investigating the problem, Claimant was attacked by an unknown person or persons and was severely beaten.

[1] Pursuant to Claimant's proposed order, the parties have reached an agreement regarding the knee injections.

2. Because of the assault, Claimant suffered fractures to multiple body parts, the most significant and severe injuries were to his face, nasal passages, jaw, and right knee. (Exhibit 2 #33). The fractures included the following:

    a. Right condylar fracture, right comminuted body mandibular fracture.

    b. Comminuted left angle fracture and left condylar fracture.

    c. Fracture of the right zygoma, LeFort fracture.

    d. Fracture of the left zygoma.

    e. Midline palatal fracture.

    f. Nasal septum fracture with deviation.

Ex. X, p. 18.

3. Due to his facial, nasal, and jaw injuries, Claimant has undergone multiple reconstructive surgeries to his jaw (including temporomandibular joint) (TMJ), mouth, face, and nasal area. (Ex. 4, p. 78 review of medical records Dr. Mason—outlining the multiple staged dental procedures that were being recommended)

4. Along with his facial, nasal, and jaw fractures, Claimant also suffered additional injuries, which included, but were not limited to, his hands, right knee, and back. He was diagnosed in the emergency room as suffering from:

    a. Right fifth metacarpophalangeal dislocation.

    b. Right fourth proximal PIP dislocation.

    c. Right patellar [kneecap] fracture.

    d. Left fifth metacarpal fracture.

    e. Bilateral lung contusion.

    f. Acute kidney injury.

    g. Abrasions to his back.

<u>Low Back / Medial Branch Blocks / Radiofrequency Ablations</u>

5. On September 28, 2011, while in the emergency room and being treated for multiple injuries, it was also noted that Claimant suffered trauma to his back which was evidenced by abrasions on his back. (Ex. 2, p. 2; Mason Dep. 23)

6. Due to his numerous injuries, which included a fractured kneecap, Claimant was not very mobile after the accident. (Mason Dep. 27)

7. As time went on, Claimant became more mobile. But due to his knee injury, Claimant was wearing a knee brace and using a cane, which caused him to walk with a limp. (Mason Dep. 27)

8. Once he became more mobile, his back injury started becoming more symptomatic.

9. Once Claimant began walking with a limp, the limping aggravated his lumbar facets and caused the facets, in his low back, to become more symptomatic and require medical treatment. (Mason Dep. 23, 27)

10. In January 2012, and due to ongoing back pain, Claimant was evaluated by Dr. Ladley O'Brien. Because of Claimant's ongoing back pain, Dr. O'Brien referred Claimant to a chiropractor. (Mason Dep. 9-10; Ex. 2, p. 35)

11. In February 2012, and due to continuing back pain, Dr. O'Brien ordered an MRI of Claimant's lumbar spine. The MRI showed some mild posterior disk bulging at L2-3, some mild disk bulging at L3-4, and disk protrusion toward the right with neuroforaminal narrowing at L4-5. (Mason Dep. 10; Ex. 4, p. 77)

12. In March 2012, it was noted that Claimant continued to walk with the assistance of a cane. (Ex. 4, p. 77)

13. Sometime in 2012, Dr. O'Brien referred Claimant to Dr. Kristen Mason and Claimant came under the care of Dr. Mason. (Ex. 2, p. 44)

14. In January 2013, Dr. Mason performed an initial evaluation. At this evaluation, Claimant complained of back pain as well as pain in his hip and knee. Claimant also marked those areas on his pain diagram. (Mason Dep. 9-10; Ex. 2, p. 35)

15. Dr. Mason ultimately diagnosed Claimant with facet arthropathy that had become symptomatic due to the assault and his altered gait. (Mason Dep. 27)

16. Due to his facet arthropathy, Dr. Mason referred Claimant for medial branch blocks.

17. In September 2014, Claimant underwent his first medial branch block, and then another one in December 2014, which reduced his back pain by 80%. The blocks were thus considered diagnostic. (Mason Dep. 25)

18. In January 2015, and due to the diagnostic response of the medial branch blocks, Claimant underwent a radiofrequency ablation. (Ex. 15, p. 555)

19. In April 2015, Dr. Mason noted Claimant's range of motion had improved since having the radiofrequency ablation. (Ex. 4, p. 209) Then, in May 2015, Dr. Mason noted that Claimant's lumbar back pain had decreased since having the radiofrequency ablation. (Ex. 4, p. 213) The benefits of the radiofrequency ablation lasted for approximately 15-18 months. Based on Claimant's response, Dr. Mason concluded he had excellent results from the procedure. (EX. 4, pp. 260, 267)

20. Sometime in 2015, Claimant stopped using a cane.

21. Around August 2016, the effects of the first radiofrequency ablation started to wear off. Therefore, Claimant underwent another radiofrequency ablation in August of 2016. (Ex. 4, p. 270) As before, the results of the radiofrequency ablation were good. (Ex. 4, p. 275) The benefits provided from this radiofrequency ablation lasted about 13 months. (Ex. 4, p. 284)

22. In October 2017, Claimant underwent another medial branch block and then another radiofrequency ablation in December 2017. (Ex. 5, p. 402). Like the prior radiofrequency ablations, the December 2017 procedure started wearing off about 15 months later, in Mach 2018.

23. In July 2019, Claimant underwent another medial branch block and then a radiofrequency ablation in September 2019. The results from the ablation were excellent. The ablation increased Claimant's lumbar range of motion and decreased his back pain. (Ex. 4, p. 331)

24. In June 2021, about 18 months after the last ablation, the effects from the procedure started to wear off. (Ex. 4, #358) In July and August 2021, Claimant underwent additional radiofrequency ablations. (Ex. 4, pp. 362, 364)

25. Around March or April 2022, Claimant thought that the last radiofrequency ablation was starting to wear off since he had increased back pain and decreased range of motion. (Ex. 4, pp. 378, 382) Due to his prior radiofrequency ablation wearing off, Dr. Mason referred Claimant back to Dr. Olsen for a repeat procedure.

26. On May 20, 2022, Respondents denied authorization for Dr. Olsen to see Claimant and repeat the radiofrequency ablation. (Ex. 4, p. 388)

27. Dr. Mason testified that the radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury. Dr. Mason testified that Claimant's facets in his low back were most likely injured during the assault and then aggravated by Claimant's altered gait. Dr. Mason also testified that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury because they have increased his range of motion-function- and decreased his pain.

28. The ALJ finds Dr. Mason's opinions about the need for the medial branch blocks and radiofrequency ablations to be credible and persuasive for many reasons. First, Dr. Mason's opinions are supported by the Claimant's statements to medical providers regarding his pain relief. For example, the decrease in pain and increased range of motion noted on examination supports a finding that the treatment is effective. Second, Dr. Mason's opinions are supported by the medical records. For example, Dr. Mason testified that Claimant has had good pain relief from the radiofrequency ablations, and the medical records support such a finding. Third, the Colorado Medical Treatment Guidelines support the use of radiofrequency ablations–but not exceeding twelve. To date, Claimant has only received about 5 radiofrequency ablations.

29. Dr. Fall also testified. Dr. Fall testified that she does not think Claimant's back injury relates to the assault or his altered gait. She also testified that even if his back condition were caused by his work injury, the radiofrequency ablations are still not reasonably necessary. Part of her opinion is based on her contention that Claimant did not have a diagnostic response to the medial branch blocks. But Dr. Mason credibly testified that Claimant did. The medical records also document that Claimant obtained substantial and sustained relief from the radiofrequency ablations. This relief included a decrease in back pain and an increase in his range of motion. Moreover, to the extent Claimant had sustained relief from the treatment, Dr. Fall wants to characterize the relief as a placebo effect, and not due to the treatment itself. Based on the medical records and opinions of Dr. Mason, such a rationale for the effectiveness of the past radiofrequency ablations seems to be an attempt to disregard evidence that goes against her ultimate conclusion. In other words, she seems to be

cherry-picking the data to support her opinion. As a result, the ALJ does not find the opinions of Dr. Fall to be persuasive.

30. The ALJ finds that Claimant suffered a back injury during the assault. The ALJ further finds that his back condition was aggravated by his altered gait that was caused by the work injury to his knee. The ALJ also finds that the initial back injury and aggravation have necessitated the need for medical treatment. Lastly, the ALJ finds that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work-related back injury.

Nasal Injury and Referral to a Specialist

31. When Claimant was assaulted, he suffered a nasal septum fracture with deviation that resulted in a nasal obstruction.

32. In May 2012, Claimant underwent a septoplasty to repair his posttraumatic nasal deformity, nasal obstruction, and septal deviation. (Ex. 4, p. 77)

33. In February 2013, Claimant presented to Dr. Alan Lipkin, an ENT, for his ongoing nasal obstruction problems that were present after his nasal septal reconstruction surgery. Dr. Lipkin recommended Claimant use nasal saline irrigation for the consequences of his work injury, which included Claimant's nasal obstruction. (Ex. 6, pp. 477-481)

34. In September 2013, Claimant presented to Dr. Jannuzzi. At this appointment, it was noted that there was obstruction involving Claimant's right sinus. But, at this appointment, it was not known whether the obstruction might be due to maxillary sinusitis or nasal intubation. (Ex. 3, p. 53)

35. As part of his treatment for his facial injuries, Claimant was prescribed a mouthguard. While using his mouthguard at night, Claimant noticed that he was having a lot of difficulty breathing through his nose.

36. In February 2022, Dr. Mason noted that Claimant was having problems breathing through his nose.

37. On April 15, 2022, Dr. Mason noted that Dr. Millam concluded that Claimant was suffering from some collapse of one of his nostrils. (Ex. 4, p. 382)

38. Other than the work-related assault, which caused a nasal septum fracture with deviation that resulted in nasal obstruction that required surgery, there is no credible evidence indicating Claimant has suffered any other nasal injuries since the assault.

39. Dr. Mason testified that she believes Claimant's current problem of breathing through his nose needs to be assessed by a specialist as part of his work injury because (1) Claimant had incurred significant trauma to his nose and face in the form of a nasal fracture, (2) he had reconstructive surgery, and (3) there does not seem to be a new and unique diagnosis.

40. The ALJ finds Dr. Mason's opinions about the need for a referral to a nasal specialist to be credible and persuasive. Her opinion is found credible and persuasive because it is consistent with, and supported by, Claimant's underlying medical records that demonstrate prior trauma to his nasal area, prior surgery to his nasal area, and a prior

collapse of his nasal area. The ALJ also finds her opinion credible because she is not saying that any nasal condition that he has will be work related, but that under the circumstances, it is reasonable to have Claimant assessed by an expert, or experts, as part of his workers' compensation claim. Had Claimant not suffered any trauma to his face or nasal area, then a referral to an expert would not be reasonably necessary to assess and treat Claimant from the effects of his work injury. But those are not the facts here.

41. Dr. Fall basically testified that because specific treatment has not been recommended for his nasal problems, there must not be a problem that requires treatment. But the issue is whether a referral and assessment by an expert, or experts, is reasonably necessary to assess Claimant's symptoms, determine whether they are work related, and then recommend treatment, if any. Therefore, Dr. Fall's contention that because no treatment or surgery has been recommended, without the assessment of an expert, puts the proverbial cart before the horse.

42. Dr. Fall also testified that due to the temporal relationship between Claimant's current breathing complaints and the initial assault, any condition is most likely not related. But Dr. Fall fails to acknowledge the limitations of her expertise. She is not an expert in nasal issues, but yet ventures out into that specialized area and renders an opinion that is beyond her expertise. It is as if she is missing the point as to what a qualified expert does. They apply their expertise to make an assessment that she cannot do, due to her lack of expertise in that field. As a result, the ALJ does not find her opinions about Claimant's lack of need for additional treatment in the form of an assessment, or assessments, to address his nasal complaints to be persuasive.

43. A referral to a nasal specialist has a reasonable prospect of defining the extent of Claimant's nasal condition that was caused by the assault and the extent of future treatment.

44. Based on the facts of this case, a referral to an expert, or experts, to assess Claimant's nasal and breathing complaints is reasonable and necessary medical treatment to treat Claimant from the effects of his work injury. Thus, the referral is reasonable and necessary medical treatment that is meant to cure and relieve Claimant from the effects of his work injury.

TMJ and Botox Injections

45. Because of the assault, Claimant sustained several facial injuries that included a broken jaw and injury to his TMJ. (Ex. 2, pp. 26, 40) At first, Claimant underwent various facial and jaw surgeries that resulted in his jaw being wired shut.

46. Then, on September 19, 2012, Claimant underwent surgery that was performed by Dr. Jannuzzi. The surgery included the removal of hardware as well as a left TMJ arthroplasty with an autogenous bone from his iliac crest, and exploration of his right parasymphysis fracture. (Ex. 3, p. 53)

47. On February 12, 2013, Claimant presented to Dr. Alan Lipkin and he found Claimant's TMJ deviated to the left and had limited mobility on the left. (Ex. 6, p. 479)

48. In March 2016, Claimant returned to Dr. Jannuzzi, the surgeon for the TMJ reconstruction surgery, to obtain an assessment for his ongoing left TMJ pain and facial pain. Dr. Jannuzzi concluded that from a surgical standpoint, Claimant was doing very well. But Dr. Jannuzzi explained to Claimant that the artificial TMJ will not function as a regular TMJ and that the difference in function will cause discomfort. The plan at that time included following Claimant as needed, as well as Claimant continuing with orthodontic care and dental care that included dental implants. (Ex. 3, pp. 58-60)

49. In June 2021, Claimant returned to Dr. Jannuzzi for a re-evaluation of his TMJ due to muscle spasm and pain regarding his TMJ. Then, Claimant's TMJ pain was 6/10 and he could not keep his mouth open wide enough to get his restorative dental work done. Therefore, to reduce Claimant's TMJ muscle spasm, increase his range of motion so he could open his mouth and continue with his dental treatment, and decrease his pain, Dr. Jannuzzi injected Botox into Claimant's superior masseter. (Ex. 3, pp. 62, 63)

50. In July 2021, Claimant returned to Dr. Mason. At this appointment, it was noted that the Botox was working significantly well and resulted in Claimant opening his mouth more and also improved his ability to bite and chew more efficiently. (Ex. 4, pp. 360, 362)

51. In December 2021, Claimant returned to Dr. Mason. At this appointment, it was noted that Dr. Waguespack, another dentist, was recommending repeating the Botox injections because he thought the recurring muscle spasm was causing Claimant's bite to not line up properly. Since it had been 6 months since his last Botox injection, and Botox injections typically last 90 days, Dr. Mason referred Claimant back to Dr. Jannuzzi for repeat Botox injections. (Ex. 4, p. 370)

52. At some point, the repeat Botox injections were denied. Then, in January 2022, Claimant returned to Dr. Mason. At this appointment, she concluded that the Botox injections were reasonably necessary to treat Claimant's jaw problems and she did not understand why the Botox injections were denied since Claimant needs the Botox to treat his TMJ. (Ex. 4, pp. 373, 376) Ultimately, in March 2022, the Botox injections were authorized, and Claimant had the injections. (Ex. 4, pp. 379, 386)

53. In April 2022, Dr. Mason stated that Claimant had been having the Botox injections about every 6-8 weeks, but they were no longer being authorized, despite the Botox injections helping "tremendously" with his left jaw and facial pain. (Ex. E, pp. 30, 31)

54. Claimant returned to Dr. Mason in May 2022. At this appointment it was noted that while the most recent Botox injections were not as helpful as the last ones, it did give Claimant about 75% pain relief but did not help entirely with his bite problems. (Ex. 4, p. 386)

55. Dr. Fall issued a report, dated April 28, 2022. In her report, she concluded that she did not find an indication for ongoing Botox injections. She did, however, indicate that "if there were an indication, clearly documented in the medical records and supported by evidence-based medicine, the Botox injections would be appropriate under maintenance care." (Ex. E, p. 42)

56. The ALJ finds that the medical records establish that the Botox injections reduce Claimant's TMJ/jaw pain and increase his range of motion. They also, to some extent, improve his bite. Therefore, the Botox injections relieved Claimant from the effects of his work injury.

57. Dr. Mason testified about the reasonableness and necessity of the Botox injections. She stated that Botox causes a temporary paralysis of the affected muscles, thereby reducing the spasm and pain. Thus, she concluded that the injections are reasonable and necessary because they reduced Claimant's spasm and associated pain coming from Claimant's TMJ and the muscles used for mastication. The ALJ finds Dr. Mason's opinions and conclusions to be credible and persuasive regarding the reasonableness and necessity of the Botox injections to treat Claimant from the effects of his work injury. Her opinion is found credible and persuasive because it is consistent with the underlying medical records, and Claimant's statements, that demonstrate Claimant gets pain relief and functional improvement from the Botox injections.

58. The ALJ does not find Dr. Fall's opinions about the Botox injections to be persuasive because the medical records document Claimant obtains consistent, albeit temporary, pain relief and increased jaw mobility from the Botox injections.

59. The ALJ finds that the Botox injections reduce Claimant's jaw pain and increase the function of his jaw by allowing him to open his mouth wider.

60. The ALJ finds that the Botox injections are reasonable and necessary medical treatment to cure and relieve Claimant from the effects of his work injury.

Claimant's Request for a Specific Medical Case Manager

61. Claimant has had a complicated course of medical treatment. There have been stops and starts with authorization issues of medical care throughout the claim. Early in the claim a medical case manager, Annette Carter, RN, was selected by the workers' compensation carrier and assigned to the claim. She assisted with the coordination and authorization of the complex medical authorizations, treatment, and payment issues that were needed to provide reasonable and necessary medical care as part of the claim. (Ex. 2, pp. 42, 44; Ex. 3, pp. 58, 61) (*See also* her written reports. Ex. 4)

62. From about 2012, through December 2021, Ms. Carter was the primary medical case manager for Claimant's care. As noted in the records, Ms. Carter started attending medical appointments with Claimant while he was treating at Denver Health in 2012. She also attended appointments with Claimant and Dr. Mason, over an approximate 8-year period. Besides attending appointments and managing care for Claimant with Dr. Mason, Ms. Carter also managed and coordinated care with Drs. O'Brien, Waguespack, Benson, Wells, Levine, Jannuzzi, and probably others.

63. Along with Ms. Carter being a medical case manager, Ms. Anita Solano, who is also an RN, also became a medical case manager and helped manage Claimant's care.

64. On January 13, 2022, Dr. Mason's office was advised that the longtime medical case manager, Ms. Carter, had been removed from Claimant's case by the workers' compensation adjuster. Dr. Mason requested the Insurer reconsider the decision. She

stated Claimant had an extremely complicated and prolonged course of care and was still not at MMI. She noted that there are several remaining items that need to be coordinated, such as the ENT evaluation and the finalization of his dental work. She also noted that her office was not equipped to assist him adequately with these needs. (Ex. 4, p. 375)

65. Dr. Mason stated that in November, she was projecting MMI in a three-month period, but was uncertain regarding MMI because of the authorization issues. She also said that Claimant would require nurse case management services from MMI through a structuring of maintenance care. Dr. Mason stated that Claimant had been through fluctuations in his depression and anxiety recently, and in the past had been severely depressed to the point of suicidality. She was concerned that his delicate emotional state would deteriorate substantially with the change and not to have the services of nurse case manager would delay MMI.

66. Dr. Mason, since the termination of the prior medical case managers, has advocated for the return and retention of the longtime nurse case managers (which were basically two people) because the long-term institutional knowledge of the claim, and the trust developed with Claimant over the period of the claim. According to Dr. Mason Claimant has trust and other issues, and Dr. Mason stated that their continuing involvement was necessary to assist her with obtaining referrals, authorization, and payment for the medical care that is necessary. (Mason Dep. p. 19)

67. The medical case managers over the period of the claim had developed a trusting relationship with Claimant. They helped coordinate Claimant's appointments, handled communication with the carrier and authorization issues for recommended medical care. The long-term and trusting relationship Claimant developed was with the two people that work for the same company. Because of the complexity of the claim, the time the claim had gone on and because of his emotional problems and psychologic state, which has always been somewhat fragile during the period of time Dr. Mason treated him, in Dr. Mason's opinion, required their specific continued involvement.

68. According to Dr. Mason, at a baseline, Claimant is not a very trusting person. Claimant has paranoia from time to time, most of it directed toward the insurance company. This is in addition to an ongoing concern that he still does not know who attacked him or why. So when Claimant does form therapeutic alliances, which he has with most of his providers, and develops a level of trust it is important to his recovery. Claimant had that trusting relationship with the prior nurse cases managers. She testified that he trusted them to act in his best interest. At this point in the claim, there is not any other nurse case manager that would be as beneficial for him because of that established relationship. (Mason Dep. 22)

69. Dr. Mason specifically conveyed that the identification of a different telephonic medical case manager who was an employee of the insurance company, which was suggested at one point, would just add a layer of complication and not be helpful. (Mason Dep. 20)

70. Dr. Mason testified that the case manager also helps her make sure that she has all the information from all the other providers, which does not always happen automatically. So it is a benefit to her to help provide medical care in a timely and

informed position. As a result, Dr. Mason believed that ongoing involvement of Case Med Solutions as nurse case manager are reasonable and necessary now. (Mason Dep. 20)

71. Dr. Mason testified that the services should be available to her and Claimant through MMI and after for a time period. She also concluded that after 11 years, the eventual end of active care will be difficult for Claimant psychologically. Claimant will have a lot of change imposed on him and the ongoing involvement will help ease that transition. She also stated that Claimant is someone who has had frequent suicidal ideations, severe depression, including mood swings, anger, and irritability. He does not have a good support system. As a result, she concluded that having somebody allied to assist with that transition to a less active phase of care would be beneficial and would probably save time, energy, and money that would be spent on other things if his depression and anxiety get any worse. (Mason Dep. 21; Mason Dep. Volume 2, 8)

72. The ALJ finds Dr. Mason's opinions regarding the need for a medical case manager to be credible and persuasive for many reasons. First, Claimant's injuries and need for treatment has been extensive. Second, Claimant's care is being provided by numerous providers and Claimant has established the need for someone to help manage his care with all of the providers involved. Third, the case managers involved in Claimant's case have helped Claimant obtain the treatment he needs for his work-related injuries.

