ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of his claim.

II. Whether Claimant established that the uninsured Employer is subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's May 12, 2020 order, specifically for failing to cover reasonable, necessary, and related medical care to cure and relieve the effects of Claimant's compensable injury, and pay temporary total disability (TTD) benefits and interest on all TTD owed and not paid when due.

FINDINGS OF FACT

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

1. This claim has been the subject of a prior hearing held before ALJ Patrick Spencer on March 12, 2020. The issues presented at that hearing included compensability of an alleged September 7, 2019 injury and whether Claimant was entitled to reasonably necessary medical benefits and lost wage benefits, i.e. temporary total disability (TTD) commencing September 7, 2019.

2. Despite proper notice, Employer failed to appear for the March 12, 2020 hearing. Accordingly, ALJ Spencer took Claimant's testimony at the March 12, 2020 hearing and issued an Order to Show Cause to Employer. Employer did not respond to the show cause order prompting ALJ Spencer to issue his order on May 12, 2020. As part of his May 12, 2020 order, ALJ Spencer found Claimant's September 7, 2019 injury compensable and ordered Employer to "cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury." ALJ Spencer also ordered Employer to pay "Claimant $6,200 in TTD benefits from September 8, 2019 through May 12, 2020" and "$175 per week in TTD benefits commencing May 15, 2020 and continuing until terminated by law." Finally, ALJ Spencer ordered Employer to pay interest on all past due TTD.

3. The ALJ adopts ALJ Spencer's Findings of Fact, as articulated in the May 12, 2020 order, as follows:

   a. Employer hired Claimant in August 2019 to tear off and re-cover a 1500 square foot roof on a customer's home. Employer told Claimant it was a "simple" one-layer job.

b. Employer agreed to pay Claimant $35 “per square” to tear off and replace the roof. A “square” is 100 square feet of roof, so there were 15 “squares” in the 1500 square foot roof. Claimant estimated it would have taken two weeks to complete the job had it been a single-layer roof as anticipated.

c. When he got on the roof and started the job, Claimant realized there were four layers of existing roof to tear off.

d. Employer was supposed to supply the materials for the project and stock them on the roof. Employer also told Claimant he would provide a worker to help with the project. Employer provided a helper the first day, but after that, Claimant was left to finish the job by himself.

e. Claimant worked on the project for a couple of days but his progress was stymied by weather. Then a representative from Regional Building came and shut the project down because Employer had not pulled a permit.

f. Two days later, Employer called and informed Claimant he had secured the building permit and work could resume.

g. Employer stopped responding to Claimant’s calls after that. The homeowners also tried to reach Employer without success. They had paid Employer $3,200 for materials, but he had not brought materials to the job site. Repeated heavy rains were causing leaking into the home, so Claimant used his personal funds to buy materials to cover the roof. The homeowners then gave Claimant additional money so he could purchase the materials needed to finish the job.

h. Claimant purchased the materials and loaded them onto the roof by himself because Employer provided no one to help him. Throughout the project, Claimant struggled to move roofing materials and complete repeated trips up and down the ladder. He developed progressively worsening low back and leg pain during the project as a direct and proximate result of the physically demanding work. The lack of help during the project probably contributed to Claimant’s injury.

i. Employer appeared at the job site on September 7, 2019, when Claimant was almost finished with the project. Claimant informed Employer he could not keep working because of his severe low back and leg pain. Employer took over work on the project.

j. Claimant filed a Workers’ Claim for Compensation form on September 20, 2019. He mailed a copy to Employer.

k. On October 15, 2019, Employer appeared at Claimant's home and berated him for filing a workers' compensation claim. He told Claimant, "You are not getting anything." Employer never paid Claimant for his work on the project.

l. Employer never referred Claimant to a physician for treatment.

m. In December 2010, Claimant sought treatment for his back pain at the VA Rocky Mountain Regional Medical Center. He underwent x-rays on December 10, 2019, but the results are not in the record. Claimant was referred for a lumbar MRI and a physical medicine evaluation before he could have a surgical consultation.

n. Claimant proved he was performing services for pay for Employer when he was injured. There is no persuasive evidence he was free from direction and control or customarily engaged in an independent trade or business related to the service provided.

o. Claimant proved he suffered an injury to his low back arising out of and occurring within the course and scope of his employment for Employer.

p. The right to select a physician passed to Claimant and he selected the VA Medical Center.

q. Under the terms of hire, Claimant would have been paid $525 for the roof project. Claimant estimated it would have taken two weeks to complete the project. Claimant's AWW is $262.50 ($525 ÷ 2 = $262.50). This equates to a weekly TTD rate of $175 and a daily rate of $25.

r. Claimant proved he is entitled to TTD benefits commencing September 8, 2019 and ongoing. Claimant stopped work on September 7, 2019 because of the effects of the work injury. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

s. The total past-due TTD is $6,200 through the date of this decision. The total accrued statutory interest is $161.58 through the date of this decision. TTD will continue to accrue at the rate of $175 per week until terminated by law. Interest will continue to accrue at the rate of $1.39 per day until the past-due TTD is paid in full.

t. Employer must pay an additional $1,550 to the Colorado Uninsured Employer Fund because it was uninsured at the time of Claimant's injury ($6,200 x 25% = $1,550).

u. Employer knew Claimant had to stop working because of the injury on September 7, 2019. Employer was required to formally admit or deny liability no later than Monday, October 7, 2019. Employer never filed an admission of liability or notice of contest with the Division of Workers' Compensation.

v. Employer should be penalized $25 per day, from October 7, 2019 through the date of this decision (May 12, 2020), for failing to admit or deny liability.

4. Claimant testified that after the May 12, 2020 order of ALJ Spencer was issued, he filed a new application for penalties because Employer never paid his lost wages as ordered. (Clmt's. Ex. 2). Claimant filed his Application for Hearing on April 15, 2022; more than a year after ALJ Spencer's May 12, 2020 order was issued. *Id.* Claimant sent a copy of the Application for Hearing to Employer's address on file with the OAC, namely: 1819 West 22nd Street, Pueblo, Colorado 81003. This is the same address that the prior May 12, 2020 and Show Cause orders were sent to without response by Employer. There is no indication that the prior mailings were undeliverable and returned to sender. Accordingly, the ALJ finds that Claimant's April 15, 2022 Application for Hearing was probably delivered to Employer as was the prior May 12, 2020 Order of ALJ Spencer.

5. Based upon the evidence presented, the ALJ finds that Employer has made no effort to abide by the May 12, 2020 order of ALJ Spencer. Similar to his non-appearance for hearing on March 12, 2020, Employer failed to appear for the August 11, 2022 hearing despite proper notice. Moreover, he did not respond to either Show Cause Order. Based upon the evidence presented, the ALJ finds that Employer has elected to ignore the proceedings and the prior orders of ALJ Spencer. Indeed, the evidence presented, including Claimant's testimony supports a finding that Employer has failed to perform a duty lawfully mandated within the time prescribed by ALJ Spencer, namely the payment of TTD as ordered. Accordingly, for the reason set forth below, the ALJ finds that the imposition of penalties is appropriate in this case.

CONCLUSIONS OF LAW

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

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

II. Penalties

C. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo.App. 1995). If the ALJ finds a violation, the ALJ must then determine whether the insurer or employer's actions, which resulted in the violation, were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App. 2003). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

D. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order, which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds

an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004). Employer did not assert that any alleged penalty had been cured. Indeed, Employer failed to respond in any fashion to ALJ Spencer's May 12, 2020 order or Claimant's April 15, 2022 Application for Hearing despite those documents being served on Employer's address of record.

E. In this case, Claimant has asserted penalties pursuant to § 8-43-304(1) for Employer's failure to follow ALJ Spencer's May 12, 2020 order requiring payment of, among other things, lost wage benefits. (Clmt's Ex. 2). As noted, a violation of an order occurs when a party authorized or obligated to perform performs an action prohibited by the order, or fails to take an action required by the order. *See Dworkin, Chambers and Williams, P.C. v. Provo,* 81 P.3d 1053, 1058 (Colo. 2003). Before analyzing Claimant's penalty claim, the ALJ notes that ALJ Spencer's May 12, 2020 order became final on June 1, 2020 as Employer did not appeal it. Moreover, the evidence presented supports finding that Employer has failed to follow the order to date. Accordingly, the asserted penalty is ongoing.

F. In this case, the Application for Hearing filed April 15, 2022, specifically notes that Claimant was seeking penalties beginning "May 12, 2020 and ongoing pursuant to § 8-43-304(1) for failure to "[respond] to the order by ALJ Spencer to pay benefits. Although Claimant did not indicate the rate at which he requested penalties be paid, he did indicate that he was seeking penalties pursuant to § 8-43-304(1), which provides that penalties for refusing to obey lawful orders shall be punished by a fine of not more than $1,000.00/day. Based upon the evidence presented, the ALJ concludes that the basis for Claimant's penalty assertions was sufficient, pursuant to § 8-43-304(4), to place Employer on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's May 12, 2020 order, specifically that portion which required Employer to pay TTD benefits.

G. Based upon the totality of the evidence presented, the ALJ concludes that Employer violated ALJ Spencer's May 12, 2020 order requiring the payment of TTD benefits. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation, which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). As ALJ Spencer's May 12, 2020 order did not become final until June 1, 2020, the imposition of penalties extends from June 2, 2020 and is ongoing.

H. While the evidence presented supports that a violation of ALJ Spencer's May 12, 2020 order occurred for failure to pay TTD benefits, it is necessary to analyze

whether Claimant filed his request for penalties timely and whether Employer's failure to pay TTD was objectively unreasonable. Here the evidence presented establishes that Claimant filed his Application for Hearing requesting penalties in excess of one year after the date that he reasonably should have known of the facts giving rise to the penalty. Indeed, Claimant did not file his request for penalties for approximately 23 months after ALJ Spencer issued his Order. Claimant was represented by Counsel at the time the May 12, 2020 Order was issued. Accordingly, the ALJ finds it reasonable to infer that his counsel would have advised him regarding the potential repercussions; including the imposition of penalties should Employer fail to abide by the Order shortly after it was issued.

I. Section 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5) constitutes a statute of limitations. *Spracklin v. Industrial Claim Appeals Office, supra.* While the ALJ is convinced that the "statute of limitations" probably ran out before Claimant filed his Application for Hearing, Employer failed to respond to the request for penalties. Indeed, review of the file materials finds them devoid of any response to the claim for penalties. Raising the statute of limitations is an affirmative defense that is subject to procedural waiver if not explicitly plead and proven in a timely fashion. *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995); *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Based upon the evidence presented, the ALJ is convinced that Employer waived any statute of limitations defense by not filing any response to Claimant's request for penalties. Moreover, the ALJ concludes that Employer has unreasonably failed to cooperate in the proceedings by failing to appear for hearing despite proper notice or respond to two separate Orders to Show Cause for his failure to appear. Based upon the evidence presented, the ALJ concludes that Employer has consciously decided to ignore the claim in hopes that Claimant will tire of the matter and cease all efforts to recover under the claim. Accordingly, the ALJ finds and concludes that Employer's actions in failing to follow the May 12, 2020 order of ALJ Spencer are objectively unreasonable.

ORDER

It is therefore ordered that:

1. Employer shall pay to Claimant a penalty in the amount of fifty ($50.00) dollars per day beginning June 2, 2020 and continuing through the date of this order, October 3, 2022, for a total of 853 days for $42,650.00 in penalties. The assessment of penalties shall continue beyond October 3, 2022 at the same rate until such time that the temporary total disability and interest payment ordered May 12, 2020 by ALJ Spencer is paid.

2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty

percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

3. All issues not decided 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: October 3, 2022

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021?
- Is Claimant entitled to a closed period of TTD benefits from August 11, 2021 through January 16, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment?
- Did Claimant prove entitlement to medical benefits?
- The parties stipulated to an average weekly wage of $770.

FINDINGS OF FACT

1. Claimant's customary profession is a hairdresser. She stopped that work in late 2020 because of issues related to COVID protocols and exposures.

2. In the end of December 2020, Claimant was hired by Employer to work on a cheese packing line. After completing a period of orientation, classroom training, and "job shadowing," Claimant worked on the packing line, packing blocks of cheese into large totes. Workers in the packing area rotate through several stations during each shift, changing tasks approximately every 30 minutes.

3. Claimant alleges injuries to her left wrist and right middle finger on January 5, 2021. There is uncertainty in the record about the exact date of injury, but the persuasive evidence shows the incidents she described occurred on her first full day working on the packing line.[1]

4. Claimant developed pain in her left wrist while packing 7" x 9" x 2" blocks of cheese into totes, To pack the cheese, Claimant would grasp four blocks of cheese and press them together, lift the cheese off the conveyor belt, turn to the side, and place the cheese into the tote. She repeated this procedure approximately every second. Claimant was later told she should only have been lifting two blocks of cheese at a time.

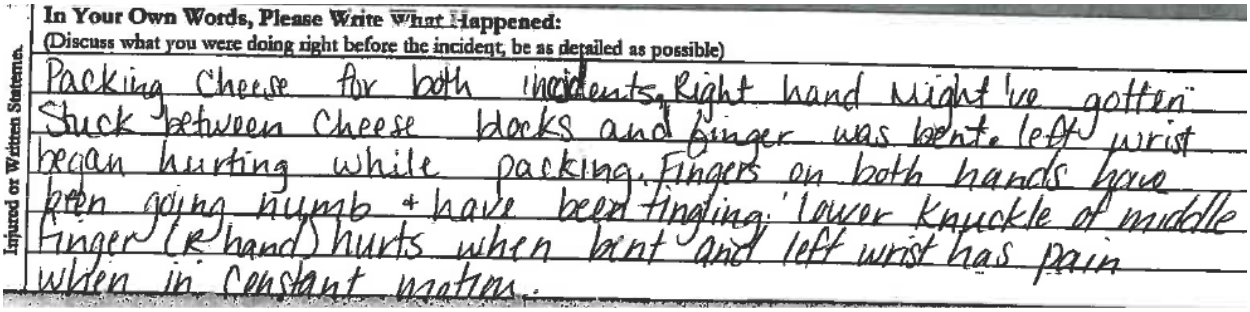
5. Claimant's supervisor noticed her shaking her left hand and moved her to the tote liner station, which requires less hand and arm use.

[1] Claimant's time cards suggest the correct date of injury is probably January 4, 2021. Nevertheless, using January 4 or January 5 as the date of injury makes no practical difference to the claim.

6. While working at the liner station, Claimant was repositioning cheese inside the tote when a block of cheese hit her right middle finger and caused the finger to abduct and hyperextend. She felt immediate pain in the base of the finger extending into the palm.

7. Claimant finished her shift that day, and continued working her regular position for approximately three weeks. She did not report an injury to Employer and sought no treatment.

8. On January 24, 2021, Claimant filed an incident report with her supervisor, Mr. DG[Redacted]. Claimant testified she reported the incident because her wrist and finger were still bothering her. Claimant wrote,


Injured or Written Statement

In Your Own Words, Please Write What Happened:

(Discuss what you were doing right before the incident, be as detailed as possible)

Packing Cheese for both incidents, Right hand might've gotten stuck between Cheese blocks and finger was bent. left wrist began hurting while packing. Fingers on both hands have been going numb + have been tingling. Lower knuckle of middle finger (R hand) hurts when bent and left wrist has pain when in constant motion.

9. Mr. DG[Redacted] gave Claimant a list of designated provides but Claimant declined to seek medical attention. Mr. DG[Redacted] said "someone from safety" would contact Claimant to discuss the injury. He also gave her names and telephone numbers of three members of management she could contact if she had questions about the situation.

10. No one from the safety department contacted Claimant about the accident.

11. Claimant continued working her regular job for approximately three months.

12. On April 23, 2021, she informed another supervisor, CB[Redacted], that she wanted treatment for her wrist and finger. Mr. CB[Redacted] recommended Claimant try physical therapy at Colorado In Motion. Claimant attended two therapy sessions, on April 23 and 28, 2021.

13. At the April 23 PT session, Claimant reported the gradual onset of left wrist pain in January, and sudden pain in her right long finger. She was not certain what caused the finger pain, but said she may have "jammed" or "caught" it. The finger was not painful that day but was painful if bumped. She also described "numbness and tingling, in both arms when sleeping or when holding her hands in front of her body." The examination showed tenderness to palpation of both forearms at the wrist, and over the right palm. Tinel's was positive bilaterally at the cubital tunnels. Finkelstein's test was mildly positive on the left. Range of motion was normal bilaterally. The therapist provided no specific diagnoses. The therapist gave Claimant a "quick" forearm massage, recommended stretches, and dispensed a thumb splint for the left hand.

14. At the April 28 visit, Claimant stated she was "fine now." She was wearing the brace at work "because her left wrist was bothering her when transferring the 7x9 cheese blocks." Her right middle finger hurt with twisting or bearing weight. The therapist massaged Claimant's right hand and demonstrated stretches. She also suggested changing postures during the day and wrapping the middle finger. No follow up was scheduled.

15. Claimant continued working regular duties until late June 2021.

16. On June 22, 2021, Claimant contacted Mr. CB[Redacted] and was directed to Workwell.

17. Claimant saw Dr. Lloyd Luke at Workwell on June 23, 2021. She told Dr. Luke, "I was packing 7x9 cheese and a piece fell on my finger (right-hand) and caused pain towards middle of hand/middle finger. Packing 7x9 cheese in the line and [left] wrist began to hurt." The right middle finger was still painful. She also described continued left wrist pain with movement, and paresthesias over the extensor surface. The symptoms were aggravated by grasping. Dr. Luke noted Claimant had tried a splint without significant benefit. Examination of the left wrist showed decreased sensation over the extensor surface, limited range of motion, and decreased strength. The right finger was painful to palpation and with motion. Dr. Luke diagnosed a right middle finger contusion and a left wrist "strain." He was also concerned about possible unhealed fractures given the length of time since the onset of symptoms. Dr. Luke opined the history and objective findings were consistent with a work-related injury. He put Claimant on work restrictions of no lifting over five pounds and no repetitive tasks involving the left wrist.

18. Employer accommodated the restrictions with modified duties. Initially she was assigned to the sealer and liner stations, which were less demanding than the packer station. Later she was assigned to a "hold and release" position, which primarily involved administrative duties. There is no persuasive evidence Claimant lost any wages while working modified duty.

19. Claimant started PT on July 2, 2021. She attended approximately 11 PT sessions between July and October 2021.

20. On July 20, 2021, PA-C Daniel Downs documented, "she has been working in a light-duty position . . . and this has been helpful. She is not manipulating heavy cheese." Claimant's right middle finger was "feeling a lot better" and the numbness and tingling had resolved. However, she still had aching pain in the left wrist.

21. On July 27, 2021, Claimant gave two-week notice that she was resigning. Claimant stated her last day would be August 10, 2021, "as I have chosen to pursue other ventures outside" the company. She made no mention of the work injury.

22. Claimant followed up with Mr. Downs on August 5, 2021, five days before the effective date of her resignation. Her right hand was doing well. She estimated approximately 50% improvement in the left wrist but progress was slow. She stated the symptoms were aggravated by her work and "she cannot tolerate her regular duties at

this time." There is no persuasive indication she was having any difficulty with the modified duty assignment. Claimant did not mention that she had tendered a resignation.

23. An MRI of the left wrist was completed on August 19, 2021. It showed a third metacarpal carpal boss with focal mild arthritic change, and a 7mm dorsal ganglion cyst with possible mile surrounding soft tissue edema.

24. Examinations by multiple providers before the MRI documented pain to palpation around the dorsal left wrist.

25. After reviewing the MRI, Dr. Luke referred Claimant for an orthopedic evaluation.

26. Claimant saw Dr. Christopher Stockburger, an orthopedic surgeon, on September 29, 2021. She described "extensive repetitive motion with her left wrist" that caused worsening pain since January. She reported intermittent swelling over the dorsal aspect of the wrist. She had some pain-free days but generally was "quite bothered" by wrist pain. Dr. Stockburger opined Claimant had "pretty mild early dorsal bossing with a mild dorsal cyst." He thought Claimant should respond well to conservative treatment, and gave her a cortisone injection.

27. The injection initially caused Claimant's symptoms to flare, but the symptoms were "almost completely resolved" a week later.

28. In mid-October 2021, Claimant attempted to return to work in a salon, but her symptoms quickly flared.

29. On October 28, 2021, Dr. Luke documented Claimant "generally has no pain, or minimal achy pain but has flares of intense carpal row pain." But the same report documented, "left wrist has gotten worse to the point where she is not able to work in the salon at all."

30. Claimant returned to Dr. Stockburger on November 17, 2021. She stated the injection helped briefly but "she has had a complete recurrence of symptoms and actually now has multifocal complaints in areas where she did not have pain previously, including volarly over her FCR, more on the ulnar side of her wrist and proximally into her forearm. These are areas where there is no obvious abnormality on the MRI." He opined her symptoms were "difficult to hone in on" and were "inconsistent with her MRI." If she were just having focal pain over the dorsal ganglion and dorsal boss area, Dr. Stockburger would consider surgery. But her new complaints raised concern about a "more global issue." He recommended a rheumatological panel to look for an autoimmune or inflammatory disorder that could be contributing to her symptoms. He also recommended she continue bracing, NSAIDs, and PT.

31. On November 19, 2021, Claimant reported more pain and reduced ROM. The pain had spread throughout her wrist and hand. Dr. Luke ordered blood work, which showed a positive ANA in a diffuse, dense, fine speckled pattern. Rheumatoid factor, CRP and ESR were normal. It was noted that the dense fine speckled pattern could be

seen in normal individuals and was rarely associated with the lupus, Sjogren's syndrome, and systemic sclerosis.

32. Claimant started a new job as a customer service representative on January 17, 2022. The job involves telephone and computer work. Claimant has tolerated the work without difficulty.

33. Claimant saw Dr. Barry Ogin on May 6, 2022 for an IME at Respondents' request. She described ongoing pain in her left wrist. Dr. Ogin noted the pathology on the MRI "does seem to match the area where she is most tender on my examination today." He opined pathology shown on MRI probably existed before the claimed injury date, but might have been aggravated to her work.

34. Dr. Ogin reviewed the Medical Treatment Guidelines (MTGs) for risk factors associated with aggravated osteoarthritis. Based on Claimant's and Mr. DG[Redacted]'s description of the job, he saw no primary risk factors. Dr. Ogin thought it plausible Claimant was exposed to the secondary risk factor of at least two pounds of pinch force or 10 pounds of hand force three times or more per minute occurred. But he opined a cumulative trauma disorder is unlikely given the short exposure, *i.e.,* the onset of symptoms during the first day on the job. Dr. Ogin opined the potential diagnosis of aggravated left wrist osteoarthritis did not fit Claimant's clinical course. The steroid injection gave no relief, and the development of multifocal complaints in new areas were not consistent with aggravated arthritis affecting the carpal boss at the base of the third metacarpal. Further, if there was aggravated arthritis, and it was caused by the claimant's occupational duties, the symptoms should have diminished once the job duties were modified, and especially once they ended entirely. Instead, Claimant's pain complaints and perception of functional disability seemed to worsen, even after she left Employer. Ultimately, Dr. Ogin concluded Claimant's complaints of refractory left wrist pain, right hand pain, and numbness and tingling to both extremities are unrelated to occupational exposures with Employer.

35. Dr. Ogin makes a well-reasoned argument, particularly regarding causation of the new and worsening symptoms starting in November 2021. However, the ALJ credits Dr. Luke's causation assessment regarding the initial left wrist "strain" and right middle finger contusion.

36. Claimant proved she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021. She consistently reported dorsal left wrist pain triggered and perpetuated by work activities. The MRI confirmed mild objective findings in the same area. Even if the underlying conditions were not caused by her job, they were probably aggravated and became symptomatic because of the work. The right finger became symptomatic after a minor trauma, and remained so for several months. Even though Claimant sought no treatment until April 2021, the symptoms that ultimately prompted her to request medical attention were the same symptoms of which she initially complained. The injury-related symptoms were sufficient to warrant evaluation and conservative treatment, including PT.

37. Respondents proved Claimant was responsible for termination of her employment on August 10, 2021. Claimant resigned her job, and the argument she left work because of the injury is not corroborated by persuasive evidence. Employer accommodated Claimant's work restrictions and there is no persuasive reason she could not have continued working for Employer after August 10. Mr. DG[Redacted]'s testimony is credible regarding Claimant's modified duty assignments. Claimant's resignation letter stated nothing about the injury, and there is no persuasive evidence she reported difficulties to a manager in any other context. Claimant's medical records contain no persuasive evidence she was having difficulty tolerating the modified duty. To the contrary, contemporaneous records indicate the activity modifications were "helpful" and Claimant was doing better. The preponderance of persuasive evidence shows Claimant voluntarily resigned on August 10, 2021 for reasons unrelated to her injuries.

CONCLUSIONS OF LAW

A. Compensability

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

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 and caused symptoms does not establish a compensable injury. Rather, a compensable injury requires medical treatment or causes a compensable disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

A pre-existing condition does not disqualify a claim for compensation or medical benefits 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). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing

condition. *F.R. Orr Construction 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 proved she suffered compensable injuries to her left wrist and right middle finger on January 5, 2021. She consistently reported dorsal left wrist pain triggered and perpetuated by work activities. The MRI confirmed mild objective findings in the same area. Even if the underlying conditions were not caused by her job, they were probably aggravated and became symptomatic because of the work. The right finger became symptomatic after a specific incident, and remained so for several months. Even though Claimant sought no treatment until April 2021, the symptoms that ultimately drove her request for medical attention were the same symptoms of which she initially complained. The dorsal left wrist pain and right middle finger pain Claimant reported to the therapist in April and to Dr. Luke in June 2021 were probably a continuation of the symptoms she developed on January 5, 2021. The injury-related symptoms were sufficient to warrant evaluation and conservative treatment, including PT.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Claimant proved evaluations and treatment by and on referral from Dr. Luke and Workwell was reasonably needed and authorized.

C. TTD

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

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” A claimant’s responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial*

Claim Appeals Office, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns her job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002).

As found, Respondents proved Claimant was responsible for termination of her employment. Claimant resigned her job, and the argument she left work because of the injury is not corroborated by credible evidence. Employer accommodated Claimant's work restrictions and there is no persuasive reason she could not have continued working for Employer after August 10. Mr. DG[Redacted]'s testimony about Claimant's modified duty assignments is credible. Claimant's resignation letter stated nothing about the injury. Nor is there persuasive evidence she reported difficulties to a supervisor in any other context. Claimant medical records contain no persuasive evidence she was having difficulty tolerating the modified duty. Instead, contemporaneous records indicate the activity modifications were "helpful" and Claimant was doing better. Claimant voluntarily resigned her job for reasons unrelated to the work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.

2. Claimant's average weekly wage is $770.

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injuries, including but not limited to evaluations and treatment received from Workwell, the August 19, 2021 MRI, and Dr. Stockburger.

4. Claimant's claim for TTD benefits from August 11, 2021 through January 16, 2022 is denied and dismissed.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the

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

DATED: October 4, 2022

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on November 30, 2021, she suffered an injury arising out of and in in the course and scope of her employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that recommended psychological therapy with Dr. Melissa Carris is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that recommended physical therapy treatment is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

4. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

5. Following the hearing, the parties stipulated that the claimant would withdraw the previously endorsed issues of temporary partial disability (TPD) and temporary total disability (TTD) benefits through September 20, 2022.

FINDINGS OF FACT

1. The claimant worked for the employer as a sales associate at the Grand Junction, Colorado location. The claimant testified that on November 30, 2021, she was walking quickly through the store and caught her foot on a free standing mirror. This caused her to lose her balance and fall into a clothing rack. The claimant testified that she injured both of her wrists and her knees when she fell.

2. This incident was reported to the employer, specifically to Jacob Jones, Operations Manager. The claimant was offered medical treatment on November 30, 2021. The claimant declined medical treatment at that time. The claimant was then sent home by Mr. J[Redacted].

3. The claimant continued working for the employer in her regular position and performing her normal job duties following the November 30, 2021 incident until December 27, 2021. On December 27, 2021, the claimant requested medical treatment related to the November 30, 2021 incident. The claimant testified that she requested

medical treatment at that time because she was approached about deficiencies in her job performance.

4. On December 27, 2021, Mr. J[Redacted] prepared an Employer's First Report of Injury. The body parties identified in that document were the claimant's "LOWER EXTREMITIES-ANKLE" (emphasis in the original). The incident was described as "[a]ssociate came around a corner, and tripped after catching her foot on a free standing mirror."

Medical Treatment Prior to November 30, 2021

5. On March 9, 2015, the claimant was seen by Dr. Craig Gustafson at Appleton Clinics. The medical record of that identifies a diagnosis of fibromyalgia.

6. On March 21, 2015, an x-ray of the claimant's left knee showed calcific density in the joint space medially and laterally, which was consistent with chondrocalcinosis (also called pseudogout).

7. On June 9, 2017, the claimant was seen by Dr. Donald Adams with Memorial Medical Group in Collinsville, Illinois. A number of issues were addressed with Dr. Adams on that date. Relevant to the present matter is the identification of a diagnosis of fibromyalgia. The claimant reported to Dr. Adams that her fibromyalgia symptoms were well controlled with Lyrica. The claimant's Lyrica prescription was refilled on that date.

8. On September 14, 2017, the claimant returned to Dr. Adams and reported that she wanted to try a different medication to treat her fibromyalgia. As a result, Dr. Adams prescribed gabapentin .

9. On September 27, 2021, the claimant was seen at Appleton Clinics by Dr. Lawrence Stelmach. At that time, the claimant reported bilateral leg and knee pain and swelling. Dr. Stelmach noted that the claimant had significant venous varicosities in both legs. He diagnosed the claimant with venous insufficiency and leg pain. Dr. Stelmach recommended the claimant use compression stockings and footwear with arch support.

10. On November 4, 2021, the claimant returned to Appleton Clinics and was seen by Jared Barjenbruch. On that date, the claimant reported left lower back pain that radiated down her buttock and posterior thigh. The claimant also reported this pain began without a specific incident or injury. The claimant was instructed to take ibuprofen and tylenol. The claimant was also prescribed cyclobenzaprine (Flexeril).

11. On November 15, 2021, the claimant was seen by Alison Weirich at Appleton Clinics. On that date, the claimant reported two weeks of sciatic pain. The claimant reported that the pain radiated from her low back down her buttock and left thigh. The claimant further stated that "she works a [Employer, redacted]'s so she would like something to help because by the end of her shift she can barely walk". The previously

prescribed cyclobenzaprine did not help her symptoms. Ms. Weirich advised the claimant on sciatic specific stretches. In addition, she recommended and administered a trigger point injection.

12. On November 24, 2021, the claimant was seen by Dr. Stelmach. The claimant reported that the trigger point injection did not help her low back pain. Dr. Stelmach recommended that the claimant avoid frequent and prolonged bending. He also recommended the use of a backrest. On that same date, Dr. Stelmach prescribed prednisone to treat the claimant's low back symptoms. Dr. Stelmach noted that the claimant "feels the need to work without interruption. It could take some time to settle this down."

Treatment after November 30, 2021

13. After requesting medical treatment from the employer on December 27, 2021, the claimant was seen at St. Mary's Occupational Health[1] on December 28, 2021. On that date, the claimant saw James Harkreader, NP. The claimant reported that she was experiencing pain in left knee, left wrist, and low back. PA Harkreader ordered x-rays of the claimant's left wrist, left knee, and lumbar spine. He restricted her to lifting no more than 10 pounds and no kneeling, squatting, or climbing.

14. The recommended x-rays were performed on December 28, 2021. For the claimant's left wrist, the x-ray showed no fracture or bony lesion. The radiologist noted chondrocalcinosis that "may represent CPPD arthropathy". The left knee x-ray also showed no fracture. There was also a finding of chondrocalcinosis in the claimant's left knee. The lumbar spine x-ray showed no acute fracture and minimal degenerative disc disease, and a renal stone was noted.

15. On December 29, 2021, the claimant returned to NP Harkreader to review the x-rays. At that time, NP Harkreader identified the claimant's diagnoses as left wrist strain, lumbosacral back strain, and left knee contusion with improving suprapatellar bursitis. NP Harkreader also noted that the claimant had CPPD (pseudogout). He opined that the claimant's fall could have aggravated the CPPD. The claimant was referred to physical therapy.

16. On January 11, 2022, the claimant reported to NP Harkreader that she was doing better and her knee pain was a three out of ten. She also requested a low back injection, as she had received one from her primary provider in November. Despite this request the claimant stated that she felt she had returned to baseline for her low back. NP Harkreader continued to recommend physical therapy.

[1] St. Mary's Occupational Health is the claimant's authorized treating provider (ATP) for this claim.

17. On January 25, 2022, NP Harkreader identified the claimant's diagnoses as left knee contusion and strain with underlying CPPD, and work related aggravation of lumbosacral back strain.

18. On February 2, 2022, the claimant returned to NP Harkreader and reported soreness and swelling in her left knee at the end of a workday. She also reported pain in her left wrist. The claimant asked for a work restriction that would allow her to work four days in a row, with three days off. NP Harkreader provided the requested recommendation regarding the claimant's work schedule.

19. On February 14, 2022, the claimant was seen by NP Harkreader. At that time she reported that physical therapy was beneficial. NP Harkreader recommended six additional physical therapy visits. He also requested to review the claimant's prior medical records to assess her back pain.

20. On March 23, 2022, the claimant returned to PA Harkreader. On that date, PA Harkreader noted the claimant's complaints of low back pain prior to November 30, 2021. Based upon his review of the prior medical records, NP Harkreader opined that the claimant's low back pain began prior to her injury. He recommended further physical therapy and referred the claimant to a knee specialist, Dr. Justin McCoy.

21. On April 26, 2022, the claimant was seen by Dr. Stagg. In the medical record of that date, Dr. Stagg noted that the claimant has a long history of low back symptoms and treatment. Dr. Stagg noted that the claimant had been referred to Dr. McCoy for an orthopedic consultation, and to Dr. Melissa Cariss "for stressors". In addition, Dr. Stagg referred the claimant to Dr. Rooks regarding her left wrist.

22. On May 6, 2022, the claimant was seen by Dr. McCoy. In the medical record of that date, Dr. McCoy listed the claimant's diagnoses as: 1) chronic bilateral knee pain; 2) left wrist pain; 3) chronic bilateral low back pain, without sciatica; 4) chondrocalcinosis; 5) pseudogout in multiple joints; and 6) back spasm. Dr. McCoy recommended a Medrol Dosepak to address the symptoms related to the CPPD. He also recommended that the claimant see a specialist regarding her left wrist and physical therapy for her back symptoms.

23. On June 7, 2022, NP Harkreader authored a response to questions posed to him by the claimant's counsel. NP Harkreader opined that the claimant's mechanism of injury could have produced or exacerbated the claimant's left wrist and left knee symptoms. He further opined that treatment of the claimant's low back should be addressed by her primary care provider.

24. At the request of the respondents, on June 16, 2022, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak obtained a history from the claimant, performed a physical examination, and reviewed the claimant's medical records. In his IME report, Dr. Lesnak opined that although an incident occurred on November 30, 2022, the claimant did not sustain an injury at that time. Dr. Lesnak further opined that the claimant did not experience an aggravation or exacerbation of any pre-existing condition on November 30, 2021. In support of his opinions, Dr. Lesnak noted that imaging studies done of the claimant's left wrist, left knee, and lumbar spine showed no evidence of an acute injury. Dr. Lesnak also noted that prior to November 30, 2021, the claimant had reported low back pain, left buttock pain, and left leg sciatica to her PCP. In addition, the claimant was previously diagnosed with fibromyalgia, and recently diagnosed with CPPD/pseudogout.

25. On June 17, 2022, the claimant returned to Dr. McCoy. At that time, the claimant reported that the Medrol Dosepak did not provide any relief of her symptoms. The claimant also reported that the back pain she was experiencing was different from her past sciatica type symptoms. The claimant's knees continued to bother her. Dr. McCoy recommended magnetic resonance imaging (MRI) of the claimant's knees. He opined that the claimant's fall at work could have caused an acute flareup of her pre-existing CPPD.

26. The claimant testified that her current symptoms include pain in her left hand, left wrist, and left knee. The claimant also testified that she has numbness in her left wrist and swelling in her left knee.

27. Dr. Lesnak's deposition testimony was consistent with his IME report. Dr. Lesnack reiterated his opinion, that based upon the medical evidence, the claimant did not suffer any injuries as a result of the November 30, 2021 incident. Therefore, medical treatment is not reasonable, necessary, or related to that incident. Dr. Lesnak also testified that there was no evidence of any acute injury in the claimant's wrists or left knee.On the contrary, the imaging supports a diagnosis of pseudogout or chondrocalcinosis, which is a type of arthritis. Dr. Lesnak also noted that the claimant has been diagnosed with fibromyalgia and chronic venous varicosities, which can cause pain and swelling in the legs and knees.

The Claimant's Last Day of Employment

28. The claimant's last day of employment with the Employer was February 4, 2022. The claimant testified that she had a confrontation with a coworker. Ultimately, the claimant decided that she no longer wished to work at the store and informed Mr. T[Redacted] that she was putting in a two week notice.

29. Mr. T[Redacted]s testified that the claimant was not going to be fired on February 4, 2022. Mr. T[Redacted] was going to investigate what occurred between the claimant and her coworker. However, before that process was completed, the claimant indicated her intention to provide her two week notice. Mr. T[Redacted] accepted the resignation as "effective immediately", and the claimant's employment ended that same date[2]. If the claimant had not resigned, continuing work was available to her with the employer.

Additional testimony on September 9, 2022

30. Following the conclusion of the July 19, 2022 proceeding, the respondents filed a motion asking to recall various witnesses due to an allegation regarding notes left on cars belonging to Ms. C[Redacted] and Mr. T[Redacted]. The ALJ granted the respondents' motion, over the objection of the claimant. The parties returned to hearing on September 9, 2021. On that date, Ms. L[Redacted] testified that she authored the notes in question and placed them on the individuals' cars. Ms. L[Redacted] further testified that she did so because she was upset with what she understood to be Ms. C[Redacted] and Mr. T[Redacted]'s testimony at the hearing. The claimant had no involvement in the creation or placement of these notes.

The ALJ's Factual Conclusions

31. The ALJ credits the medical records and the opinions of Dr. Lesnak over the contrary opinions of PA Harkreader. While it is undisputed that the claimant fell at work on November 30, 2021, that incident did not result in an injury necessitating medical treatment. The ALJ also credits the claimant's testimony that she requested medical treatment only after she was approached about deficiencies in her job performance. The ALJ finds that the claimant's current need for treatment of her left knee and left wrist is due to pre-existing conditions. It is clear from the medical records that the claimant suffers from fibromyalgia, chronic venous varicosities, and CPPD/pseudogout. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury arising out of and in the course and scope of her employment with the employer. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her fall on November 30, 2021 aggravated or accelerated the pre-existing conditions in her left knee and left wrist.

CONCLUSIONS OF LAW

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

[2] The ALJ recognizes that the paperwork the claimant signed indicating her resignation lists a date of January 21, 2022 as the date of resignation. This effectively "backdated" the claimant's resignation to allow for a two week period that ended on February 4, 2022. The ALJ recognizes that this was not an ideal way for the employer to accept the claimant's resignation as effective immediately. However, this does not change the fact that the claimant resigned from her position with the employer.

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, than she suffered an injury arising out of and in the course and scope of her employment with the employer on November 30, 2021. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her fall on November 30, 2021 aggravated or accelerated the pre-existing condition in her left knee and left wrist. As found, the medical records and the opinions of Dr. Lesnak are credible and persuasive.

ORDER

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

Dated October 6, 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. WC 5-120-710-001

ISSUES

1. Did Claimant waive his right to the lower extremity impairment ratings Respondent admitted to previously by not requesting that the DIME physician examine his left and right knees?

2. If Claimant did not waive his right, what is the appropriate impairment rating for Claimant's lower extremities?

3. What is the propriety of Respondent's February 22, 2022 Final Admission of Liability?

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on September 11, 2019 in the course and scope of his employment as a security guard with Employer. Claimant suffered bilateral knee injuries when a student knocked him backwards over another student.

2. Claimant was diagnosed with an acute medial meniscus tear of his right knee. Claimant did not improve with physical therapy, so he had a right knee surgery. Claimant developed post-surgery sepsis in his right knee, and had a second surgery to drain his right knee. (Ex. C).

3. On January 17, 2020, Claimant presented with two weeks of diarrhea and his stool was C difficile positive. Claimant continued to have digestive issues over the next year related to the post-surgery infection. (Ex. C).

4. Felix Meza, M.D., Claimant's authorized treating physician (ATP), referred Claimant to John Aschberger, M.D., for an impairment assessment. Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, a 22% right lower extremity impairment rating, and a 10% whole person impairment rating for the gastrointestinal (GI)/digestive issues Claimant developed as a result of treatment for the knee injuries. (Ex. 1).

5. Respondent filed a Final Admission of Liability (FAL) on August 31, 2021, admitting for medical benefits of $93,303.79, Temporary Total Disability ("TTD") benefits of $26,481.61 and medical maintenance care after reaching MMI. Respondent further admitted for an MMI date of August 17, 2021, a 14% left lower extremity scheduled impairment rating, a 22% right lower extremity scheduled impairment rating, and a 10% whole person impairment rating for digestive issues. (Ex.1).

6. Claimant objected to the August 31, 2021 FAL and requested a Division Independent Medical Examination (DIME) to evaluate Claimant's GI issues. The objection and request for a DIME were not submitted into evidence.

7. The ALJ finds that Respondent was on notice that Claimant was challenging the impairment rating for Claimant's GI issues.

8. Caroline Gellrick, M.D. was selected as the DIME examiner. Claimant paid Dr. Gellrick's $1,000 DIME fee. On January 2, 2022, Dr. Gellrick notified counsel that the DIME fee was $1,400, because the date of injury was more than two years before the DIME. Claimant paid Dr. Gellrick the additional $400. Dr. Gellrick also noted in her email: "IR has been given for the knees with Dr. Ashberger [sic]. Am I suppose [sic] to address just the Digestive system OR do the knees and the DIGESTIVE????" (Ex. 3)

9. Claimant's attorney responded to Dr. Gellrick on January 3, 2021, saying "[j]ust the digestive system." Dr. Gellrick's question and counsel's response were copied to the IME Unit and Respondent's counsel. (Ex. 3).

10. The ALJ finds Claimant did not dispute the lower extremity impairment ratings admitted by Respondent in the August 31, 2021 FAL. The ALJ further finds that Respondent knew Claimant was only challenging Dr. Acheberger's GI impairment rating.

11. Claimant underwent a DIME with Dr. Gellrick on January 6, 2022. According to, Dr. Gellrick's DIME report, she was asked "to determine MMI, impairment, and apportionment of [Claimant's] digestive system." Dr. Gellrick further noted "[a]lthough the MRR shows the knees were injured and one knee had surgery, this examiner was only asked to consider the digestive system." (Ex. 2).

12. Dr. Gellrick concluded that Claimant did not require any further invasive treatment, but did need medical management and medication. She found Claimant was at MMI on October 29, 2021. Dr. Gellrick assigned Claimant a 20% whole person impairment rating for his digestive issues. (Ex. 2).

13. Respondent filed an FAL on February 22, 2022, admitting for medical benefits of $93,303.79, TTD benefits of $26,481.61 and medical maintenance care after reaching MMI. Respondent further admitted for an MMI date of October 29, 2021 and a 20% whole person impairment rating based on Dr. Gellrick's DIME report. (Ex. 2).

14. Although Respondent previously admitted to a 14% left lower extremity impairment rating and a 22% right lower extremity impairment rating, Respondent listed the scheduled impairments as 0% for Claimant's left and right lower extremities in the February 22, 2022 FAL. (Ex. 2).

15. Respondent relied on W.C.R.P. 5-5(f) when filing the February 22, 2022 FAL, and admitted liability strictly in conjunction with Dr. Gellrick's DIME report.

16. Claimant objected to the FAL and filed an Application for Hearing on March 16, 2022, endorsing penalties for failure to admit for Claimant's physician's extremity ratings as well as DIME rating, attorney's fees, Permanent Partial Disability ("PPD"), medical benefits, and TTD benefits. (Ex. D). In the Response to the Application for Hearing, Respondent endorsed, in addition to several other issues, Claimant's failure to meet his burden to overcome the DIME. (Ex. E).

17. At hearing, Claimant's counsel clarified that the issue at hand was PPD, and specifically, the impairment ratings for Claimant's lower extremities. Respondent's counsel agreed with this recitation of the issue.

18. In communications to Claimant's counsel, Respondent's counsel asserted "Respondent cannot unilaterally admit to any rating it so chooses and is required to take a position on the DIME's rating as stated via admission or file an application for hearing to overcome the DIME. Respondent asserts Claimant waived his right to have the extremity ratings addressed by failing to include those body parts in the DIME application." Respondent further stated "there was no agreement between the parties that respondent would maintain an admission for the extremity ratings assigned by the authorized treating physician in addition to any rating assigned by the Division IME doctor." (Ex. 3).

19. In his impairment assessment, Dr. Aschberger described Claimant's meniscal tear, the surgical intervention, and subsequent infection. Dr. Aschberger also described the degenerative changes in both of Claimant's knees and the restricted range of motion in his right knee. (Ex. 1).

20. Claimant credibly testified at hearing that his left and right knee symptoms, including pain and restricted range of motion, remain.

21. The ALJ finds that Claimant did not waive his right to the lower extremity impairment ratings admitted by Respondent, in the August 31, 2021 FAL.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

Scheduled and Non-Scheduled Injuries

As agreed at hearing, the issue here is PPD, specifically Claimant's lower extremity impairment ratings, and Respondent's argument that Claimant waived his right to have his lower extremity ratings addressed because these body parts were not listed in the DIME application. Scheduled and non-scheduled injuries are treated differently under the Act for purposes of determining permanent disability benefits. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). It is undisputed that Claimant suffered an admitted injury in the course and scope of his employment. Claimant suffered a meniscus tear in his right knee that required surgical intervention. Claimant has degenerative changes in both knees, and a loss of range of motion in his right knee. (Findings of Fact ¶¶ 9-10). These are scheduled injuries. *See* § 8-42-107(2) C.R.S. Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, and a 22% right lower extremity impairment rating. If Claimant wanted to challenge the impairment ratings for his scheduled injuries, he could have proceeded to hearing, and he did not have to go through the DIME process. *See Delaney* 30 P.3d at 693 (there is no absolute right to a DIME as a prerequisite to a hearing in cases that clearly involve only scheduled injuries). As found, Claimant did not challenge the impairment rating for his scheduled injuries. (Findings of Fact ¶ 10).