73. The ALJ finds that the need for a specific medical case manager, Ms. Carter, or Ms. Solano, is reasonable and necessary for several reasons. First, because of the time spent managing Claimant's care, each nurse case manager has a significant amount of knowledge regarding Claimant's medical needs and the doctors involved. Second, Claimant has trust issues and is comfortable working with Ms. Carter or Ms. Solano. Third, Dr. Mason believes working with a new case manager would be difficult for Claimant psychologically.

74. The medical case managers here are providing administrative and communication functions designed to coordinate the medical treatment and insure proper care is being provided to Claimant.

75. Respondents have removed the prior medical case managers and replaced them by offering a new medical case manager. Respondents have therefore offered and provided medical case management, and continue to offer medical case management, by offering a medical case manager – of their choice – to help manage Claimant's care.

## CONCLUSIONS OF LAW

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

### General Provisions

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

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

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

**I. Whether Claimant has proven by a preponderance of the evidence that the medial branch blocks and the radiofrequency ablations (a/k/a rhizotomies) for his lumbar spine are reasonable, necessary, and related to his industrial injury?**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ finds and concludes that Claimant's lower back was injured during the assault, and that his back condition was aggravated and became more symptomatic, i.e., painful with limited range of motion, when he became more mobile and started walking with a limp shortly after the assault. The ALJ further finds and concludes that the back injury, and aggravation, necessitated the need for medical treatment, and Claimant has undergone various treatment for his back.

As also found, Claimant has undergone a number of medial branch blocks and radiofrequency ablations which have been beneficial. As found, the treatment has reduced Claimant's pain and increased his range of motion. But the benefit from each treatment has varied from approximately 12-18 months. Because the treatment is usually not permanent, the treatment must be repeated. In this case, Claimant has had about 5 radiofrequency ablations. As testified to by Dr. Mason, the Colorado Medical Treatment Guidelines suggest that radiofrequency ablations should be limited to 12 over a person's lifetime. At this time, Claimant has not had 12.

Dr. Mason credibly and persuasively testified that the medial branch blocks and radiofrequency ablations are reasonable and necessary to treat Claimant from the effects of his work injury. Her opinion is supported by the underlying medical records, which document an injury to Claimant's back right after the assault, additional back pain due to his altered gait, combined with the relief each medial branch block and radiofrequency ablation has provided Claimant over the years.

The ALJ has also considered the opinions of Dr. Fall. Overall, the ALJ does not find Dr. Fall's opinions to be persuasive. Dr. Fall testified that she does not think Claimant's back injury relates to the assault or his altered gait. This is even though the emergency room records establish Claimant had abrasions on his back after the assault and was referred for chiropractic treatment after Claimant started walking and became more mobile after the assault. She also testified that even if his back condition were caused by his work injury, the radiofrequency ablations are still not reasonably necessary, in part, because she contends Claimant did not have a diagnostic response to the medial branch blocks. Her alternative theory is that any positive effect of the ablations is due to a placebo effect. As found above, the ALJ rejects such a conclusion and finds that portion of her opinion to be evidence of rejecting data that does not support her conclusions, i.e., cherry-picking. On the other hand, Dr. Mason credibly and persuasively testified that Claimant did have a diagnostic response to the medial branch blocks and the radio frequency ablations. The medical records also document that Claimant obtained substantial and sustained relief from the radiofrequency ablations. This relief included a decrease in back pain and an increase in his range of motion. As a result, the ALJ does not find the opinions of Dr. Fall to be persuasive.

Thus, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the medial branch blocks and radiofrequency ablations are reasonably necessary and related to treat Claimant from the effects of his work injury.

**II. Whether Claimant has proven by a preponderance of the evidence that the referrals for medical treatment for his posttraumatic nasal deformity, nasal obstruction, septal deviation, and breathing problems are reasonable, necessary, and related to his industrial injury?**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Moreover, the cases suggest that medical "treatment" encompasses both diagnostic and curative medical procedures. *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999) ("The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury."); *Villela v. Excel Corp.,* W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining Claimant's condition and suggesting further treatment).

Because of the assault, Claimant suffered significant facial trauma, which included a nasal septum fracture with deviation that resulted in a nasal obstruction.

As found, in May 2012, Claimant underwent a septoplasty to repair his posttraumatic nasal deformity, nasal obstruction, and septal deviation. In February 2013, Claimant presented to Dr. Alan Lipkin, an ENT, for his ongoing nasal obstruction problems that were present after his nasal septal reconstruction. At that time, Dr. Lipkin recommended Claimant use nasal saline irrigation for the consequences of his work injury, which included Claimant's nasal obstruction.

In September 2013, Claimant presented to Dr. Jannuzzi. At this appointment, it was noted that there was obstruction involving Claimant's right sinus. But, at this appointment, it was not known whether the obstruction was due to maxillary sinusitis or nasal intubation.

As part of his treatment for his facial injuries, Claimant was prescribed a mouthguard. While using his mouthguard at night, Claimant noticed that he was having a lot of difficulty breathing through his nose and brought it up with Dr. Mason in February 2022. Soon after, in April 2022, Dr. Mason noted that Dr. Millam concluded that Claimant was suffering from some collapse of one of his nostrils.

Other than the work-related assault, which resulted in a nasal septum fracture with deviation, and a nasal obstruction that required surgery, there is no credible evidence that Claimant has suffered any other nasal injuries since the assault.

Moreover, Dr. Mason testified that she believes Claimant's current problem of breathing through his nose and need for an assessment is because (1) Claimant incurred significant trauma to his nose and face in the form of a nasal fracture, (2) he had reconstructive surgery, and (3) there does not seem to be a new and unique diagnosis.

The ALJ finds Dr. Mason's opinions regarding causation of Claimant's nasal problems and need for a referral to a specialist to be credible and persuasive. Her opinion is found credible and persuasive because it is consistent with, and supported by, Claimant's underlying medical records that demonstrate prior trauma to his nasal area, prior surgery to his nasal area, and a prior collapse of his nasal area.

The ALJ has considered Dr. Fall's opinion. Her opinion is basically that too much time has elapsed from the date of injury for any nasal problems to be related. But she is not an expert in these matters. Moreover, her opinion is inconsistent with Claimant's underlying medical records that demonstrate trauma to his nasal passage, collapse to his nasal passage, and surgery.

As found, a referral to a nasal specialist, or specialists, has a reasonable prospect for defining the extent of Claimant's nasal condition and the extent of future treatment that is needed due to the assault. As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the need for medical treatment from a nasal specialist, or specialists, to evaluate Claimant's nasal breathing problems is reasonably necessary and related to his work injury.

### III. Whether Claimant has proven by a preponderance of the evidence that the Botox injections to the TMJ area of the jaw are reasonable, necessary, and related to his industrial injury?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether 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).

In this case, the assault fractured Claimant's jaw and damaged his left TMJ. As a result, Claimant underwent a left TMJ arthroplasty in 2012. Due to his injuries, and the TMJ surgery, Claimant has developed muscle spasms involving his TMJ. The muscle spasms reduce his range of motion, i.e., ability to open his mouth, and also cause facial pain.

As found, the Botox injections reduce Claimant's pain and increase his range of motion. As a result, the Botox injections relieve Claimant from the effects of his work injury.

Dr. Mason testified about the reasonableness and necessity of the Botox injections. She stated that Botox causes a temporary paralysis of the affected muscles, thereby reducing the spasm and pain. Thus, she concluded that the injections are reasonable and necessary because they reduced Claimant's spasm and associated pain coming from Claimant's TMJ and the muscles used for mastication. The ALJ finds Dr. Mason's opinions and conclusions to be credible and persuasive regarding the reasonableness and necessity of the Botox injections to treat Claimant from the effects of his work injury. Her opinion is found credible and persuasive because it is consistent with the underlying medical records that demonstrate Claimant gets temporary pain relief and functional improvement from the injections.

Dr. Fall, in her April 28, 2022, report concluded that she did not find an indication for ongoing Botox injections. But the ALJ found that the Botox injections reduced Claimant's pain and increased his function. Therefore, the ALJ rejects Dr. Fall's opinion that the Botox injections are not reasonable and necessary.

The ALJ finds and concludes that Claimant established by a preponderance of the evidence that the Botox injections are reasonable and necessary to treat Claimant from the effects of his work injury.

## IV. Whether Claimant has established that he is entitled to his preferred nurse case manager?

The Act requires that Respondents offer medical case management. "Every employer or its insurance carrier shall offer at least managed care or medical case management…" § 8-42-101(3.6)(p)(II). The Act defines case management as "a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." § 8-42-101(3.6)(p)(A).

> It is now well established that the term "shall" refers to a mandatory act. *Salazar v. Industrial Claim Appeals Office*, 10 P.3d 666 (Colo. App. 2000). Further, the term "assign" is defined in Webster's II New College Dictionary, (1995) as the action of selecting, appointing and designating. Thus, by its plain language § 8-42-101(3.6)(p)(I)(A) requires the insurer to select the case manager.

*Muir v King Soopers*, W.C. No. 4-350-892, 4-5 (May 23, 2003).

Respondents fulfilled the requirements by selecting and assigning a new case manager. The Act does not require the same or preferred case manager, but only a "person" who is "knowledgeable in workers' compensation health care." Pursuant to the Workers' Compensation Guide, this could be '"a highly skilled nurse who specializes in managing workers' compensation injuries, whether it is a catastrophic injury or an injury that requires surgery." Workers' Compensation Guide § 2:14, Westlaw (database updated Apr. 2018)." *Macaulay v. Villegas*, 6 (Colo. App. April 7, 2022).

Respondents possess exclusive authority to designate the case manager who will be providing medical case management. Respondents are not required to assign Claimant's preferred or requested case manager. Instead, Claimant's recourse is his right to refuse the presence of a case manager at the Claimant's medical appointment. § 8-43-203(3)(b)(IV).

Moreover, as set forth in *Muir*:

> § 8-42-101(3.6)(p) contains no such procedure whereby the Claimant may seek the services of a case manager other than the one selected by the respondent, and we may not read non-existent provisions into the statute. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000). Under these circumstances we are compelled to conclude the General Assembly intended to vest

> the respondent with the exclusive authority to designate the person to provide case management services.

*Muir v King Soopers*, W.C. No. 4-350-892, 6 (May 23, 2003).

Respondents are not required to designate requested nurse case managers, even if recommended by an authorized medical provider:

> Relying on the decision in *Muir v King Soopers*, W.C. No. 4-350-892 (May 23, 2003), the ALJ concluded the statute specified 'case management' is to be a system "developed by the insurance carrier" and the insurance carrier "shall assign" the person to fulfill that role. A recommendation by a medical provider had no significance in that regard.

*April Tatman v. Morgan County*, W.C. No. 5-090-379 (September 8, 2022).

Likewise, nurse case management is not a medical benefit. Thus, a medical provider's opinion that only specific nurse case managers are reasonable, necessary, and related, is irrelevant as to who selects the Nurse Case Manager:

> Accordingly, the services of a case manager that are interchangeable with those of the guardian described in *Nanez*, would fail to qualify as a medical benefit…The ALJ's finding the recommendation of [requested nurse case manager] to be reasonable and necessary notwithstanding, we find the ALJ's determination he is without authority to authorize a case management provider does not represent error.

*April Tatman v. Morgan County*, W.C. No. 5-090-379 (September 8, 2022).

Claimant contends that the analogy of the designation in the first instance of a nurse case manager resembles the designation of an authorized treating physician in the first instance. Once a specific treating physician is authorized, there is no way for the Respondents to deauthorize that specific treating physician, unless done through a utilization process. Thus, Claimant contends that once a case manager is authorized, there is no way for Respondents to deauthorize the case manager. See *Granger v. Penrose Hosp.*, W.C. No. 4-351-885 (July 20, 1999); *Chapman v. The Spectranetics Corp*., W.C. No. 4-162-568 (May 30, 1997).

But based on a review of the statute, the ALJ does not concur that the analogy is appropriate. The Act requires the insurer to offer "medical case management." The Act then defines "case management" as "a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." Section 8-42-101(3.6)(p)(A).

A strict reading of the relevant statutory provisions leads this ALJ to conclude that the provision of "medical case management" is not the provision of medical treatment. Thus, the fact that a nurse, RN, is providing medical case management does not convert the medical case management service into medical treatment. The benefit at issue is "medical case management" and the insurer only has to provide a person who is

"knowledgeable in workers' compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided." Thus, a person who is knowledgeable in workers' compensation health care could be an adjuster. Thus, merely assigning the task to a nurse, or even a physician, does not convert the medical case management service, an administrative function, into medical treatment governed by the same statutes and laws regarding the authorization of a physician. In other words, it is the type of service being provided pursuant to statute that dictates who gets to control the provision of that service, and not the type of person providing the service.

The ALJ is mindful that changing the medical case manager might result in consequences that are medical in nature. For example, a new medical case manager might cause Claimant to need additional medical treatment due to increased anxiety or depression. But again, the consequence of changing the medical case manager does not change the administrative, and non-medical, nature of the service being provided under the statute.

As a result, the ALJ finds and concludes that Respondents fulfilled their obligation by first offering and assigning case managers, who were nurses, at the beginning of the claim. Then, Respondents exercised their right to select a new medical case manager and assigning that new nurse case manager to Claimant. Claimant's statutorily granted recourse, if he was dissatisfied with the selected medical case manager, is to exercise his right of refusal. Claimant does not have the right pursuant to statute or case law to select a specific medical case manager of his choice. Moreover, pursuant to statute and case law, Respondents' liability does not require Respondents to accommodate Claimant's request for a prior medical case manager.

Claimant has thus failed to establish that he is entitled to ongoing medical case management services with a specific, or prior, case manager of his choosing.

## ORDER

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

1. Respondents shall pay for reasonable and necessary medical treatment for Claimant's low back, which shall include medial branch blocks and radiofrequency ablations.
2. Respondents shall pay for Claimant to undergo Botox injections to treat Claimant's facial injuries, which includes the area involving his TMJ.
3. Respondents shall pay for the referrals for Claimant to be evaluated by a specialist, or specialists, to evaluate Claimant's nasal and breathing problems.
4. Claimant is not entitled to his preferred nurse case manager, even if it is a prior case manager.

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

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

DATED: November 21, 2022

/s/ Glen Goldman

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

## ISSUES

I. Determination of Claimant's average weekly wage (AWW).

## FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on February 12, 2022.

2. On April 16, 2022, Respondents filed an Amended General Admission of Liability admitting for medical benefits and temporary total disability (TTD) benefits from February 13, 2022 through March 18, 2022 (4 6/7 weeks). Respondents admitted for an AWW of $304.20 at a TTD rate of $202.80, totaling $985.03 of TTD paid to Claimant. Respondents admitted AWW was based on the wages of a different employee.

3. Claimant's paystubs demonstrate that she earned the following wages during the following pay periods leading up to her work injury.

| Pay Period | Gross Wages |
|---|---|
| 11/5/2021-11/18/2021 | $869.26 |
| 11/19/2021-12/2/2021 | $922.72 |
| 12/3/2021-12/16/2021 | $872.80 |
| 12/17/2021-12/30/2021 | $1,083.68 |
| 12/31/2021-1/13/2022 | $952.96 |
| 1/14/2022-1/27/2022 | $283.52 |
| 1/28/2022-2/10/2022 | $548.16 |
| **Total:** | **$5,533.10** |

4. Based on the above gross wages, Claimant's AWW is $395.22 ($5,533.10 divided by 14 weeks = $395.22). The corresponding TTD rate with an AWW of $395.22 is $263.48 ($395.22 multiplied by 66 2/3 = $263.48). A TTD rate of $263.48 multiplied by 4 4/7 weeks = $1,279.76.

5. Based on Claimant's AWW, Claimant is owed $294.73 in TTD ($1,279.76 minus $985.03).

## 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).

**Average Weekly Wage**

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

Claimant's paystubs provide an accurate basis for determining Claimant's actual gross earnings leading up to her work injury. As found, an AWW of $395.22, based on the average of Claimant's gross wages in the 14 weeks prior to her industrial injury, is a fair approximation of Claimant's wage loss and diminished earning capacity. As Respondents paid Claimant TTD based on a lower AWW ($304.20) and, thus, lower TTD rate ($202.80), Claimant is owed TTD in the amount of $294.73, per the calculations set forth in Findings of Fact #4-5.

## ORDER

It is therefore ordered that:

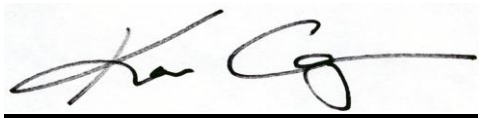
1. Claimant's AWW is $395.22, with a corresponding TTD rate of $263.48.

2. Respondents shall pay Claimant $294.73 in TTD owed to Claimant, based on Claimant's AWW and corresponding TTD rate determined herein.

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: November 22, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

## ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is an employee of Respondent pursuant to a contract of hire.

II. Whether Claimant proved by a preponderance of the evidence she sustained a compensable industrial injury arising out of and in the course of her employment.

III. Whether Claimant proved by a preponderance of the evidence she and/or her health insurance carrier is entitled to reimbursement of reasonable, necessary and related medical expenses.

## FINDINGS OF FACT

1. Claimant is 64 years of age. Claimant retired from her last paid employment approximately 15 years ago.

2. Respondent is a food bank serving southern Colorado.

3. Claimant credibly testified at hearing. She testified that she had personally been using the services of Respondent, then subsequently decided to volunteer for Respondent at a particular market.

4. Claimant provided volunteer services for Respondent beginning in approximately May 2021. Initially, there was no particular onboarding process for Claimant as a volunteer. Respondent subsequently required volunteers to complete volunteer paperwork online, including a "Volunteer Waiver and Release of Liability" form. The form repeatedly and solely refers to the signatory as a "Volunteer." The form states, in part,

> 1. Release and Waiver. Volunteer does hereby release and forever discharge and hold harmless [Respondent] and its successors and assigns from any and all liability, claims, and demands of whatever kind or nature, either in law or equity, which arise or may hereafter arise from Volunteer's activities with [Respondent]. Volunteer understands that that this release discharges [Respondent] from any liability or claim with respect to any bodily injury, personal injury, illness, death, or property damage that may result from the Volunteer's activities. Volunteer understands that [Respondent] does not assume any responsibility for or obligation to provide financial assistance or

other assistance, including but not limited to medical, health, or disability insurance in the event of injury or illness.

2. Medical Treatment. Volunteer does hereby release and forever discharge [Respondent] from any claim whatsoever which arises or may hereafter arise on account of any first aid, treatment, or services rendered in connection with the Volunteer's activities with [Respondent].

3. Assumption of the Risk. The Volunteer understands that the activities/work may be hazardous to the Volunteer, including, but not limited to lifting, loading and unloading, and other warehouse activities. Volunteer hereby expressly and specifically assumes the risk of injury or harm and releases [Respondent].

(R. Ex. L, p. 82).

Claimant testified that she did not specifically remember completing the form, although she remembered going online to fill out documentation. She acknowledged that the electronic signature on the form (her email address) dated June 28, 2021 was her correct information.

5. Claimant did not receive, nor was there any agreement between the parties that Claimant was to receive, any type of remuneration for her volunteer services. Claimant was not paid any wages and did not receive any fringe benefits for her volunteer services.

6. Claimant had access to free groceries at the market as did non-volunteer individuals. Claimant testified that, as a volunteer, she was able to for groceries at the market after her volunteer shift, resulting in her having first pick at the best foods on display. She further testified that, as a volunteer, the market did not watch her for food limits as they did for non-volunteers.

7. Claimant chose how many hours she wanted to volunteer per week, and signed up for the desired volunteer shift online. Claimant typically performed her volunteer services for 1-3 hours per week.

8. Claimant was supervised by Respondent's Market Manager, RS[Redacted]. As the Market Manager, Ms. RS[Redacted] was responsible, in part, for instructing the volunteers as to the tasks to be performed and overseeing the work of the volunteers. Claimant testified that she would arrive for her volunteer duty and be assigned a task, such as loading or unloading a pallet, cleaning the bathroom, or checking the refrigerator. Claimant testified that she was required to take directions from RS[Redacted] on what tasks to do and how to do them. Claimant testified that she would be reprimanded by RS[Redacted] if she did not do her work task according to RS[Redacted]'s standards. Claimant testified that RS[Redacted] was in control of her work tasks while she was at the market. Claimant testified that RS[Redacted] had the

authority to terminate volunteer employment, did terminate another volunteer in Claimant's presence on one occasion.

9. Claimant alleges she sustained an industrial injury while performing services for Respondent on November 4, 2021. Claimant testified that she was assigned to unload a pallet of Thanksgiving canned food, then stock the leftover boxes in the storage room. She testified that while performing this task she felt a back spasm in her shoulder blades.

10. Claimant testified that she did not immediately seek medical treatment and instead obtained a back brace on her own. Claimant testified that she contacted her rheumatologist, who prescribed her a course of steroids, which did not improve Claimant's symptoms. Claimant testified that she subsequently sought additional medical treatment when the pain worsened to the point she was having difficulties with mobility and performing activities of daily living.

11. Claimant presented to the emergency department at Parkview Medical Center on November 15, 2021 with complaints of low back pain radiating into her left buttock and throughout the entirety of her right leg. Claimant underwent a CT of the lumbar spine, for which Charles Westin, M.D. noted revealed acute fractures of the sacrum and no acute fracture or traumatic subluxation of the lumbar spine. It was suspected that osteoporosis likely contributed and there was a possible insufficiency fracture. CT imagining was also suggestive of neuroforaminal narrowing and spinal stenosis.

12. On November 16, 2021 Claimant underwent a neurosurgical consultation at Parkview Medical Center with Ali K. Murad, M.D. and Thomas J. Scruton, P.A. Claimant reported that her symptoms began after lifting some heavy boxes when she was volunteering about two weeks prior. Claimant reported that she experienced lower back pain at the time that evolved to radiating pain in the left buttock and right lower extremity. Dr. Murad noted that evaluation demonstrated lumbar degeneration, particularly at L4-5, and sacral fractures. He further noted that Claimant's past medical history was notable for osteoporosis, rheumatoid arthritis, and peripheral neuropathy. Dr. Murad gave the following assessment: Right L5 radiculopathy of unclear etiology; L4-5 changes on CT: Degenerative, infectious or autoimmune (very unlikely) differential; sacral insufficiency fractures; suspect severe osteoporosis; rheumatoid arthritis on leflunomide; peripheral neuropathy." (R. Ex. H, p. 36).

13. Claimant underwent a lumbar spine MRI on November 17, 2021 which revealed moderate central spinal stenosis L4-5; extensive degenerative disc disease with evidence of small posterior annual tear of L4-5 discs; mild grade 1 anterolisthesis of S1 upon S2 and slight anterior angulation of S1 with compression fracture of S1, with no evidence of cord or nerve root compression. PA Scruton documented, "Patient with acute minimally displaced fractures of the bilateral sacral alae likely insufficiency in setting of osteoporosis, no reported trauma. Likely secondary to chronic osteoporosis." (Cl. Ex. 000018.) PA Scruton noted, "She thinks her sacral fractures may actually be quit old and associated with a sacrococcygeal fracture she sustained in her 20s.

Notably she had no pain in palpation/percussion of the sacrum on exam yesterday. She has no lower back pain at this time." (Id. at p. 39).

14. Claimant underwent epidural steroid injections on November 19, 2021 from which she reported significant benefit. It was noted that Claimant's fractures appeared subacute versus chronic in nature. No surgical intervention was recommended at the time.

15. On November 29, 2021 Claimant presented to Eric Bernauer, M.D. at Physician Anesthesia of Pueblo. She reported that she experienced signification relief from the epidural steroid injection but continued to experience some persistent pain.

16. On January 26, 2022, Claimant returned to the emergency department at Parkview Medical Center after falling on pavement and fracturing her nose. She reported that she had been experiencing numbness in her right leg since November 2021, which resulted in occasional falls.

17. Claimant returned to performing her volunteer services for Respondent in approximately mid-January 2022 and continued to volunteer for Respondent for approximately 1-2 hours per week until April 21, 2022.

18. On April 25, 2022, SW[Redacted], Direct Services Manager, emailed Claimant and requested that she cease her volunteer work with Respondent until she resolved her legal matters (the alleged work injury).

19. Claimant testified that, despite referring to herself as a volunteer in correspondence with Respondent, she "feels like" she was an employee of Respondent due to the "setup."

20. Claimant further testified that, prior to the incident on November 4, 2021, she did not have prior back issues or difficulties performing activities of daily living. She testified that she continues to experience weakness in her right leg and tingling in her toes. Claimant testified that she cannot bend like she used to, has difficulties on inclines, and walks with a cane. Claimant stated that she has received medical bills in excess of $50,000. Claimant has private health insurance. Claimant testified that her doctors have recommended surgery for her back injury.

21. Mr. SW[Redacted] credibly testified at hearing on behalf of Respondent. Mr. SW[Redacted] testified that volunteers go online to sign up and sign a waiver. Mr. SW[Redacted] testified that volunteers are not paid or compensated in any manner, nor are they provided any fringe benefits. He further testified that there are managers who oversee the volunteers. Mr. SW[Redacted] explained that volunteers are given food safety training, while employees are provided additional training not given to volunteers. He testified that volunteers are not given any preferential access to the groceries offered at the market.

22. ZE[Redacted], Chief Financial Officer, credibly testified at hearing on behalf of Respondent. Mr. ZE[Redacted] testified that volunteers do not receive any wages,

benefits or other form of compensation. He explained that there is an onboarding, but no hiring process, for volunteers. Mr. ZE[Redacted] testified that volunteers dictate the number of hours they work. He further testified that Respondent does not carry workers' compensation insurance for volunteers.

23. Claimant failed to prove it is more probably true than not a contract of hire existed between Claimant and Respondent. Accordingly, there was no employer-employee relationship subjecting the parties to the provisions of the Act.

## 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).

## Employer-Employee Relationship

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 Workers' Compensation Act, he was performing 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. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." §8-40-203(1)(b), C.R.S. The term "employee" is defined as any person in the service of any person or corporation "under any contract of hire, express or implied." §8-40-202(1)(b), C.R.S.

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, WC 4-853-602 (ICAO, July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966); *In re Ritthaler*, WC 4-905-302-02 (ICAO, May 7, 2014).

Claimant argues that she was an employee of Respondent pursuant to an implied contract to perform work. She contends that the volunteer "hiring process" and the Volunteer Waiver and Release of Liability constitute a contract for hire as an agreement between parties regarding Claimant's services, containing mutual agreements and obligations between the parties.

As found, the preponderant evidence does not establish that an express or implied contract of hire existed between Claimant and Respondent. Respondent- had all volunteers execute the Volunteer Waiver and Release of Liability form, which specifically refers to claimant therein as a volunteer and does not contain any provision regarding any remuneration. That the waiver addresses some obligations on behalf of the volunteer (i.e. release of liability) does not constitute a contract for *hire*. Neither the waiver, nor the nature of the volunteer relationship between Claimant and Respondent, indicate there was any mutual agreement or meeting of the minds that Claimant would be providing services for remuneration.

Claimant strictly performed services for Respondent in a volunteer capacity without receiving, or any agreement to receive, remuneration. As a volunteer, Claimant had the ability to shop for groceries at the market just as other non-volunteer members of the community did. Mr. SW[Redacted] credibly testified that volunteers are not compensated in any manner, not provided any fringe benefits, and are not given any preferential treatment with respect to access to the groceries. That Claimant may have been able to pick her groceries first by virtue of being present in the market earlier than others due to her chosen volunteer shift, or that the market did not strictly enforce food limits, does not in these circumstances constitute remuneration sufficient to establish a contract of hire. There is no evidence Claimant volunteered with the expectation of remuneration. *See Aspen Highlands Skiing Corp. v. Apostolou*, 854 P.2d 1357 (Colo. App 1992), *aff'd*, 866 P.2d 1384 (Colo. 1994) (where the court, citing *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), noted that if the services are volunteered without any expectation of compensation in return, the fact that the alleged employer may provide some benefit on a gratuitous basis will not convert a volunteer into an employee). The evidence demonstrates Claimant provided services for Respondent solely as a volunteer. Claimant understood and acknowledged that she was a volunteer and Respondent did not obligate itself to provide any compensation or other benefit to Claimant in return for Claimant's volunteer services.

Claimant further argues that she was an employee because she was under direction and control of Respondent, who also had the right to terminate the relationship without liability. These factors are relevant to the determination of whether Claimant was an employee or independent contractor. See §8-40-202(2)(a) & (b), C.R.S. (any individual who performs services for pay for another shall be deemed to be an employee unless the person is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent business related to the service performed). An analysis of whether Claimant was an employee or independent contractor occurs when it has first been established that there was an employer-employee relationship subjecting the parties to the provisions of the Act. As the ALJ determined herein that Claimant was not performing services for pay and there was no contract of hire, the distinction between employee and independent contractor, as well as determination of whether any injury arose out of and in the scope of employment, are moot.

## ORDER

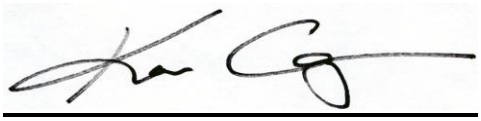
It is therefore ordered that:

1. Claimant's claim is denied and dismissed.

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

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

DATED: November 23, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-142-174-003**

---

## ISSUE

- Did Claimant prove entitlement to medical benefits for treatment to his groin and hips are due to his admitted work related back injury?

## FINDINGS OF FACT

1. Claimant works for Employer as a mechanic. He sustained an admitted low back injury on February 24, 2020. He injured himself using a 3" pipe lever to straighten a bent snowplow mount.

2. He treated with Dr. Lakin who referred him for x-rays and a MRI scan. The MRI scan showed L4-5 stenosis and degenerative disc disease. Dr. Lakin treated him with medications and returned him to light duty. He was referred to Dr. Sparr for back injections.

3. After conservative care did not help, he was seen in August 2020 by Dr. Kang who recommended consideration of an anterior lumbar interbody fusion at L4-5.

4. An IME was performed by Dr. Elfenbein on October 8, 2020 and he indicated that the pain generator was his right hip osteoarthritis. He indicated that this needed to be addressed before any further treatment for Claimant's lumbar spine.

5. The Claimant was referred by Dr. Sparr to Dr. Miner for evaluation of his hip. Claimant saw Dr. Miner on November 11, 2020. Dr. Miner diagnosed bilateral advanced hip osteoarthritis and recommended bilateral hip arthroplasty. He also noted in the history that the pain was isolated to the bilateral groin region. On December 10, 2020, he underwent bilateral total hip arthroplasty with Dr. Miner. Following the surgery, Dr. Miner noted on January 20, 2021 that Claimant's hip and groin pain had resolved.

6. Claimant returned to Dr. Miner on March 8, 2021. In his chart note, he states "Unfortunately patient sustained a large femoral DVT approximately 2 weeks ago . . . He states that he started developing symptoms in the groin 2 weeks prior to the clot itself and then noticed increasing leg swelling he called our office and we informed him to go to the emergency room for an evaluation and ultrasound." (Respondents Exhibit D-14 – 15). Dr. Miner questioned whether the pain was due to the DVT or psoas tendonitis. Dr. Miner evaluated Claimant virtually on April 12, 2021 and Claimant reported that his preoperative groin and thigh pain had essentially resolved.

7. The Claimant continued to have low back pain and he eventually underwent an anterior lumbar interbody fusion on May 27, 2021 with Dr. Kang.

8. Claimant's authorized treating provider for his occupational injury is Dr. George Johnson. He reported in his May 10, 2022 chart note that Claimant "had some PT following the surgery but discontinued due to his L groin pain which has been present since the surgery." Dr. Johnson stated Claimant needed additional work up for the left groin pain as it was uncertain if the current condition was due to the non-work related hip condition or his work related low back. (Respondents' Exhibit B page 2). Without explanation or new medical evidence to support his conclusions, Dr. Johnson stated in his July 14, 2022 report that it was his professional opinion "that Claimant's groin pain is due to his back surgery and, as it did not start until he had his back surgery, it should be covered by work comp.". (Claimant's Exhibit 4, page 35).

9. On June 13, 2022, Claimant was evaluated at UC Health by Dr. Finn. Dr. Finn stated that Claimant presented for ongoing left groin pain that began 6 days after the ALIF procedure. Dr. Finn opined that "His pain is somewhat atypical." Dr. Finn further stated "I do not know this is the result of the L4-5 fusion. It certainly would be an unusual result that I have not seen before." (Respondents' Exhibit E page 1)

10. Claimant was seen at UC Health by Andrew Donovan, MD (Resident) Neurological Surgery. Claimant had been evaluated post ALIF surgery with worsening left groin pain. The pain would shoot down the inside of his leg from the groin and extinguishing at the knee (nondermatomal pattern). After exam, Claimant was encouraged to follow up with Sports Hernia Clinic as the pain does not appear to be from his spine surgery in etiology. (Respondents Exhibit E, page 2).

11. The Claimant was evaluated by Dr. Lee and Dr. Rothchild on August 3, 2022. The possibility of a hernia was ruled out. Imaging and clinic exam did not show a hernia in the left groin. Extensive work up including CT, US, MRI and EMG were all unremarkable. The timing of it didn't make sense for a sports hernia as Claimant was recovering in bed after his spine surgery when he developed pain with left leg flexion. (Respondents' Exhibit F).

12. Respondents obtained an IME with Dr. Wallace Larson. In his September 28, 2022 report, Dr. Larson stated that "[a]t this time his left groin pain has not been definitely diagnosed but is most likely iliopsoas tendinitis either as an idiopathic condition or related to his total hip arthroplasty…it is not like related to his anterior lumbar fusion." Dr. Larson recommended "CT-guided iliopsoas injection with contrast material to document the precise location of the injection but that would be outside his occupational claim". Dr. Larson observed that "[a]lthough many entries in the medical records indicate his groin pain began only after the spine surgery, the note from Dr. Todd Miner of 3/8/2021 indicates left groin pain with a suspicion of iliopsoas tendinitis at that time." Dr. Larson opined that the request for physical therapy "is not likely to be beneficial and is not occupationally related." Dr. Larson further opined Claimant has reached MMI for his February 24, 2020 work injury as of the date of the IME. (Respondents' Exhibit G).

## CONCLUSIONS OF LAW

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

*Generally*

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. 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).

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

D. Once a claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d

448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra.*

E. 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 question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the Claimant has failed to sustain his burden of proof that his hips or groin symptoms are related to his admitted work injury. I am persuaded by the opinions of Dr. Larson, whom I find to be credible, that these symptoms are not related to the Claimant's work injury. I am unpersuaded by Dr. Johnson's opinions to the contrary since they are conclusory without any reported analysis supporting his opinions.

F. Claimant alternatively argues that the medical care for an unrelated condition is covered under a claim where such treatment optimizes recovery for the compensable injury. Claimant relies on *Price Mine Service v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App, 2003) and *Gardea v. Express Personnel Professionals*, W.C. 4-650-961 (I.C.A.O, 2011) for this proposition. However, I find that the Claimant has failed to sustain his burden of proof that treatment for the Claimant's hips are groin were or are necessary in order for him to receive optimum treatment of the industrial injury.

**ORDER**

1. The Claimant's request for medical treatment for his groin or hips is denied and dismissed.

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

**NOTICE:** 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: November 23, 2022

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

## ISSUES

- Whether Respondents are precluded from challenging the impairment rating provided by the Division Independent Medical Examiner (DIME) per the July 30, 2020 stipulation of the parties.

- If Respondents are not precluded from challenging the DIME opinions concerning impairment, whether Respondent presented sufficient evidence to overcome the February 7, 2022 DIME opinion of Dr. Karl Larsen regarding permanent impairment.

- Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to maintenance medical treatment.

## FINDINGS OF FACT

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

### *Background*

1. Claimant sustained a work injury to her left shoulder on March 28, 2019. There was initial confusion as to which shoulder Claimant allegedly injured; however, during the discovery process the parties determined that Claimant actually injured her left shoulder rather than the right shoulder as referenced in many of her medical reports.

2. On July 30, 2020, the parties filed a Stipulation and Motion for Approval wherein Respondents agreed to file a medical benefits only General Admission of Liability (GAL) admitting that Claimant injured her left shoulder on March 28, 2019. (Clmt's Ex. 2, p. 5-6). As part of this stipulation, Claimant agreed that she was not alleging an injury to the right shoulder or the left foot/ankle as a result of the March 28, 2019 incident. *Id*. at p. 6. She also stipulated that she was not seeking temporary total disability (TTD) benefits as a consequence of her left shoulder injury; however, the stipulation did not contain any terms/agreements concerning permanent impairment. *Id.* The Stipulation effectively retracted a September 20, 2019 "Notice of Contest" which denied liability for an alleged injury to the left shoulder. *Id* at p. 5. The stipulation was approved by an order of ALJ William Edie issued August 4, 2020. *Id*. at p. 8-9.

### *Claimant's Initial Post-Injury Treatment*

3. Following her left shoulder injury, Claimant presented to the Parkview emergency room (ER) on April 8, 2019. While in the ER, Claimant complained of a left

upper injury two to three weeks prior while at work. She was moving while cleaning and may have over stretched her shoulder. Claimant had full range of motion. (Resp. Ex. H, p. 145-146).

4. Claimant saw Dr. Likes for the first time on April 11, 2019, nearly two weeks after the work incident. (Resp. Ex. G, p. 46). She underwent conservative medical care.

5. Claimant had an MRI of her left shoulder on May 29, 2019. It demonstrated anterior and superior rotator cuff tendinopathy with partial thickness tearing; mild to moderate AC joint arthrosis and subacromial subdeltoid bursitis. (Resp. Ex. G, p. 45). A second MRI of the left shoulder was obtained on November 16, 2020. It continued to demonstrate moderate subscapularis tendinosis. (Resp. Ex. G, p. 62).

### *Dr. Miguel Castrejon's Independent Medical Examination*

6. Claimant underwent an independent medical examination (IME) with Dr. Miguel Castrejon at the request of Claimant's counsel on June 25, 2020. (Clmt's. Ex. 4). She reported to Dr. Castrejon that she experienced pain in her left shoulder while cleaning a bathtub. (Clmt's. Ex. 4, p. 48). She reported having been sent for an MRI of the left shoulder that revealed a tear. *Id.* As of the June 25, 2020 examination, Claimant was reporting ongoing, constant pain in her left shoulder that she reported had not been addressed through treatment. *Id.* Dr. Castrejon had few medical records and did not have a copy of Claimant's imaging report(s). *Id.* 49. Based on the available records and Claimant's reported history, Dr. Castrejon determined that Claimant had a compensable injury to her left shoulder. *Id.* He diagnosed her with a left shoulder rotator cuff strain with clinical findings of impingement and rotator cuff weakness. He also recommended that internal derangement be ruled out and noted that Claimant appeared to have an element of left shoulder girdle myofascial pain. *Id.* Dr. Castrejon opined that he would want to review the entire file before determining whether additional care was needed for the left shoulder, and if not, then to determine her impairment rating. *Id.* at 50.

### *Dr. William Ciccone's Independent Medical Examination*

7. Respondents requested an IME with Dr. William Ciccone. Dr. Ciccone evaluated Claimant on August 4, 2021. Dr. Ciccone noted that Claimant was wiping down a bathtub when she experienced pain and clicking in her shoulder. She denied any fall on or impact to her shoulder. (Resp. Ex. F, p. 26). He attempted a physical exam prompting Claimant to report increasing pain. Consequently, he stopped the examination. (Resp. Ex. F, p. 28). Dr. Ciccone noted that Claimant demonstrated guarding during the examination and reported diffuse myofascial pain with palpation to the left shoulder. (Resp. Ex. F, p. 35). He commented further that Claimant's pain appeared to be worsening with treatment, which would be unusual. (Depo. Tr. p. 8:23-25). Dr. Ciccone noted that Claimant's range of motion initially was nearly full but a few months later was significantly restricted. (Depo. Tr. p. 9:2-8).

8. Dr. Ciccone opined that Claimant suffered a minor sprain/strain to the left shoulder. (Resp. Ex. F, p. 34). He explained that Claimant's mechanism of injury (MOI) was not substantial enough to cause a significant injury, including a rotator cuff tear. (Depo. Tr. p. 7:4-7, 23-25; 8:1). He noted that Claimant had a click in her shoulder and increased pain but there was no impact on the shoulder, no fall and no lifting injury. (Depo. Tr. p. 9:14-19). He opined further that there were no objective findings of a shoulder injury that would limit Claimant's range of motion. (Resp. Ex. F, p. 34). Finally, Dr. Ciccone explained that Claimant's MRI did not reveal an acute injury, but rather chronic degenerative changes. He clarified that tendinosis is a common natural aging process wherein the tendons degenerate as people age and that tendinopathy is not usually associated with trauma. (Resp. Ex. F, p. 34; Depo. Tr. p. 12:9-13-13:1-5). Finally, Dr. Ciccone noted that Claimant's rotator cuff was degenerated and undergoing tendonotic changes. Accordingly, he opined that there was no acute rotator cuff pathology seen on the MRI scans. (Depo. Tr. p. 12:12-23). Based on the MRI reports, Dr. Ciccone indicated that he would diagnose Claimant with tendinosis of the rotator cuff – which he concluded was a personal non work-related degenerative condition. (Depo. Tr. p. 22:16-18).

9. Dr. Ciccone opined Claimant was at maximum medical improvement (MMI) around May 23, 2019. (Resp. Ex. F, p. 39). He did not issue work restrictions or assign an impairment rating. (Resp. Ex. F, p. 36-37).

***Respondents' Request for a 24-month Division Independent Medical Examination (DIME)***

10. Respondents ultimately requested a 24-month DIME pursuant to the Workers' Compensation Act in order to determine whether Claimant had reached MMI and if so, whether she sustained permanent impairment. Dr. Karl Larsen was selected as the DIME examiner and he evaluated Claimant on January 31, 2022. Dr. Larsen issued a DIME report outlining his opinions concerning causation, MMI and impairment on February 7, 2022. (Resp. Ex. E, pp. 19-21).

11. During her 24 month DIME, Claimant reported "unremitting" shoulder pain since March 2019. She also told Dr. Larsen that she was working as a housekeeper cleaning a hotel bathtub when she felt a "pull" in her left shoulder. According to Dr. Larsen, Claimant noticed increasing pain afterwards while cleaning the walls of the tub. Claimant was able to keep working but noticed persistent pain at the end of her workday. While she reported the incident to her supervisor, Claimant did not obtain medical treatment until April 8, 2019 – about three or four weeks after the incident. (Resp. Ex. E, p. 19, see FOF ¶ 3).

12. At the outset of her physical examination, Dr. Larsen noted that Claimant was sitting comfortably but when asked to engage in "any sort of motion or examination of the shoulder, [she] winces and grimaces . . . a lot". (Resp. Ex. E, p. 20). According to Dr. Larsen's DIME report, Claimant demonstrated so much pain behavior; he asked if he needed to stop the examination. *Id*. He went on to note that Claimant's pain behavior

was out of proportion to the exam stresses, which he felt was compromising Claimant's range of motion measurements. *Id.*

13. In his February 7, 2022 DIME report, Dr. Larsen commented that Claimant had left shoulder pain secondary to rotator cuff tendinopathy that was part of the naturally progressive aging process. While Claimant became symptomatic at work, Dr. Larsen explained that the work injury was not of sufficient magnitude to produce a rotator cuff tear. He opined that Claimant's shoulder pain was related to the natural progression of her underlying degenerative process and not the result of a work injury. (Resp. Ex. E, p. 20).

14. Dr. Larsen opined that Claimant would benefit from treatment, but this treatment should be pursued outside of workers' compensation. He recommended physical therapy. (Resp. Ex. E, p. 20).

15. Dr. Larsen indicated that the conception of Claimant having reached MMI was "not really applicable . . . as [he] did not hold the opinion that [Claimant suffered] a work-related condition. Nonetheless, if he were "forced" to pick a date for MMI, Dr. Larsen indicated that he would fix it as of January 26, 2021, the date of her last appointment with Dr. Likes. (Resp. Ex. E, p. 21). Dr. Larsen stated no maintenance care was required, but again, this was premised on his statement that Claimant did not sustain a compensable left shoulder injury.