Waiver

Respondent, relying on *Michael Baldrey v. RTD,* WC 5-092-210, asserts that Claimant waived his substantive right to an examination of his lower extremities by the DIME physician by not requesting an evaluation of those areas of the body. In *Baldrey*, the claimant's ATP placed him at MMI and found he had no permanent medical

impairments. The claimant requested a DIME, and on the DIME form the claimant selected region 3 (psychological) and region 5(ENT-face). The claimant did not endorse region 1 (upper extremity) or region 4 (spine), nor did he pay the fee for the additional parts of his body. When the claimant was evaluated by the DIME physician, he reported neck and left shoulder pain as well as left arm numbness and weakness, and the claimant expected the DIME physician to evaluate those areas of his body. The ALJ found the Claimant waived his right to have these other areas of his body evaluated by not selecting these regions on the DIME form and not paying for them. *Baldrey*, however, is distinguishable. First, the claimant in *Baldrey* was found to have no impairment ratings. Here, Dr. Aschberger assigned Claimant a 14% left lower extremity impairment rating, a 22% right lower extremity impairment rating, and a 10% whole person impairment rating for digestive issues. (Findings of Fact ¶ 4). Second, the claimant in *Baldrey* wanted the DIME physician to evaluate his upper extremity and spine, but intentionally did not select those areas on the DIME form, nor did he pay for them. In contrast, Claimant only wanted the DIME physician to evaluate his digestive system, and this is what was marked on DIME form. (Findings of Fact ¶¶ 9-10). Lastly, the respondents in *Baldrey* never admitted liability, but here Respondent filed an FAL and admitted liability. (Findings of Fact ¶ 5).

"Waiver is the intentional relinquishment of a known right. Waiver may be express, as when a party states its intent to abandon an existing right, or may be implied, when a party engages in conduct that manifests its intent to relinquish the right, or that is inconsistent with its assertion." *Ross v. Republic Insur.*, 134 P.3d 505, 510 (Colo. App. 2006) (emphasis added); *see also Leprino Food Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 479 (Colo. App. 2005); *In re Marriage of Robbins*, 8 P.3d 625 (Colo. App. 2000). Respondent argues Claimant waived his substantive right to an examination of his lower extremities by the DIME physician by not requesting an evaluation of those areas of the body. *See* Ross *v. Republic In. Co.,* 134 P.3d 505, 510 (Colo. App. 2006). As found, Claimant was not seeking an examination of his lower extremities. Claimant's decision to accept the lower extremity ratings assigned by Dr. Aschberger does not constitute a waiver of Claimant's previous admission regarding the lower extremity ratings. Respondent admitted liability to the lower extremity rating, and as found, Claimant did not challenge the impairment ratings for this scheduled injuries. Claimant did not waive Respondent's admission of liability in the August 31, 2021 FAL with respect to his lower extremity impairment ratings.

ORDER

It is therefore ordered that:

1. Claimant did not waive his right to the previously admitted lower extremity ratings.

2. Respondent shall pay Claimant PPD based on a 14% lower left extremity impairment rating, a 22% lower right extremity impairment rating, and a 20% whole person impairment rating for Claimant's digestive issues.

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

4. Respondent shall pay statutory interest at 8% on all benefits not paid when due.

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

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

DATED: October 6, 2022

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

ISSUES

- Did Claimant prove he suffered a compensable low back injury on January 29, 2021?

- Whether the medical treatment provided by Brandi Olson, N.P. on February 4, 2021 was authorized, reasonable, necessary and related to the claimed work injury?

STIPULATIONS

- The low back surgery performed by Dr. Chung on April 2, 2021 was unauthorized.

FINDINGS OF FACT

1. Claimant has worked as a trucker and mechanic for his own company. As part of his trucking business, he performs maintenance on his trucks and trailers. The maintenance work is physically demanding and includes lifting truck tires weighing 175 to 200 pounds.

2. On January 29, 2021, he had just finished performing work on one of his 3 trucks and was putting the tires back on the truck. The tire was next to a wall and had fallen over. As he attempted to lift the tire to put it back on the truck, he bent and had extreme pain. He could not stand due to the pain. He called his wife at approximately 8:30 p.m. and let her know he had injured his back and needed help.

3. Claimant's wife, K[Redacted] testified that after she spoke with the Claimant, she called their son, Joshua and informed him that they needed to go from their homes in Rye, Colorado to the shop in Pueblo to help the Claimant since he could not stand due to his low back pain. They drove from Rye to the shop in Pueblo where they found the Claimant sitting next to a wall. When she arrived with her son, the truck Claimant had been working on was half way in and half way out of the shop. She and her son, Joshua helped the Claimant get up on his feet and they put him in her car. Joshua finished putting the tires back on the vehicle and put the vehicle outside the shop and closed up the shop.

4. K[Redacted] drove the Claimant home and she and Joshua placed him on the bed. They did not take him to the emergency room since Claimant thought he would get better on his own. This occurred on a Friday. He spent that weekend on the bed. She had never seen him hurt that badly before. On the morning prior to the incident of lifting the tire Claimant was pain free. That weekend, after the incident, K[Redacted] would have to assist him in going to the restroom since he was in so much pain.

5. S[Claimant's son redacted] testified that after his mother called him on the date of injury she picked him up and they drove to the shop. When they arrived, Claimant was sitting on the floor near a wall. He was unable to get up and they helped him get up and get to her vehicle. He put on the remaining 2 tires on the truck. He estimated the tires weighed between 150 to 200 pounds. After the tires were on the truck, he moved the truck out of the truck bay, cleaned up and then secured the shop. He followed his mother's vehicle in his father's truck home. He helped his mom to get the Claimant into the house since he could not walk on his own. They helped him into the house.

6. Claimant testified that he was self-employed and had worked for his company for a total of 14 years, both under the current name and a previous company name. His job duties included long-haul truck driver, mechanic and processing the final payroll. In a typical week he would spend 60 to 70 hours on the road. The company had 3 trucks and 4 trailers. The trucks had 10 tires and the trailers had 8 tires. He would normally change the tires every 7 months on average. He would perform maintenance work on the weekends. Prior to the date of the incident, he was never unable to change the tires or perform his mechanic work due to back pain.

7. On the date of the incident Claimant performed general maintenance on the trucks. He was replacing bushings on the truck which required him to remove the tires. He started this project around 2:00 p.m. He worked by himself. He had pulled eight of the 10 tires off to perform this work. He had put 6 of the tires back on and was lifting the 7th tire off the ground. As he was lifting, he felt immediate pain in his back and right leg. His pain level was a 10 out of 10 and he had tingling and numbness in his right leg. After his wife and son took him home, he had to utilize a walker and a cane to ambulate.

8. K[Redacted], Claimant's wife, called Nurse Practitioner, Brandi Olson at Parkview Internal Medicine on Monday morning. They were able to get an appointment with Brandi Olson for February 4, 2021. In the medical record for that day, the reason for the appointment is listed as "Annual". (Respondents Ex. C, p. 32). The document appears to document an annual physical with items such as preventive care items. However, in the treatment portion of the report, she identifies that he had lumbar back pain with radiculopathy affecting right low extremity. She recommended, among other things, x-rays, MRI and a referral to neurosurgery. The History of Present Illness does not list any mechanism of injury. It is devoid of any history to explain the reason why he was experiencing low back pain with radiculopathy requiring x-ray, MRI and referral to neurosurgery.

9. The Claimant testified that when he saw Brandi Olson on February 4, 2021 he told her that he injured himself while he was picking up a tire and heard a "pop" and fell to the floor and had pain in his right leg. Claimant's wife testified that she heard Claimant tell Ms. Olson that he injured himself lifting a tire at work. However, the medical record for that date does not reflect the mechanism of injury.

10. Claimant came under the care of Dr. Chung. It is unclear as to whether Claimant was referred to Dr. Chung by N.P. Olson based on the initial report from his office dated March 18, 2021. The more specific statement on how he got there was that

he was self-referred appears to be more accurate based on the specificity of the information rather that the more general statement under the chief complaints section of the medical report. (Respondents Exhibit E, p. 054). After consideration of conservative care, the Claimant elected to have surgery which was performed on April 2, 2021. The surgery included posterior wide complete bilateral laminectomies at L2-S1 for stenosis leading to lumbar radiculopathy and neurogenic claudication to decompress and explore the neural elements. It also included transforaminal lumbar interbody fusions at L2-3, L3-4, L4-5 and L5-1 using cages. "(Respondents Exhibit F, pp. 98 – 105).

11. Claimant has a history of low back problems, and had treated periodically with Donald Dressen, D.C. (Respondents Ex. B). He would see him infrequently for everyday soreness or after "rough-housing" with his grandchildren. He had injured his back about 32 years ago when he was hauling gravel for Kirkland Construction and the truck rolled on its side. He injured his back just below the shoulder blades. He did not injure his low back at that time.

12. Claimant did not file a workers compensation claim prior to March 9, 2022 since he thought that as an owner he could not make a claim. He changed his mind after speaking with a social security representative to make a disability claim. After speaking with her, he filed a claim on March 9, 2022 which was about 4 or 5 days after the conversation.

13. Dr. Brian Reiss performed an IME for Respondents and issued a report dated July 13, 2022. Dr. Reiss stated in his report that "Diagnosis of claimant's lumbar condition includes lumbar strain with pain along with preexistent degenerative disc disease, spondylolisthesis and spondylolysis and persistent chronic pain." (Respondents' Exhibit A, p.006).

14. Dr. Reiss further opined as to the course of treatment that: 'A visit to his primary care provider would have been reasonable after a work incident. Some imaging studies may have been reasonable but with pre-existing symptomatology it is not clear that the imaging studies would necessarily be related to any work incident. He would have been sent for some physical therapy and perhaps injections with a rehabilitation physician but never was. I do not believe surgical intervention was indicated in relationship to the work incident and would not be considered related to the work incident. The physical therapy after surgery was reasonable but as the surgery was not reasonable or related, therapy also would not be related to any work incident. The ALJ determines that Dr. Reiss' opinion surgery performed by Dr. Chung was not reasonably necessary or related to cure and relieve the effects of Claimant's the work injury is not credible. Prior to this work incident, the Claimant was capable of performing his job duties of driving long distances and mechanical work on his vehicles that involved periodic lifting of heavy weights including tires, truck batteries and other truck parts without difficulty. It was not until after this incident that Claimant had pain running down his leg which interfered with his ambulation and which ultimately required extensive surgery.

15. Claimant proved he suffered a compensable injury to his low back on January 29, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. These facts are sufficient to establish a compensable claim.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved he suffered a compensable injury to his low back on January 29, 2021. Claimant's testimony regarding the incident and onset of symptoms was credible. Although Brandi Olson's initial report on February 4, 2021 does not document the mechanism of injury, Claimant and Claimant's wife credibly testified that she was given the details of the work related injury. Although Claimant did seek occasional chiropractic treatment before the tire lifting incident, the nature and extent of the symptoms and pain he experienced after the incident on January 29, 2021 differed in degree. He was unable to ambulate without assistance and the pain radiated into his right lower extremity. This sequela emanated from the tire lifting incident of January 29, 2021.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

In addition to proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). The parties have stipulated that the surgery performed by Dr. Chung was unauthorized.

The parties have indicated that in addition to compensability, the second issue to be determined is whether the medical treatment provided by Brandi Olson, N.P. on February 4, 2021 was authorized, reasonable, necessary and related to the claimed work injury. There appears to be no question that the treatment provided by Ms. Olson was reasonable, necessary and related to the work injury. The real issue is authorization. Since the injury was not reported to the carrier in this case, the carrier had no opportunity to designate a medical provider, the question is whether the treatment provided was emergent in nature.

Emergent medical care is compensable. *Marks v. Continental Airlines, Inc.* W.C. 4-170-455 (February 27, 1998); *Lucero v. Jackson Ice Cream,* W.C. 4-170-105 (January 6, 1995). However, after the incident, the Claimant did not seek emergency care, but instead waited over the weekend to contact his regular provider. The visit to Brandi Olson, N.P. was not emergent. The care provided by Brandi Olson on February 4, 2021 is unauthorized.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on January 29, 2021 is compensable.

2. Insurer is not liable for the treatment provided by Brandi Olson, N.P., on February 4, 2021, as unauthorized.

3. As stipulated, the surgery performed by Dr. Chung on April 2, 2021 is unauthorized.

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

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

DATED: October 11, 2022

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

ISSUES

- Should Respondents be penalized under § 8-43-304(1) for violation of WCRP 5-5(A)?
- Whether the Final Admission of Liability is void *ab initio*?
- Whether Respondents are entitled to attorney's fees and costs based on §C.R.S. 8-43-211(2)?

FINDINGS OF FACT

1. Claimant filed an Application for hearing on January 12, 2022 asserting a penalty against Respondents for violation of W.C.R.P 5-5. Specifically, Claimant alleged the following: "The Respondents are subject to a penalty of up to $1,000 per day for each rule violation pursuant to C.R.S. section 8-43-304(1). The Respondents violated W.C.R.P. 5-5(A) for filing a final admission of liability without a report attached from a treating physician. When a final admission is predicated upon medical reports, a narrative report and appropriate worksheets MUST accompany the admission. The attachment of the physician's report of workers compensation injury form is required in cases where such document is supplied by the physician concurrently with the narrative report. Attached documentation must provide a statement from an authorized treating physician regarding the date of maximum medical improvement, permanent impairment and maintenance medical benefits. The penalty violation started on March 11th, 2021 and is ongoing." (Respondents Exhibit K, p. 38).

2. A hearing was set on this application for May 12, 2022 and the hearing was cancelled on February 15, 2022. (Respondents Exhibit N). A second Application for Hearing dated March 11, 2022 was filed. In addition to the language set forth above, Claimant added: "The Claimant is only requesting $1.00." (Respondents Exhibit O, p. 46).

3. The Final Admission of Liability (FAL) that was filed on March 11, 2021 did have attached to it the Closing Physician's Report of Worker's Compensation Injury dated July 7, 2022 signed by Steven Quackenbush, PA-C and electronically counter-signed by John Reasoner, M.D. (Respondents Exhibit B, page 10). Additionally, a narrative report, also dated July 7, 2022 was also attached to the Final Admission. (Respondents Exhibit B, pages 12 – 15).

4. Both reports address maximum medical improvement (MMI) which occurred on July 7, 2020, provided for 0 percent permanent impairment and indicated there was no need for maintenance care after MMI.

5. Claimant testified at hearing that prior to the MMI determination, he was never examined by Dr. Reasoner and was only seen by Mr. Quackenbush.

6. Claimant filed an objection to the Final Admission of Liability and a notice and proposal and application for Division IME. (Respondents Exhibit C and D).

7. A prehearing conference was held before PALJ Laura Broniak on March 30, 2022. In addition to the stipulated issue of allowing the DIME to proceed, Respondents also raised the issue of ripeness of the issues set forth in Claimant's application for hearing; namely penalties and whether the FAL was void *ab initio*. Claimant argued that the issues were ripe since he was never evaluated by a physician in violation of the rules of procedure. Judge Broniak determined that issues brought by Claimant were ripe. (Respondents Exhibit P).

8. The Division IME was performed by Dr. Douglas Scott on June 22, 2022. Dr. Scott determined that the Claimant reached MMI on July 7, 2020 and had 0% impairment. He also determined that the Claimant required no maintenance medical treatment. (Respondents Exhibit T).

CONCLUSIONS OF LAW

Section 8-43-304(1) provides that an insurer "who violates any provision of [the Workers' Compensation Act] . . . shall be punished by penalties of up to $1,000 per day."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statue or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). An insurer acts unreasonably if it fails to take action a reasonable insurer would take to comply with a statute, rule or order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*.

If the alleged violator cures the violation within 20 days of the mailing of an application for hearing seeking penalties, no penalty shall be assessed unless the party seeking the penalty proves by clear and convincing evidence that the alleged violator knew or should reasonably have known they were in violation. Section 8-43-304(4).

Claimant argues Respondents violated W.C.R.P. 5-5 since the medical reports attached to the FAL were based primarily on the opinions of the physician's assistant and the reviewing doctor, despite the fact that Dr. Reasoner never examined the Claimant. W.C.R.P. 16-3(E)(2) provides "The Physician must evaluate the injured worker at least once within the first three visits to the Designated Provider's office." The only evidence as

to whether Claimant was seen by Dr. Reasoner is Claimant's testimony and his testimony is credible. However, Claimant did not plead a violation of W.C.R.P. 16-3(E)(2). 8-43-304 requires that a penalty be pleaded with specificity. Since Claimant did not afford Respondents the opportunity to cure the penalty violation he cannot pursue the penalty violation.

Claimant further argues that Doctor Reasoner's failure to examine the Claimant renders the FAL void ab initio. The basis for this argument is the decision in *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). In that case, the court of appeals held that the FAL did not include the entire report of the rating physician and was legally insufficient and did not operate to close the claim. The court's rationale for the holding was that the statute required medical reports to be filed in order to put the claimant on notice of the exact basis of the admitted or denied liability so that the claimant can make an informed decision whether to accept or contest the final admission. Here, the Claimant does not allege that he did not have the requisite notice of the basis of the FAL. To the contrary, he did have notice which prompted him to object to the FAL and request a DIME. Therefore, it is evident that Claimant was afforded the opportunity to dispute the FAL with sufficient notice based on the FAL, despite the fact that Claimant was not examined by Dr. Reasoner prior to the Final Admission of Liability. The Claimant did obtain a DIME which was performed by Dr. Douglas Scott. This independent evaluation validates the prior determinations by the authorized treating physician, despite the fact that Claimant testified that was never examined by Dr. Reasoner. The rationale in *Paint Connection Plus v. Industrial Claim Appeals Office, supra*. does not apply in this case.

Respondents have requested attorney's fees and costs for Claimant's alleged prosecution of an unripe issue. C.R.S. 8-43-211(3) provides for reasonable attorney fees when an attorney requests a hearing on an issue that is not ripe for adjudication at the time the request or filing is made. As noted by Judge Broniak in her prehearing order, an issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006. The term "fit for adjudication" refers to a disputed issue for which there is not legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. Olivas-Soto v. ICAO, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). The ALJ determines that both issues brought by Claimant; namely penalties and whether the FAL was void *ab initio* were ripe and have been decided by this order. There is nothing speculative or contingent with respect to the determination of these issues. Respondent argues that since Dr. Reasoner was not joined by Claimant in the claim for penalties the issue is not ripe as against Respondent. While that argument may be valid if the penalty sought was for a violation of W.C.R.P.16-3(E)(2), the specific penalty actually alleged was for Respondent's violation was of W.C.R.P. 5-5(A). As such, the issue of penalties asserted against Respondent is ripe. However, as previously determined, there was no violation of that Rule by Respondent.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties is denied and dismissed.

2. Claimant's request to render the FAL void *ab initio* is denied and dismissed.

3. Respondent's request for attorney's fees and costs is denied and dismissed.

4. Any issues 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 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 need not 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: October 12, 2022

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

ISSUES

- Did Claimant prove she suffered a compensable injury to her left knee on July 11, 2021?
- If compensable, did Claimant prove entitlement to TTD benefits from July 13, 2021 through January 11, 2022?
- Did Respondents prove TTD should be reduced because of late reporting?
- Did Respondents prove Claimant's eligibility for TTD terminated on or after November 2, 2021 because she was released to her regular employment?
- Did Claimant prove the left knee treatment she received was reasonably necessary and causally related to the compensable injury?
- Did Claimant prove treatment she received was authorized?
- The parties stipulated to an average weekly wage (AWW) of $150.50, with a corresponding TTD rate of $100.33.

FINDINGS OF FACT

1. Claimant worked part-time for Employer as a barista. She injured her left knee on July 11, 2021 when she slipped on a wet section of floor. Her left knee "popped" and she felt immediate pain.

2. Claimant did not report the injury to anyone at work that day. Instead, she called her mother during a break and stated she almost fell "again," her knee popped, and it was hurting. The "again" to which Claimant referred was an incident a few weeks prior, when she slipped on a wet floor and fell. Claimant suffered no injuries during the fall. She and some co-workers "laughed [about it] and that was the end of it."

3. Claimant finished her shift on July 11, 2021 and went home. She and her mother applied ice to the left knee, and she rested it.

4. Claimant worked her regular shift the next day. Despite having "a lot of pain and discomfort," she said nothing about the accident to her supervisor.

5. The knee remained swollen and painful, so Claimant saw her PCP, Dr. Davison-Tracy, on July 13, 2021. Dr. Davison-Tracy documented a "2D[ay] history of knee pain after she slipped and 'caught herself' from falling and the knee buckled? Some inc pain and swelling and that is the knee she had repaired her medial meniscus in 2017 and again in 2019. Pain seems worse to patient than her prev[ious] injuries." Examination

of the left knee showed swelling, tenderness, decreased range of motion, and laxity with varus and valgus maneuvers. Dr. Davison-Tracy ordered an MRI and referred Claimant to Dr. Albright, an orthopedic surgeon.

6. As mentioned in Dr. Davison-Tracy's report, Claimant had significant problems with the left knee before July 11, 2021. She first injured the knee in 2015 or 2016 while playing basketball. She underwent an arthroscopic partial lateral meniscectomy July 2016 with Dr. Albright. She recovered well and returned to sports in September 2016.

7. Claimant played basketball with no problems until 2019, when the knee started swelling during a tournament. An MRI showed a recurrent lateral meniscus tear and she underwent a second arthroscopic surgery. Claimant attended post-operative PT for approximately two months and was released from regular follow up. Claimant resumed running but did not return to playing basketball. She had no significant ongoing issues related to the left knee until the work accident in July 2021.

8. On July 14, 2021, Claimant spoke with a nurse in Dr. Albright's office. She explained she injured her left knee on July 11 at work. The report documents, "The floor was slick and she almost slipped. Patient caught herself but in so doing she may have twisted and she did feel and hear a pop from her knee. Since then it has been very painful . . . lacking range of motion . . . her knee is very swollen and she can't bear any weight." Dr. Albright was on vacation, so Claimant was scheduled for the earliest available appointment on July 26. The nurse advised Claimant to wrap the knee, wear her old knee brace, and use crutches to avoid weightbearing.

9. Claimant texted her supervisor, Ms. SC[Redacted], the morning of July 16, 2021. She stated, "I injured myself and am supposed to be immobile until at least the 26th. I have a doctors note, where do you want me to send it?" She said nothing about hurting herself at work. Ms. SC[Redacted] replied that she would call [Insurer, Redacted] and request medical leave so Claimant would have time to recover without having to worry about her job.

10. [Insurer, Redacted] handles workers-related injuries, short-term disability, and nonwork-related leaves of absence for Employer. Ms. SC[Redacted] contacted [Insurer, Redacted] about personal medical leave for Claimant because she had been given no reason to think the condition was work-related.

11. Claimant had an MRI of the left knee on July 21, 2021, which showed a radial tear of the lateral meniscus and chondromalacia.

12. Claimant saw Dr. Albright on July 26, 2021. She stated her knee pain started a few weeks ago after she slipped on a wet spot at work. Before the injury she felt some "occasional" knee pain that generally resolved within a day or two. However, after the work accident "pain did not resolve, and she has had persistent swelling. She has increased pain with prolonged standing or walking activities as well." She described 5/10

knee pain at rest, 7/10 with ADLs and 10/10 with physical activities. Dr. Albright reviewed the MRI and diagnosed an acute lateral meniscus tear. He recommended surgery.

13. Claimant and her mother testified they stopped by Employer's store for coffee as they were on their way to the appointment with Dr. Albright the morning of July 26. They testified Ms. SC[Redacted] was outside taking orders from customers in the drive-through. They testified Claimant's mother told Ms. SC[Redacted] they were on their way to a medical appointment for the injury "she had at work." They testified Ms. SC[Redacted] responded by merely offering a free coffee and asking them to "keep her posted." Claimant and her mother initially thought the conversation took place on July 21, but later decided it was July 26 because they were on the way to a medical appointment.

14. Ms. SC[Redacted] denied being outside taking orders on July 26, or speaking with Claimant or her mother about Claimant's knee on July 26. Ms. SC[Redacted] testified her standard procedure when an employee reports an injury is to complete an incident report, contact [Insurer, Redacted], and inform the district manager.

15. Claimant and her mother's testimony regarding the alleged conversation the morning of July 26 is no more credible than Ms. SC[Redacted]'s testimony. Claimant failed to prove she reported the injury on July 26, 2021.

16. Claimant texted Ms. SC[Redacted] the evening of July 26 and stated she had been scheduled for surgery the following week. Claimant stated she had not heard from [Insurer, Redacted]. Ms. SC[Redacted] asked Claimant to check her spam folder because "I had them send your information to email." The text exchange contains no mention of any work-related injury.

17. On July 29, 2021, Claimant's mother spoke with the physical therapist and "requested information about waiting until 8/24/21 for surgery." The records do not explain why Claimant postponed the surgery, nor could Claimant recall a reason when asked about it at hearing.

18. On September 6, 2021, Dr. Albright performed a left knee arthroscopy with a partial lateral meniscectomy and lateral compartment chondroplasty. Intraoperative inspection showed a radial lateral meniscus tear and grade 1 to 1 lateral compartment chondromalacia. Claimant was admitted to the hospital and discharged on September 8.

19. An Employer's First Report of Injury was completed on September 10, 2021. The form lists Claimant as the preparer, although that is questionable given some of the verbiage used. Claimant testified she did not know who completed the form. In any event, Respondents accept September 10, 2021 as the date Claimant first provided notice of the injury. The form describes the accident as "slipped on wet floor heading towards cold bar, locked knee and heard a pop and jerked leg." The form lists July 11, 2021 as the date Employer was notified. This notation is inaccurate; Claimant admitted she told no one about the accident on July 11 and testified the first mention of a work-related injury was on July 26.

20. Employer did not refer Claimant to a medical provider after being notified of the injury on September 10, 2021. As a result, Claimant had the right to select her own treating physician.

21. Claimant had a post-op appointment with Dr. Albright on September 17, 2021. This appointment effectuated Claimant's selection of Dr. Albright as her ATP.

22. As with the previous surgeries, Claimant recovered well from the September 2021 surgery.

23. On November 2, 2021, Dr. Albright gave Claimant a work excuse stating her only restrictions were "walking only, no high-impact (running or jumping) activities." Claimant acknowledged receiving a copy of the work note from Dr. Albright's office.

24. Claimant's regular job with Employer required no high impact activities such as running or jumping. Dr. Albright's November 2, 2021 restrictions would not have precluded Claimant's regular work.

25. Claimant saw Dr. Mark Failinger on April 16 2022 for an IME at Respondents request. Claimant described the accident and onset of symptoms consistent with her statements to other providers and her testimony. Claimant told Dr. Failinger about her previous knee injuries and surgeries, and that she had no significant residual problems with the knee after the second surgery and no difficulties before the work accident on July 11, 2021. Dr. Failinger performed an extensive review of Claimant's pre- and post-injury medical records. Dr. Failinger stated radial meniscal tears are generally caused by an acute, traumatic event rather than a degenerative process. He opined the accident as described by Claimant could have created a radial tear and accelerated pre-existing chondromalacia. Dr. Failinger concluded the work accident probably caused, accelerated, or permanently aggravated the pathology in Claimant's left knee.

26. Dr. Failinger testified via deposition consistent with his report. He agreed surgery was a reasonable option given the pathology and Claimant's failure to improve with time.

27. Claimant received and reviewed an employee handbook when she was hired by Employer. The handbook states, "a partner who suffers a work-related injury or illness must notify the store manager as soon as possible. The partner or manager must report the injury by calling . . . or by using the online service . . . ." Claimant interpreted the handbook to allow a verbal report of an injury. Her interpretation is reasonable because the handbook does not explicitly state the method by which the employee should "notify" the store manager. Additionally, the alternative procedure of calling the toll-free number would necessarily result in a verbal report. Nevertheless, Claimant's failure to report the injury in any form is clearly inconsistent with the instructions in the handbook.

28. Employer prominently displays a large poster with labor-related notices, including procedures regarding work-related injuries. The poster clearly states, in large type, "IF YOU ARE INJURED ON THE JOB, WRITTEN NOTICE OF YOUR INJURY MUST BE GIVEN TO YOUR EMPLOYER WITHIN FOUR WORKING DAYS AFTER THE

ACCIDENT." The section about reporting injuries is the largest and most readily noticeable part of the poster. There is also a second notice in smaller typeface that repeats the instruction to report all injuries in writing within four working days. This poster is displayed in a location where all employees would be reasonably expected to see it. Claimant admitted she was aware of the poster.

29. Claimant proved she suffered a compensable injury to her left knee on July 11, 2021. Claimant's description of the accident and resulting symptoms is credible. Although Claimant had previous left knee problems, here is no persuasive evidence she had any residual limitations or required any treatment before the work accident.

30. Claimant proved the left knee evaluations and treatment she received starting July 13, 2021 was reasonably needed to cure and relieve the effects of her injury.

31. Claimant failed to prove she reported the injury or otherwise gave put Employer on notice of a potential work-related injury before September 10, 2021.

32. Claimant failed to prove the treatment she received before September 10, 2021 was authorized. There is no persuasive evidence of, and Claimant did not argue, a bona fide emergency that would render treatment authorized before Employer was notified of the injury.

33. Claimant had the right to select her own physician after September 10, 2021. She selected Dr. Albright, who became authorized as of September 17, 2021.

34. Respondents proved Claimant's TTD benefits should be reduced for failure to timely report the injury. The ALJ finds it appropriate to reduce TTD benefits to zero until September 6, 2021, when Claimant had surgery and no longer would have been capable of even modified duty.

35. Respondents proved Claimant was given a release to regular employment on November 2, 2021. The persuasive evidence shows the remaining restrictions as of that date would not have precluded her regular job as a barista.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A pre-existing condition does not disqualify a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms during or after work activity 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). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition that manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved she suffered a compensable injury to her left knee on July 11, 2021. Claimant's description of the accident and resulting progression of symptoms is credible. She described the injury in a consistent manner to multiple providers starting with the first evaluation on July 13. Dr. Failinger's opinions and conclusions regarding causation are credible. Although Claimant had two prior left knee surgeries, there is no persuasive evidence of any residual limitations or need for treatment before the work accident. The accident probably caused or new radial tear, aggravated or accelerated an underlying condition, or some combination thereof.

B. Medical treatment was reasonably needed

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. As found, Claimant proved the left knee treatment she received starting July 13, 2021 was reasonably needed and causally related to the work accident.

C. Treatment before September 10, 2021 was not authorized

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). The respondents are only liable for treatment rendered by authorized treating providers. Absent an emergency, the ALJ cannot award medical treatment provided by unauthorized providers, even if the treatment was otherwise reasonably needed or causally related. *E.g., Torres v. City and County of Denver*, W.C.

No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995).

Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

The obligation to designate a physician arises when the employer receives information indicating to a reasonably conscientious manager that a potential compensation claim might be involved. *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984).

Claimant failed to prove she or her mother notified Employer of a potential work-related injury before September 10, 2021. Claimant concedes she did not report the injury on July 11 or July 12 while working. Nor did she say anything about a work injury in her texts with Ms. SC[Redacted]. The only possible notification before September 10 is the alleged conversation between Claimant's mother and Ms. SC[Redacted] in the drive-through. Claimant and her mother were unsure about the date of the conversation but eventually settled on July 26. Claimant and her mother appeared credible in describing the alleged conversation with Ms. SC[Redacted]. But Ms. SC[Redacted]'s testimony also appeared credible. It is possible the conversation took place. It is also possible it was on a different day or simply did not happen at all. Given the description of an essentially off-hand comment during a brief conversation in a drive-through line, Ms. SC[Redacted] may have not heard, or misunderstood Claimant's mother's comment that the knee injury occurred at work. Ms. SC[Redacted]'s alleged response does not sound like the reaction one would expect from an experienced manager had she understood Claimant's mother to be reporting a work injury. Claimant has the burden of proof on this issue, and the aforementioned uncertainties prevent her from crossing the threshold of "more likely than not." Claimant failed to prove she or her mother reported a work accident at any time before September 10, 2021.

Employer has no obligation to designate a treating physician before September 10, 2021 because it had no notice of the injury. Although Ms. SC[Redacted] knew Claimant was having problems with her left knee, she did not know it was work-related because Claimant did not inform her of such. Accordingly, evaluations and treatment Claimant received before September 10, 2021 were unauthorized and not the responsibility of Respondents.

D. Dr. Albright became authorized on September 17, 2021

There is no persuasive evidence Employer referred Claimant to a physician after she reported the injury on September 10, 2021. Therefore, the right of selection passed

to Claimant. A claimant "selects" a physician when she demonstrates by words or conduct she has chosen a physician to treat the industrial injury. *Squitieri v. Tayco Screen Printing*, Inc., W.C. No. 4-421-960 (September 18, 2000). Claimant saw Dr. Albright on September 17, 2021, which constitutes the "selection" of Dr. Albright as her ATP as of that date.

E. TTD commencing July 13, 2021

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. As found, Claimant proved she was disabled from her regular job and suffered an injury-related wage loss commencing July 13, 2021. Ordinarily, Claimant would be entitled to TTD benefits retroactive to the date she left work. But Respondents have requested the ALJ impose a "late reporting" penalty until September 10, 2021, the date Claimant provided notice of the injury.

Section 8-43-102(1)(a) requires a claimant to notify their employer of the injury *in writing* within four days of its occurrence. If the claimant does not timely report the injury in writing, the ALJ "may" impose a penalty of "up to one day's compensation for each day's failure to so report." The term "may" means the imposition of a "late reporting" penalty is not mandatory but is left to the ALJ's discretion. *Lefou v. Waste Management*, W.C. Nos. 4-519-354 & 4-536-799 (March 6, 2003). The penalty for late reporting is an affirmative defense on which the respondents bear the burden of proof. *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995).

Respondents proved Claimant's TTD benefits should be reduced to zero until September 6, 2021. The requirement to report an injury in writing serves several functions, not the least of which is to ensure a record of exactly when an injury was reported and remove ambiguity as to whether the claimant believes a medical problem is potentially work-related. Another important purpose is to allow the respondents to timely comply with their statutory obligations regarding the provision of medical benefits and mitigate their liability for indemnity benefits. Those concerns were directly implicated here. Although Ms. SC[Redacted] knew Claimant was having problems with her knee, she reasonably assumed it was a personal issue. The written notice need not take any particular form, and Claimant could have easily referenced the work injuries in a text message to Ms. SC[Redacted]. At a minimum, Claimant could have simply told Ms. SC[Redacted] about the accident. Claimant offered no persuasive explanation for not reporting the injury before September 10, 2021. The ALJ further notes Claimant postponed the surgery over a month for no known reason, which prolonged the period of disability. Based on the foregoing factors, it is appropriate to penalize Claimant one day's compensation for each day from July 13, 2021 through September 5, 2021.

Claimant had surgery on September 6, 2021, at which point she would have been off work regardless of any modified duty Employer might have offered. Once she had surgery, the late reporting no longer impacted Respondents' liability in any meaningful way. Claimant is entitled to TTD benefits commencing September 6, 2021.

F. Termination of TTD effective November 2, 2021

Once commenced, TTD benefits continued until one of the events enumerated in § 8-42-105(3)(a)-(d). Here, Respondents seek to apply § 8-42-105(3)(c), which mandates termination of TTD when "the attending physician gives the employee a written release to return to regular employment." Section 8-42-105(3)(c) is an affirmative defense on which Respondents have the burden of proof. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004); *Schuldies v. United Sporting Good Wholesale*, W.C. No. 4-413-232 (January 7, 1999). Whether a claimant has been released to regular employment duty by the attending physician is a question of fact for the ALJ. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

Dr. Albright is Claimant's primary ATP, so he qualifies as "the attending physician." Claimant acknowledged receiving a copy of the November 2, 2021 release. The only remaining question is whether Claimant was released to "regular employment" despite the fact she still had some limitations on certain types of activities.

The phrase "regular employment" in § 8-42-105(3)(c) refers to the claimant's regular employment at the time of the injury. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995); *see also Plotner v. Westran, Inc*., W.C. No. 3-108-724 (March 9, 1995) ("8-42-105(3)(c) reflects the General Assembly's view that once the attending physician finds the claimant to be physically capable of performing all the functions of his preinjury employment, any subsequent wage loss is the result of the claimant's own actions or general economic circumstances and not the industrial injury."); *Estes v. Schlage Lock*, W.C. No. 4-154-405 (December 11, 1995); *Morgan v. Bear Coal Company, Inc.,* W.C. No. 3-105-057 (December 1, 1995).

Dr. Albright released Claimant to return to work on November 2, 2021 with the only restrictions of "walking only, no high impact (running or jumping) activities." Those restrictions would not have prevented Claimant from performing her regular job as a barista. Respondents proved Claimant's attending physician gave her a release to return to regular employment on November 2, 2021.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left knee injury on July 11, 2021 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably need to cure and relieve the effects of Claimant's compensable injury, including but not limited to treatment by Dr. Albright and his referrals on or after September 17, 2021.

3. Claimant's claim for medical benefits related to evaluations and treatment received before September 10, 2021, including the September 6, 2021 left knee surgery, is denied and dismissed.

4. Claimant's average weekly wage is $150.50, with a corresponding TTD rate of $100.33.

5. Insurer shall pay Claimant TTD from September 6, 2021 through November 1, 2021.

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

7. Claimant's claim for TTD from July 13, 2021 through September 5, 2021 is denied and dismissed.

8. Claimant's claim for TTD from November 2, 2021 through January 11, 2022 is denied and dismissed.

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

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

DATED: October 12, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-067-268-008

ISSUES[1]

1. Whether Respondents established by clear and convincing evidence that the opinion of DIME physician, Dr. McAlpine is incorrect based on her failure to apportion Claimant's permanent impairment rating.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to permanent total disability benefits.

3. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or to prevent further deterioration of his condition pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

PROCEDURAL ISSUE

Claimant originally endorsed the issue of disfigurement. However, due to video and logistic issues, Claimant was permitted to withdraw the issue of disfigurement without prejudice and to refile an application for hearing on that issue.

FINDINGS OF FACT

1. The parties stipulated that Claimant's average weekly wage is $723.53.

2. Claimant is a 44-year-old native of Oaxaca, Mexico who moved to the United States in 1999. Claimant's primary language is Spanish, and he has limited ability to speak English. Claimant earned a high school degree in Mexico, and has no additional formal education. Claimant was unable to provide a detailed work history, and testified his work history is primarily limited to construction jobs, including performing stucco installation.

3. On January 12, 2018, Claimant sustained admitted injuries arising out of the course of his employment with Employer on January 12, 2018, when a large pile of wood planks fell on him at a construction site where he was working. As a result of the incident, Claimant sustained an open fracture of his right femur, and other injuries. At the scene, Claimant was evaluated by emergency medical personnel, for a right leg fracture and

[1] Claimant's Position Statement identifies as issues: Injury to Claimant's right hip & knee; Soft-tissue injury to Claimant's neck & back; and Injury to Claimant's left shoulder." Based on Claimant's Position Statement, it appears Claimant seeks a determination regarding the compensability of these alleged injuries. Although "compensability" was identified in Claimant's Application for Hearing, it was not identified in Claimant's Case Information Sheet, nor was it identified as an issue for decision at the outset of hearing. (Hrg. Tr., p. 9, l. 10 – p. 12, l. 14). Accordingly, the ALJ does not address the compensability of alleged injuries to Claimant's right hip, right knee, neck, back or left shoulder, except as relevant to deciding the issues identified for determination.

swelling and abrasions of his left hand. Claimant was then transported by ambulance from the site to North Suburban Medical Center (NSMC) (Ex. N).

4. On January 12, 2018. At NSCM, Jared White, M.D., performed an open reduction internal fixation (ORIF) surgery to repair Claimant's right femoral shaft fracture. Claimant remained hospitalized until being discharged on January 15, 2018. During his hospitalization, Claimant reported left arm and abdominal pain, indicating he shielded himself with his left arm when the wood fell on him, and that wood fell on his abdomen. Claimant denied pain elsewhere in the body. X-rays of Claimant's chest, left wrist, left hand, and right knee performed were negative for fractures. (Ex. O).

5. On February 26, 2018, Claimant began treatment at Colorado Occupational Medical Partners (COMP). From February 26, 2018 through May 2, 2018, Claimant's treatment at COMP was primarily post-surgical physical and occupational therapy directed at his right leg. During that time, Claimant reported pain in his right leg, right knee, and groin. (Ex. R). In April 2018, Claimant received a brace for his right knee. (Ex. T).

6. On May 8, 2018, Claimant was evaluated by Tom Chau, PA-C, at COMP for complaints of left arm pain and numbness, neck, and back pain. Mr. Chau diagnosed Claimant with left arm pain, dorsalgia, and cervicalgia. He recommended additional physical therapy and ordered a cervical MRI. (Ex. 18). The MRI was taken on May 18, 2018, and showed mild degenerative changes and no acute pathology. (Ex. V).

7. Claimant was then evaluated by Matthew Lugliani, M.D., at COMP, on May 23, 2018. Dr. Lugliani recommended chiropractic care, and massage for Claimant's neck, and back. On June 6, 2018, Dr. Lugliani referred Claimant for a left shoulder MRI. (Ex. R). The left shoulder MRI showed mild tendinosis without a tear, and was otherwise normal. (Ex. W).

8. From May 9, 2018 through July 24, 2018, Claimant attended physical therapy at COMP, during which he was noted to have an antalgic gait and required the use of a cane. Physical therapy addressed Claimant's right leg, left arm, neck and back. (Ex. R). At discharge from COMP on July 24, 2018, Claimant continued to experience pain and weakness in his right leg, and was using a cane for ambulation. The therapist noted Claimant had plateaued with strength and could continue independently with exercise at home. (Ex. R).

9. On June 25, 2018, Claimant was evaluated by Rafer Leach, M.D., at MSK Medical, reporting headaches, neck pain, back pain, abdominal pain, left shoulder and elbow pain, right hip pain, and right knee pain. Dr. Leach referred Claimant for cervical and lumbar x-rays, which were normal, with the exception of mild lumbar discogenic endplate changes. (Ex. 13). Dr. Leach referred Claimant for chiropractic care and massage at MSK, which Claimant attended for approximately one month. (Ex. 16 & X).

10. On July 30, 2018, Claimant began treatment with Kristin Mason, M.D., at Rehabilitation Associates of Colorado. Dr. Mason's initial diagnosis was a femoral shaft

fracture and probable tibial plateau fracture, left shoulder sprain, with possible rotator cuff injury and scapular myofascial pain; cervical sprain/strain; lumbar sprain-strain; and prior thoracic injury with impairment rating. Dr. Mason referred Claimant to Jason Gridley, D.C., for chiropractic care directed at his spine, and to Denver Physical Therapy. In October 2018, Dr. Mason added a diagnosis of right hip labral tear, and referred Claimant for evaluation to Brian White, M.D., authorization for the referral was denied, and Claimant has not been treated for his right hip. (Ex. Z).

11. Claimant saw Dr. Gridley eight time between August 6, 2018 and September 26, 2018. At Claimant's final visit, he reported improved pain in his lower back, and shoulder. (Ex. 8).

12. Claimant attended three courses of physical therapy at Denver Physical Therapy. From August 17, 2018 to October 12, 2018; from April 29, 2019 through November 5, 2019; and from August 20, 2020 through November 5, 2020. (Ex., AA). At Claimant's final visit on November 5, 2020, Claimant continued to have pain in his right knee and left shoulder, and difficulty walking. (Ex. AA).

13. On November 26, 2018, Dr. Mason referred Claimant to Patrick McNair, M.D., for evaluation of his knee and concerns about Claimant's hardware from the ORIF procedure. In April 2019, Dr. McNair performed hardware revision surgery due to screw failure and also performed a right meniscectomy, chondroplasty, and lysis of adhesions. (Ex. 20).

14. Claimant remained under Dr. Mason's care for approximately four years, with his last documented visit on June 30, 2022. In February 2021, Dr. Mason assigned permanent restrictions, including lifting limited to thirty pounds, repetitive lifting limited to 15 pounds, and carrying limited to 30 pounds. On March 1, 2021, Dr. Mason added a restriction of limiting pushing and pulling to thirty pounds. Between March 1, 2021, and June 30, 2022, Claimant saw Dr. Mason thirteen times, for each visit, Dr. Mason completed a WC 164 form, which assigned the same restrictions, without modification. (Ex. Z).

15. During Claimants visits with Dr. Mason between March 1, 2021 and June 30, 2022, he reported swelling around his knee on March 1, 2021, and again on June 30, 2022. On January 3, 2022, Dr. Mason noted "generalized swelling" after Claimant had sustained a fall two weeks earlier. Otherwise, no lower extremity swelling was noted, and specifically noted as not being present on several occasions. At Claimant's June 30, 2022 visit with Dr. Mason, Claimant reported that his knee continues to "swell at time" and she noted slight swelling in the knee on examination. (Ex. Z).

Kristin Mason, M.D.

16. Dr. Mason testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Dr. Mason testified that as a result of the January 12, 2018 incident, Claimant sustained a right hip labral tear, and a right knee medial meniscal tear (in addition to the conditions previously diagnosed). She opined that Claimant's April 2019 knee surgery was causally related to Claimant's accident. Dr. Mason also opined that

Claimant's spinal issues are myofascial in nature, and that his prior lower back and neck issues were aggravated by the January 12, 2018 injury, and the alteration in his gait was due to his leg injury. Additionally, she indicated although Claimant had some left rotator cuff tendinosis, there was no discrete significant tear. She testified that Claimant is at maximum medical improvement.

17. With respect to medical maintenance, Dr. Mason testified Claimant is on medications for which he needs to be monitored, and he requires orthotics, a TENS unit, and single-point cane. She also testified it would be reasonable for Claimant to follow up with orthopedics and to see Dr. Gridley for chiropractic care. Dr. Mason's testimony was credible and persuasive.

18. Dr. Mason testified she had Claimant on 30-pound lifting restrictions for a long period of time, and that Claimant has gait difficulties which are caused by a leg length discrepancy and pain. Claimant's right leg is approximately one inch shorter than his left, which is managed with shoe modifications and orthotics. Claimant uses a cane in his right hand to support himself.