16. Regarding impairment, Dr. Larsen noted:

> ". . . I do not think an impairment rating related to her work injury is appropriate as her condition is not due to her work activities, but again due to the natural process of aging. That being said, I did take the measurements appropriately to generate an impairment rating. If one were to use those numbers to generate an impairment rating her range of motion deficits would leave her with a 14% upper extremity impairment which converts to an 8% whole person impairment rating.

(Resp. Ex. E, p. 21).

17. On February 18, 2022, the Division Independent Medical Examination (DIME) Unit sent a letter to Dr. Larsen asking him to provide a rationale for his stated impairment rating in light of his comment that Claimant's condition was not caused by her work activities. (Resp. Ex. D, p. 12). Indeed, the DIME Unit noted as follows: It is unclear why an impairment rating was assigned for the left shoulder if the injury was deemed to be non-work [related] that occurred on 03/28/2019". *Id.* Dr. Larsen did not timely respond to the inquiry. Consequently, on April 15, 2022, the DIME Unit issued a "DIME Process Concluded" notice to the parties. In the notice letter, the DIME Unit indicated that they previously issued an Incomplete Notice to the physician and the physician's response was not received. Accordingly, the DIME Unit advised the parties that they considered

the DIME process complete. Respondent Insurer was informed that they had 20 days from the date of the notice to admit liability consistent with the DIME report or file an application for hearing challenging the opinions of Dr. Larsen. (Resp. Ex. B, p. 6).

18. Respondents elected to file an Application for Hearing to overcome the DIME opinion regarding impairment on May 5, 2022. (Resp. Ex. C).

### *Dr. Larsen's Supplemental DIME Report*

19. The parties engaged in discovery to prepare for hearing. When Claimant failed to timely respond to interrogatories, the parties proceeded to a prehearing conference before Prehearing Administrative Law Judge (PALJ) John Sandberg on July 29, 2022. During that prehearing, the parties learned that Dr. Larsen had issued a supplemental DIME report on April 23, 2022, which was sent to the DIME Unit only. PALJ Sandberg sent the supplemental DIME report to the parties at which time it was discovered that Dr. Larsen, per the DIME Unit's request for clarification regarding the degree of Claimant's work-related impairment, had issued a 0% impairment rating. The parties agreed to vacate and continue a hearing that was set for August 25, 2022. (Resp. Ex. D).

20. In his April 23, 2022 supplemental DIME Report, Dr. Larsen apologized for the confusion his original DIME report may have caused, noting that he was "simply attempting to provide information regarding what an impairment rating WOULD be *if* the injury were work-related". (Resp. Ex. E. p. 24)(Emphasis added). He then reiterated his "opinion that it [was] more likely than not that [Claimant's] shoulder condition was not the result of her work injury but is the result of the natural process of aging and degeneration over time". *Id.* Accordingly, and per the Division IME Unit's request for clarification, Dr. Larson completed a "new attached examiner's summary" reflected that Claimant had a 0% impairment rating for Claimant's left shoulder condition. *Id.*

### *Dr. Ciccone's Post DIME Records Review & Deposition Testimony*

21. Dr. Ciccone issued a supplemental medical records review following the DIME on August 1, 2022. (Resp. Ex. F, p. 41). Dr. Ciccone's opinion did not change from his original report. Dr. Ciccone stressed that Claimant did not suffer a significant trauma to the shoulder; she just had pain with activities. (Resp. Ex. F, p. 42).

22. Dr. Ciccone commented that there was no basis for Dr. Larsen to issue an impairment rating based on his initial report. (Resp. Ex. F, p. 43).

23. Dr. Ciccone testified via deposition on September 28, 2022. He testified as a board certified, level II accredited expert in orthopedic medicine. (Depo. Tr. p. 6:11-14).

24. Dr. Ciccone testified that based upon the MOIs described by Claimant

there was insufficient force directed to the shoulder to cause a rotator cuff tear. (Dep. Tr. p. 7:1-25, p. 8:1). He concluded that Claimant suffered a "minor sprain or strain, but nothing serious. (Depo. Tr. p. 9:9-23). He indicated further that Claimant would have been at MMI between six and eight weeks following her March 28, 2022 injury. Id. at p. 11:7-17.

25. Dr. Ciccone reiterated his opinions that Claimant's left shoulder condition was related to tendinosis, which he noted is the natural degeneration of tendons that occurs with aging and that this opinion was supported by the objective evidence visualized on MRI. (Depo. Tr. p. 12:9-25; p. 13:1-23). According to Dr. Ciccone, Claimant's shoulder pain was caused by these degenerative changes. (Depo. Tr. p. 22:19-25).

26. Dr. Ciccone also agreed with Dr. Larsen that Claimant did not require medical maintenance treatment. He explained that Claimant did not suffer a significant injury that would require any maintenance treatment or work restrictions. (Depo. Tr. p. 15:17-25; p. 16:1-7).

27. Dr. Ciccone explained that Dr. Larsen's addendum DIME report was the more accurate opinion of his (Dr. Larsen's) opinion concerning impairment and that Claimant would not have any ratable impairment caused by a minor sprain/strain injury. (Depo. Tr. p. 17:10-25; p. 18:1-12). When asked if simply having an incident at work would automatically mean that a person suffered an injury, Dr. Ciccone noted: "No, you can have pain at work all the time and not have an injury". (Depo. Tr. p. 18:13-17). He also noted that merely because a person suffers an accepted work injury does not mean they are automatically entitled to an impairment rating. (Depo. Tr. p. 18:18-21). Finally, Dr. Ciccone noted that the AMA Guidelines do not require the assignment of an impairment rating in every case. Rather, an impairment rating should be assigned when there is a "work-related injury that [has] resulted in a loss of function [to] an extremity directed related or causally related to that injury". (Depo. Tr. p. 19:4-11).

28. The evidence presented persuades the ALJ that Dr. Larsen's true opinion regarding impairment is explicitly articulated in his April 23, 2022 DIME Addendum Report. The ALJ credits the content of this report to find that Claimant suffered no impairment, i.e. 0% as a result of her March 28, 2019 work injury. In fact, the ALJ finds that Dr. Larsen tried to articulate the same in his February 7, 2022 report; however, his choice of verbiage created ambiguity and confusion surrounding the issue prompting the DIME Unit to request clarification regarding the degree of Claimant's work-related impairment. (See generally, Resp. Ex. D, pp. 12-14). Indeed, the DIME Unit noted as follows: "It is unclear why an impairment rating was assigned for the left shoulder if the injury was deemed to be non-work [related] that occurred on 03/28/2019". Id. at p. 12-13. Because Dr. Larsen did not respond to the request for clarification promptly, the DIME Unit considered the "DIME Process Concluded" and notified the parties on April 15, 2022, that Respondent-Insurer had 20 days from the date of the notice to admit liability consistent with the DIME report or file an application for hearing challenging the opinions of Dr. Larsen. (Resp. Ex. B, p. 6). As noted above, Respondents then elected to file an

application for hearing to challenge the 14% scheduled impairment rating decision from Dr. Larsen's February 7, 2022 DIME report.

29. The ALJ credits the opinions of Dr. Larsen and Dr. Ciccone that Claimant's MOI was minor and would not have resulted in rotator cuff pathology or a significant injury as support for the finding that Claimant suffered 0% work injury related left shoulder impairment. Indeed, both Dr. Ciccone and Dr. Larsen noted that there was insufficient force to cause anything more than a minor sprain/strain to Claimant's left shoulder. Moreover, the imaging (MRI) in this case revealed an absence of acute rotator cuff pathology to support a finding that Claimant sustained a traumatic injury to the left shoulder on March 28, 2019. To the contrary, Dr. Ciccone noted that Claimant's rotator cuff was degenerated and undergoing tendonotic changes, which he opined was a personal non work-related degenerative condition. Similarly, as part of his independent medical examination, Dr. Larsen noted:

> The injury onset she describes is not likely to have caused her condition, specifically her MRI findings. Indeed, the first and second MRIs seem to demonstrate progression of the tendinosis to involve the infraspinatus as well as changes involving the subscapularis despite the fact that she was no longer working in the capacity of a housekeeper. This would make sense with a naturally occurring progressive condition.

(Resp. Ex. E, p. 20).

30. Based upon the evidence presented, the ALJ finds that Respondents have proven that Dr. Larsen's assignment of 14% scheduled impairment, as articulated in his February 7, 2022 DIME report was probably incorrect.

31. Claimant has failed to establish that she is entitled to maintenance medical treatment.

32. Based upon the evidence presented, the ALJ is not convinced that Respondents are precluded from challenging the impairment rating assigned by Dr. Larsen as referenced in his February 7, 2022 DIME report.

## CONCLUSIONS OF LAW

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

### *Generally*

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

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

***The Parties July 30, 2020 Stipulation and Motion for Approval***

B. Parties in workers' compensation proceedings frequently waive, by words or actions, various legal rights and stipulate to certain facts. See, *e.g., Jordan v. Black Gold Asphalt Co*., W.C. No. 4-562-913 (September 28, 2004) (parties stipulated to AWW), affd on other grounds, Colo. App. No. 05CA0198, Aug. 25, 2005 (NSOP). It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *Cherokee Metropolitan Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). Moreover, it has been recognized that "[a] party's participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein." *USI Properties East, Inc. v. Simpson*, 938 P.2d at 173. In this case, Claimant contends that Respondents are precluded from challenging the impairment rating initially provided by Dr. Larsen as part of his February 7, 2022 DIME report because they had entered into a stipulation regarding the compensable nature of Claimant's left shoulder injury. Indeed, Claimant urges the ALJ to "[find] that Respondents are bound by the July 30, 2020 stipulation as it pertains to advancing any legal theory contrary to the plain and unambiguous terms therein". Although the stipulation in question unambiguously states that Respondents are accepting liability for the "left shoulder injury" that occurred on March 28, 2019, it does not contain any terms/agreements concerning permanent impairment. Indeed, the stipulation contains no reference to impairment at all. Nonetheless, Claimant contends that by agreeing to accept liability and file a medical benefits only General Admission of Liability (GAL), Respondents agreed to accept any impairment associated with Claimant's compensable injury. The ALJ is not persuaded.

C. Careful review of the language comprising the stipulation persuades the ALJ that Respondents did not waive their right to challenge any impairment that may be associated with the stipulated compensable injury in this case. Rather, the stipulation only addressed Respondents agreement to "accept the left shoulder injury that occurred March 28, 2019 for medical benefits" by filing a General Admission of Liability. In this case, the ALJ is not convinced, as argued by Claimant, that the stipulation extends to matters beyond liability for the injury, e.g. impairment that may arise after treatment for the admitted injury in complete. Because Respondents challenge to Dr. Larsen's February 7, 2022 impairment rating does not advance any legal theory contrary to the plain and unambiguous terms of the stipulation, the ALJ concludes that Respondents are not precluded from disputing the rating.

*Overcoming the DIME Opinion of Dr. Larsen Regarding Permanent Impairment*

D. A DIME physician's findings concerning causation and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-

42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment the party challenging the DIME must demonstrate that the physicians determination in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. While a DIME physician's opinions are entitled to special weight on issues of MMI and whole person impairment, they are not entitled to any special weight when it comes to extremity ratings. §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. Indeed, in *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998), the Court of Appeals explained that the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries, i.e. whole person impairment. Consequently, where permanent impairment is limited to a portion of the body included on the list of scheduled ratings in C.R.S. § 8-43-107(2)(a) a DIME opinion merely has to be rebutted by a preponderance of the evidence to be overcome. *Delaney v. Industrial Claims Appeals Office,* 30 P.3d 691, 693 (Colo.App. 2000). In this case, it is clear that Dr. Larsen assigned 14% scheduled impairment to Claimant's left upper extremity per his February 7, 2022 DIME report. Accordingly, the ALJ concludes that Claimant's injuries involve body parts listed on the schedule and Respondents, as the challenging party, carry the burden of overcoming Dr. Larsen's scheduled rating opinion by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see also, Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019)(whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

F. In this case, Respondents assert that the opinions of Dr. Larsen concerning impairment are ambiguous and that a threshold determination of what his actual impairment rating opinion is must be resolved before the question of whether Respondents overcame his opinions can be addressed. Based upon the evidence presented, the ALJ agrees. If the DIME physician offers ambiguous or conflicting opinions concerning impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo.App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo.App. 05CA0491, January 26, 2006) (not selected for publication).

In this case, it is clear that a conflict exists between Dr. Larsen's February 7, 2022, DIME report and his subsequent April 23, 2022 addendum requested by the DIME Unit. After careful review of the reports in question, the ALJ concludes that Dr. Larsen's true opinions concerning Claimant's work related impairment are those expressed in his DIME addendum report issued April 23, 2022. As noted therein, Dr. Larsen opined that Claimant had 0% impairment as a result of the work incident.

G. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo.App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). After considering the totality of the evidence presented, the ALJ concludes that Respondents have produced unmistakable evidence establishing that Dr. Larsen's assignment of 14% upper extremity impairment per his February 7, 2022 DIME report was probably in error. In fact, the April 23, 2022 addendum to Dr. Larsen's February 7, 2022 DIME report persuades the ALJ that his original assignment of impairment in this case was highly probably incorrect.

H. As found, support for the conclusion that Dr. Larsen's February 7, 2022 impairment-rating opinion has been overcome, rests in the opinions of Dr. Larsen and Dr. Ciccone when they explained that there was insufficient force to cause anything more than a minor sprain/strain to Claimant's left shoulder and the imaging (MRI) in this case, which revealed an absence of acute rotator cuff pathology to support a finding that Claimant sustained a traumatic injury to the left shoulder on March 28, 2019 upon which a work injury impairment rating can be based. Accordingly, the ALJ credits Dr. Larsen's DIME addendum where he credibly explained why Claimant had 0% work related impairment to conclude that his prior February 7, 2022 impairment-rating opinion has been overcome.

### *Claimant's Entitlement to Maintenance Medical Benefits*

I. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical

treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

J. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the record evidence persuades the ALJ that Claimant has failed to prove she is entitled to medical maintenance care. None of her authorized treating physicians have recommended that she undergo maintenance care. Indeed, then only opinions presented concerning medical maintenance treatment in this matter come from Dr. Larsen and Dr. Ciccone and Claimant did not testify. In Dr. Larsen's original January 2022 DIME report, he did not recommend medical maintenance treatment for Claimant. Rather, Dr. Larsen stated that no maintenance care was required. He specifically stated that any further care for Claimant's left shoulder should be pursed outside of workers' compensation. Similarly, Dr. Ciccone opined that Claimant did not require medical maintenance treatment under workers' compensation.

K. The evidence presented supports a conclusion that Claimant has failed to present any recommendations from a treating provider that she requires further medical treatment that is reasonable, necessary or related under workers' compensation to cure and relieve her of the effects of her work related left shoulder sprain/strain. Accordingly, Claimant's request for medical maintenance treatment must be denied and dismissed.

## ORDER

It is therefore ordered that:

1. Respondent's request to set aside the 14% scheduled person impairment rating associated with Claimant's left shoulder injury is granted. Claimant is at MMI without permanent impairment per the April 23, 2022 supplemental DIME report.

2. Claimant's request for maintenance medical treatment benefits is denied and dismissed

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

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

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

DATED: November 23, 2022

/s/ Richard M. Lamphere

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-188-805-002**

## ISSUES[1]

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury on October 6, 2021, in the course and scope of his employment.

2. Whether claimant is entitled to medical benefits rendered related to his October 6, 2021 injury.

3. Whether Claimant should be awarded Temporary Total Disability (TTD) benefits, and if so, what was Claimant's Average Weekly Wage (AWW)?

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to § 8-43-408(5), C.R.S.

## FINDINGS OF FACT

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

1. Claimant is a 29 year-old male who injured his right foot on October 6, 2021. Claimant suffered a displaced fracture of the medial cuniform. (Ex. 1).

2. Employer is an automotive repair shop with two locations in Colorado. JC[Redacted], one of the owners, appeared on behalf of Employer at the hearing. Mr. JC[Redacted] is also Employer's registered agent. (Ex. 17).

3. Claimant credibly testified that sometime in early October 2021, he saw a sign located in the back of a green pickup at Employer's south Broadway location that read "mechanic wanted". (Ex. 6).

4. Claimant testified that he went to Employer's office and applied for the mechanic position because he wanted a career change. Claimant was working for a locksmith company at that time, and he arrived at Employer's office in his locksmith van. Claimant testified he had previous experience as a lead mechanic, but he is not ASE certified.

5. Claimant credibly testified that he filled out an application and met with Mr. JC[Redacted] about a job as a mechanic. Claimant further testified that Mr. JC[Redacted] "hired him on the spot."

[1] Claimant's counsel raised the issues of disfigurement and permanent partial disability in the position statement submitted to the Court. These issues were not before the ALJ at the hearing. Claimant filed a brief withdrawing the issue of permanent partial disability on August 1, 2022, and stated at the beginning of the hearing that disfigurement was not an issue for the hearing.

6. Robin Freeman worked for Employer for approximately 45 days between September and October 2021 at the main office. Ms. Freeman testified that she put together employee files and handled general office work.

7. Ms. Freeman testified that Claimant applied for a mechanic position with Employer. She credibly testified that Claimant and Mr. JC[Redacted] spoke in the front lobby of the main building, and Claimant was hired as a mechanic to work at Employer's other location. Ms. Freeman testified that she compiled an employee file for Claimant that included his application and copies of his social security card and ID. Ms. Freeman did not know Claimant's rate of pay. Ms. Freeman credibly testified that she was terminated because she fell asleep at work.

8. Claimant testified that he quit his locksmith job to work for Employer. He further testified that he began working at Employer's south location on October 3, 2021. Claimant used his own tools, and was given direction as to what car to work on, and what to do. Claimant had not been given a uniform.

9. Claimant testified that between October 3 and October 6, 2021 he worked on the carburetor in Mr. C[Redacted]'s race car; he worked on a toe hitch lock; he worked on a couple of cars; he unplugged a hybrid battery on a Lexus RX 300, because he was supposed to work on the car; and he cleaned up around the shop.

10. Claimant testified that on October 6, 2021, Jack Walsh, who also worked for Employer, asked Claimant to help him move some oil tanks. Claimant testified that the three, 100 gallon tanks, were stacked on each other but they were crooked. The tanks began to fall. Even though Claimant tried to run, one tank hit him and injured his foot.

11. Mr. Walsh called Mr. JC[Redacted] and told him about the accident. Mr. JC[Redacted] came to the shop and took Claimant to Urgent Care. Claimant credibly testified that he did not have any health insurance.

12. Claimant went to Rocky Mountain Urgent Care on October 6, 2021. Jennifer Briggs, P.A. evaluated Claimant, and x-rays were taken of his ankle and foot. The only record regarding this visit submitted into evidence is an October 10, 2021 billing statement. (Ex. 13).

13. Claimant was evaluated at Orthopedic Centers of Colorado on October 12, 2021. Claimant testified that SC[Redacted], Mr. JC[Redacted]'s wife who also works for Employer, provided this referral for Claimant. Claimant was diagnosed with a displaced medial cuneiform fracture. (Ex. 11).

14. On October 20, 2021, Claimant had surgery on his right foot. A right foot cuneiform open reduction and internal fixation was performed. The medical records state that Claimant "injured his right foot in a work-related incident." (Ex. 1).

15. Claimant had follow-up appointments at Orthopedic Centers of Colorado on November 2, 2021 and November 23, 2021. At the November 23, 2021 appointment, Claimant was still in a boot and doing well. He was to follow up in four weeks and get

more x-rays. (Ex. 11). There is no evidence in the record that Claimant attended this follow-up appointment or received additional x-rays.

16. Claimant testified that it has been six to seven months since he has seen a doctor. Claimant further testified that he believed his surgeon recommended therapy. There is nothing submitted into evidence, however, indicating that therapy was recommended for Claimant.

17. A "Visit Charge Detail" from Mile High Surgicenter LLC, for Claimant's October 20, 2021, surgery was admitted into evidence. (Ex. 2). According to this document, the total billed charges were $29,624.05, and there is a balance due of $3,621.50. Claimant testified that Employer paid for part of his surgery. Mrs. SC[Redacted] wrote a check in the amount of $8,443.00 to Mile High Surgery Center, and the notation reads "Adrian Santa Rosa's surgery." (Exs. 15-16). An $8,443.00 payment is referenced on Exhibit 2. There is no credible evidence in the record as to whether Claimant paid any of the billed charges, nor is there any credible evidence in the record as to what amount, if any, is outstanding.

18. An "Account Inquiry" from Orthopedic Centers of Colorado was admitted into evidence. (Ex. 11). According to the document, there is an outstanding balance of $3,105.00. There is no credible evidence in the record, however, as to what amounts, if any, Claimant paid to Orthopedic Centers of Colorado.

19. An "Account Summary" from Englewood Rocky Mountain Urgent Care was admitted into evidence. (Ex. 13.). According to the document, there was a "patient payment" of $150.00, and an outstanding balance of $80.00. There is no credible evidence in the record indicating if Claimant paid the $150.00, and if $80.00 is still outstanding.

20. A bill from DJO, LLC, for crutches, in the amount of $53.12, was admitted into evidence. (Ex. 14). Claimant testified that this amount is outstanding and has not been paid.

21. The ALJ is unable to determine what amounts if any, Claimant has paid for his medical care to date. Similarly, the ALJ is unable to determine what medical expenses are still outstanding.

22. Other than the initial application, Claimant never completed any other paperwork for Employer. Additionally, Claimant never received a paycheck from Employer.

23. Following the accident on October 6, 2021, Claimant and Mr. JC[Redacted] exchanged multiple text messages. Mr. JC[Redacted] expressed concern over Claimant's injury and in one message wrote "like I've said several times I own my part . . . either way you need to be taken care of and I will own my part." (Ex. 23).

24. Mr. JC[Redacted] testified that he never hired Claimant, and Claimant was never an employee. Mr. JC[Redacted] testified that Claimant hung around the shop and made friends with the guys, but he was not supposed to be there, and he had not hired him. Mr.