19. Dr. Mason does not believe Claimant can return to work in construction. She recommended a 30-pound lifting restriction (but that Claimant could not carry that weight due to his use of a cane). She testified Claimant continues to require a cane for ambulating and standing, and he is limited to 20-30 minutes of walking or standing per hour and 2 hours of standing in an eight-hour shift. She further opined Claimant needs to elevate his leg four times per day for approximately ten minutes per session, that Claimant is unable to stoop, kneel, crouch or crawl (i.e., positional restrictions), and that Claimant can work while seated and frequently lift five pounds, with the ability to elevate his leg.

20. Many of the work restrictions in Dr. Mason's testimony were not identified in her medical records or the WC 164 forms she completed since February 2021, and, in at least one instance, not supported by Claimant's medical records. For example, although Dr. Mason testified that Claimant would need to elevate his leg four times per day for 10 minutes to address swelling, during the thirteen visits between March 1, 2021 and June 30, 2022, Claimant reported knee swelling three times, one of which was related to a fall. Claimant also indicated at the June 30, 2022 visit that his knee would swell "at times," and Dr. Mason documented "slight" swelling. Claimant's contemporaneous records are inconsistent with the recommendation that Claimant elevate his leg four times daily to address swelling. Moreover, Claimant demonstrated "elevating" his leg by resting it on his cane, which he can do while seated.

Kathie McAlpine, M.D. - DIME

21. On November 17, 2020, Kathie McAlpine, M.D., performed a Division Independent Medical Examination (DIME). As the result of her review of Claimant's medical records and examination, Dr. McAlpine diagnosed Claimant with a comminuted right femur fracture with ORIF repair; right hip labral tear and mild chondral degeneration; left shoulder sprain; left shoulder chronic distal infraspinatus tendinosis; cervical spine sprain with mild degenerative changes; and mild lumbar spine degenerative changes with mild

bilateral sciatica. She placed Claimant at MMI effective November 17, 2020. Dr. McAlpine assigned Claimant the following permanent impairment ratings:

Left upper extremity 8% scheduled impairment
Left lower extremity 9% scheduled impairment
Cervical spine 8% whole person impairment
Lumbar spine 13% whole person impairment.

The cervical and lumbar spine impairments assigned by Dr. McAlpine combined for a 20% whole person impairment.

22. Dr. McAlpine did not apportion Claimant's impairment noting: "No impairment ratings were provided concerning any previous injury/conditions of the Right Hip, Left Shoulder, Cervical & Lumbar spines, therefore an apportionment was not done." (capitalization original). (Ex. M).

23. Dr. McAlpine recommended the following work restrictions for Claimant: "Standing and walking should be done for no more than 20-30 mins per time up to a maximum of 1-3 hours per shift with rest periods between the periods of standing or walking. Lifting and carrying up to 25-30 lbs. as tolerated. (Ex. M).

24. With respect to maintenance care, Dr. McAlpine opined that reasonable maintenance care included 12 weeks of physical therapy with exercise and massage for the cervical and lumbar spine, upper and lower extremities. She also recommended providing an in-home TENS unit and adaptive shoe inserts. (Ex. M).

John Burris, M.D.

25. John Burris, M.D., at Respondents' request, performed two independent medical examination (IME) of Claimant – one on December 10, 2019 and a second on April 27, 2021. In both reports, Dr. Burris indicated he was not provided a significant portion of Claimant's medical records. In his first report, Dr. Burris opined Claimant reached maximum medical improvement on July 8, 2018, and that Claimant had near full range of motion of the right hip and right knee, and normal neurologic function. He opined that Claimant had no ratable impairment, no work restrictions, and that no further medical treatment was reasonable or necessary. He also indicated Claimant had no measurable leg length discrepancy based on Dr. Burris' measurements. (Ex. L).

26. In his second report dated April 27, 2021, Dr. Burris indicated he disagreed with Dr. McAlpine's assigned impairment ratings, and opined that Claimant's symptoms were not work-related. He reiterated his opinion that claimant reached MMI on July 18, 2018, and that no impairment was appropriate.

27. Dr. Burris testified by deposition, and was admitted as an expert in occupational medicine. Dr. Burris opined that Claimant's sole work-related injury was his right femur fracture, and that Claimant had no evidence of a residual deficit associated with the injury.

28. In his testimony, Dr. Burris provided additional information about his examinations taking place in April 2021 and December 2019 not documented in his IME reports or inconsistent with his reports. For example, Dr. Burris testified that the only objective findings in his examination of Claimant were a slight shortening of the right leg and atrophy of the quadriceps muscle. He characterized the leg length discrepancy as two centimeters. However, in his December 10, 2019 report he specifically indicted there was no measurable discrepancy, and did not document a leg length examination in the April 27, 2021 report. In his December 10, 2019 report, Dr. Burris indicated "[d]uring many provocative maneuvers, he reports pain in unrelated anatomic regions," without describing or documenting the maneuvers. In testimony, he offered examples that were not otherwise documented. In his testimony, Dr. Burris indicated Claimant showed signs of "Waddell's testing" indicating non-physiologic complaints, although he did not document Waddell's testing in either of his IME reports.

29. In large measure, Dr. Burris' opinions regarding restrictions and permanent impairment rating are based on his view that Claimant's only work-related injury was a fractured femur, and that the femur has completely healed. Dr. Burris' opinions are inconsistent with Claimant's treating providers, in that no treating provider has opined that Claimant's only work-related injury was his femoral fracture, that he has no restrictions or that he has no impairment. The ALJ does not find Dr. Burris' opinions persuasive.

Claimant's Prior Injury and Impairment Rating

30. Claimant also sustained a work-related injury in September 2014, when a sheet of drywall fell on him. As the result of that event, Claimant underwent treatment with Lawrence Lesnak, D.O., and other providers. On April 2, 2015, Dr. Lesnak assigned Claimant a 5% whole person impairment rating for a mild closed head injury. He further opined that Claimant did not qualify for any type of impairment for his low back, buttock, or neck. (Ex. U).

31. On December 22, 2015, Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel assigned Claimant a 16% impairment for his cervical spine; 26% impairment for his lumbar spine, and a 12% psychiatric impairment. Claimant's cervical and lumbar spine impairment ratings convert to a combined 38% whole person impairment. (Ex. DD).

32. In addition, in association with Claimant's 2014 injury, treating provider Lon Noel, M.D., assigned permanent restrictions based on a functional capacity evaluation, including the following:

a. Overhead lifting: 5-10 pounds occasionally, no frequent overhead lifting;

b. floor-to-waist, waist-to-shoulder lifting: 30 pounds occasionally, 10 pounds frequently;

c. Bilateral upper extremity carrying: Maximum 20 pounds for total of 50 feet occasionally;

d. Right/left upper extremity carrying: Maximum 15 pounds for total of 50 feet occasionally;

e. Bilateral push/pull: Maximum of 45 pounds/50 pounds respectively;

f. Sitting for 1 hour, standing for 2 hours; walking for 2 hours, before changing position.

g. No working in unprotected heights, such as high ladders or scaffolding; and

h. No use of heavy vibrating machinery such as jackhammers.

(Ex. GG).

33. Although these restrictions were recommended, Claimant was able to obtain and maintain full time employment working construction, and work without accommodations for restrictions..

Katie Montoya – Vocational Expert

34. Vocational consultant, Katie Montoya, testified at hearing. Ms. Montoya was admitted as an expert in vocational rehabilitation, job placement, training, and evaluation. Ms. Montoya met with Claimant by video and performed a vocational assessment in April 2021. Ms. Montoya testified that Claimant's vocational profile was that of an unskilled worker, with the ability to perform a limited set of semiskilled jobs. Ms. Montoya opined that absent Claimant's injuries, he would be qualified to perform semiskilled jobs, including construction work, labor work, landscaping, some heavy equipment operation, restaurant/kitchen work, and machine operation. She testified that but for his injury, Claimant would have been able to perform any job in "any work classification that didn't require more than a semiskilled profile."

35. Ms. Montoya opined that the work restrictions recommended by Dr. Mason limit Claimant to sedentary work. She indicated Claimant cannot, based on is work restrictions, return to construction labor positions, and that the Claimant's use of a cane limits the environments in which he is able to work, although it would not prevent Claimant from working entirely. She testified that the additional work restrictions identified by Dr. Mason in her testimony, including Claimant's need to change positions, take breaks and elevate his leg, and limitations on operating a vehicle make it unlikely that Claimant would be able to perform competitive full-time work. She further opined that it is unlikely that Claimant could be retrained for other work. Ms. Montoya testified that if the restrictions recommended by Dr. McAlpine were applied, there may options for employment.

36. Ms. Montoya prepared a preliminary report regarding her opinions in April 2021, which was not offered or admitted into evidence. She did not prepare a final report. She testified that she performed labor market research, but did not perform a labor market survey with respect to Claimant, although she routinely performs labor market surveys. (A labor market survey involves contacting potential employers to determine the availability of suitable employment). Ms. Montoya's determination of available work is

based, in part, on labor market research which consists of reviewing employment listings and postings, and determining based on that information whether Claimant could perform the work available. The ALJ finds Ms. Montoya's opinion that Claimant is unlikely to engage in competitive employment unpersuasive.

Cynthia Bartmann – Vocational Expert

37. Vocational expert, Cynthia Bartmann testified at hearing. Ms. Bartmann was admitted as an expert in vocational rehabilitation, job placement training and evaluation. Ms. Bartmann authored two reports regarding Claimant's ability to obtain employment considering the work restrictions assigned by Dr. McAlpine and Dr. Mason prior to hearing.

38. Ms. Bartmann prepared two employability evaluations of Claimant, one dated July 26, 2021, and one dated March 19, 2022. Based on Dr. McAlpine's work restrictions (i.e., lifting 20-30 pounds, standing, and walking for 20-30 minutes for up to three hours per day. Ms. Bartmann was present for hearing and was aware of the additional restrictions about which Dr. Mason testified, and indicated the additional restrictions did not affect her opinions regarding Claimant's employability, although she indicated that they would reduce Claimant's employment options to the sedentary work category. In such a position, lifting would be limited to 10 pounds or less, and sitting at least six to eight hours per day.

39. She opined Claimant would be eligible for employment in positions falling into the sedentary work category. Ms. Bartmann performed labor market research and a labor market survey to assess Claimant's employment opportunities, within the Claimant's restrictions assigned by Dr. McAlpine. Ms. Bartmann's survey included contacting potential employers to obtain information regarding available employment opportunities. She opined that she believes job opportunities exist for Claimant within his vocational skills and work restrictions.

40. Examples of such employment included working light packing, labeling, and assembly positions. Ms. Bartmann provided several examples of light assembly positions which would fit with Claimant's restrictions, and would not be affected by Claimant's limited English proficiency. These included sedentary work packing paper products for restaurants that would require lifting less than 10 pounds, packaging dental products, packaging tea, and working at a bindery. She testified these types of positions are available locally, and do not require transferrable skills.

Claimant

41. Claimant testified at hearing that he was not aware of prior work restrictions related to his 2014 injury, and that he was able to work without difficulty prior to his January 2018 injuries. He has had no prior injuries to his left shoulder, right knee, or right hip prior to the January 12, 2018 injury. Claimant testified that his right hip currently swells "a lot" and that his legs are not strong. Claimant testified that he has constant pain, and that he has pain in his neck and arm, which waxes and wanes. He testified that he uses a cane the majority of the time, but at home he finds other objects to support himself. Claimant

testified that he elevates his leg during the day, and uses his cane to do so. Claimant demonstrated “elevating” his leg by placing his right leg extended on his cane, while the end of the cane rests on the ground.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming DIME - Apportionment

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 determination of 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).

Respondents assert Dr. McAlpine’s permanent impairment rating is incorrect because she did not deduct the 2015 impairment rating for Claimant’s cervical and lumbar spine from her calculations. The version of § 8-42-104 (5), C.R.S., in effect prior to September 7, 2021[2], provides “In cases of permanent medical impairment, the employee’s award or settlement shall be reduced: (a) When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under [the Act] or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.”

As found, Claimant received permanent medical impairment ratings for his cervical and lumbar spine from Dr. Orgel regarding his 2014 injury and from Dr. McAlpine regarding his 2018 injury. Dr. McAlpine did not deduct Dr. Orgel’s cervical and lumbar impairment ratings from her own because she was not provided with any records related to the prior impairment. The assignment of a prior impairment rating does not, by itself, require apportionment. Instead, the Act requires deduction of the prior impairment rating where the employee has “received an award or settlement,” and the prior rating is “established by an award or settlement.” The record before the ALJ contains no evidence that Claimant received an award or settlement. That is, no documents reflecting an award or settlement were offered or admitted into evidence, and no testimony was elicited to establish that Claimant’s 2015 impairment rating was reduced to an award or settlement.

[2] The version of section 8-42-104(5), C.R.S., effective September 1, 2021, only modifies the first sentence of the section to state: “In cases of permanent medical impairment, the employee’s award shall not be reduced except:,” and does not change the standard for apportionment.

In position statements, Respondents contend, “Claimant and Big Horn Plaster, Inc. reached a settlement agreement for $95,000 in November 2016.” Respondents’ contention, however, is not supported by evidence before the ALJ. Respondents therefore argue “The Court should take judicial notice of files in the Division of Workers Compensation and the Office of Administrative Courts. This settlement was filed and approved by the Division and this Court can take judicial notice of the same.” (Respondents’ Position Statement, p. 5).

Colorado Rule of Evidence 201 permits an ALJ to take judicial notice (*i.e.*, administrative notice) of an adjudicative fact that is “one not subject to reasonable dispute in that it is either (2) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Because an alleged settlement is not “generally known”, the analysis falls under the second prong of C.R.E. 201. An “ALJ's decision to take administrative notice is discretionary unless the party requesting administrative notice provides the ALJ with the necessary information." *In Re Mendez*, W.C. No. 4-330-270 (ICAO Jan. 19, 2001); see also C.R.E. 201 (c) and (d). Respondents did not provide the ALJ with the documents for which administrative notice is sought. Consequently, administrative notice is discretionary.

The ALJ declines to take administrative notice of documents contained within the Division files for several reasons. First, Respondents did not provide the ALJ with the necessary information permitting the ALJ to take administrative notice. The OAC has no record of any settlement related to Claimant’s 2014 claim, thus the ALJ cannot merely refer to the court’s own records. Instead, the records for which notice is requested are asserted to be in Division files. Division files are not maintained by the OAC, and the ALJ nor does not have direct access to Division files. While the ALJ may, within his discretion take administrative notice of Division records, “[i]t is the obligation of the party desiring the ALJ to consider documents in the Division’s file to obtain certified copies from the Division.” *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (Jun. 9, 2009). W.C.R.P. 9-10 provides a mechanism for the parties to obtain certified files from the Division, and renders such certified documents self-authenticating. Respondents, however, did not obtain the Division file, and instead seek to place the burden on the court to obtain the Division file.

Respondents’ position statement refers to a purported settlement in November 2016, without identifying the case number or specific documents for which administrative notice is requested. Consequently, Respondents’ request places the burden on the court to determine the case number of Claimant’s prior claim, request the entire certified file from the Division, and determine the documents for which administrative is sought. The ALJ sees no basis to engage in an exercise available to the parties under W.C.R.P. 9-10, and of which they chose not to avail themselves.

Second, even assuming the OAC independently obtains the Division file, the “fact” of which Respondents request the ALJ take notice is more nuanced than merely determining Claimant entered into a settlement for $95,000 in November 2016. The issue

is whether Claimant received a settlement for a prior permanent impairment rating to his cervical and lumbar spine. Thus, the ALJ would be tasked with reviewing and analyzing the Division file to determine the scope of any settlement and whether the criteria for apportionment under § 8-42-104 (5) are met. Given it is Respondents' burden of proof to establish these elements, the ALJ declines to devote the OAC's resources to this task.

Finally, it would be prejudicial to the Claimant for the ALJ to take administrative notice of this issue at this stage in the proceedings. Although judicial notice may be taken at any stage in the proceeding, the facts for which notice is sought are elements of the Respondents' claim not otherwise supported in the record. Because Respondents bear the burden of proof, Claimant was not obligated to (and did not) elicit evidence on the issue. It would be manifestly unfair to permit a party to establish an essential element of its claim after the close of evidence through an untimely request for administrative notice. Doing so would deprive the Claimant of the opportunity to present evidence or argument regarding the effect of such a settlement or award on his current impairment rating.

Because Respondents have failed to present credible evidence that Claimant received a prior settlement or award for permanent partial disability to the same body parts at issue in the present case, Respondents have failed to establish that the permanent partial disability rating assigned by the DIME physician is incorrect.

Permanent Total Disability (PTD)

To prove permanent total disability the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, 487 P.3d 1007 (Colo. App. 2019). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Grant v. WalMart Assoc., Inc.,* WC 4-905-009 (ICAO, Mar. 18, 2019). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter, supra*. The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Bymer*, *supra*; *Blocker v. Express Pers.,* WC 4-622-069-04 (ICAO July 1, 2013). The question of whether the claimant proved the inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995); *see Yeutter, supra* (reasoning that DIME opinion held no special weight in a subsequent hearing where claimant sought permanent total disability benefits).

Claimant has failed to establish an entitlement to permanent total disability benefits or that he is unable to earn any wages. As found, Claimant has been assigned permanent work restrictions limiting his lifting and pulling to thirty pounds. He also has mobility restrictions which prevent him from walking or standing for more than 30 minutes per hour. The ALJ finds the opinions of Ms. Bartmann to be more persuasive than those of Ms. Montoya with respect to Claimant's employability. Specifically, Ms. Bartmann's opinion that Claimant can engage in sedentary work and that his limited English proficiency does not exclude Claimant from employment. The ALJ finds credible Ms. Bartmann's testimony that she has contacted and spoken with potential employers who have or may have available work Claimant can perform considering his restrictions, including the restriction that Claimant elevate his leg four times per day. Because Claimant's restrictions do not prevent Claimant from earning any wages, the ALJ concludes Claimant is not entitled to permanently total disability benefits.

Medical Maintenance Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Both Dr. Mason and Dr. McAlpine credibly opined that Claimant will likely require durable medical equipment in the future, including orthotics and a TENS Unit. Further, Dr. Mason credibly opined that Claimant should be permitted follow up appointments with orthopedics to address his leg, and chiropractic care as needed. No evidence was presented that Claimant requires any current medical maintenance benefits. The ALJ credits the opinions of Dr. Mason and Dr. McAlpine, and concludes Claimant has established that future medical treatment is reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

Because no specific medical treatment has been requested by Claimant's ATP at this time, the issue of whether any specific medical treatment should be authorized as medical maintenance benefits is not ripe, and the ALJ is without jurisdiction to authorize any specific treatment. *See Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). The ALJ makes no findings or conclusions regarding the reasonableness, necessity, or relatedness of any specific treatment.

ORDER

It is therefore ordered that:

1. Respondents' request to apportion Claimant's cervical and lumbar impairment ratings is denied and dismissed.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Claimant's request for a general award of medical maintenance benefits is granted. Respondents shall pay for reasonable and necessary medical maintenance treatment causally related to Claimant's January 18, 2018 work injury.

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

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

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 13, 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 admitted average weekly wage (AWW) of $1,154.00 should be increased for purposes of permanent partial disability (PPD) benefits.

Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

FINDINGS OF FACT

1. On January 30, 2020, the claimant suffered an injury at work. The respondent has admitted liability for the claimant's work injury. At the time of her injury, the claimant worked as the Chief Deputy Clerk and was paid $28.85 per hour. During her employment with the employer, the claimant had medical insurance, dental insurance, and vision insurance.

2. After her work injury, the claimant received various pay increases before resigning from her position on August 25, 2022. Those increases are as follows:

a) On June 15, 2020, the claimant's pay was increased to $34.00 per hour.

b) On December 11, 2020, the claimant's pay was increased to $35.70 per hour.

c) On January 28, 2021, the claimant's pay was increased to $42.2692 per hour; ($7500.13 per month).

3. In April 2022, the claimant was placed on administrative leave without pay. On May 9, 2022, the claimant received a letter regarding continuation of medical insurance coverage pursuant to COBRA. In that letter, the claimant was informed that the monthly premium to continue her health insurance coverage would be $806.10. The claimant did not pay this premium.

4. On May 20, 2022, the respondent filed a Final Admission of Liability (FAL) admitting for a permanent impairment rating of 18 percent, whole person. The average weekly wage (AWW) identified in the FAL was $1,154.00

5. On June 20, 2022, the claimant received a letter from the Social Security Administration (SSA) confirming that the amount of $170.10 would be withheld for medical insurance premiums under Medicare.

6. The claimant asserts that her AWW should be increased to $1,726.15 to reflect the various raises she received after the work injury.

7. Due to her January 30, 2020 work injury, on September 24, 2020, the claimant underwent low back surgery that included L2-L3 microdiscectomy with laminectomy.

8. As a result of the September 24, 2020 lumbar surgery, the claimant has a disfigurement on her lower back consisting of a well-healed surgical scar that runs from just below her belt-line up her spine and measures 18 cm in length. This scar is a different color than the surrounding skin.

CONCLUSIONS OF LAW

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

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

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

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force **at the time of the injury**. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *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 v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply Section 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp., supra*.

5. A claimant's AWW must also include the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. Section 8-40-201(19)(b), C.R.S. It is not required that the employee actually purchase the insurance coverage for the AWW to be increased. *Ray v. Industrial Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005), aff'd. 145 P.3d 661 (Colo. 2006).

6. The claimant's AWW shall be increased to reflect the cost of continuation of insurance coverage. Therefore, claimant's AWW shall be increased by $806.10 for a total AWW of $1,960.10. The ALJ recognizes that the SSA is withholding $170.10 for the claimant's Medicare coverage. However, the ALJ finds that the cost identified in the May 9, 2022 COBRA letter is reasonable and appropriate in determining the cost of replacement insurance coverage. Therefore, that amount is also reasonable in calculating the claimant's AWW. The ALJ declines to include the claimant's post-injury raises to her AWW.

7. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

8. As a result of her January 30, 2020 work injury and related surgery, the claimant has sustained a permanent disfigurement to areas of the body normally exposed to public view.

ORDER

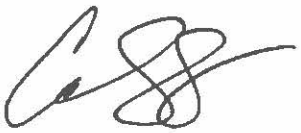
It is therefore ordered:

1. For purposes of calculating PPD benefits, the claimant's AWW is increased to $1,960.10.

2. The respondent shall pay claimant $2,000.00 for her permanent disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

Dated October 18, 2022.



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

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

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

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

ISSUES

- Did Claimant prove the admitted 10% scheduled ratings should be "converted" to the equivalent 6% whole person rating?

- Did Claimant prove entitlement to an award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant worked as a licensed psychiatric technician at the Colorado Mental Health Institute and had done so for over 16 years. He suffered an admitted injury to his left shoulder on October 6, 2020 while reaching to open a heavy metal door. As he was doing so, he felt a pop in his shoulder.

2. Claimant was initially diagnosed with a left shoulder strain.

3. An MRI performed on December 28, 2020 showed mild glenohumeral arthritis along with tendinosis and fraying of the supraspinatus. No full thickness tear was seen. (Claimant Exhibit 14, p. 355).

4. After several months of conservative care, Dr. Kobayashi performed surgery consisting of left shoulder arthroscopic subacromial decompression/rotator cuff repair (supraspinatus) and left proximal biceps tenodesis (subpectoral) on July 14, 2021. The surgery included insertion of a double loaded Y-knot anchor in the greater tuberosity with sutures placed through the supraspinatus tendon. Additionally, the subpectoral biceps tenodesis was performed with 2 Mitek Panalok suture anchors. (Claimant's Exhibit 8, pp. 219 – 220).