JC[Redacted] testified that he paid some of Claimant's bills because he was trying to help someone who was hurt. The ALJ does not find this testimony credible.

25. On October 6, 2021, Claimant received an email from Tekmetric Shop Management System. The email read "JC[Redacted] has invited you to join Autolab 4000. Clink the link below to activate your account and start using Tekmetric Shop Management System." (Ex. 25). Claimant credibly testified that Tekmetric is an application that records what vehicle a person is working on.

26. The ALJ finds, based on the totality of the evidence, Claimant had been hired by Employer, Claimant was an employee, and Claimant suffered a compensable injury in the course and scope of his employment on October 6, 2021. The ALJ further finds that Claimant's surgery and related medical appointments were reasonable, necessary and related to his October 6, 2021 work injury.

27. Claimant testified that he was not able to work for six months because of his foot injury. This testimony was uncontroverted.

28. Claimant testified that he was supposed to earn $25 per hour working for Employer, and this was the standard rate in the industry. There is no evidence in the record to controvert this testimony. Claimant testified he currently works 10 hours per day as a mechanic. There is no evidence in the record, however, to demonstrate that Employer hired Employee to work any time over eight hours a day, or 40 hours per week.

29. The ALJ finds that Claimant's AWW at the time of his injury on October 6, 2021 was $1,000.00 per week ($25.00/per hour * 40 hours). The ALJ further finds that Claimant is entitled to TTD from October 6, 2021 through April 6, 2022.

30. Claimant endorsed the issue of penalties based on § 8-43-408(1),[2] C.R.S., specifically, Employer's failure to have workers' compensation insurance at the time of Claimant's injury. Mr. JC[Redacted] testified that Employer has workers' compensation insurance through Pinnacol Assurance, and he has no idea why he would not have had insurance coverage at the time of Claimant's injury. Mr. JC[Redacted] testified that Claimant was not an employee, so workers' compensation would not be triggered. Claimant presented no credible evidence to support the assertion that Employer does not have workers' compensation insurance.

31. The ALJ finds that Claimant did not prove by a preponderance of the evidence that Employer did not have workers' compensation insurance on October 6, 2021.[3]

[2] The applicable statute is § 8-43-408(5), C.R.S.
[3] The ALJ is not making a finding as to whether Employer has workers' compensation insurance.

## CONCLUSIONS OF LAW

### *Generally*

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

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

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

### *Medical Benefits*

The ALJ credits the testimony of Claimant and Ms. Freeman that Mr. JC[Redacted] hired Claimant to work as a mechanic. Further, Mr. JC[Redacted] knew Claimant was at the shop, and he invited Claimant to join Autolab on the Tekmetric Shop Management System. As found, based on the totality of the evidence, Claimant proved by a preponderance of the evidence that he was an employee on October 6, 2021. (Findings of Fact ¶ 26).

An injury must arise out of, and in the course of, Claimant's employment to be compensable. § 8-41-301(2)(b)(c), C.R.S. As found, Claimant was working for Employer on October 6, 2021, when an oil tank fell and injured Claimant's right foot. According to the Act, an employer must pay for medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." C.R.S. § 8-42-101(1)(a). The

determination as to whether claimant's treatment is reasonable and necessary is one of fact for resolution by the ALJ. *Durango v. Dunagan*, 939 P.2d 496, 499 (Colo. App. 1997). In *Durango*, the ALJ determined the employer was liable for claimant's treatment because claimant's physician "agreed that surgery was a reasonable treatment for claimant's condition." *Id*. As found, Claimant's surgery and related medical appointments were reasonable, necessary and related to his work injury.

The ALJ, however, was unable to determine what amounts if any, Claimant has paid for his medical care. Similarly, the ALJ is unable to determine what medical expenses are still outstanding. (Findings of Fact ¶ 21).

***AWW***

Claimant's AWW is based upon his wages at the time of injury. §8-42-102(2), C.R.S. (2001). The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. §8-42-102(3), C.R.S.; *Campbell v. IBM*, 567 P.2d 77 (Colo. App 1993); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo. App. 1992). As found, Claimant's AWW was $1,000.00. (Findings of Fact ¶ 29).

***TTD***

To prove entitlement to TTD, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a result of the disability and; (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 1997). As found, Claimant became temporarily and totally disabled for six months, during which time he was unable to work because of his injury. (Ex. 12 and Ex. A). Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days. Claimant is entitled to TTD benefits beginning October 6, 2021 and ending April 6, 2022. (Findings of Fact ¶ 29).

***Penalties***

Section 8-43-408(5), C.R.S. provides for a twenty-five percent increase in compensation where the employer, at the time of an injury, has not complied with the insurance provisions of the Act. Here, Claimant is seeking penalties pursuant to 8-43-408(5), C.R.S. Claimant bears the burden of showing that Employer did not maintain workers' compensation insurance at the time of the injury. *Maldanado v. Nirbhao, Inc.,* WC 5-122-747-001 (ICAO May 7, 2021) (claimant bears the burden of proof to justify penalty based on lack of insurance coverage); *McManus v. Oil Tools,* WC 4-481-926 (ICAO Apr. 29, 2002); *Smedley v. Calcomp/Access Graphics Tech.,* WC 4-210-382 (ICAO Oct. 3, 1995). Mr. JC[Redacted] testified that Employer has workers' compensation insurance, and he did not file a claim because Claimant was not an employee. Claimant presented no credible evidence to controvert Mr. JC[Redacted]'s testimony. As found, Claimant failed to prove that Employer did not have workers' compensation insurance on October 6, 2021. (Findings of Fact ¶ 31).

## ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that he was an employee and he suffered a compensable injury on October 6, 2021, in the course and scope of his employment.

2. Respondent shall reimburse Claimant for his medical expenses. Since the ALJ was unable to determine Claimant's medical expenses, Counsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue.

3. Claimant's average weekly wage is $1,000.00.

4. Claimant has shown that due to his injury he was out of work from October 6, 2021 through April 6, 2022. He is entitled to TTD based on an AWW of $1,000.00.

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: November 23, 2022

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

## ISSUES

- Did Claimant prove entitlement to permanent total disability ("PTD") benefits?

- At the outset of the hearing, the ALJ determined that the endorsed issues of average weekly wage and TTD were closed by the June 14, 2021 Final Admission of Liability (FAL), which was only contested with respect to permanent total disability.

- The endorsed issue of "medical benefits" is not necessarily closed because the June 14, 2021 FAL admitted for medical benefits after MMI. Medical benefits after MMI remain open, subject to Respondents' right to contest reasonable necessity, causation, or authorization of any specific treatment. However, at hearing Claimant could not identify any specific medical benefits recommended by an ATP that are disputed or denied. Accordingly, all issues related to medical benefits after MMI are reserved for future determination, if necessary.

## FINDINGS OF FACT

1. Claimant worked for Employer as a cleaner. She suffered admitted injuries to her head, neck, and back in a slip and fall accident on December 3, 2019.

2. Claimant was referred to Concentra Medical Centers for authorized treatment. She was diagnosed with a head contusion, lumbar, thoracic and cervical strains, and adjustment reaction. Claimant underwent primarily conservative treatment, including PT, chiropractic, massage therapy, medications, injections, and a TENS unit. She required no surgery for the injuries.

3. Cervical and brain MRIs were normal, as was an upper extremity EMG.

4. A lumbar MRI on March 31, 2020 showed multilevel degenerative changes and a disc extrusion at L5-S1, possibly impinging the left S1 nerve root. Claimant had an epidural steroid injection (ESI) that did not help.

5. Claimant was referred to Dr. Kathy McCranie, a physical medicine and rehabilitation specialist. On July 27, 2020, Dr. McCranie noted Claimant "is now complaining of multiple and expanding symptomatology. . . . Her pain diagram shows nearly total posterior body pain, excluding only the right arm and leg, and top and posterior head." Similarly, on August 17, 2020, Claimant reported symptoms with in multiple areas including her face, forehead, bilateral knees, bilateral legs, low back, and left arm. Dr. McCranie saw nothing on the MRIs to explain Claimant's widespread symptoms.

6. To investigate Claimant's "expanding symptomatology," Dr. McCranie recommended a psychological evaluation to evaluate a somatic disorder. Dr. McCranie opined Claimant was a poor candidate for any type of surgery, "considering her multiple

and diffuse symptoms that do not follow specific pathology. She was also noted to have several positive Waddell findings on today's examination, indicative of a psychological component to her pain."

7. A repeat lumbar MRI on October 7, 2020 showed improvement of the L5-S1 disc extrusion.

8. On October 29, 2020, Dr. Reinsma, Claimant's primary ATP at Concentra, documented complaints of "pain to bilat LE with primary, localization to the front of her knee. Worse after rest. This is inconsistent with radicular pain as well as inconsistent with the MRI findings."

9. Claimant saw Dr. Andrew Castro for a surgical evaluation on November 4, 2020. Dr. Castro noted the disk herniation was significantly smaller and improving on its own. He suggested another ESI but saw no indication for surgery.

10. Claimant had a repeat ESI on November 24, 2020.

11. On November 30, 2020, Claimant told Dr. McCranie the second ESI provided no benefit. Claimant said she had felt "paralyzed" over the past two days with difficulty walking and doing basic chores. But physical examination showed normal gait, normal strength and sensation, and no evidence of neurological deficits.

12. Dr. McCranie determined Claimant was at MMI on December 14, 2020. She assigned an 18% whole person impairment rating for soft tissue injuries to the lumbar and cervical spines. Dr. McCranie deferred formal work restrictions to Dr. Reinsma but opined, "Based on my examination of the patient, her improvement, and objective pathology, I would anticipate that she would be able to work at least within the light work category."

13. On December 21, 2020, Dr. Reinsma agreed Claimant was at MMI on December 14, and adopted Dr. McCranie's impairment rating. Dr. Reinsma provided permanent restrictions of no lifting over 20 pounds and occasional bending and rotating at the waist.

14. Claimant underwent a DIME with Dr. James Regan on May 28, 2021. Dr. Regan diagnosed lumbar, thoracic, and cervical strains. He agreed Claimant reached MMI on December 14, 2020. Dr. Regan assigned a 23% whole person rating for the lumbar, thoracic, and cervical spines. Regarding work restrictions, Dr. Regan opined Claimant should "minimize bending at the waist [and] . . . avoid any lift[ing] over 25 pounds."

15. Respondents filed a Final Admission of Liability (FAL) based on Dr. Regan's DIME report. The FAL also admitted for al medical benefits after MMI. Claimant timely objected to the FAL and requested a hearing on the sole issue of permanent total disability.

16. Claimant participated in a Functional Capacity Evaluation (FCE) on June 8, 2021 with Sherry Young, OTR. Ms. Young concluded Claimant can lift up to 20 pounds occasionally, and tolerate occasional bending at the waist. She further opined Claimant

can sit on a frequent basis and stand or walk on an occasional basis. She can tolerate 60-90 minutes of continuous sitting or 10-30 minutes of continuous standing or walking. She opined Claimant needs a 5-10 minute break every 30-45 minutes. Mr. Young concluded Claimant can work four hours per day, five days per week within the aforementioned restrictions.

17. CatalystRTW investigated employment opportunities for Claimant, and identified a full-time Market Research Associate position with Solomon Group. This is a sedentary job that involves contacting businesses and consumers by telephone to gather, verify, and update survey information. The daily schedule was flexible and allowed for breaks and postural changes as needed.

18. In June 2021, Dr. Reinsma reviewed the job description and demands and opined Claimant could perform the work on a full-time basis. He reaffirmed that opinion in July 2022.

19. Katherine Harris performed a vocational evaluation for Respondents. She interviewed Claimant in January 2022 and wrote a report dated September 29, 2022. Ms. Harris testified at hearing consistent with her report. Ms. Harris noted Claimant was born and raised in Mexico and immigrated to the United States in 1999. Claimant is a US citizen. She completed the sixth grade in Mexico, with no other formal education. Claimant's primary language is Spanish, with limited ability to communicate in English. Her work history includes unskilled and semi-skilled occupations, including packing, food production, bread-making, housekeeping, and janitorial work. Ms. Harris interviewed Claimant, reviewed medical records, and performed labor market research regarding work opportunities in the Spanish-speaking labor market in the Denver metro area. She specifically considered jobs that offer training, and part-time, full-time, or flexible schedules. She also referenced free resources to help Claimant find and secure suitable work. She testified employers have become increasingly flexible and willing to accommodate workers with limitations over the past few years because of the tight job market and low unemployment. Ms. Harris opined Claimant is competitively employable in a variety of unskilled sedentary or modified-light occupations including food service, cashier, companion, sewing operator, counter clerk, hostess, hand packager, retail sales, usher, ticket taker, and lobby attendant.

20. After the injury, Claimant continued to work for Employer in a modified position until she voluntarily resigned in August 2021 for non-disability-related reasons. Before the accident, Claimant's job duties included cleaning machines, "proof" boxes, process mixers, and tables, sweeping floors and removing trash. After the injury, Employer provided modified duty consistent with the restrictions from Claimant's ATPs. The modified tasks included working on labels and sorting product.

21. Employer continued to provide modified duty after Claimant was put at MMI. There is no persuasive evidence Employer intended to terminate Claimant had she not resigned. Employer's General Manager, Mr. G[Redacted], credibly testified Claimant was a good worker and he would hire her "tomorrow" if she wanted to return to work. He credibly testified Employer would pay the "prevailing rate" and accommodate any restrictions currently in place.

22. Claimant testified to limitations that interfere with her ability to sustain basic activities, including routine activities of daily living. Claimant does not believe she can consistently sustain activity at a level required of competitive employment.

23. The severe limitations described by Claimant are not supported by the medical records or other persuasive evidence.

24. Dr. Reinsma, Dr. McCranie, and Dr. Regan's opinions regarding Claimant's permanent restrictions and work capacity are credible and persuasive.

25. Ms. Harris' vocational analysis and opinions are credible and persuasive.

26. Claimant can work and earn wages in a variety of occupations at the sedentary and modified-light levels.

27. Claimant failed to prove is permanently and totally disabled.

## CONCLUSIONS OF LAW

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001). A claimant is not required to present expert medical or vocational evidence to establish permanent total disability, but can rely on any admissible evidence to support their claim. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Nevertheless, the presence or absence of expert opinion evidence is a legitimate factor to consider when evaluating the preponderance of persuasive evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

As found, Claimant failed to prove she is permanently and totally disabled. While the ALJ does not doubt that Claimant suffers residual pain and associated limitations from the work injury, the question is whether those limitations are severe enough to render her totally disabled as opposed to merely partially disabled. There is insufficient persuasive evidence to support a finding of permanent total disability under the applicable "any wages" standard. As Ms. Harris persuasively explained, Claimant can sustain

employment in a variety of occupations at the sedentary or modified-light level. Additionally, Claimant remains employable with Employer and could still be working had she not voluntarily resigned for non-disability-related reasons. The opinions of Drs. Reinsma, McCranie, and Regan regarding Claimant's restrictions and work capacity are credible and persuasive. Claimant's description of limitations that would preclude all competitive employment is unsupported by medical records or other persuasive evidence. Although a claimant is not required to present expert medical or vocational evidence to establish permanent total disability, the presence or absence of expert opinion evidence is a legitimate factor to consider when evaluating the preponderance of persuasive evidence. *E.g., Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Even though Claimant's permanent restrictions, education, limited English proficiency, and work experience significantly narrow the range of work she can perform, there are still numerous jobs in the competitive economy consistent with Claimant's limitations.

## ORDER

It is therefore ordered that:

1. Claimant's request for permanent total disability benefits is denied and dismissed.

2. All issues not decided herein and not previously closed by operation of law are reserved for future determination.

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

DATED: November 29, 2022

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

## ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the bilateral hip arthroscopy surgery recommended by Dr. Michael Ellman is reasonably necessary and related to the admitted August 15, 2019 work injury.

## PROCEDURAL HISTORY

Claimant filed an Application for Hearing on June 14, 2022 listing the issues of medical benefits that were reasonably necessary and related to the August 15, 2019 work injury, specifically noting that a hip arthroscopy was denied.

## FINDINGS OF FACT

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

1. Claimant was 24 years old at the time of the hearing in this matter but only 21 years old at the time of the admitted incident. Claimant worked for Employer as an operation assistant for approximately five years before the accident starting in approximately 2014. The job required Claimant to lift cases of alcohol, food, moving kegs around, pushing heavy equipment. He also needed to walk extensively throughout the venues to do set ups and would typically walk 10,000 to 20,000 steps a day on concrete floors, going up and down stairs.

2. Claimant was injured in the course and scope of his employment with Employer on August 15, 2019 when he was taking a full liquor cage off of a box truck. The box truck had a raising platform gate that moved up and down in order to unload the cage. Claimant was taking the liquor cage off the box truck in order to set up a bar at a concert venue. The cage was a large enclosure that holds multiple liquor boxes locked up for security purposes. This cage was made of stainless steel approximately six feet tall, five feet wide and approximately two to three feet deep. The cage was full of cases of liquor bottles. Claimant stated that the full cage probably weighed approximately 500 to 600 lbs., including the cage weight.

3. Claimant was originally in the box car and wheeled the cage onto the lift gate platform. He stepped off of the lift platform in order to move it down. The cage started to wheel off of the lift gate and Claimant stepped in front of it to stop it from falling and damaging the contents. Claimant was unable to stop the cage's trajectory, and the cage fell off the lift gate, which was approximately four feet high, onto Claimant, who was

slammed[1] by the cage full of liquor, onto the ground. Claimant fell onto his back with the cage pinning him to the dirt floor. Claimant's lower body was centered directly underneath the cage. The top of the cage ended up right above his belly button, and his lower half was completely under the cage, with both of his legs and feet pointed to the left. His arms were free from the cage.

4. One coworker came to Claimant's aid to get the cage off of him but was unable to shift the heavy cage on his own, so he called two other coworkers to help him. Claimant observed they had to use all their strength to lift the cage. Then Claimant was able to extricate himself from under the cage with their help. Claimant estimated that the coworkers were approximately 6 feet, 150 pounds; 6 feet, 220 pounds; and 6 feet, 300 pounds. Claimant noted that he was accustomed to estimating weight because he had to do it on a daily basis.

5. Claimant was light-headed and felt pain and numbness in his lower extremities immediately after the cage fell on him. In the weeks following the injury, he experienced pain in the front of his body, right at his beltline, all the way across. The pain was on both sides of his hips, on both sides on his body, and in his groin area. The center of his groin area just below his beltline was tender to palpation. Claimant stated he was sent to Concentra by Employer. He assured that even though he was provided with some medical care, it was minimal, and he continued to have bilateral abdominal pain that extended across his hip, despite him being released to full duty. He continued to work despite the pain but required assistance with lifting heavy items. Further, he did not feel that Concentra left the door open to address his continuing problems. He was laid off for a couple a month, then, during COVID, his place of employment was converted to a homeless shelter and his duties were very light, serving meals and sitting around. In approximately November, he returned to his regular job, which was when the pain increased again with heavy lifting.

6. On the day of the accident, August 15, 2019, Claimant was taken to Concentra Medical Center and was evaluated by Karen Larson, M.D. within about an hour of the accident. Dr. Larson took a history that

> He was standing on the ground at the tail of a box truck with the with [sic.] the cage on the lift gate of box truck. Unfortunately, the cage slid off the lift gate an on top of him, pushing him down and pinning him to the ground. Lift gate was raised up to his waist, but cage is 5 feet tall. 150-200 lb. approx.[2]
>
> It knocked him to the ground and pinned him down onto his L side, twisted at the torso with the torso facing up and the legs facing sideways. It struck him in the side of the head, R shoulder, R wrist and hand, R hip, R knee, and L lower leg. Coworkers lifted the cage off him.

Claimant reported that he had pain over the right side of the scalp and jaw, the right shoulder, the right hip and groin pain radiating to the right low back pain, and lesser pain on the left low back. On exam, Dr. Larson noted evidence of trauma to the right parietal

[1] The hearing transcript states "slanted down" (Tr. p. 12:10) but this ALJ's notes reflect "slammed down." This ALJ determines that the transcription was incorrect.

[2] This ALJ infers Claimant was describing the weight of the empty cage, as he testified that the cage full of liquor was approximately 500-600 lbs.

scalp with a 4 cm abrasion that was tender with a tender right jawline. She noted that Claimant had joint pain, back pain, joint swelling, joint stiffness and limping. Dr. Larson observed that Claimant had a large abrasion on the right shoulder with some swelling over the superolateral aspect, and tenderness over same area, a small abrasion on the dorsum of the right wrist and hand.

She noted tenderness over the lateral right hip, right groin, low back, and buttock. He was unable to stand with full weight on the right leg and had an antalgic gait. He had pain in the right low back on back flexion, He had right lateral hip, groin, and back pain on left bending and R rotation. He had right low back pain with right straight leg raise. He had an abrasion and swelling over the right anterior knee. The left lower leg had a medial distal calf abrasion with some swelling. Claimant had a past medical history of right shoulder surgery. She ordered x-rays for the right shoulder and right hip, which she interpreted as normal. She also took Claimant off work and was instructed to return to modified duty on August 19, 2019 with restrictions of lifting/pushing/pulling a maximum of 15 lbs., could do limited bending, standing, and walking but could not squat or kneel.

7. On August 19, 2019 Claimant followed up at Concentra, and was evaluated by Dr. Karen Hill. The "History of Present Illness" was copy and pasted from the initial visit. On exam Dr. Hill noted all normal findings, but pain with range of motion. She expanded the work restrictions to 25 lbs. but otherwise kept the prior restrictions. Claimant was also seen by therapist Marcin Swiderski who noted Claimant had bilateral groin pain and right hip pain on manual muscle testing (MMT).

8. Claimant underwent five sessions of physical therapy at Concentra. His therapists noted "B groin pain 4+ /5"[3], worse on the right, in addition to stating Claimant had "soreness in lower abdomen TTP right inguinal lig, R pubic ramus tender and superior, lower abdomen tender" after trunk extension on August 19, 2019. The therapists made similar comments on August 22, 26, and 29, 2019, and September 4.

9. Dr. Larson attended Claimant on August 27, 2019 and noted that Claimant continued to heal his abrasions and was improving except for the right groin, hip, and inner thigh and that he continued to walk with a mild limp. She advanced his work activities to 35 lbs. and stated he could squat and knee occasionally. The therapist noted on August 29, 2019 that hip pain and limitations were less on days when he did not work, because at work he was constantly standing or walking.

10. On September 6, 2019 Dr. Larson noted Claimant's right hip was approximately 70% better except for pulling and tenderness in the groin right thigh and abdomen, and pain in his left toe with activity. She noted Claimant reported that he was wanting to ensure nothing was wrong with his toe. Dr. Larson recorded that Claimant was ready to try full duty work as he continued working with restrictions. She had the left toe x-rayed but preliminary findings were normal. She returned Claimant to full duty.

11. Dr. Larson placed Claimant at maximum medical improvement on September 20, 2019. She indicated that Claimant's injuries had resolved except for the abdomen pulling pain, right hip, and thigh pain with range of motion and tenderness. Claimant was released from care without impairment, restrictions, or maintenance care.

[3] This ALJ infers that "B groin pain" indicated that Claimant was complaining of bilateral groin pain.

12. Claimant was evaluated by PA-C Sarah Steele of SCL Health on November 17, 2020. Claimant was complaining of hip pain. She took a history as follows:

> 22 y/o male here today for physical.
>
> He has been having right hip pain, off/on since injury occurred last year at work. He had a heavy metal cage full of alcohol land on him, his initial xrays [sic.] were normal, negative for fracture, he underwent PT, was d/c'd. He has continued to stay active, doing regular stretching. He will occasionally not[e] (sic.) popping, at times this can be painful, "stop me in my tracks", Pain tends to be worse with activity.

They discussed his hip pain, recommended baseline x-rays in light of the previous years' mechanism of injury. On musculoskeletal examination, only right hip joint pain was noted. The radiologist, Jennifer Kemp, M.D., noted an "old fracture healed in deformity involving pubic symphysis. Ms. Steele suggested that they could try physical therapy again, but she suspected Claimant had a hip flexor strain. She noted that if pain persisted she would consider an MRI evaluation. She recommended rest, avoidance of aggravating activities/exercises, antiinflamatories as needed and regular stretching.

13. On November 17, 2020 Dr. Jennifer Kemp read the right hip x-rays from Touchstone Imaging. She noted a bone cyst intertrochanteric of the right femur measuring 1.5 cm and a bony deformity at the pubic symphysis greater on the left consistent with remote trauma. Dr. Kemp stated that the findings were consistent with an old fracture healed in deformity involving the pubic symphysis.

14. Sarah Steele, PA-C wrote Claimant a note on November 19, 2020 stating that the hip x-ray showed an old fracture to the pubic symphysis that had healed in 'deformity.' and recommended evaluation with a specialist.

15. Claimant had a "One Time Eval" on December 17 2020 with Dr. Patrick Antonio at Concentra. He documented that:

> Within the past two months, the patient states that the discomfort has been worsening without any known cause. He was seen by his PCP and new imaging of the pelvis performed on November 17, with the impression "old fracture healed in deformity involving pubic symphysis." He is concerned that the constant discomfort and recent worsening discomfort might be correlated to the injury in August 2019. He denies any new injuries to this area or activities that may have exacerbated the symptoms.

On exam he found mild tenderness to deep palpation at the medial to bilateral anterior superior iliac spine (ASIS), minimal discomfort over the pubic symphysis area and full extension and flexion of the hip. He stated that Claimant had joint pain and muscle pain. He diagnosed right hip contusion and strain, and ordered a re-read of the original pelvic x-ray as well as a physical therapy evaluation. He specifically noted that, while he had some doubts about the relatedness to the August 15, 2019 work injury, that the objective findings were consistent with the history and work-related mechanism of injury.

16. Claimant was attended by Ms. Swiderski on December 17, 2020, who documented that Claimant reported that a 500-600 lbs. liquor cage fell on his right hip and thighs. Claimant reported that the shooting pelvic pain became more frequent approximately two months prior, as well as bilateral ASIS pain.

17. Dr. Sheldon Feit, a radiologist from New York performed an independent radiologic document review. He stated that the film for the right hip from August 15, 2019 showed no evidence of fracture and a probable bone cyst within the right femur. He also reviewed the film of the pelvis on November 17, 2020 which showed an irregular fracture within the pelvis around the symphysis pubis and a plain film of the right hip, which showed the right pubic bone fracture. He also noted that there was evidence of a small cyst within the intertrochanteric region of the femur. Dr. Feit opined that since the initial films failed to show any lesion or fracture that the subsequently viewed fracture was unrelated to the August 15, 2019 work injury. [4]

18. Claimant had an MRI of the right hip performed on April 14, 2021 which was read by Dr. Vincent Herlihy and compared it to the November 17, 2020 radiographs. He noted that there was an osseous bump at the anterior right femoral head neck junction with a resulting 69 degrees right femoral alpha angle. Cam morphology of the right proximal femur with a 69 degrees alpha angle predisposes the patient to cam-type femoral acetabular impingement. There was a nondisplaced detachment of the anterior superior right acetabular labrum between the 2:00 and 3:00 positions. There was mild grade 2 and 3 chondromalacia in the right hip with physiologic joint fluid. There was mild to moderate arthrosis of the pubic symphysis with posttraumatic capsular hypertrophy and ossification. There was bilateral inferior capsular stripping which undermined the bilateral adductor longus origins. Those findings could be seen with a sports hernia/athletic pubalgia. There was a 15 mm chondroid lesion in the medullary bone of the anterior intertrochanteric right femur without aggressive features, most likely representing an enchondroma. There was a separate well-defined 20 mm STIR hyperintense lesion with a sclerotic rim in the posterior aspect of the right greater femoral trochanter which was visible on the comparison radiographs. No aggressive features were identified and differential considerations for this benign-appearing lesion included a fibroxanthoma, fibrous dysplasia, or a unicameral bone cyst.

19. On May 11, 2021 Claimant was evaluated at Next Level Physical Therapy. They took a history consistent with the August 15, 2019 injury noting that Claimant has continued to have intermittent bilateral hip pain. They noted that Claimant had a diagnosis of bilateral hip femoroacetabular Impingement as well as labral tears and had been referred for physical therapy for conservative care by Dr. Genuario. They also documented that Claimant's pain is mostly always through his anterior hip and is there throughout the day, however, is made worse with sitting for long periods of time, working out, and with various quick movements. Since the time of onset, his pain has slightly progressed. Claimant continued with physical therapy through June 2021 with continued bilateral hip irritation.

20. Claimant was seen by Dr. Genuario on May 20, 2021 regarding left knee pain and bilateral hip pain. At that time Dr. Genuario reviewed the left leg MRI and found that Claimant had a ruptured bucket handle meniscus tear with large meniscal displaced flap in the intercondylar space. He recommended knee surgery and did not make any

[4] Dr. Feit failed to state that the pelvis around the symphysis pubis bone was even shown on the original x-ray and this ALJ declines to make that leap.

comments with regard to the bilateral hip problem. On August 19, 2021 PA Jeremy Bradley noted that Claimant was progressing well regarding his left knee arthroscopy.

21. Dr. Michael Ellman of Panorama Orthopedics and Spine Center evaluated Claimant on January 7, 2022 noting the following regarding Claimant.

> His pain started when he was working in August of 2019 and a heavy cage full of liquor fell on top of him. He was subsequently found to have a pubic symphyseal fracture that has since healed. Unfortunately, he continues to struggle from a hip pain standpoint. His pain Is worse on the right over the left, getting up to a 6/10 in terms of rating in the c-type distribution. He has tried formal physical therapy for over a year as well as rest, activity modification, and anti-inflammatories. He Is quite frustrated with the amount of pain he Is In. He did get bilateral hip MRIs from Touchstone as well as x-rays from Touchstone

Claimant presented for a second opinion of his continued, daily bilateral hip pain with the right worse than the left in a "c-type" distribution across the abdomen. He described it as aching and sharp pain, occurring daily and rated it as 6/10, with associated symptoms of tenderness, exacerbated by activities for an extended period of lime, lifting, sports and twisting/turning, and alleviated by rest and stretching. He diagnosed bilateral hip strains and joint disorders. Dr. Ellman reviewed the x-ray images from November 17, 2020 that demonstrated equal and symmetric joint space throughout with no significant arthritic changes. He had evidence of a notable Cam deformity with an alpha angle on the right of 72 degrees and on the left an alpha angle of 68 degrees. He had Tonnis grade 1 changes, but no evidence of dysplasia.

Dr. Ellman reviewed the April 14, 2021 bilateral hip MRIs without contrast from Touchstone Imagine. He noted that the Images demonstrate evidence of bilateral anterior superior labral tears, with the right worse than the left. He noted that Claimant had some early chondromalacia, worse on the right than the left, but no other significant abnormalities. He did note that he had a chondral lesion on the medullary bone on the anterior right inner trochanteric region without aggressive features consistent with an enchondroma.

Dr. Ellman stated Claimant had evidence consisted with bilateral hip Cam predominant femoroacetabular impingement (FAI) syndrome with labral tears bilaterally. He had some early chondromalacia, worse on the right over the left but no advanced arthritic changes. Dr. Ellman emphasized that Claimant was a surgical candidate and that the plan was to proceed with the right hip arthroscopy, labral repair, Cam and pincer osteochondroplasty and capsule repair. He planned on staging Claimant's left hip surgery three months later.

22. On January 12, 2022 Dr. Ellman request authorization to proceed with a right hip arthroscopy with femoroplasty and labral repair and ordered a right hip abduction brace.

23. Dr. Mark Failinger, an orthopedic surgeon, performed an independent medical examination on March 19, 2022. He obtained a history which was consistent with the accident reported by Claimant involving the liquor cage falling on his abdomen and lower extremities. He reported he had pain in the hips and legs and multiple scrapes, following which he was treated at Concentra, where x-rays were taken, and he performed

physical therapy for a couple of months. Claimant stated he was approximately 60-75% back to normal but continued with continuous pain in both hips on the front, which would decrease and increase depending on exertion. Claimant informed Dr. Failinger that the pain in his bilateral hips increased over time, until approximately one year after the accident. He was attended by his primary care physician (PCP) but was directed back to the workers' compensation provider at Concentra, where he proceeded with another two months of physical therapy. He was eventually released, and Claimant returned to his PCP. He was sent to UCHealth where he was treated by Dr. Genuario for the hips. He was again sent to physical therapy at Next Level PT for several months with only a little improvement. Claimant then went on his own to Dr. Ellman for a second opinion regarding the hips. Dr. Ellman recommended surgery.

Dr. Failinger documented that Claimant continued to have bilateral hip pain and that the severity would depend on his level of activity. He would occasionally take ibuprofen and frequently do stretches or exercise. On exam, Dr. Failinger noted no pain behavior but groin pain with squats. On pain diagram Claimant noted anterior groin pain bilaterally with stabbing and aching pain, with a pain level of 3/10. Dr. Failinger specifically opined that Claimant's current complaint were not related to the August 15, 2019 accident. He opined that Claimant never reported any discomfort or pain in the left hip at the time of the injury, only in the left lower leg and right hip in addition to multiple abrasions to other body parts, which resolved.

Dr. Failinger opined that Claimant "was noted to have early groin pain and right-sided hip pain, which reasonably could have occurred with either a labral tear or with a pubic ramus fracture or even a pubic symphysis injury. The patient's symptoms were consistent with injury in those areas." However, he went on to state that because Claimant returned to his regular work within three weeks of the work injury, that it was not medically probable that Claimant's injuries to his right hip were caused by the August 15, 2019 work injury, especially since he was on his feet all day doing heavy physical lifting. He stated that "[R]ather, it is medically probable that the patient's symptoms are due at this time to bilateral femoroacetabular impingement." He goes on to state:

> It is not reasonable that the patient had left hip symptoms all along, but that such was never reported in the records. Similar to the right hip, [Claimant's name redacted]'s left hip femoroacetabular impingement has created hip labral symptoms for which the patient has ongoing discomfort and is seeking treatment at this point under the Workers' Compensation claim. Based on the above, the hip symptoms at this point are not medically reasonable or probable as being due to the work incident of August 15, 2019.
>
> …
>
> …it is not medically probable the patient could have returned to full duty in a manual labor job of being on his feet all day if, in fact, he had fractured his pubic ramus or had sustained a significant symphysis strain or had torn a labrum.
>
> …
>
> The x-rays and the MRIs that were performed when the patient sought treatment in November of 2020 are consistent with a developmental deformity called femoroacetabular impingement, of which he has a CAM variant. These

> are classically known to create labral tearing, which appears to have occurred in [Claimant's name redacted]'s case. For the reasons explained above, it is with high medical probability that the patient's current symptoms are due to the CAM deformity, which was not created by the work incident of August 15, 2019. That is a developmental phenomenon which causes labral tears and, in a fair number of patients, hip symptoms. However, that is not related in any way to the work incident of August 15, 2019.

24. On May 24, 2022 Respondents filed a General Admission of Liability stating that the claim was a medical only case with no lost time. Respondents further noted that they were admitting for liability for the contusion of the right hip only.

25. Claimant deposed Dr. Ellman on October 7, 2022. Dr. Ellman was accepted as an expert, board certified orthopedic surgeon at Panorama, in the field of orthopedics. A great majority of his practice involved treating hips.[5] Dr. Ellman testified he understood that a heavy cage fell on Claimant and created a lot of trauma around his pelvic region. He diagnosed Claimant with, and is treating him for, bilateral hip labral tears. He described the labrum as "a little gummy worm or fibrous tissue that lives around the socket and can peel off the bone and tear." Dr. Ellman explained that labral tears can be acute or chronic, and it is difficult to assess causality. More than 50% of people have labral tears. Some of them cause pain, some of them do not. Dr. Ellman stated that Claimant has symptomatic labral tears, and the pain he has described was consistent with labral tears. The pain typical would start in the hip and radiated to the anterior aspect or front of the hip, or in the groin.

26. Dr. Ellman stated that Claimant's mechanism of injury with the cage likely caused the traumatic tears of his labrums. He stated that "[A]s you rotate the hip, you can impinge that area of bone against the labrum. The labrum can peel off the bone…with any impact to the pelvis where that piece of bone just impinges against the pelvis, and it hits against it and the labrum peels off the bone." He stated the impact of the cage of bottles falling on Claimant with his legs to the side was consistent with the impact that would be sufficient to tear the labrums. Dr. Ellman explained that if Claimant had acutely torn his labrums on his date of injury, he would still be able to function. "The vast majority of patients with labral tears can lead a functional life, can walk, can run, can cut, can pivot. But...it kind of creates what I call a toothache of the hip, where you have… aching, sore-type pain deep in the hip that a lot of patients just deal with..."

27. Dr. Ellman stated that if Claimant had undiagnosed, asymptomatic torn labrums before his work injury, the injury with the cage aggravated the tears causing them to be symptomatic and in need of treatment. He explained that labral erythema, or bruising of the labrum, is a red inflammatory tissue seen inside the labrum on symptomatic tears. Dr. Ellman stated it is medically probable that Claimant's work injury either caused, accelerated, or exacerbated his bilateral labral tears. Dr. Ellman stated that Claimant's mechanism of injury, with both hips rotated and pelvis getting a direct impact on top of it, certainly supports an injury to both hips and both labrums.

28. Dr. Ellman stated that it is reasonable for Claimant's symptoms to wane and wax after the injury, based upon the amount of inflammation going on with the labrum at

[5] Dr. Ellman testified that 98% of his practice was treating hip complaints.

that time that can create pain. The nociceptor, or pain receptors, in the labrum can be triggered with certain activities and cause pain. It is reasonable that Claimant's symptoms could have improved after his date of injury with conservative treatment, and then worsen without a subsequent intervening injury. It is not improbable that Claimant could return to a physically demanding job four weeks after the injury. It is not unreasonable for symptoms to wane for 15 months. Dr. Ellman has "seen just about everything in the book" with hip symptom waning and waxing.

29. Dr. Ellman stated that the fact that Dr. Larson released Claimant to full duty on September 20, 2019 had no effect on his opinion that Claimant needs further treatment under this claim. Dr. Ellman opined that through no fault of his own, Claimant went to work a little early and did not allow everything to heal and aggravated his hips and pelvis. He personally would not have released a patient back to full activities until at least 8-12 weeks post-injury.

30. Dr. Ellman explained Claimant's finding of a Cam-type femoroacetabular impingement (FAI). Claimant has a bump on the ball of his hip joints. This is a "common finding" in the general population. Dr. Ellman stated that Claimant's finding of a Cam-type femoroacetabular impingement (or FAI), has no effect on his opinion about the causation or the acceleration of the labral tears being related to the work injury. "Again, he had no symptoms before. He had symptoms after. To me, in my head, it's pretty simple, CAM lesion or no CAM lesion."

31. Dr. Ellman explained Claimant's finding of a pubic ramus fracture. The pubic ramus is the part of the pelvis where two pelvic rings come together in the front. This finding demonstrates the significance of the trauma to Claimant's pelvis; it broke his bone. The fracture signifies a direct front to back impact of the pelvis. Dr. Ellman stated that he would expect Claimant's pubic ramus fracture to heal in three to eight weeks.

32. Dr. Ellman's requested surgery is a minimally invasive procedure where he goes in through a couple of "poke holes," fixes the labrum, and reattaches it to the acetabular rim. He will re-sculpt the ball and socket to take away any impingement. Claimant can expect three weeks on crutches and three to four months before full activities. Dr. Ellman expects full, permanent return to function for the hips following the surgery. Dr. Ellman stated the surgery is medically necessary. Claimant has tried therapy, anti-inflammatories, and non-operative treatment for three years. Dr. Ellman did not expect him to get much better without surgery and the labrums were not likely to heal or reattach themselves without surgery. Dr. Ellman stated that Claimant's need for labral repair of both right and left hips was medically probably related to his work injury. Dr. Ellman stated there is nothing medically unreasonable about moving forward with surgery. His diagnosis is very clear. Diagnostic injections are not necessary, and cortisone injections are bad for the hips, long-term, especially in young, active patients.

33. Dr. Ellman saw nothing on exam, review of diagnostic studies or patient discussion that indicated a subsequent intervening injury to Claimant's hips. Dr. Ellman assessed his patients' credibility, as there were no situations where the description of the injury and/or development of symptoms did not make sense or gave him pause on how to move forward with regard to surgeon. He found Claimant credible.

34. Claimant identified the picture of a liquor cage, similar to the one that fell onto him, but stated that the photographed one was not as full as the one that fell on him. The picture showed a cage containing multiple shelves holding full boxes of liquor, at least five cases wide per shelf, holding approximately two cases tall on the top shelf and at least one tall on the two other shelves. Claimant testified that the full cage weighed approximately 500 to 600 lbs. when full.[6]

35. Claimant stated that he continued to work for Employer after the work-related injury and did not incur any other injuries since the work-related injury of August 15, 2019. Further, he had no hip problems prior to the trauma of August 15, 2019.

36. Claimant continued to have constant pain, which continued since the work injury. It was throbbing and aching and involved some numbness as well. He learned to push through the pain and keep working. However, he had to ask for help to perform some of the activities he used to perform on his own, such as heavy pushing, pulling, and lifting at work. There was a period, during COVID, when he was laid off. However, when he returned to his regular work in November 2020, the pain increased. He went to his personal provider to ask for further care. After he had the MRI, his PCP told him to reach out to Insurer as his problems were related to the work injury, and that is when they authorized the one-time visit with Concentra. He stated that he could no longer tolerate the symptoms and wished to proceed with the surgery recommended by Dr. Ellman in order to move forward and heal. He stated he had completed at least six months of physical therapy without lasting relief.

37. Following his release from Concentra, he stated he continued to exercise and work out at the gym, though he was limited in what he was able to do. He specifically stated he could not perform leg presses or squats. He also attempted running, jumping jacks and rope jumping without success.

38. Claimant explicitly noted that he did not have any difficulties with his hips, pelvis, or groin before the work-related crush injuries. Prior to his work injury, he played with his nephew, played slow-pitch softball, and worked out at the gym. He was able to squat, deadlift, leg press, treadmill, and stair climber with no issues due to hip, groin, or pelvic pain. Claimant played catcher for four years of high school baseball before his injury. He had no problems being in a deep squat due to hip or groin pain.

39. Claimant stated that PA Steele referred Claimant to Dr. Joseph Hsin, who in turn referred Claimant for the MRI of the right hip, which took place on April 14, 2021. Ms. Steele also referred Claimant to Dr. Genuario at UCHealth for evaluation regarding his bilateral hip and abdomen/pelvis pain.

40. Respondents deposed Dr. Failinger on October 19, 2022, after the hearing, a Board-Certified physician in orthopedic surgery and sports medicine as well as a Level II accredited physician retained by Respondents to perform an independent medical examination (IME) of Claimant. He stated that fifty percent of his income was for performing IMEs, at the rate of two to three IMEs per week. Dr. Failinger did not recall

[6] This ALJ noted that a typical case of liquor weighs between 30 and 40 lbs., which multiplied by fifteen cases per cage, could indicate a weight of between 500 to 600 lbs., including the weight of the cage itself, which probably weighed between 100 to 200 lbs.

Claimant, nor did he remember Claimant's face. Dr. Failinger's surgery practice was limited to knee and shoulders, not hips. Dr. Failinger performed no hip surgeries. Dr. Failinger opined that the surgery proposed was for Claimant's hip FAI, and not a traumatic injury. Dr. Failinger testified, "There was multiple things that hurt, but the right hip was focused, and it was the last thing to resolve."

41. Dr. Failinger testified that labral tears can wax and wane. If Claimant had symptoms for months and it kind of got better and worse, it's more reasonable that he could have accelerated or extended his pre-existing tearing. Dr. Failinger testified several times that Claimant requested to go back to work and to full duty. However, Dr. Failinger testified that Claimant did not report during the IME that he had asked to go back to work. He testified Claimant only told him he worked the entire time, and only missed the day after the injury. He testified that he asked Claimant no questions about his job duties. He did not base his description of Claimant's "very heavy job" on anything that came from Claimant, but on his general knowledge of the type of job Claimant had. Dr. Failinger testified that it was his "understanding, he did return back to full duty, but he still had ongoing symptoms. It's consistent with the [medical] records."