5. Following the surgery, Claimant received physical therapy with Synergy Physical Therapy & Wellness. He received therapy from November 22, 2021 through February 14, 2022, when he was discharged. At the time of discharge, the assessment was "Loss of motion since last PN. Improvements made in functional strength and able to perform a 10# shelf lift to 72" for 5 reps. Continuation of home program should allow maintenance of symptomatic elimination over time and lessen chance of recurrence." (Claimant's Exhibit 11, p. 336).

6. Claimant's primary ATP, Dr. Thomas Centi, put Claimant at MMI on February 16, 2022. (Claimant Exhibit 6, p. 195). Physical examination showed well healed surgical scars. There was no edema and no ecchymosis. There was mild tenderness with palpation to the bicep region. Range of motion was slight limited in all planes. Strength was good. Dr. Centi provided a right shoulder impairment rating of 10% extremity which converted to 6% whole person. Dr. Centi opined Claimant required no maintenance treatment and released him from care.

7. Respondent filed a Final Admission of Liability (FAL) on March 21, 2022 admitting for the 10% scheduled extremity rating assigned by Dr. Centi. The FAL denied medical benefits after MMI.

8. Claimant timely objected to the FAL and requested a hearing. Claimant endorsed "Permanent Partial Disability Benefits" on the Application for Hearing.

9. Respondents filed a timely Response to Application for Hearing on April 11, 2022.

10. At the request of Respondent, Dr. Fall performed an IME on August 10, 2022. (Respondent's Exhibit A). In her report, which is consistent with her testimony, she states, "Regarding the functional deficit, there is no indication of any functional deficit proximal to the shoulder."

11. Claimant credibly testified that currently he can accomplish most tasks involving his left shoulder, but that the pain builds up and he has to take Tylenol. He also has loss of strength with lifting. Because of the loss of strength, he has to lift closer to his core. When he is doing the laundry, he has to take the laundry basket with the clothes with his right hand. Claimant's testimony has demonstrated that he has limitations extending beyond his left extremity. Dr. Fall's IME did not consider the limitations that Claimant testified to at the hearing. Although the examination and testing done by Dr. Fall did not replicate the Claimant's symptoms, the Claimant's testimony with respect to his pain and loss of strength is more credible since the IME was a single time and of limited duration.

CONCLUSIONS OF LAW

A. Claimant proved that his impairment should be converted to a whole person impairment.

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-

705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgery performed by Dr. Kobayashi was directed to anatomical structures proximal to the "arm," including the supraspinatus tendon. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *see also Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). More importantly, Claimant credibly described pain and associated functional limitation in areas proximal to his arm. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. Centi provided Claimant with a 6% whole person. Neither party requested a DIME, so Dr. Centi's rating is binding under § 8-42-107.2(b). Claimant is entitled to PPD benefits based on Dr. Centi's 6% whole person rating.

B. Claimant failed to prove entitlement to medical benefits after MMI

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove he needs additional treatment to relieve the effects of his injury or prevent deterioration of his condition. Multiple treating and examining providers agree no further treatment is required. Claimant testified he would like to return to an ATP "to get the thing fixed and get on with - - get on with my life." Dr. Centi was aware of Claimant's ongoing symptoms but did not think he needed any further treatment. There is no persuasive evidence of any change in Claimant's condition or other factor that would reasonably be expected to change his ATPs mind on that subject.

ORDER

It is therefore ordered that:

1. Claimant's request for an award for whole person impairment based on 6% whole person is granted.

2. Claimant's request for a general award of medical benefits after MMI 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: October 19, 2022

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

ISSUES

- Did Claimant prove a revision total knee arthroplasty is reasonably necessary and causally related medical treatment after MMI?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right knee on March 4, 2019 when he slipped on ice.

2. An MRI showed an unstable osteochondral lesion, and Dr. Lucas King performed an arthroscopic chondroplasty on April 22, 2019.

3. The surgery was not helpful and Dr. King eventually performed a total knee arthroplasty (TKA) on October 9, 2019. Manipulation of the knee at the conclusion of the surgery showed good stability and full range of motion.

4. Postoperative x-rays on October 9, 2019 showed the prosthetic components were in satisfactory position with no fracture, dislocation, or other complication.

5. Claimant struggled with post-operative pain and limited range of motion. On October 24, 2019, Dr. King advised Claimant to become more aggressive with PT and exercises, or his knee would continue to stiffen.

6. At a follow up with Dr. King on December 10, 2019, Claimant's pain was fairly well controlled but he had only 75 degrees of flexion. Claimant was ambulating with a very stiff, one-legged gait. Dr. King obtained x-rays, which showed a well-placed prosthesis with no signs or loosening or acute pathology. Dr. King did not think additional PT would improve Claimant's range of motion and recommended a manipulation under anesthesia (MUA) to break up scar tissue.

7. Dr. King performed an MUA on December 16, 2019. He noted that the October 2019 TKA was successful from a technical standpoint "but unfortunately, the patient did not go to therapy right away and became extremely stiff, despite going to therapy finally." Before the MUA, Claimant had motion from 20-80 degrees. During the procedure, Dr. King obtained full extension and 135 degrees of flexion.

8. On January 14, 2020, Dr. King's PA-C noted Claimant was not going to therapy as prescribed. Claimant inquired about another MUA. Examination showed Claimant was lacking 30 degrees of full extension and had only 90 degrees of extension. According to Dr. King, the reason Claimant was in this situation was because he was not going to therapy and was not pushing to get his motion back. A repeat MUA would not help without therapy.

9. Claimant followed up with Dr. King on February 11, 2020. His knee was still severely limited despite going to therapy and working with home exercises. He had only 90 degrees of flexion and -20 degrees of extension. Claimant was very frustrated and wanted another manipulation. Dr. King requested authorization for a repeat MUA with arthroscopy to remove scar tissue. Dr. King noted post-op PT would be "critical" to regaining ROM.

10. Dr. William Ciccone II reviewed the surgery request for Respondents. He opined the first MUA was reasonable but a second procedure would probably not be helpful given the prior poor outcome. Dr. Ciccone recommended a second opinion from a fellowship-trained joint replacement specialist to evaluate other factors such as implant position and extensor mechanism function.

11. Dr. King performed an MUA and arthroscopic synovectomy and debridement on February 21, 2020. His report notes that Claimant "did not get into physical therapy right away [after the first MUA] and became extremely stiff once again." Dr. King removed "significant" and "abundant" scar tissue. During the procedure, Dr. King obtained full extension and 125 degrees of flexion "without difficulty at all."

12. Claimant started PT immediately and was given a continuous passive motion (CPM) machine to use at home.

13. Claimant's pain and range of motion slowly improved over the next several months. On July 23, 2020, Claimant had no pain and was "pleased with his progress." He demonstrated 120 degrees of flexion and full extension.

14. At a September 22, 2020 appointment with Dr. King, Claimant was described as "doing very well" and "happy with his recovery." Range of motion testing showed full extension and 110 degrees of flexion "without difficulty." Claimant was a "little bit disappointed that he cannot get full flexion as of yet, but he knows that he need to continue to work on it." Dr. King released Claimant to annual follow up.

15. Claimant had a right knee MRI on December 17, 2020 that showed extensive artifact from the TKA, possible patella baja, and a small joint effusion. No structural issue related to the implants was suggested in the report.

16. Claimant was put at MMI on January 26, 2021 by his ATP, Dr. Thomas Centi. His ROM had decreased to 88 degrees of flexion. Dr. Centi assigned a 37% lower extremity impairment rating, and recommended three years of orthopedic follow up as maintenance care.

17. Respondents filed a Final Admission of Liability (FAL) on February 8, 2021 based on Dr. Centi's report. The FAL admitted for post-MMI maintenance care.

18. Claimant returned to Dr. King on February 25, 2021. His knee was still limiting his activity and "he is not very happy at this point." Claimant had full extension but only 90 degrees of flexion. Dr. King obtained updated x-rays and reviewed them with Claimant, along with the prior films. Dr. King could not see any difference from the

previous x-rays. The prosthesis looked "well aligned" with no sign of loosening or acute pathology. Dr. King suggested additional PT but Claimant was frustrated and did not think therapy would to anything more for him. Claimant wanted to pursue another MUA and arthroscopy because "he needs to get that flexion better." Dr. King noted, "The patient understands that he is very prone to having scar tissue."

19. Dr. King performed the arthroscopy and MUA on March 8, 2021. He again lysed and debrided "significant" scar tissue in multiple areas of Claimant's knee. During the manipulation, Dr. King obtained almost 130 degrees of flexion and full extension with no evidence of instability.

20. Claimant saw Dr. King again on September 16, 2021. His knee was still very stiff despite the multiple manipulations. Dr. King noted, "He did seek a second opinion over at St. Mary's and was told that it might be some overstuffing of his anterior compartment." [1] Dr. King obtained updated x-rays, and compared them to the previous x-rays. The prosthesis was "well placed" with no sign of loosening. Dr. King was unsure if overstuffing was the issue "as much as just significant scar tissue." Claimant requested another opinion, and Dr. King referred Claimant to his partner, Dr. Shane Rothermel, who specializes in revision arthroplasty.

21. Dr. Rothermel evaluated Claimant on September 20, 2021. He saw no obvious cause for Claimant's continued symptoms from physical exam and radiographic imaging. He reviewed multiple x-rays and opined they showed "overall good alignment of components with no evidence of loosening osteolysis or hardware complications." Dr. Rothermel asked Claimant to obtain inflammatory lab work to rule out any concern for infection.

22. Claimant completed the bloodwork, and returned to Dr. Rothermel on September 23, 2021. Dr. Rothermel opined, "I am unable to identify any correctable aspect of his prior total knee arthroplasty." Dr. Rothermel thought the most likely explanation was recurrent scar tissue. He concluded, "I do not believe that I can make him better by revising his knee arthroplasty."

23. Dr. King met with Claimant again on December 2, 2021, and reiterated he saw no surgical solution to Claimant's situation. Claimant was insistent he wanted a revision, so Dr. King referred him for another opinion with a different total joint surgeon.

24. Claimant saw Dr. Centi on December 15, 2021, who concurred with the referral to another specialist. Dr. Centi and/or Dr. King referred Claimant to Dr. David Walden.

25. Dr. Walden evaluated Claimant on January 13, 2022. Claimant explained he had received no sustained benefit from any of the previous procedures, and the ongoing lack of mobility significantly limited his activities. Claimant referenced second opinions from Dr. VanManen[2] and Dr. Rothermel regarding a possible revision TKA. Dr.

[1] Based on information in later reports, the provider was probably Dr. VanManen.
[2] No records from Dr. VanManen were offered at hearing.

Walden reviewed x-rays taken on August 23, 2021[3] and opined, "there may be a rotational abnormality of the femoral component." Dr. Walden called a partner in his practice who specializes in joint replacements and revisions, Dr. William Howarth, to review the images. Dr. Howarth agreed "there appears to be some malpositioning of the components including a rotational problem with the femoral component and an inferior positioning of the patella." He opined Claimant would likely need a revision TKA.

26. Claimant saw Dr. Howarth on February 10, 2022. Dr. Howarth opined the August 23, 2021 x-rays show evidence of internal rotation of the femoral component and a revision TKA was indicated.

27. Claimant saw Dr. Mark Failinger on May 28, 2022 for an IME at Respondents' request. Dr. Failinger found no indication of misalignment based on the physical examination. He noted some mild laxity, which argues against malpositioning of the femoral component. Dr. Failinger opined it is possible but not probable the femoral component is malpositioned. But even if it were malpositioned, is it not probable a revision TKA will improve Claimant's range of motion and function. Dr. Failinger could not corroborate Dr. Howarth's interpretation of the August 23, 2021 x-rays because he did not have access to the images or even the report. However, no such problem was identified on any previous imaging. Dr. Failinger emphasized any misalignment would have occurred at the first TKA because there was no evidence of loosening or shifting of the hardware. Therefore, it should have been visible on all imaging done since the TKA. Dr. Failinger concluded Claimant's pain probably stems from a combination of pre-existing degenerative changes and post-surgical scar tissue.

28. Dr. Howarth testified via deposition on August 10, 2022. He described two "radiographic findings" he believes he can remedy with a revision TKA. The first issue is "apparent" malpositioning of the femoral component. Dr. Howarth opined the malpositioning is subtle and would not necessarily require a revision absent Claimant's clinical presentation. The second issue Dr. Howarth identified is excessive posterior tibial slope. Although the tibial slope is not causing a problem at present, it will inevitably fail in the future. Dr. Howarth testified a revision TKA is the only surgical option that can improve Claimant's condition. He opined doing multiple MUAs would "never work" and "if someone is doing three [MUAs] . . . they don't know what they are doing." Dr. Howarth emphasized a revision TKA is a "very difficult procedure" and would entail a "very difficult rehab" to regain function because Claimant's knee ROM has been limited for several years.

29. Dr. Failinger testified at hearing to elaborate on the opinions in his report and address some of the issues raised in Dr. Howarth's deposition. Dr. Failinger noted Claimant's knee demonstrated full range of motion immediately after the TKA components were installed, and later after each MUA. The ability to move the knee normally while Claimant is unconscious is a strong indicator that the hardware is properly positioned. Given the disagreement between surgeons regarding the x-ray findings, Dr. Failinger recommended a CT scan as the "gold standard in determining whether or not that femoral component is positioned properly." Dr. Failinger agreed the tibial slope angle

[3] The August 23, 2021 x-rays were not offered at hearing.

discussed in Dr. Howarth's deposition may cause premature failure of the TKA in the future, but it has no impact on Claimant's current symptoms or restricted range of motion. Dr. Failinger testified Claimant is predisposed to forming excessive scar tissue, which leads to inflexibility and decreased range of motion. Scar tissue was cited by more than one provider as a likely source of Claimant's symptoms and limitations. Dr. Failinger opined that even if Claimant were to undergo a revision TKA, he will probably still struggle with knee motion because his body will inevitably produce more scar tissue. Dr. Failinger also noted Claimant's underlying diagnosis of rheumatoid arthritis, which is known to cause poor outcomes after a TKA.

30. Claimant failed to prove a revision TKA is reasonably needed to relieve the effects of his injury or prevent deterioration of his condition.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Medical benefits can continue after MMI if necessary to relieve the effects of the injury and prevent deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Surgery can be a permissible form of post-MMI treatment, if it is undertaken for the purposes outlined in *Grover*. *E.g., Shipman v. Larry's Transmission Center*, W.C. No. 4-721-918 (August 25, 2008) (surgery to correct a leg-length discrepancy approved as post-MMI treatment); *Hayward v. UNISYS Corp., supra* (knee surgery may be curative or may be *Grover*-style maintenance treatment designed to alleviate deterioration of the claimant's condition). Even if the respondents admit liability, they retain the right to dispute the reasonable necessity of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The claimant must prove entitlement to specific medical benefits 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).

As found, Claimant failed to prove the revision TKA recommended by Dr. Howarth is reasonably needed to relive the effects of the work injury or prevent deterioration of his condition. There is no doubt Claimant is severely limited by his knee problems and he is quite understandably searching for a solution. The difficult question is whether a revision procedure will probably help. Multiple surgeons have looked at Claimant's situation and reached well-reasoned but conflicting conclusions. Dr. Rothermel and Dr. King saw no correctable abnormality after reviewing multiple imaging studies conducted over several years. No interpreting radiologist suggested a problem either. Dr. Walden and Dr. Howarth looked at different x-rays and saw an issue with femoral rotation. Dr. VanManen apparently saw a different issue (patellofemoral overstuffing), although his report was not offered at hearing. Dr. Failinger did not have the opportunity to review the August 2021 x-rays, but based on the available evidence he concluded a revision TKA probably will not help Claimant. Dr. Howarth and Dr. Walden are no more persuasive than Dr. King, Dr. Rothermel, and Dr. Failinger regarding the need for a revision TKA. Moreover,

regardless of whether femoral malpositioning is contributing to Claimant's symptoms and disability, Dr. Failinger persuasively explained that Claimant's propensity to form scar tissue will significantly hamper his ability to improve after a revision TKA, as will his underlying rheumatoid arthritis. The preponderance of persuasive evidence fails to establish that Claimant "more likely than not" will benefit from a revision TKA.

ORDER

It is therefore ordered that:

1. Claimant's claim for a revision total knee arthroplasty 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: October 19, 2022

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

ISSUES

I. The issue addressed in this decision involves Claimant's entitlement to maintenance medical treatment. The specific question answered is whether Claimant established, by a preponderance of the evidence, that she is entitled to a maintenance medical appointment with Dr. Robert Leland to determine the integrity of the surgical hardware in her right foot and whether he is a candidate for removal of the same.

FINDINGS OF FACT

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

Claimant's November 18, 2019 Injury

1. Claimant works as a teacher for Employer. She sustained an admitted work-related injury on November 18, 2019, when her right foot inadvertently got caught between two desks and she fell forward as she was passing out papers to her students.

2. Claimant testified she experienced "instant" pain and asked to go to the emergency room (ER) for treatment. She presented to the emergency department of Prowers Medical Center where x-rays were taken. X-rays revealed "[n]o evidence of acute or concerning boney abnormality in the right foot or ankle." (Resp. Ex. I, p. 217). Claimant was diagnosed with an acute right foot ligamentous injury but with concern for Lisfranc injury based on the location. *Id.* She was discharged to home with crutches and recommendations to ice and elevate the foot. *Id*. at p. 217-221.

3. On November 26, 2019, Claimant was evaluated during her initial workers' compensation medical appointment by Physician Assistant (PA) Dan Klepacz. Physical examination revealed no swelling, redness or bruising about the right foot. Claimant reported tenderness over the dorsum of the foot, especially over the right 2nd, 3rd, and 4th metatarsals. (Resp. Ex. I. p. 224). She also demonstrated limited dorsi and plantar flexion of the right ankle due to pain. *Id*. Claimant was advised that full healing could take a "couple of weeks". *Id*. She was again advised to ice and elevate the foot frequently and take NSAIDs (non-steroidal anti-inflammatory drugs) as needed and scheduled for a follow-up appointment. *Id.*

4. Claimant returned to PA Klepacz on December 18, 2019 for a follow-up appointment. During this encounter she reported continued pain and daily swelling especially with standing and walking. (Resp. Ex. I, p. 227). Because Claimant's progress had plateaued but was still symptomatic, PA Klepacz referred her to physical therapy for exercise, stretching, and alternative treatment to include ultrasound and dry needling. *Id.* at p. 228. (Rs' Ex. I, p. 215).

5. Claimant returned to PA Klepacz for a follow-up on January 10, 2020. During this appointment, Claimant reported ongoing right foot pain. PA Klepacz referred Claimant to podiatry for evaluation. (Resp. Ex. I, p. 237).

6. Claimant presented to the offices of Dr. Robert Leland at UC Health Foot and Ankle Center for an orthopedic evaluation on January 24, 2020. (Resp. Ex. G, p. 26). Dr. Leland opined that review of Claimant's previously obtained x-rays were "strongly suspicious for widening of her first intercuneiform and intermetatarsal base space consistent with a Lisfranc disruption. *Id*. at p. 26-27. Dr. Leland recommended a weight bearing CT scan to "better delineate [Claimant's] injury". *Id*. at p. 26.

7. CT of the right foot performed February 14, 2020 demonstrated "comminuted fracture fragments involving the base of the second metatarsal with slight widening of the Lisfranc joint with increased distance between the medial cuneiform and the second metatarsal base. (Resp. Ex. G, p. 31).

8. Based upon Claimant's imaging, Dr. Leland diagnosed a right subtle right ligamentous Lisfranc injury. (Rs' Ex. G, p. 36; *see also* p. 40). He noted that Claimant was at "high" risk for continued pain as the displacement seen on imaging would not improve over time. Accordingly, he proposed surgical intervention. *Id.*

9. Claimant underwent an open reduction internal fixation (ORIF) of the right tarsometatarsal disruption, right midfoot arthrodesis, right gastrocnemius recession, and a local bone graft on March 5, 2020. (Resp. Ex. G, p. 48). The operative note included a description of the potential risks of the operation, to include but not be limited to "bleeding, infection, neurovascular damage leading to loss of limb or limb function, malunion, nonunion, *need for hardware removal*, pain or functional limitations despite operative treatment and anesthetic risks". *Id*. (emphasis added). Moreover, the operative note supports a finding that three, 3.5 mm surgical screws were implanted into the right foot as part of the March 5, 2020 procedure. *Id*. at p. 49, 53.

10. Post-operative x-rays were obtained April 16, 2020. (Resp. Ex. I, p. 249). These images showed three threaded screws present from the operation and no evidence of hardware fracture or loosening. *Id.* Following a telemedicine appointment with Claimant on April 23, 2020, Dr. Leland documented that the x-rays taken April 16, 2020, demonstrated "maintenance of hardware and arthrodesis position". (Resp. Ex. G, p. 124). He also opined that there was "early favorable signs of healing across her arthrodesis site". *Id.*

11. Dr. Leland discharged Claimant from his care on May 28, 2020. (Resp. Ex. G, p. 126). Closing x-rays of the right foot showed status post Lisfranc fixation without visualized complication. (Rs' Ex. G, p. 129).

12. On June 2, 2020, Claimant participated in a telehealth visit with PA Klepacz. (Resp. Ex. I, p. 256). During this visit, Claimant denied pain in the foot and reported that

she had completed her physical therapy. *Id.* PA Klepacz noted that Dr. Leland had taken Claimant out of her walking boot, had prescribed some exercises and reported to Claimant that "*there may need to be a screw removal at a later date"*. *Id*. at p. 256 (emphasis added).

13. On June 29, 2020, Claimant presented to her primary care physician ("PCP"), High Plains Family Health Center, for follow up of conditions unrelated to the work-injury. (Rs' Ex. H, p. 135). During the evaluation she reported that her foot was improving following the workers' compensation injury, that she was no longer wearing the walking boot, but that she had some occasional pain with walking. *Id*. Her PCP recommended she inquire into physical therapy under the workers' compensation claim. *Id*. Claimant testified that she continued with physical therapy after the surgery and did well with it. (Hrg. Tr. p, 14, ll. 2-3).

14. Claimant completed additional post-surgical physical therapy (PT) between June 25, 2020 and August 14, 2020. (Resp. Ex. I, pp. 259-277). At her discharge from PT on August 14, 2020, it was documented that Claimant was "doing great" and according to her doctor, "did not need more physical therapy". *Id*. at p. 277.

15. Claimant returned to PA Klepacz on August 21, 2020. (Resp. Ex. I, p. 278). PA Klepacz noted that Claimant had been "doing a lot of activities such as light jogging, hiking, waiting (sic) in a riverbed" and was "functioning at work like she would expect to without any restrictions needed. *Id*. PA Klepacz placed Claimant at maximum medical improvement (MMI) during this appointment, noting that Claimant had no permanent impairment and no permanent work restrictions. (Resp. Ex. I, p. 278). While he indicated that Claimant had no maintenance care needs after MMI, PA Klepacz noted that he "discussed future imaging needs with Claimant should there be any new onset or worsening of pain". Id. at p. 278, 281. PA Klepacz' August 21, 2020 report of MMI and impairment was not countersigned by a physician until September 1, 2020. (Resp. Ex. I, pp. 278-281).

16. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Frank Polanco on February 11, 2021. (Resp. Ex. F, p. 21). After completing a records review and a physical examination, Dr. Polanco agreed that Claimant reached MMI on August 21, 2020. *Id*. at p. 23. He also opined that Claimant had no permanent impairment and did not "require further active treatment or diagnostics", noting specifically that "maintenance care is not required". *Id*.

Respondents' February 23, 2021 Final Admission of Liability and Claimant's March 22, 2022 Application for Hearing

17. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Polanco's DIME opinions. (Resp. Ex. B, p. 2). The FAL is dated February 23, 2021 and was purportedly mailed to Claimant and the Division of Workers' Compensation (Division). *Id.* While the February 23, 2021 FAL was supposedly mailed to the Division, there is no record showing that it was received there. Indeed, after Claimant filed an

Application for Hearing on March 22, 2022, endorsing medical benefits and her request for a "reevaluation" of her permanent medical impairment, the parties attended a prehearing conference (PHC) before Pre-hearing Administrative Law Judge (PALJ) Craig Eley on July 13, 2022. (Resp. Ex. E, p. 16). The PCH was convened to address Respondents' Motion to Engage in Discovery with an Unrepresented Claimant. *Id.* During the PHC, Respondents argued that they needed information from Claimant regarding whether and when she received the February 23, 2021 FAL in order to determine if Claimant's time to request a hearing to overcome the DIME determination regarding impairment had expired. *Id.* Because the DIME process was closed by the Division on February 11, 2021 and Claimant did not file an application ostensibly challenging the impairment rating opinion of Dr. Polanco for more than a year after that closure, Respondents asserted that an order to engage in discovery was appropriate. *Id.* at p. 17.

18. PALJ Eley observed that pursuant to C.R.S. § 8-43-203(2)(b)(II), "Claimant's right to apply for hearing to overcome the DIME opinion arises upon the filing of a Final Admission of Liability by Respondents adopting the DIME opinion. PALJ Eley went on to note that "regardless of whether Claimant ever received a Final Admission, the Division [had] not. Thus, PALJ Eley noted that "[e]ven if a Final Admission [had] been sent to Claimant, unless filed with the Division it is of no effect". (Resp. Ex. E, p. 17). During the PHC, Claimant explained that she did not intend to pursue an effort to overcome the DIME opinion. Rather, she noted that she was seeking an order for maintenance medical benefits. *Id.*

19. PALJ Eley struck the issue of reevaluation of Claimant's permanent impairment as an issue for hearing and determined that the issue of medical maintenance benefits was ripe, despite the lack of an FAL being filed with the Division, based on Respondents' representation that maintenance care was being denied. (Resp. Ex. E, p. 19).

20. The record supports a finding that Respondents did not endorse claim closure in their June 22, 2022 response to Claimant's Application for Hearing nor did they appeal PALJ Eley's July 13, 2022 PHC order. (Resp. Ex. D, E). The evidence presented also supports a finding that Respondents did not move to add claim closure or any other affirmative defense to the claim for maintenance medical benefits as an issue for hearing. Most importantly, Respondents did not object to proceeding to hearing on September 15, 2022 on the issue of maintenance care. Consequently, the ALJ finds that Respondents waived "claim closure" as a defense when challenging the request for maintenance treatment despite Claimant's admission that she received a copy of Respondents February 23, 2021 FAL denying maintenance medical benefits.

Claimant's Treatment With her Primary Care Physician (PCP) Following the February 11, 2021 DIME with Dr. Polanco

21. On April 28, 2021, Claimant presented to her PCP with reports of continued pain in her right foot following her workers' compensation injury. (Rs' Ex. G, p. 153). She

wanted to try something for "chronic pain". *Id.* Physical examination revealed that all extremities moved with full range of motion and there was no appreciable joint tenderness or swelling. *Id*. She was prescribed Duloxetine for her increased right foot complaints. *Id*. at 154.

22. On May 6, 2022, Claimant presented to her PCP and it was noted that she was having significant pain in her hips, thigh, and elbows for which she was seeing a chiropractor and massage therapist. (Rs' Ex. H, p. 163). The pain in her hips was reported to cause her to toss and turn at night and cause deep muscular pain. *Id*. It was further noted that the massage therapy was deep therapeutic massage mainly to the lateral hips and medial thighs, as well as low back and elbows. *Id*. She was diagnosed with pain in the right hip and pain in the left hip. *Id*. at 165. There is no mention of right foot complaints in the report from this date of visit. *Id*.

23. On June 17, 2022, Claimant presented to her PCP for follow up of the hip and leg pain. (Rs' Ex. H, p. 168). It was noted that she had undergone blood tests and x-rays which were essentially normal, and she continued to see the chiropractor and massage therapist but still had pain with movement. *Id*. She reported having gone to Hawaii with the ability to do most things except one of her hikes due to pain. *Id*. Physical therapy for the left hip was recommended. *Id*. Claimant made no mention of right foot complaints. *Id*.

24. On August 12, 2022, Claimant presented to her PCP for follow up of the hip pain. (Rs' Ex. H, p. 211). It was reported that she had approximately seven-week history of left hip pain for which she was seeing physical therapy. *Id*. During this visit it was noted that Claimant reported increasing right foot pain and her surgeon previously indicated that due to having small bones she may need to have the screws removed a couple of years after surgery. *Id*. It was noted that over the last couple of months she had increased pain and numbness in her right foot that was limiting her ability to hike and go down stairs. *Id*.

25. During the August 12, 2022, visit with her PCP, Claimant reported that approximately two weeks prior she was lifting a kayak and pulled her groin muscles for which she had to take a muscle relaxant with significant improvement. (Rs' Ex. H, p. 211). It was further reported that Claimant stated she may have a hip labral tear, possibly bilateral, for which a bilateral hip MRI was recommended. *Id*.

Claimant's Hearing Testimony

26. At hearing Claimant testified that since her February 11, 2021 DIME with Dr. Polanco, the condition of her right foot has worsened. She reported increasing pain and testified that she has "[d]aily pain, swelling, and [a] decrease in ability to do activities, and increased pain in work activities". (Hrg. Tr. p. 15, ll. 9-23). Claimant testified that she was having increasing difficulties with activities that require her to put extra weight on her right foot, including hiking, basic walking, paddle boarding, housework, ascending/descending stairs and performing yardwork that required repetitive any repetitive bending up and down movements. (Hrg. Tr. p. 16, ll. 3-6).

27. During cross-examination, Claimant testified that while Dr. Leland discharged her from his care without the need for follow-up visits, he indicated that she may need a screw removal at a later date. (Hrg. Tr. p. 23, ll. 9-17). She also agreed that by his report, Dr. Polanco did not recommend maintenance treatment. (Hrg. Tr. p. 24, ll. 6-8).

28. Claimant disagreed with Respondents' contention that "no medical provider has determined that you actually need hardware removal", testifying: "I have not been approved to see the surgeon, so I have not gotten that message from him". (Hrg. Tr. p. 28, ll. 2-5). In response to the question of whether her PCP recommended hardware removal, Claimant responded: "That's not her expertise, so she has not even discussed that. She referred me to see Dr. Leland". *Id.* at ll. 6-9. Nonetheless, Claimant did not produce a medical record evidencing that her PCP recommended she follow up with Dr. Leland or orthopedics.

CONCLUSIONS OF LAW

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

Generally

A. 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). A 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.

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

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion

of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Maintenance Medical Benefits

D. A claimant is entitled to ongoing medical benefits after MMI if he/she presents substantial evidence that future medical treatment will be reasonably necessary to relieve the claimant of the effects of the injury or prevent deterioration of the his/her condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995). When the respondents challenge a request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits by a preponderance of the evidence. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015).

E. 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.* In announcing its decision in *Grover*, the Court stated that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Subsequent Courts have indicated that ongoing medical treatment can be ordered if a claimant's condition can be expected to deteriorate so that greater disability results in the absence of such care. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo.App. 1995). Indeed, in *Milco,* the Court of Appeals refined the test for awarding maintenance medical benefits by noting that irrespective of its nature, maintenance treatment "must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Milco Construction v. Cowan, supra*. If the Claimant reaches this threshold, the Court in *Milco* stated that the ALJ should then, as a second step, enter a "general order similar to that described in Grover." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she 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).

F. In this case, Respondents argue principally that Claimant failed to demonstrate that any need for continued treatment directed to the right leg/foot is causally related to her November 18, 2019 industrial injury. Rather, Respondents seemingly argue that Claimant's current need for treatment, including any treatment directed to the right foot is related to her onset of non work-related hip and thigh pain. Indeed, Respondents note as follows:

> [Claimant's] chiropractic treatment and massage therapy were prescribed in response to the onset of Claimant's hip and thigh pain complaints. In fact, it was not until three months after the onset of hip and thigh pain that Claimant first reported right foot pain. By that time, she had been receiving chiropractic treatment and massage therapy specifically focused on the lateral hips and medial thighs for approximately three months. The record does not support a causal connection between Claimant's alleged right foot pain and these treatments, nor does it support the relation of these treatments to Claimant's alleged right foot pain complaints. Claimant cannot use treatment rendered to two unrelated body parts as support for her claim that she has treated for alleged right foot symptoms.

Based upon the evidence presented the ALJ is not persuaded that Claimant is attempting to "use" the treatment directed to her bilateral hips/thighs, i.e. two non work-related body parts to justify her claim for a maintenance medical appointment with the authorized surgeon in this case. While Claimant testified that she believes her increasing right leg/foot pain and functional decline are related to her November 18, 2019 industrial injury, the evidence presented persuades the ALJ that Claimant made it clear that her hip pain is unrelated to that injury. The ALJ credits Claimant's testimony to conclude that her condition of her right foot has worsened since her surgery and DIME appointment. The ALJ is convinced that Claimant is probably experiencing daily swelling and increased pain/difficulty with activities that require her to put extra weight on her right foot, due to the deteriorating nature of her right foot condition.

G. Based upon the evidence presented, the ALJ is convinced that Claimant's reoccurring right lower extremity pain and functional decline is likely emanating from and in part caused by her November 18, 2019 right foot injury. While it is clear that Claimant's bilateral hip pain may be impacting her functional abilities, her increasing right foot pain, which is impinging on her ability to engage in weight bearing activities combined with the indication that she is at risk for a hardware removal supports a conclusion that there is a periodic need to monitor (evaluate) the condition of Claimant's right foot. Because the ALJ is convinced that Claimant's persistent and worsening right leg/foot pain is related to her November 18, 2019 industrial injury and because her PCP is not an orthopedist who has opined regarding the cause of Claimant's persistent and worsening right foot pain,

the ALJ finds Claimant's request to return to Dr. Leland for further evaluation reasonable and necessary.

H. In this case, the ALJ concludes that there is substantial evidence in the record to support an ongoing need to assess and if necessary, treat the injuries Claimant sustained during his admitted claim. As noted, without such evaluation, the ALJ is convinced that Claimant's present condition will likely deteriorate further resulting in greater functional decline. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that she is entitled to a follow-up examination with Dr. Leland to assess the integrity of the surgical hardware used to treat her work-related Lisfranc fracture and otherwise address/prevent further deterioration of her condition. Respondents retain the right to challenge any/all treatment recommendations, including a request for hardware removal on the grounds that the recommended treatment is no longer reasonable, necessary or related to Claimant's November 18, 2019 industrial injury. *See*, *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003).

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary post-MMI medical treatment from authorized providers to relieve Claimant from the ongoing effects of her industrial injuries and/or prevent deterioration of her condition, including authorization of a follow-up medical appointment with Dr. Leland.

2. Respondents retain the right to challenge future requests for maintenance treatment on the grounds that such care is maintenance in nature, is not reasonable, necessary or related to Claimant's November 18, 2019 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

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: October 19, 2022

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-204-318-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on July 1, 2021.

II. If found compensable, whether Claimant is entitled to temporary disability benefits.

III. If found compensable, whether a penalty of one day of indemnity benefits for each day Claimant did not report a work injury should be found.

IV. If found compensable, whether Claimant is entitled to a general award of medical benefits and whether the treatment Claimant received at Salud Clinic, and its referrals, is authorized.

V. If found compensable, the appropriate average weekly wage.

FINDINGS OF FACT

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

1. Claimant is a 65-year-old, Spanish speaking man, who worked for Employer, a plant nursery, for approximately 30 years, full time and then seasonally in 2020 and 2021. The last day he worked for Employer for the 2021 season was September 24, 2021. *Ex. F, 61, 68, 73, 76.*
2. Claimant's performed irrigation work. He would complete this work by using a tractor, hoe, and shovel.
3. Following his departure at the end of the 2021 season, Claimant claimed and received unemployment benefits. *Ex. F, 69; Test. Cl.* In January 2022, he represented to the unemployment office that he intended to return to his employment and asked for an exception and waiver of his work search requirement. *Ex. F, 67*. In early spring, 2022, Claimant contacted his supervisor, Mr. TG[Redacted], and told him he was having trouble with unemployment. *Test. of TG[Redacted] and Claimant.* In early April 2022, Mr. TG[Redacted] told Claimant that he did not have a position for him at that time. On May 3, 2022, approximately 10 months after his alleged injury, Claimant filed a claim for workers' compensation, stating that he sprained his low back digging irrigation on July 1, 2021, at 11:00 a.m. *Ex. N, 103.*
4. In April 2022, Claimant began drawing social security retirement benefits. *Ex. 8, 75.* He testified that he did not intend to go back to work.
5. Claimant testified that on July 1, 2021, he was shoveling for irrigation and experienced a

back injury. He testified that he told his supervisor, Mr. TG[Redacted], that his back was bothering him and that he had made an appointment to be seen at the clinic. He did not, however, tell Mr. TG[Redacted] that he suffered a work injury. Claimant testified that on July 2, 2021, he went to his PCP Salud Family Health Centers, and was provided a letter with restrictions. *CL's Ex. 4, Bates 30.* He testified that he took that letter to Mr. DZ[Redacted], the General Manager, with his son and gave it to Mr. DZ[Redacted]. Claimant contends that that was his report of a work injury. He testified that he did not say anything to Mr. DZ[Redacted] at all during this meeting, because the letter speaks for itself. The letter, however, makes no reference to a work-related injury. It says, "Please be aware [Claimant] is currently being treated for lumbago that affects the right lower extremity. At this time, recommend [Claimant] to avoid activities that worsen current symptoms. Also recommend light duty and avoid heavy lifting/pushing or pulling for the next 4-6 weeks."

6. During his testimony, Claimant denied complaining to a medical provider that he has had back pain for five years. This testimony, however, is in direct conflict with the medical record from May 2022 that documents Claimant has had back pain since about 2017 and that his back pain had been getting worse since about 2019. *Ex. E, p. 13.*

7. Claimant testified that he gave Employer the July 2, 2021, letter issued by Diana Kessel, PAC, that set forth his work restrictions. Based on the credible and persuasive testimony of Mr. TG[Redacted], and Mr. DZ[Redacted], as set forth below, the ALJ finds that Claimant did not give Employer the July 2, 2021, letter that set forth his restrictions.

8. Two witnesses from Claimant's employer, Mr. TG[Redacted] and Mr. DZ[Redacted], testified. Mr. DZ[Redacted] testified that Employer is a tree nursery and employed seasonal and full-time workers such as Claimant. He testified that Claimant had worked for the company for several years and that Claimant received unemployment benefits in the off season in 2020 and 2021. He also testified that when Claimant had issues he wanted to discuss with him, Claimant would bring his son in to translate and they would have a meeting. Claimant did not hesitate to arrange for these meetings when he apparently felt it was important. Mr. DZ[Redacted] testified that Claimant did not at any time meet with him and report a work injury. Claimant did, however, meet with Mr. DZ[Redacted] and discuss retirement. Mr. DZ[Redacted] testified, contrary to Claimant, that Claimant did not meet with him and provide him the letter seen at *Ex. 4, 30*. Mr. DZ[Redacted] had not seen that letter before the hearing. The ALJ finds Mr. DZ[Redacted]'s testimony to be credible and persuasive.

9. Mr. TG[Redacted], who speaks Spanish, was Claimant's supervisor. Mr. TG[Redacted] testified that Claimant never informed him of a back injury. He testified that on July 1, 2021, Claimant did tell him that walking over uneven or muddy ground hurt his leg. Claimant therefore asked not to do particular things at work. Mr. TG[Redacted] accommodated this request and assigned Claimant to driving the tractor. Mr. TG[Redacted] was not informed of a back injury or of a work-related injury. Mr. TG[Redacted] testified he was not provided any written letter regarding restrictions for Claimant. He further testified that Claimant worked the entire 2021 season, ending in late September 2021, working his regular hours on the tractor and doing other things, based upon Claimant's indication of what he preferred to do and what hurt him. According to Mr. TG[Redacted], Claimant did not at any time during the rest of his time working that

season report a work injury or a back injury to Mr. TG[Redacted]. Mr. TG[Redacted] testified that Claimant did not request medical treatment for a work injury. But, Claimant did call and speak to Mr. TG[Redacted] sometime in February of 2022, asking when work would start, and represented that he was ready to work. He did not report a work injury at that time either. Mr. TG[Redacted] also spoke to Claimant in March or April of 2022, when again Claimant represented he was ready to work. He did not, however, report a work injury during this phone call. Mr. TG[Redacted] told Claimant that the nursery was at a stage in the season where Claimant's preferred work was not available yet. Claimant was not brought back to work at that time and his workers' compensation claim followed. Based on his interaction with Claimant, at no time did Mr. TG[Redacted] get the impression that Claimant was contending that he hurt himself at work – until Claimant filed a claim in 2022. The ALJ finds Mr. TG[Redacted]' testimony to be credible and persuasive.

10. Both Mr. TG[Redacted] and Mr. DZ[Redacted] credibly testified that the required notification regarding workers' compensation reporting was posted in the greenhouse and the office where meetings took place. This was not disputed by Claimant.

Medical Treatment and Records

11. On June 18, 2021, Claimant presented to his PCP at Salud Family Health Centers. At this visit, Claimant complained of having 2 weeks of back pain on the right with pain radiating down the back of his leg. Thus, his symptoms started almost one month before his alleged work injury of July 1, 2021. At this visit, Claimant also stated that there was no fall or injury, but he "thinks he tweaked [his back] at work picking up a heavy object." Claimant was diagnosed with acute right-sided low back pain with right sided sciatica. X-rays were also taken and showed signs of arthritis in his lower back. Based on Claimant's complaints and presentation, he was prescribed physical therapy for 6-12 weeks. Absent from this report is any indication that he hurt his back doing irrigation work with a shovel. Moreover, the medical report indicates that Claimant merely said that he 'thinks" he injured himself at work. *Ex. E, pp. 29-32.*

12. On July 2, 2021, Claimant returned to his PCP complaining of back pain. At that time, however, he had already been in treatment through Salud Family Health Centers for back complaints which began around June 4, 2021. He already had had an x-ray and his doctor had called him to let him know that he had arthritis in his back. *Ex. E, pp. 32, 33.* Absent from this report is any indication Claimant stated that he injured his back the day before doing irrigation work and working with a shovel. At this visit, his PCP recommended Claimant continue taking his medications and also issued restrictions which included avoiding heavy lifting, pushing, and pulling for the next 4-6 weeks. *Ex. E, pp. 33, 34; Ex. 4, p. 30*.

13. After the July 2, 2021, medical appointment, Claimant underwent PT and indicated that his back was better. *Ex. E, p. 38*.

14. On October 13, 2021, after being laid off from work, Claimant returned to his PCP and indicated that his right sided back pain and sciatica had returned. He also indicated that his back pain returned after he performed his physical therapy. But, he also stated that his back pain was better when he was not working. *Ex. E, p. 38*.

15. On November 30, 2021, Claimant returned to Salud Family Health Services. At this appointment, Claimant treated for a UTI, and underwent a urinalysis. Claimant did not complain of back or leg pain at this visit. *Ex. E, pp. 45-47*.

16. On March 30, 2022, Claimant returned to Salud. At this appointment, Claimant sought additional medical treatment for his back and leg pain which continued to worsen. At this appointment, it was noted that Claimant's condition continued to worsen and that he now had pain radiating down to his calf area and that these symptoms occurred more frequently. Thus, Claimant's condition continued to worsen – despite the fact that he had not worked since September 2021.

17. Dr. Reiss was retained by Respondents to perform an independent medical examination (IME). Claimant showed up for the evaluation, but without an interpreter. Dr. Reiss, or Respondents, were ultimately able to arrange for an interpreter, but Claimant had already left and refused to return to his office to complete the IME with an interpreter. As a result, Dr. Reiss performed a medical records review and set forth his opinions in his report. Dr. Reiss also testified at hearing and was qualified as an expert in orthopedics. The opinions set forth in his report are consistent with his testimony.

18. In his report, Dr. Reiss noted a number of discrepancies in Claimant's medical history when compared to Claimant's contention that he injured his back on July 1, 2021, while digging with a shovel. Dr. Reiss noted the following:

    - The June 18, 2021, medical report demonstrates a history of back pain starting in early June. The history provided in the report does not correlate well with Claimant's claim of injuring himself while digging. The complaints of back pain significantly predate his claimed injury of July 2021.
    - The July 2, 2021, report does not appear to mention a work injury.
    - The July 2021, physical therapy records appear to demonstrate that Claimant became asymptomatic.
    - The October 13, 2021, medical report seems to demonstrate that Claimant was sent to physical therapy to treat his back pain that started in June of 2021, and that the physical therapy in July resolved Claimant's complaints.
    - The March 30, 2022, report demonstrates episodes of right low back pain worsening over time, but yet there does not appear to be any mention of a work-related injury.
    - The medical records demonstrate Claimant's back condition is long standing, chronic, and preexisting.

    Ex. A, pp. 1-4.

19. Dr. Reiss ultimately concluded that Claimant's current diagnosis is most likely low back pain associated with degenerative disc disease of the lumbar spine with some degree of spinal stenosis and possible neurogenic claudication – all of which were preexisting and not related to Claimant's work. The ALJ finds Dr. Reiss' opinions and conclusions that Claimant's low back pain, need for medical treatment, and disability, was not caused by his work activities to be credible and persuasive.

Ultimate Findings of Fact

20. Based on the totality of the evidence, Claimant's testimony is not found to be credible.

21. Claimant has had ongoing low back pain since 2017.

22. Claimant's back pain started to worsen in 2019.

23. On approximately June 4, 2021, approximately one month before Claimant's claimed work injury, Claimant's back pain continued worsening and he developed pain radiating down his leg.

24. On June 18, due to his back and leg symptoms that started around June 4, 2021, Claimant went to Salud for medical treatment to address his worsening back and leg pain.

25. Claimant returned to Salud Family Health Services on July 2, 2021, for ongoing back pain with radiation down his leg. Claimant was evaluated and provided work restrictions. The report from this visit does not indicate Claimant injured his back while performing irrigation duties while digging at work. Moreover, despite Claimant's testimony to the contrary, the ALJ finds that Claimant did not provide the July 2, 2021, letter from Diana Kessel that set forth Claimant's restrictions to Employer or report a work injury.

26. After Claimant stopped working for Employer in September 2021, Claimant's condition still continued to worsen.

27. Claimant failed to establish by a preponderance of the evidence that his need for medical treatment was caused by his work activities. Claimant also failed to establish by a preponderance of the evidence that the restrictions and resulting disability was caused by his work activities.