42. Dr. Failinger testified that he was unaware that as soon as COVID hit, the Employers locale turned into a homeless shelter, and Claimant's only job was to stand/ sit around serve dinner. He first testified that this could change his opinion, then stated that it would not change his opinion because Claimant continued to perform his regular job for six months before COVID hit. Dr. Failinger testified that "the most reliable thing of what actually occurs is not patient history, but the actual medical records."

43. Dr. Failinger testified he placed a lot of significance on that fact that Dr. Larson released Claimant to full duty in September 2019 and that Dr. Larson did not have a reason or motive to close a case if Claimant was symptomatic. Dr. Failinger testified that Dr. Larson's records focused right-sided hip pain were significant to him.

44. Dr. Failinger opined, consistent with his report, that it's not medically probable that Claimant's admitted injury involving a crush trauma by a metal cage filled with glass and liquid accelerated/ exacerbated or caused a need of treatment of Claimant's labral tears. However, he stated that impact activities, torquing and twisting activities could have accelerated the labral tearing that occurs with a Cam lesion causing a worsening.

45. Dr. Failinger testified, consistent with his report, that there was a significant discrepancy in the reported initial weight of the cages in the Concentra note and what was later reported as the weight of the cages, yet, in terms of causation, the weight was not really a factor in this case as far as he was concerned. He stated that, even if the cage was only 150-200 pounds, that weight falling on the front of Claimant's hips could cause trauma to his labrums. He testified that he received no information that employer was refuting Claimant's demonstrative photo of a similar but less-stocked cage, or that it took three men to remove the cage from Claimant. He testified that, with his life experience of the weight of metal, glass, and liquid, is it was not probable that the cage only weighed 150 pounds.

46. As found, Dr. Failinger's opinion that the cage did not have a significant impact on Claimant's injuries to his bilateral hips is not credible. The cage full of liquor

and mixes, fell off of the lift gate, which was four feet in the air, and onto Claimant, pinning him to the ground. One co-worker alone could not shift the cage to move it off of Claimant. Three large workers exerted all of their strength to shift the cage off of Claimant so he could get out from underneath it. Further, Dr. Failinger heavily relied on Dr. Larson's September 5 and September 20, 2019 notes as stating that Claimant was recovered. This ALJ does not read those records in the same manner. Dr. Larson, in fact noted Claimant continued to have tenderness across his abdomen with exertion or range of motion. In light of Claimant's youth, his failure to understand his right to request ongoing care related to the workers' compensation injuries and his testimony that he continued to have problems after he was released as well as the reasoning behind his failure to insist on medical care for his work-related injuries, Claimant's testimony is credible and persuasive over the opinions of Dr. Failinger.

47. As found, Claimant was injured in the course and scope of his employment when the very heavy cage fell four feet onto Claimant's hips and lower extremities. This crush injury caused an aggravation or acceleration to the Cam deformity, which in turn caused the labral tears. He continues to have ongoing pain across his abdomen, and the bilateral labral hip tears for which he requires medical care, including the surgery recommended by Dr. Ellman.

48. As found, Claimant and Dr. Ellman are more persuasive than the contrary opinions and testimony proffered by Dr. Failinger or Dr Feit. Dr. Ellman persuasively addressed the issue of causation in this matter that the traumatic events of August 15, 2019 caused the aggravation of the Cam deformity and the labral tears. Claimant has shown that it is more likely than not that the continued bilateral hip conditions were caused or aggravated by the work injury. Claimant has shown that it is more likely than not that the continuing need for treatment of the bilateral hips is due to the work-related accident of August 15, 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. (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. Causation of Left Hip Condition

This is an admitted case. On May 24, 2022 Respondents filed a General Admission of Liability stating that the claim was a medical only case with no lost time. Respondents further noted that they were admitting for liability for the contusion of the right hip only. Therefore, before determining medical benefits in this matter, the issue of causation of the left hip condition must be assessed and determined.

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work-related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant has shown that the aggravation of the Cam deformity and the bilateral labral tears was proximately caused by the August 15, 2019 work related accident when the heavy liquor cage fell off the lift gate directly onto Claimant's hips and legs and more likely than not the cause for the need for further medical care as recommended by Dr. Ellman. Dr. Ellman persuasively explained that hip labral tears are very different from meniscal tears, for example. This ALJ infers from Dr. Ellman's testimony that many individuals, especially young athletes, continued working out, playing sports, and doing demanding activities despite having hip labral tears caused by trauma, while they likely could not continue with those demanding activities if, for example, they had a tear in the knee joint. Further, this ALJ specifically finds that the records of Dr. Larson are somewhat repetitive or duplicative of prior visits and that the Concentra physical therapists records that note Claimant has bilateral hip pain with exertion to be more accurate. Lastly, this ALJ does not find Dr. Failinger's opinion provided in his report or through testimony persuasive. Dr. Failinger's expertise centers on orthopedics of the

knees and shoulders, and not specifically with regard to hips. Dr. Ellman is persuasive and convincing over the contrary testimony and opinions of Dr. Failinger.

As found, Dr. Failinger's opinion that the cage did not have a significant impact on Claimant's injuries to his bilateral hips is not credible. Claimant's testimony is credible and persuasive. The cage full of liquor and mixes, fell off of the lift gate, which was four feet in the air, and onto Claimant, pinning him to the ground from the hips down. One co-worker alone could not even shift the cage to move it off of Claimant. Three large workers exerted all of their strength to shift the cage off of Claimant so he could get out from underneath it. Further, Dr. Failinger heavily relied on Dr. Larson's September 5 and September 20, 2019 notes as stating that Claimant was recovered. This ALJ does not read those records in the same manner. Dr. Larson, in fact noted Claimant continued to have tenderness across his abdomen with exertion or range of motion. In light of Claimant's failure to understand his right to request ongoing care related to the workers' compensation injuries following his release, his testimony that he continued to have problems after he was released and continued to work through the pain, as well as the reasoning behind his failure to insist on medical care for his work-related injuries, Claimant has persuasively explained the delay in obtaining care. And Dr. Ellman's opinions and testimony were also more persuasive and credible over the opinions of Dr. Failinger.

## C. Medical Benefits

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

Claimant has proven by a preponderance of the evidence that it is more likely than not that he requires reasonable and necessary medical treatment for these bilateral labral tears. As found, Claimant was injured when the very heavy cage fell four feet onto Claimant's hips and lower extremities, which cause the crush injury to his hips,

aggravating or accelerating to the Cam deformity, which in turn caused the labral tears. He continues to have ongoing pain across his abdomen from the bilateral labral hip tears for which he requires medical care, including the surgery recommended by Dr. Ellman. As found, Claimant and Dr. Ellman are more credible and persuasive than the contrary opinions and testimony proffered by Dr. Failinger or Dr Feit. Dr. Ellman persuasively addressed the issue of causation in this matter that the traumatic events of August 15, 2019 caused the aggravation of the Cam deformity and the labral tears. Claimant has shown that it is more likely than not that the continued bilateral hip conditions and pain were caused or aggravated by the work injury. Claimant has shown that it is more likely than not that the continuing need for treatment of the bilateral hips is due to the work-related accident of August 15, 2019.

## ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for Claimants' continuing need for reasonable, and necessary medical care for the aggravation of the Cam deformity and bilateral labral tears as recommended by Dr. Ellman, caused, or aggravated by the traumatic work-related accident of August 15, 2019.

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 30th day of November, 2022.

Digital Signature

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 5-185-498-001**

## STIPULATIONS

The parties stipulated that if the claim is reopened that Claimant would not be entitled to TTD after September 26, 2022, the date he began his new employment.

## ISSUES

- Did Claimant prove the claim 5-185-498 should be reopened based on a change of condition?
- Did Claimant prove entitlement to medical benefits including treatment for herniated discs in his neck?
- Did Claimant prove entitlement to temporary total disability benefits prior to September 26, 2022?

## FINDINGS OF FACT

1. Claimant worked for Employer as a Client Care Aide. Claimant sustained an admitted injury on September 25, 2021 to his neck when he was involved in a patient restraint. The Claimant was initially seen at the Emergency Department on September 26, 2021 at 11:56 p.m. by Dr. Honig. The ED notes indicate that he had pulled a muscle in his neck while at work and then after the incident, he was taking ibuprofen for the pain and he tossed his head back to swallow the pills and heard a pop in his neck and had worsening pain along his left trapezius region. A CT angiogram scan was performed on this date, which was interpreted as "unremarkable". Dr. Honig noted that the CT was negative for vertebral artery injury or other obvious injury. He felt it was appropriate for Claimant to undergo outpatient treatment of cervical sprain.

2. The Claimant was next seen by Nurse Practitioner Brendon Madrid at Concentra on September 27, 2021. Mr. Madrid's diagnosis was neck strain. The claim was admitted and treatment was provided. Claimant was referred to Dr. Donald Dressen for chiropractic treatment.

3. The Claimant was placed at maximum medical improvement on November 19, 2021. The Claimant was released to return to work full duty at that time. The claim closed by final admission on December 27, 2021. At the time of MMI, Mr. Madrid made the following notations: "No pain today. Feeling better. Chiro with Dr. Dressen completed. No numbness or tingling." He was assigned no permanent impairment. (Claimant Exhibit 5, pp. 87 – 92).

4. The Claimant did not object to the final admission of liability or request a Division IME.

5. The Claimant testified at hearing that after he was placed at MMI he continued to experience headaches.

6. The Claimant later developed tingling from his shoulder down to his pinky on his left arm. He also has constant aching going up from the neck to the left side of his skull.

7. He returned to Parkview Medical on January 16, 2022 when he had neck pain when he slept wrong and woke up with worsening neck pain. Dr. Rogers noted that the pain in his neck did not radiate and Claimant denied arm or leg weakness or numbness. Claimant requested that an MRI be performed. However, Dr. Rogers did not think that an emergent MRI was required given his otherwise reassuring exam and recent normal CT.

8. Claimant returned to Concentra on February 3, 2022 for a one time examination for increased neck pain. He was seen by Brendon Madrid. He reported constant pain and had pain of 9 out of 10. He reported that he was diagnosed with COVID-19 on January 1, 2022. When he had COVID, he had hard coughing episodes. These coughing episodes resulted in increased neck pain. Although Mr. Madrid did not feel the second event, namely the coughing episode was work related, he would order an MRI.

9. The MRI was taken on February 22, 2022. The MRI showed a circumferential bulge with broad based posterior herniation at C3-4, C6-7 causing bilateral neural foraminal stenosis. It also showed circumferential bulge with broad based posterior and left foraminal herniation at C4-5 causing moderate left and mild right neural foraminal stenosis The MRI also showed circumferential bulge with broad based posterior herniation at C5-6 causing moderate bilateral neural foraminal and mild central canal stenosis.

10. Claimant stopped working on April 22 or 25, 2022[1] because he could no longer perform his job duties to work on the floor. He was asked to sign a document that he had restrictions for a non-work related condition on June 25, 2022.[2] When he refused to sign that document, he was terminated.

11. Claimant had an epidural steroid injection into his neck after a referral from Brandon Madrid. Following the injection, he felt better for about a month. After the month, he developed pain again. This includes constant headaches and constant tingling down his left arm when he holds things too long.

[1] According to the Employment records, (Claimant Exhibit 13, p. 309) the Claimant had restrictions of no takedowns and no over head work over 20 lbs. on April 19, which approximately coincides with his testimony.

[2] Although not critical to this order, the date of separation is documented as 6/24/2022. (Claimant Exhibit 13, p. 309).

12. Claimant currently works at a family support center for autism as a registered behavioral technician. He works with children on the spectrum. He started this job on September 26, 2022.

## CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Renz v. Larimer County, 924 P.2d 1091 Colo.App. 1996).* The party requesting reopening bears the burden of proof. Section 8-43-304(4). A "change in condition" refers to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that is causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The claimant suffers a "worsening" of a pre-existing condition if the change is the natural and proximate consequence of a prior industrial injury, with no contribution from a separate, intervening causative factor. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Whether a particular condition represents a natural progression of the industrial injury or is the result of an efficient intervening cause is one of fact for determination by the ALJ. *Lutgen v. Teller County School Dist. No. 2*, WC No. 3-846-454 (ICAO June 12, 1986), *aff'd*, *Teller County School Dist. No. 2 v. Indus. Claim Appeals Office*, (Colo. App. No. 96CA1194, December 27, 1996) (not selected for publication).

I find that the Claimant has failed to sustain his burden of proving that his worsened condition is due to the natural progression of his work injury. While he sustained a compensable neck strain, that neck strain resolved November 19, 2021. It was not until he contracted COVID-19 and had bouts of hard coughing that he developed pain again that prompted the taking of an MRI that showed the disc disease at multiple levels of his cervical spine. The Claimant has provided no credible evidence that the pathology of the spine as evidenced on the MRI was caused by the work related incident or was symptomatic due that incident. It was not until the Claimant developed the COVID induced hard coughing bouts that the Claimant had increased symptomatology in his neck that resulted in him obtaining medical treatment.

## ORDER

It is therefore ordered that:

1. Claimant's request to reopen W.C. No. 5-185-498 for medical benefits is denied and dismissed.

2. Claimant's request for medical treatment for his neck is denied and dismissed.

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

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

DATED: November 30, 2022

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

## PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 18, 2022 on issues that included medical benefits and denial of surgery. On August 17, 2022 Claimant moved, before PALJ Susan Phillips, to endorse the issue of compensability, which was granted.

The parties attended a hearing on September 1, 2022. Respondents moved for a continuance of the hearing as counsel for Respondents had been hired the prior day, was unable to appropriately prepare for hearing, and had not submitted any pleadings. This ALJ granted Respondents' motion for a continuance for good cause shown, over Claimant's objection, and the matter was rescheduled for September 30, 2022. This ALJ further allowed Respondents to submit responsive pleadings. Finally, this ALJ granted Claimant's motion to add the issues of temporary total disability benefits and average weekly wage, and Respondent's issue of termination for cause to the issues set for hearing.

This ALJ also modified the record exchange deadline pursuant to W.C.R.P. Rule 9-1(A) and allowed the parties to exchange medical and employment records by no later than 10 days prior to the continued hearing. Discovery in the matter was frozen as of the September 1, 2022 hearing.

## STIPULATIONS OF THE PARTIES

The parties stated that medical benefits had been paid to date, with the exception of the surgery pursuant to Dr. Pehler's request for prior authorization. The parties agreed, if the claim was found compensable, that medical providers to date, including but not limited to Occupational Medical Partners, Dr. Matthew Lugliani, Dr Robert Broghammer, Dr Zachary Jipp, Patricia Dockter PT, as well as the referral physicians, Dr. Do Long Vu, Dr. Scott Primack, PA Maria Kaplan, and Dr. Stephen Pehler, were all within the chain of referral and authorized treating providers. Respondents continued to deny the surgery in light of the W.C.R.P. Rule 16 report issued by David H. Elfenbein, M.D. on March 30, 2022. The stipulation of the parties is approved by this ALJ and becomes part of this order.

The parties stipulated that, if Claimant proved compensability, Claimant was a maximum wage earner, and his temporary total disability benefits rate is $1,158.92. This stipulation of the parties is approved by this ALJ and becomes part of the order.

## ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant sustained an injury in the course and scope of his employment with Employer on September 17, 2021.

IF THE CLAIM IS FOUND COMPENSABLE:

II. Whether Claimant has shown by a preponderance of the evidence that he is entitled to medical benefits that are reasonably necessary and related to the injury including surgery per Dr. Pehler recommendations.

III. Whether Claimant has shown by a preponderance of the evidence he is entitled to temporary disability benefits related to the work injury of September 17, 2021.

IV. If Claimant has proven he is entitled to temporary disability benefits, whether Respondents have shown by a preponderance of the evidence that Claimant was responsible for his termination and not entitled to temporary disability.

V. Whether Claimant has proven by a preponderance of the evidence what his average weekly wage is.

## FINDINGS OF FACT

Based on the evidence presented in this matter, the ALJ enters the following findings of fact:

1. On September 17, 2021, Claimant was employed as a biomechanical services specialist III for Employer for approximately eight years, since he was hired on July 9, 2013. His job involved maintenance of multiple machines at different Employer locations, including dialysis machines and equipment, water treatment equipment, as well as training nurses and ancillary staff on the use of the equipment. He also trained new hires for biomechanical services. The job included a lot of pushing, pulling, moving and lifting very heavy equipment including water tanks, carbon tanks or reverse osmosis industrial machinery that could weigh a couple hundred pounds. They would try to have other staff available to lift the heavier equipment but sometimes Claimant would have to do the lifting independently.

2. On Friday, September 17, 2021 Claimant was servicing a dialysis machine when one of the hoses or blood tubes was stuck under the wheel of the machine. Claimant bent down to lift the machine to untangle the hose. While trying to disentangle the hose, his back popped, which caused immediate pain and spasming as well as numbness going down his lower extremities. He felt the pop, not just heard it. At the time, he was tilting the middle section of the heavy machine to get the quarter inch tubing out from under it. He could not stand up immediately, so he slowly crept back in a bent down position and sat on a chair to see if the pain eased. He realized that something serious had happened to his back. He slowly made his way out to his vehicle and noticed that his lower legs and feet had a numbness and tingling feeling. He sat in his car for a while before going home. Claimant contacted his supervisor by email, as he was not onsite, to let him know what had happened to him. They discussed the injury and agreed to have Claimant wait until the following Monday to see if he continued to have symptoms, before going to the workers' compensation provider. Claimant felt that the injury, while serious, was not life threatening, so he did not go to an emergency room.

3. Claimant was initially seen by Dr. Robert Broghammer on September 21, 2021. Dr. Broghammer noted Claimant went to pick up a dialysis machine a little bit to get the thing caught underneath the wheels and he strained is back. Dr. Broghammer noted no pain behaviors on exam. He found no particular exam concerns but referred Claimant to physical therapy. He stated that "[T]he worker's history is consistent with a work-related injury." But that he considered it to be "an exacerbation of the chronic pre-existing condition."

4. Respondents filed an Employer's First Report of Injury (FROI) noting a work-related injury on September 16, 2021 at approximately 11:28 a.m., which was reported to Employer the same day. It also noted that Claimant was picking up the machine when he "tweeked" [sic.] his back and they referred Claimant to Dr. Robert Broghammer for treatment at Occupational Medical Partners. Lastly, it noted that Claimant sought medical treatment on September 20, 2021.[1] The FROI was completed by Claimant's supervisor on September 23, 2021.

5. Claimant testified that he had a back injury when he was approximately 20 years old, which resolved with conservative care, such as physical therapy and one injection. He stated that he did not have any problems with his back since then and specifically in the last five to ten years. Claimant was 41 years old at the time of the hearing. Claimant stated that he would not have been able to carry out his job in biomechanical services for the last eight years if he had ongoing back problems because of all the heavy lifting required. He also stated that he had been very active, doing his job and things like biking, without difficulty. He stated that he had not had any treatment in the last twenty years related to his back and that his providers took down incorrect histories if they mentioned otherwise. Lastly, Claimant stated that he had no limitations on his work or outside activities or in any way missed any work due to physical problems prior to the back injury. Claimant was credible and persuasive.

6. Claimant explained that he never had problems with numbness and tingling in his legs like he has now and did not understand where the providers obtained the information, but it was not from him. He has had numbness and tingling since his work injury from the calf down to his foot. When he was twenty years old, he had sciatica pain, which included pain in the buttock area going down his leg to right above the knee but that it resolved with treatment. He denied he told providers that he had "chronic pain" in his low back at any time immediately before this injury, as he did not use the word chronic, and vehemently denied that he told his providers he had pain continuously since he was 20 years old. He was able to perform his heavy work and his recreational activities without any problems with either his back or his lower extremities. Claimant was credible.

7. Claimant returned to see Dr. Broghammer on September 28, 2021 but had had no improvement yet, as he had just started physical therapy. Dr. Broghammer noted that Claimant was in too much pain to return to his work and his supervisor had told him 'to not come in' to work. The provider also noted Claimant continued to have back pain

[1] The Employer's First Report of Injury states September 16 and September 20, 2021. However, the medical records show that the first appointment was on September 21, 2021, so this ALJ infers, Employer was simply off by one day and should have noted September 17, 2021 and September 21, 2021 respectively.

and bilateral foot numbness and tingling. He stated that "the worker will continue modified activities and physical therapy." Work restrictions were lifting up to 10 lbs., carrying 10 lbs., push/pull 20 lbs., no prolonged standing or sitting and should change positions as necessary.

8. Claimant was evaluated by Patricia Dockter, P.T. on September 28, 2021. She noted as follows:

> 40 yo male with c/o's LBP. B feet N/T after he was bending over to pick up dialysis machine to free up a piece of tubing from underneath the machine. Pt experienced he felt a 'sharp pain in my lower back. area.".
>
> Pt has history of chronic LBP since he was 20 years old. No history of surgery. Pre-injury pain baseline levels: symptom free, except for in B feet after a couple hours of standing, walking. Pt works as a biomedical technician for DaVita. N/T Per pt, he repairs, maintains dialysis equipment. AGG factors: standing>5min increases B feet N/T, Wearing flip flops or barefoot increases N/T B feet. Sitting> 5min increases his back pain. Sitting/driving in his car, L/R S/L increases back pain. Difficulty with lower body dressing. Alleviating factors: sitting helps get rid of B N/T feet but he has increased pain from pressure at his coccyx with sitting. Lying in prone 'seems to open it (back) up". Pt reports that squatting "all the down helps the back pain, B foot N/T".

9. On October 14, 2021 Dr. Broghammer reported that Claimant had not made progress and ordered an MRI of the lumbar spine. Restrictions were similar but added no crawling, kneeling, squatting or climbing and no bending or twisting. He noted that the objective findings were consistent with the work-related mechanism of injury, diagnosing low back strain.

10. Claimant underwent a lumbar spine MRI on October 23, 2021 at Health Images. The images were read by Dr. Saidmunib Sana, who stated that there was:

> Central disc herniation at L4-5 causing mild bilateral subarticular zone narrowing. This may be irritating the bilateral L5 nerve roots.
>
> Right paracentral disc herniation at L5-S1 which mildly posteriorly displaces the right S1 nerve root.
>
> Severe L5-S1 spondylosis where there are prominent type I endplate changes. There is moderate to severe bilateral foraminal narrowing at this level.

11. On October 25, 2021 Insurer filed a Notice of Contest, for further investigation.

12. Dr. Broghammer referred Claimant to physical medicine and rehabilitation (PMR) specialist, Dr. Scott Primack, on October 27, 2021, after reading the MRI report.

13. Claimant consulted with Do Long Vu, DO, on November 3, 2021. Dr. Vu noted that Claimant had loss of range of motion of the lumbar spine but otherwise a negative exam. Claimant complained of low back pain and numbness and tingling of the lower extremities. His assessment was as follows:

> Patient has signs and symptoms consistent with discogenic low back pain due to the lumbar disc extrusion at L5-S1 on the MRI of the lumbar spine as noted above. He also does have type I Modic endplate changes at L5-S1. The symptoms he feels in his legs the tinging numbness paresthesias likely neuritis from the inflammation of the disc extrusion. He does not have weakness on exam today though he does feel unsteady in his on his feet at times. He is concerned that he may trip and fall If he returns to work at this time.

Dr. Vu also stated that he thought Claimant "would benefit greatly from lumbar epidural steroid injection for the discogenic low back pain and inflammation from the disc extrusion."

14. Claimant was transferred to Dr. Matthew Lugliani and the Claimant saw him on November 16, 2021 for the first time. Under "Chief Complaint" Dr. Lugliani has the identical history, wording and poor grammar as Dr. Broghammer.[2] Under "subjective" Dr. Lugliani noted that Claimant had worsening symptoms with ongoing mid and low back pain, numbness and tingling in the bilateral feet. Under "Review of Systems" Dr. Lugliani noted back pain and difficulty walking. He noted that inspection of the back revealed scoliotic posture, a left anterior hip rotation and elevation, SI tenderness. Back range of motion was limited with positive facet loading maneuvers in all planes. He noted Claimant was seeing a PMR specialist and was awaiting injections. He further ordered chiropractic and massage therapy, as well as referred Claimant to Dr. Vu.

15. Zachary Jipp, D.C., evaluated Claimant on December 9, 2021 noting a history as follows:

> His injury occurred on 9/17/21. At the time he worked for [Employer] kidney dialysis company. He bent over to pick up something heavy and immediately felt a sharp pain in his lower back. He does report a history of chronic back pain from an injury that occurred 20 years ago. He received a couple injections for this previous injury. Regarding this most recent work-related injury, his low back pain continues. If he sits for too long or stands for too long both of his feet will go numb but he denies radiating leg symptoms. He no longer works with a company. Prolonged sitting, standing aggravate his pain. He also reports disturbed sleep due to pain. He has tried physical therapy with minimal relief. He has been referred for an epidural but that is awaiting insurance approval. Recent MRI findings show disc herniations at L4-L5 and L5-S1. He denies bowel/bladder incontinence. saddle paresthesia.

16. Dr. Lugliani saw Claimant on December 17, 2021 but the report will not be summarized here as it is a duplicate chief complaint from Dr. Broghammer's report of September 21, 2021 and the exam is exactly, word for word, with errors and everything, the same from his November 2021 report. The only remarkable statement is his concern regarding Claimant not getting recommended EMG and injections authorized.

17. On January 5, 2022 Claimant was evaluated by Dr. Primack, who obtained the following history:

> [Claimant] is a 40-year-old right-handed male presents for a comprehensive electrodiagnostic consultation of his ongoing back pain with rating symptoms going into the right lower extremity as well as the left lower extremity. He works at [Employer]. He remembers that he was doing well up until 9/17/2021. While working in the capacity as a biomedical technician, hosing was stuck underneath 1 of the wheels of a dialysis machine. He bent over to lift up to to dislodge the low hose by moving the machine. He had sudden severe back pain. In time, he did begin to have radiating symptoms going into his right lower extremity as well as his left lower extremity.

Dr. Primack determined that, considering the "clinical examination as well as the imaging studies," the injections with Dr. Vu were considered reasonable, appropriate, part of the injury. He diagnosed intervertebral disc degeneration of the lumbar region and

[2] This ALJ infers that this was just a copy and paste job.

spondylosis without myelopathy or radiculopathy of the lumbar region and stated that they would go forward with the EMG/NCS.[3]

18. Dr. Lugliani noted on January 26, 2022 the same copied chief complaint, which is not credible. He noted that Claimant had a 70% improvement from the epidural lumbar injections with decreased pain and increased range of motion. The exam was also almost identical to the prior report, with the exception of stating that the spine curvature resolved, hips were aligned, and Claimant had minimal tenderness to palpation in the paralumbar area. He noted that back range of motion was full with mild facet loading maneuvers. He decreased work restrictions at this point to 30 lbs. lifting.

19. By February 16, 2022 Claimant reported to Dr. Lugliani that the benefit of the injections had decreased, and his low back pain and lower extremities increased exponentially. He noted a left anterior hip rotation with scoliotic curvature of the spine, paralumbar tenderness and positive facet loading maneuvers. Dr. Lugliani referred Claimant to Dr. Pehler for an orthopedic evaluation.

20. On February 17, 2022, Claimant treated with Dr. Vu and reported that he had more than 80% relief of his back and leg pain/symptoms following the January 14, 2022 injection. Dr. Vu maintained Claimant's treatment plan and recommended a second injection. On March 11, 2022, Dr. Vu performed a bilateral S1 transforaminal lumbar epidural steroid injection.

21. Claimant was attended by Dr. Lugliani on March 22, 2022, who noted that the second ESI was not of benefit and Claimant continued to have increasing lumbar spine and lower extremity complaints, especially in his bilateral feet.

22. Claimant was first evaluated at Dr. Stephen Pehler's office by physician assistant Maria Kaplan of Orthopedic Centers of Colorado on March 23, 2022. PA Kaplan took a history of present illness consistent with Claimant's testimony. She recommended surgical intervention due to Claimant's continued pain despite physical therapy, anti-inflammatories, rest, two lumbar epidural steroid injections and noted that the surgery would be a bilateral L4-5 microdiscectomy as well as L5-S1 lumbar disc replacement.

23. On March 28, 2022 Dr. David H. Elfenbein issued a report stating that pathology was not limited to one level as required by CO guidelines for artificial disc replacement. He stated that it was unclear what the pain generator was. He stated that because Claimant did not respond to ESIs, it was unclear if the L4-L5 disc was a source of his complaints. He recommended further injection therapy (i.e., selective facet injections, possible discogram) would be appropriate to help define the pain generator. Therefore, he recommended denial of the request for bilateral L4-L5 microdiscectomy and L5-S1 lumbar disc replacement as not medically necessary.

24. On March 30, 2022 Insurer sent a denial of the request for prior authorization.

25. Dr. Pehler attended Claimant on April 1, 2021 and noted that at this point in time, Claimant had attempted multiple rounds of conservative treatment including physical therapy as well as epidural steroid injections, anti-inflammatory medicines, and

[3] EMG/NCS are electromyography and nerve conduction studies.

rest without significant symptomatic relief. He noted Claimant had a spondylosis at L5-S1 with bilateral neuroforaminal stenosis and a central disc protrusion with central stenosis at L4-5. Dr. Pehler's recommendation continued to be for bilateral L4-5 hemilaminotomy with microdiscectomy and L5-S1 lumbar disc arthroplasty, because Claimant was a young healthy patient, they would like to preserve his motion and a bilateral L5-S1 hemilaminotomy with foraminotomy would only address his neurocompression element and would not address his low back pain component of his clinical symptoms.

26. On April 22, 2022 Dr. Pehler wrote a letter to Insurer in response to the denial of surgery based on Dr. Elfenbein's peer review. Dr. Pehler specifically disagreed with Dr. Elfenbein opinion as there was clear indication for surgery. He specifically opined that the MRI images of the mid sagittal cut clearly showed severe collapse at the L5-S1 and central protrusion of the L4-5. The next two images of the parasagittal cuts going from the right to the left showed severe compression of the L5-S1 nerve root and an active lumbar radiculopathy. He went on to describe additional images that show the central protrusion and lateral recess stenosis and disc protrusion of the L4-5 compressing the descending roots bilaterally and at the L4-S1 levels that demonstrate bilateral recess stenosis. He stated that his recommendation for a lumbar disc replacement at the L5-S1 and bilateral microdiscectomy/decompression at the L4-5 level was reasonable, supported, and medically indicated. The L5-S1 disc replacement would address Claimant's severe collapse at the L5-S1 and severe bilateral foraminal stenosis. The L4-5 bilateral discectomy/decompression would address the compression at the L4-5 and allow Claimant to preserve the motion of his spine. Lastly, he indicated that this surgery was appropriate as it would address Claimant's ongoing complaints that have not been addressed by conservative care, allowing Claimant to have long term relief and be able to return to work.

27. On June 21, 2022 Dr. Lugliani stated that Claimant's symptoms had persisted and not changed, with low back pain and radiating symptoms into his bilateral feet. Dr. Lugliani specifically stated that he agreed with the Orthopedic Spine specialist regarding surgical intervention. He also made a referral to Dr. Disorbio, a psychologist due to Claimant's ongoing extra stress associated with the injury and other biopsychosocial factors. Dr. Lugliani's last report is for August 9, 2022 which specifically states that Claimant was to continue with self-directed exercise and massage therapy, to follow up in six weeks and the same restrictions. The M-164 form stated that Claimant was not at maximum medical improvement, which was unknown.

28. Claimant testified that he would like to proceed with the surgery recommended by Dr. Pehler because he would like to get better. He specifically stated as follows:

> Q Okay. And, I mean, you want to go forward with the surgery, correct?
>
> A Yeah. Uh-huh.
>
> Q Okay. And why?
>
> …
>
> A You know, number 1, for the last 20 years, I've been working in dialysis, taking care of patients. It's what I do. You know, it's a big part of my life. And I want to get back to doing that. This last year, not being able to work and do what I do, which is save lives, take care

> of people, it's been really hard, especially coming off of the COVID pandemic. You know, things were pretty intense right there, and it was pretty awesome to help people out. So after the COVID pandemic, to hurt my back and be out for a year like this, it's really difficult. And then just, you know, getting back some quality of life. I'd love to get back on my bicycle again and lose this weight. So it's not good for my health, you know?

29. Claimant credibly testified that he continued to have pain, sometimes aching and sometimes stabbing sensations, in the low back, which was especially painful when he was sleeping, and the pain wakes him up. He stated that "sleeping is horrible" for him. He generally had about four hours of restful sleep before the pain becomes intolerable. He also continued to have problems with his lower extremities. When he walks, his legs get numb and sometimes causes him to have to drag his legs, like the leg has gone to sleep. He does do yoga, which helps somewhat, giving him temporary relief.

30. Claimant testified that he reviewed his 2021 tax return for wages he earned from Employer. From January 1, 2021 through his last day working, on September 17, 2021, Claimant earned $68,723.00. Employer was his only employment at that time. No other evidence regarding wages was submitted and Respondents did not contradict or challenge Claimant's testimony. Claimant is found credible. September 17 is the 260$^{th}$ day of the year. Claimant's average weekly wage if found to be $1,850.61

31. Claimant stated that he was terminated from his employment with Employer but did not recall receiving anything documenting that termination. He never received any offer of light duty employment, though his supervisor briefly discussed the possibility of some light duty but never confirmed if any was available nor received an offer letter. He further stated he was not aware of any work policy changes that were to take effect by the end of September 2021.

32. Claimant was more persuasive in his testimony and explanations that he did not have any problems following his back injury when he was in his twenties. He testified that he reported the old injury in the spirit of disclosure, and never reported that the problems continued following his care many years ago. Claimant had been working at heavy duty job for Employer, performing maintenance on heavy equipment and dialysis machines which he had to lift or move around in order to do his job. He was very persuasive in his testimony that he had no limitations or problems with either his back or his lower extremities until the September 17, 2021 lifting incident at work, when he heard his back pop and felt immediate debilitating pain and subsequent numbness and tingling in both his lower legs/feet. Claimant has shown by a preponderance of the evidence that he sustained work related injuries to his low back and lower extremities on September 17, 2021.

33. Respondents designated Dr. Broghammer and the parties stipulated that the providers in this matter were authorized. Claimant sustained a work-related injury on September 17, 2021 for which he required care. The care provided by the authorized treating providers to date has been reasonably necessary and related to the compensable injuries to Claimant's low back and lower extremities. Further, Claimant has already tried multiple types of conservative care that would likely provide Claimant relief without success and now requires more aggressive care in the form of surgery as recommended by Dr. Pehler and that Dr. Lugliani agreed was a proper course of care. The opinions of Dr. Pehler and Dr. Lugliani are more persuasive than the contrary opinion of Dr. Elfenbein.

Claimant has shown by a preponderance of the evidence that he is entitled to receive the recommended bilateral L4-5 hemilaminotomy with microdiscectomy and L5-S1 lumbar disc arthroplasty (artificial disc replacement).

34. Claimant had an acute injury on September 17, 2021. He was so incapacitated by the pain to the lumbar spine on that day he could not straighten up and had to sit down. He slowly made his way to his vehicle and went directly home, where he contacted his offsite supervisor. While he waited through the weekend, the following Monday he requested medical care and was seen on September 21, 2021 and thereafter by the designated providers who provided restrictions. These restrictions were incompatible with Claimant's described job duties as they were sedentary to light duty and Claimant's job included lifting and moving heavy equipment. Claimant continued to have restrictions and was likely not able to perform his regular job. His ATPs have not stated that Claimant is at MMI. Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability beginning on September 18, 2021, which should continue until terminated by law.

35. Further, Claimant was not provided an offer of modified employment, and has now been terminated from employment with Employer. Claimant provided credible and persuasive testimony that he could not perform his regular duties and that, while he discussed tangentially with his supervisor the possibility of returning to work, the persuasive evidence is that Claimant was not at fault for his termination. Respondents failed to show that Claimant participated in a volitional act in this matter which caused his loss of employment.

## 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

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

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); see also, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. Id.;

*Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Claimant was within the course of his employment as he was engaged in performing maintenance on a dialysis machine for Employer. This job required Claimant to perform various tasks including testing the machine that was being repaired. This involved making sure that all the parts were working appropriately. Claimant was in the process of doing just that when he noticed that one of the blood tubes was under the wheel of the dialysis machine and he was bent over and lifted the dialysis machine to get the tubing out from under the wheel. That is when Claimant felt the pop in his low back and the immediate onset of pain that caused him to be unable to straighten out and had to scooch backwards in order to sit down. Claimant knew it was a serious injury and reported it the same day to his supervisor. They both agreed that he should wait it out during the weekend to see if the problem would resolve on its own. The following Monday, Claimant requested to see a provider and was sent to Dr. Broghammer. Claimant credibly testified that, while he had a prior injury to his low back at the age of 20, that problem had resolved, and Claimant was able to carry out his heavy-duty job for Employer for over eight years without limitations or restrictions. It is specifically found that the providers spun Claimant's notification that he had had a prior back injury into his having a chronic low back problem. It is also found that the providers were incorrect in this assumption. This ALJ finds Claimant to be credible in this matter. Claimant has shown that he sustained compensable work-related injuries to his low back and bilateral lower extremities in the course and scope of his employment as a biomechanical services specialist for Employer that are proximately cause by the incident of September 17, 2021.

Respondents argued that Claimant had a preexisting condition which was the cause of Claimant's ongoing low back pain. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work-related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption

that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Based on the MRI findings showing the underlying genetic abnormality of a small ventral canal and the underlying degenerative disc disease, it is clear that Claimant had some preexisting condition. However, Claimant credibly testified that he was asymptomatic from the time he was hired by Employer to the date of the accident of September 17, 2021. This is supported by the fact that he was able to perform the requirements of his job, which involved moving and lifting heavy machines on a daily basis. The fact that multiple medical providers copied and pasted the same medical history is not persuasive to this ALJ. The multiple providers even used the same language and grammatical errors. Claimant has shown that it is more likely than not that the mechanism of injury, the lifting of the dialysis machine while bent over to stretch to reach the blood tube stuck under the dialysis machine wheel, did, in fact, cause the injuries and aggravation of the asymptomatic degenerative condition. Claimant has shown that the specific accident that happened on September 17, 2021 caused the injury or aggravation of the underlying degenerative condition causing both disability and the need for medical care which are the proximate result of the work-related accident.

### C. Medical Benefits

The Workers' Compensation Act (Act) imposes upon every employer the duty to furnish such medical treatment "as may reasonably be needed at the time of the injury ...and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. That duty includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mutual Insurance Co. v. Jacoe,* 102 Colo. 515, 81 P.2d 389 (1938); *Country*

*Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 11 (Colo. App. 2004). A Claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's preexisting condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). An injury, nevertheless, must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability. See *Colorado Fuel & Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). A claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

Here, Claimant was initially seen by providers that were designated by Employer and those within the chain of referral. Claimant was diagnosed with an acute injury on September 17, 2021 to the lumbar spine. The MRI imaging show both degenerative and congenital conditions as well as the acute herniated discs at two levels (L4-5 and L5-S1). Claimant did not have any symptoms or restrictions prior to his injury or during the eight years he worked for Employer performing a heavy job, which included lifting and moving heavy machinery. Even if some of the underlying conditions are not work related, it is found that Claimant had an aggravation of those congenital and degenerative conditions which caused the immediate symptoms following the lifting incident on September 17, 2021. This accident caused the underlying condition to require medical care. Claimant has shown by a preponderance of the evidence that the work-related accident of straining his low back while lifting was the direct causal event that precipitated the need for medical care in this matter. Claimant has shown that the medical care that he obtained from the

authorized treating providers was reasonably necessary medical care and related to the September 17, 2021 work-related injury.

It is further found that, but for the work-related injury Claimant sustained on September 17, 2021, Claimant would not have required the surgical care recommended by Dr. Pehler. Dr. Pehler is both credible and persuasive, in light of the MRI findings, and the fact that Claimant has failed conservative care, that the proposed two-level surgery is reasonably necessary and related to the accident of September 17, 2021. Claimant has proven that it is more likely than not that the need for the proposed surgery was proximately caused by the September 17, 2021 work related accident.

**D. Temporary Disability and Responsibility for Termination**

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits from the date following his September 17, 2021 injury until terminated by law. Claimant sustained work related injuries and aggravation of the underlying preexisting disease on September 17, 2021 that caused a disability lasting more than three work shifts and caused him to leave work and lose wages. Claimant was continued to be incapacity at the time of the hearing, causing continued wage loss. Claimant has not been placed at maximum medical improvement by an authorized treating provider nor has he returned to modified or regular employment. Claimant has shown that it is more likely than not that Claimant was disabled and is entitled to receive indemnity benefits as a cause of the work injuries.

Respondents argue the affirmative defense of Claimant's responsibility for termination as a defense to payment of TTD benefits. The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. "Fault" requires that the claimant must have performed some volitional act or exercised a

degree of control over the circumstances resulting in the termination. See *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). Whether the claimant is responsible for the termination of his employment must be based upon an examination of the totality of circumstances. *Id.* The burden to show that the claimant was responsible for his discharge is on the Respondents. See *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). Therefore, Respondents bear the burden of proof to establish the applicability of these provisions. *Witherspoon v. Metropolitan Club,* W. C. No. 4-509-612 (Dec. 16, 2004). Respondents averred at hearing that Claimant's statements that he was in too much pain to return to work showed his complicity in failing to return to work or accept a light duty job, and therefore, was a volitional act that merits termination of temporary disability benefits. Respondents also argued that Claimant admitted he was not vaccinated for COVID-19 and that Employer had a new policy, which Claimant was not aware of, that all employees had to be vaccinated, and alluding to Claimant's knowledge that his employment would be at an end because of his position regarding vaccination. However, the question of whether Claimant acted volitionally or exercised a degree of control over the circumstances of the termination is one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, as found, the evidence at hearing was not sufficient to persuade this ALJ. Claimant clearly was under significant restrictions from the injuries as he was having problems both standing or sitting for extended periods of time. Claimant described his job as heavy as he had to move and lift dialysis equipment, water tanks, carbon tanks and other equipment and materials and there was no persuasive evidence that a job within Claimant's limitations was available. Respondents did not submit any persuasive evidence that Respondents tendered a light duty job offer, nor that Claimant knew or how Claimant should have known about a policy instituted by Employer. Respondents have failed to show that Claimant's indemnity benefits should be denied under the termination statute.

## E. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But 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. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). In calculating the fair approximation of Claimant's average weekly

wage, wages were considered from January 1, 2021 through his date of injury on September 17, 2021, his last day of employment. Claimant testified that his tax return showed wages earned from Employer were $68,723.00. Employer was his only employment for 2021. His earnings divided by 260 days results is an average weekly wage of $1,850.37.[4] As Claimant was earning in excess of the maximum wage, Claimant's temporary total disability benefits are limited as of July 1, 2021 by statute to the maximum rate, which was $1,158.92.

## ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained compensable work-related injuries to his lumbar spine and causing lower extremity sequelae on September 17, 2021 within the course and scope and arising out of his employment with Employer.

2. Respondents shall pay for Claimant's reasonably necessary and related medical benefits as provided by the stipulated authorized treating providers, including the lumbar spine surgery recommended by Dr. Pehler.

3. Claimant's fair approximation of his average weekly wage is $1,850.37.

4. Respondents shall pay for temporary total disability benefits as of September 18, 2021 at the maximum rate of $1,158.92 per week until terminated by law. Respondents failed to show Claimant was responsible for his termination.

5. Respondents shall pay interest at the statutory rate of eight percent on all amounts not paid when due.

6. 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

[4] January 1, 2021 through September 17, 2021 is 260 days. 260 days divided by 7 days a week is 37.14 weeks, which when you divide $68,723 by 37.14 is a total of $1,850.37. This divided by 2/3 would equal $1,233.58, which is in excess of the maximum TTD benefits any Claimant injured after September 7, 2021 but before July 1, 2022 could receive.

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 30th day of November, 2022.

Digital Signature

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