28. Claimant also failed to establish by a preponderance of the evidence that his work activities aggravated a preexisting condition and necessitated the need for medical treatment or caused any disability.

29. Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable injury on July 1, 2021.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to carry his burden to prove by a preponderance of the evidence that he suffered a compensable work injury. Claimant did testify consistent with his claim for compensation, alleging a specific injury occurring while shoveling at a specific time on a specific day: July 1, 2021. Claimant also contends that he reported an injury that day and asked for treatment, but Mr. TG[Redacted] credibly denies a report of a work injury occurred. Mr. TG[Redacted] credibly testified that Claimant made him aware that his leg hurt when he did particular things. But Claimant did not report a back or work injury. Mr. TG[Redacted] did not understand him to ever be complaining of a back issue, let alone a work-related injury. Claimant was allowed to avoid work that gave him difficulty and to do the type of work that he preferred. Claimant had been working for this employer for many years, is an older worker, and that accommodation, unrelated to any work injury, makes sense.

As found, on July 2, 2021, Claimant reported to his personal medical provider and did not give any report of a work injury. By then, he had already been seen for back pain that had worsened around June 4, 2021, had x-rays taken, and had been notified by his PCP that he had arthritis in this back. Moreover, Claimant had reported that he had experienced problems with his back for 5 years. Plus, if Claimant had reported a specific injury, the medical records would not read as they do.

Mr. TG[Redacted] allowed Claimant to do the things that did not bother his leg, and Claimant finished the season with regular pay. Claimant is 65 years old and has a degenerative back, which hurts with and without activity, and has continued to worsen – even after he stopped working for Employer.

The ALJ finds and concludes that Dr. Reiss' ultimate opinion is that Claimant did not suffer a work-related injury and that his back and leg pain is due to a degenerative back condition that has continued to degenerate, without any contribution from Claimant's work. The ALJ has credited and found persuasive the opinion of Dr. Reiss because the ALJ finds and concludes that his opinion is consistent with, and supported by, Claimant's medical records.

The ALJ has considered whether Claimant's work activities caused a new and discrete injury or whether they aggravated his preexisting back condition. The ALJ finds and concludes that his work activities did not cause his back condition in the form of a discrete injury, or aggravate his preexisting back condition, and cause the need for medical treatment or cause any disability.

Based upon the totality of the evidence, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable work injury.

ORDER

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

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

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

DATED: October 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. Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of his claim.

II. Whether Claimant established that the uninsured Employer is subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's May 12, 2020 order, specifically for failing to cover reasonable, necessary, and related medical care to cure and relieve the effects of Claimant's compensable injury, and pay temporary total disability (TTD) benefits and interest on all TTD owed and not paid when due.

FINDINGS OF FACT

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

1. This claim has been the subject of a prior hearing held before ALJ Patrick Spencer on March 12, 2020. The issues presented at that hearing included compensability of an alleged September 7, 2019 injury and whether Claimant was entitled to reasonably necessary medical benefits and lost wage benefits, i.e. temporary total disability (TTD) commencing September 7, 2019.

2. Despite proper notice, Employer failed to appear for the March 12, 2020 hearing. Accordingly, ALJ Spencer took Claimant's testimony at the March 12, 2020 hearing and issued an Order to Show Cause to Employer. Employer did not respond to the show cause order prompting ALJ Spencer to issue his order on May 12, 2020. As part of his May 12, 2020 order, ALJ Spencer found Claimant's September 7, 2019 injury compensable and ordered Employer to "cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury." ALJ Spencer also ordered Employer to pay "Claimant $6,200 in TTD benefits from September 8, 2019 through May 12, 2020" and "$175 per week in TTD benefits commencing May 15, 2020 and continuing until terminated by law." Finally, ALJ Spencer ordered Employer to pay interest on all past due TTD.

3. The ALJ adopts ALJ Spencer's Findings of Fact, as articulated in the May 12, 2020 order, as follows:

   a. Employer hired Claimant in August 2019 to tear off and re-cover a 1500 square foot roof on a customer's home. Employer told Claimant it was a "simple" one-layer job.

   b. Employer agreed to pay Claimant $35 "per square" to tear off and replace the roof. A "square" is 100 square feet of roof, so there were

15 “squares” in the 1500 square foot roof. Claimant estimated it would have taken two weeks to complete the job had it been a single-layer roof as anticipated.

c. When he got on the roof and started the job, Claimant realized there were four layers of existing roof to tear off.

d. Employer was supposed to supply the materials for the project and stock them on the roof. Employer also told Claimant he would provide a worker to help with the project. Employer provided a helper the first day, but after that, Claimant was left to finish the job by himself.

e. Claimant worked on the project for a couple of days but his progress was stymied by weather. Then a representative from Regional Building came and shut the project down because Employer had not pulled a permit.

f. Two days later, Employer called and informed Claimant he had secured the building permit and work could resume.

g. Employer stopped responding to Claimant’s calls after that. The homeowners also tried to reach Employer without success. They had paid Employer $3,200 for materials, but he had not brought materials to the job site. Repeated heavy rains were causing leaking into the home, so Claimant used his personal funds to buy materials to cover the roof. The homeowners then gave Claimant additional money so he could purchase the materials needed to finish the job.

h. Claimant purchased the materials and loaded them onto the roof by himself because Employer provided no one to help him. Throughout the project, Claimant struggled to move roofing materials and complete repeated trips up and down the ladder. He developed progressively worsening low back and leg pain during the project as a direct and proximate result of the physically demanding work. The lack of help during the project probably contributed to Claimant’s injury.

i. Employer appeared at the job site on September 7, 2019, when Claimant was almost finished with the project. Claimant informed Employer he could not keep working because of his severe low back and leg pain. Employer took over work on the project.

j. Claimant filed a Workers’ Claim for Compensation form on September 20, 2019. He mailed a copy to Employer.

k. On October 15, 2019, Employer appeared at Claimant’s home and berated him for filing a workers’ compensation claim. He told

Claimant, “You are not getting anything.” Employer never paid Claimant for his work on the project.

l. Employer never referred Claimant to a physician for treatment.

m. In December 2010, Claimant sought treatment for his back pain at the VA Rocky Mountain Regional Medical Center. He underwent x-rays on December 10, 2019, but the results are not in the record. Claimant was referred for a lumbar MRI and a physical medicine evaluation before he could have a surgical consultation.

n. Claimant proved he was performing services for pay for Employer when he was injured. There is no persuasive evidence he was free from direction and control or customarily engaged in an independent trade or business related to the service provided.

o. Claimant proved he suffered an injury to his low back arising out of and occurring within the course and scope of his employment for Employer.

p. The right to select a physician passed to Claimant and he selected the VA Medical Center.

q. Under the terms of hire, Claimant would have been paid $525 for the roof project. Claimant estimated it would have taken two weeks to complete the project. Claimant’s AWW is $262.50 ($525 ÷ 2 = $262.50). This equates to a weekly TTD rate of $175 and a daily rate of $25.

r. Claimant proved he is entitled to TTD benefits commencing September 8, 2019 and ongoing. Claimant stopped work on September 7, 2019 because of the effects of the work injury. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

s. The total past-due TTD is $6,200 through the date of this decision. The total accrued statutory interest is $161.58 through the date of this decision. TTD will continue to accrue at the rate of $175 per week until terminated by law. Interest will continue to accrue at the rate of $1.39 per day until the past-due TTD is paid in full.

t. Employer must pay an additional $1,550 to the Colorado Uninsured Employer Fund because it was uninsured at the time of Claimant’s injury ($6,200 x 25% = $1,550).

u. Employer knew Claimant had to stop working because of the injury on September 7, 2019. Employer was required to formally admit or deny liability no later than Monday, October 7, 2019. Employer never

filed an admission of liability or notice of contest with the Division of Workers' Compensation.

v. Employer should be penalized $25 per day, from October 7, 2019 through the date of this decision (May 12, 2020), for failing to admit or deny liability.

4. Claimant testified that after the May 12, 2020 order of ALJ Spencer was issued, he filed a new application for penalties because Employer never paid his lost wages as ordered. (Clmt's. Ex. 2). Claimant filed his Application for Hearing on April 15, 2022; more than a year after ALJ Spencer's May 12, 2020 order was issued. *Id.* Claimant sent a copy of the Application for Hearing to Employer's address on file with the OAC, namely: 1819 West 22nd Street, Pueblo, Colorado 81003. This is the same address that the prior May 12, 2020 and Show Cause orders were sent to without response by Employer. There is no indication that the prior mailings were undeliverable and returned to sender. Accordingly, the ALJ finds that Claimant's April 15, 2022 Application for Hearing was probably delivered to Employer as was the prior May 12, 2020 Order of ALJ Spencer.

5. Based upon the evidence presented, the ALJ finds that Employer has made no effort to abide by the May 12, 2020 order of ALJ Spencer. Similar to his non-appearance for hearing on March 12, 2020, Employer failed to appear for the August 11, 2022 hearing despite proper notice. Moreover, he did not respond to either Show Cause Order. Based upon the evidence presented, the ALJ finds that Employer has elected to ignore the proceedings and the prior orders of ALJ Spencer. Indeed, the evidence presented, including Claimant's testimony supports a finding that Employer has failed to perform a duty lawfully mandated within the time prescribed by ALJ Spencer, namely the payment of TTD as ordered. Accordingly, for the reason set forth below, the ALJ finds that the imposition of penalties is appropriate in this case.

CONCLUSIONS OF LAW

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

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

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

II. Penalties

C. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo.App. 1995). If the ALJ finds a violation, the ALJ must then determine whether the insurer or employer's actions, which resulted in the violation, were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App. 2003). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

D. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order, which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v.*

Hewuse, 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004). Employer did not assert that any alleged penalty had been cured. Indeed, Employer failed to respond in any fashion to ALJ Spencer's May 12, 2020 order or Claimant's April 15, 2022 Application for Hearing despite those documents being served on Employer's address of record.

E. In this case, Claimant has asserted penalties pursuant to § 8-43-304(1) for Employer's failure to follow ALJ Spencer's May 12, 2020 order requiring payment of, among other things, lost wage benefits. (Clmt's Ex. 2). As noted, a violation of an order occurs when a party authorized or obligated to perform performs an action prohibited by the order, or fails to take an action required by the order. *See Dworkin, Chambers and Williams, P.C. v. Provo,* 81 P.3d 1053, 1058 (Colo. 2003). Before analyzing Claimant's penalty claim, the ALJ notes that ALJ Spencer's May 12, 2020 order became final on June 1, 2020 as Employer did not appeal it. Moreover, the evidence presented supports finding that Employer has failed to follow the order to date. Accordingly, the asserted penalty is ongoing.

F. In this case, the Application for Hearing filed April 15, 2022, specifically notes that Claimant was seeking penalties beginning "May 12, 2020 and ongoing pursuant to § 8-43-304(1) for failure to "[respond] to the order by ALJ Spencer to pay benefits. Although Claimant did not indicate the rate at which he requested penalties be paid, he did indicate that he was seeking penalties pursuant to § 8-43-304(1), which provides that penalties for refusing to obey lawful orders shall be punished by a fine of not more than $1,000.00/day. Based upon the evidence presented, the ALJ concludes that the basis for Claimant's penalty assertions was sufficient, pursuant to § 8-43-304(4), to place Employer on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's May 12, 2020 order, specifically that portion which required Employer to pay TTD benefits.

G. Based upon the totality of the evidence presented, the ALJ concludes that Employer violated ALJ Spencer's May 12, 2020 order requiring the payment of TTD benefits. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation, which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). As ALJ Spencer's May 12, 2020 order did not become final until June 1, 2020, the imposition of penalties extends from June 2, 2020 and is ongoing.

H. While the evidence presented supports that a violation of ALJ Spencer's May 12, 2020 order occurred for failure to pay TTD benefits, it is necessary to analyze whether Claimant filed his request for penalties timely and whether Employer's failure to pay TTD was objectively unreasonable. Here the evidence presented establishes that Claimant filed his Application for Hearing requesting penalties in excess of one year after the date that he reasonably should have known of the facts giving rise to the penalty.

Indeed, Claimant did not file his request for penalties for approximately 23 months after ALJ Spencer issued his Order. Claimant was represented by Counsel at the time the May 12, 2020 Order was issued. Accordingly, the ALJ finds it reasonable to infer that his counsel would have advised him regarding the potential repercussions; including the imposition of penalties should Employer fail to abide by the Order shortly after it was issued.

I. Section 8-43-304(5) provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5) constitutes a statute of limitations. *Spracklin v. Industrial Claim Appeals Office, supra.* While the ALJ is convinced that the "statute of limitations" probably ran out before Claimant filed his Application for Hearing, Employer failed to respond to the request for penalties. Indeed, review of the file materials finds them devoid of any response to the claim for penalties. Raising the statute of limitations is an affirmative defense that is subject to procedural waiver if not explicitly plead and proven in a timely fashion. *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995); *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Based upon the evidence presented, the ALJ is convinced that Employer waived any statute of limitations defense by not filing any response to Claimant's request for penalties. Moreover, the ALJ concludes that Employer has unreasonably failed to cooperate in the proceedings by failing to appear for hearing despite proper notice or respond to two separate Orders to Show Cause for his failure to appear. Based upon the evidence presented, the ALJ concludes that Employer has consciously decided to ignore the claim in hopes that Claimant will tire of the matter and cease all efforts to recover under the claim. Accordingly, the ALJ finds and concludes that Employer's actions in failing to follow the May 12, 2020 order of ALJ Spencer are objectively unreasonable.

ORDER

It is therefore ordered that:

1. Employer shall pay to Claimant a penalty in the amount of fifty ($50.00) dollars per day beginning June 2, 2020 and continuing through the date of this order, October 3, 2022, for a total of 853 days for $42,650.00 in penalties. The assessment of penalties shall continue beyond October 3, 2022 at the same rate until such time that the temporary total disability and interest payment ordered May 12, 2020 by ALJ Spencer is paid.

2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

3. All issues not decided 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: October 3, 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. 5-183-987-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable accidental injury or occupational disease.

II. If compensable, whether Claimant proved by a preponderance of the evidence that the medical treatment he received was reasonable, necessary, and related to his to his work injury and whether he is entitled to a general award of medical benefits.

III. If compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits.

PRELIMINARY ISSUES - STIPULATIONS

- The parties stipulated that they are reserving a determination of the Claimant's average weekly wage. If the case is found compensable the parties agreed to confer on the time period for temporary partial disability or temporary total disability benefits.
- Though penalties were initially endorsed on Claimant's January 5, 2022, Application for Hearing, Claimant asserted at hearing that penalties were no longer being sought.

FINDINGS OF FACT

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

1. Claimant is a 59-year-old Package Driver for [Employer] in Boulder, Colorado. *RHE A.* [EMPLOYER] employed Claimant since January 19, 2015. *Id.*
2. On a typical workday, Claimant would arrive at the Boulder [Employer] center about 8:30 in the morning. Upon his arrival, his truck would be pre-loaded with packages that have to be delivered that day. Claimant works as a "swing" driver, meaning he is assigned different routes by [Employer], but works full-time. Claimant's truck on average would have 250-300, but sometimes up to 700, packages at the start of his shift. Claimant would spend the first part of his day quickly re-organizing the packages in the truck to conform to his delivery route. Because of the number of packages that have to be delivered, [Employer] puts a lot of pressure on drivers to get their routes done quickly, but 9 to 10-hour days were not uncommon. Claimant delivered packages that weighed up to 150 pounds maximum and that 70-to-100-pound packages of various shapes were not uncommon. Packages were packed all the way to the back of the truck which was 700 to 1,000 square feet in size. *Hrg.Tr*. 19:22 to 21:7, 22:15 to 23:11, and 23:16 to 24:1.

3. During the years that Claimant worked for Employer he had experienced pain when moving boxes, but he would ordinarily continue working and usually the problem subsided. *Hrg.Tr*. 24:2-14.

4. Claimant testified that he felt a left wrist twinge while working that he felt worsened rather than improved, and that his best estimate of the date this occurred was July 29, 2021 – because it took the wrist pain awhile to worsen to the point that he reported it to his supervisor and obtained treatment. *Hrg.Tr*. 14:17 to 25:4, 27:5-8, and 29:9-16.

5. Claimant reported a left wrist injury on September 15, 2021. He stated that the left wrist "just started hurting." *RHE A; Tr. 41:22-25.*

6. The First Report of Injury was completed by Employer and lists September 16, 2021, which is the first date Claimant received medical treatment, as the date of first reporting. *CHE 3*.

7. Claimant at first did not provide a specific mechanism of injury, date, or time as to the occurrence of the condition.

8. On September 16, 2021, Claimant sought treatment at Concentra Medical. *RHE I.* He reported to PA Devon Jacobs that he was uncertain as to the cause of his left wrist pain and offered no specific mechanism of injury. Claimant merely felt the condition may have been related to job duties. *Id.* Claimant denied any specific injury, fall, or trauma and described the gradual onset of aching discomfort. *Id.* There was no mention of him feeling a twinge in his wrist while working and then it not getting better. Following a physical exam, an x-ray of the left wrist was performed and was negative for fracture or acute findings. *Id.* Claimant was diagnosed with osteoarthritis of the left wrist and work-related causality was not established by the Concentra provider. Thus, Claimant was referred to his PCP or an orthopedist under his private insurance for further evaluation and treatment. *Id.*

9. Later that same day, on September 16, 2021, Claimant was seen by Kathleen Jegapragasan, M.D. at Boulder Centre for Orthopedics. Dr. Jegapragasan reviewed the X-rays and did a physical examination which revealed that Claimant likely had a TFCC (triangular fibrocartilage complex) tear. Dr. Jegapragasan informed Claimant he should be restricted from work and ordered an MRI to confirm the diagnosis. *CHE 5*, p. 18**.**

10. On September 29, 2021, Dr. Jegapragasan reviewed the MRI of the left wrist, identifying a "complex TFCC tear, with some foveal detachment and severe ECU (extensor carpi ulnaris) tendonitis." Dr. Jegapragasan prescribed injections and bracing for the TFCC and ECU. *CHE 5*, p. 23.

11. Respondents filed a Notice of Contest on October 7, 2021, asserting that the illness was not work-related based on the ATP findings. *RHE B.*

12. Upon being referred to an orthopedist under his private insurance for further evaluation, Claimant received ongoing treatment through April 2022 at Boulder Centre for Orthopedics. *RHE F; RHE H.* Though various treatments were discussed to address Claimant's TFCC tear to the left wrist (including physical therapy, injections, and surgery), at no point during Claimant's treatment at Boulder Centre for Orthopedics was the injury determined to be work-related. *Id.* Nor do the medical

records indicate that Claimant was ever referred back to an ATP at Concentra to pursue treatment through workers compensation. *Id.*

13. On January 4, 2022, Claimant underwent a TFCC repair and debridement by Dr. Daniel Master at Boulder Surgery Center to address the following diagnoses: (1) left wrist triangular fibrocartilage complex tear; (2) left wrist ulnar impaction syndrome; and (3) left wrist extensor carpi ulnaris tearing. *RHE K.*

14. Claimant filed an Application for Hearing on January 5, 2022, endorsing the following issues: compensability; medical benefits, authorized provider; reasonably necessary; average weekly wage; temporary total benefits; and penalties. *RHE C.* Respondents filed their Response to the same on February 4, 2022. *RHE D.*

15. Respondents arranged for Claimant to undergo an independent medical examination (IME) with L. Barton Goldman, M.D. A prehearing was held to limit the scope of Dr. Goldman's Questionnaire, which was requested to be completed by Claimant before the IME. It was Claimant's position that he did not have to complete the entire Questionnaire. Pursuant to the prehearing order that was issued, Claimant was not required to complete the entire questionnaire. The prehearing ALJ determined that Claimant did not have to answer a number of questions, including providing information about his prior hospitalizations, accidents, and injuries. He was also not required to provide information about his hobbies and recreational activities. But the prehearing order indicated that Dr. Goldman could still inquire about the information Claimant did not answer on the Questionnaire if he felt it was relevant or pertinent to his evaluation. *RHE E* pp. 13, 36, 37.

16. Following the prehearing conference on Claimant's motion to limit the scope of information for the IME, Claimant attended the IME with Dr. Goldman on July 8, 2022, and July 11, 2022. *RHE E.* On interview with Dr. Goldman, Claimant reconfirmed that he did not recall a specific injury or incident with respect to the gradual onset of wrist pain. But he did state that he felt a twinge while repositioning a box. *Id.*

17. Dr. Goldman did ask Claimant to provide certain information he left off the Questionnaire, such as hobbies and recreational activities, but Claimant declined. *Hrg*. *Tr*, p. 100.

18. Dr. Goldman persuasively testified consistent with his comprehensive report. In his IME report, Dr. Goldman concluded that symptoms for a TFCC tear should mainly be on the ulnar side of the wrist, which did appear to be the case with Claimant. *RHE E.* He concluded that the diagnosis had been accurately assessed but the causation was not work-related. *Id.* Claimant described variable and multi planar activities related to his work responsibilities that did not rely specifically on repetitive unilateral left ulnar wrist supination nor prolonged wrist extension with repetitive supination of the forearm or elbow extension. *Id.* Thus, Dr. Goldman concluded that Claimant's subjective history did not provide sufficient medical evidence that would support an occupational illness causation determination for his left wrist symptoms and diagnosis consistent the evidence-based medicine analysis. *Id.*

19. Dr. Goldman also relied on the Medical Treatment Guidelines during his assessment of Claimant's injury. *RHE E.* He referred to page 12 of Rule 17, Exhibit 5, Cumulative

Trauma medical treatment guidelines. *Id.* He noted that a TFCC tear symptoms should mainly be on the ulnar side of the wrist with tenderness over the TFCC complex, localized pain, clicking findings, and abnormal motion with one of the following movements: (1) forced supination and pronation with axial pressure on an ulnar deviated wrist; (2) the patient pushing up from a seated position using the hand; and/or (3) ballottement of the distal ulna with the wrist supinated causes of normal motion as compared to the asymptomatic side. *Id.*

20. Regarding his causality analysis, Dr. Goldman considered that Claimant described "variable and multi planar activities that do not rely specifically on repetitive unilateral left ulnar wrist supination and extension nor prolonged wrist extension with repetitive supination of the forearm or elbow extension." *RHE E.* Further, Claimant did not consistently describe a discrete wrist hyperextension trauma, and his history noted more symptoms with flexion as compared to extension. *Id.*[1]

21. Instead, Dr. Goldman provided that for the type of repetitive injury asserted, "you're generally talking about repetitive motion on a frequent basis within, in this case . . . certain plains of motion for four to six hours." *Tr. 66:14-18.* He elaborated that "I see it more with . . . factory works, people who are doing fine work on production lines where they can't move around very much. It's the same thing over and over and over and over again." *Id. 66:21-25.* In contrast, Dr. Goldman testified that "[Claimant] also has a job where he can use his hands in all kinds of different ways." *Tr. 67:9-12.*

22. Again, when asked about activities outside of work during the IME with Dr. Goldman, Claimant declined to answer whether he participated in any strength training of recreational activities that would repetitively use his upper extremities in a more restricted fashion than the essential duties of his work. *RHE E, p. 23.* Claimant also refused to share the specific avocational or recreational activities he was either currently participating in or would like to resume. *Id.*

23. Considering Rule 17, Exhibit 5 of the Medical Treatment Guidelines, the objective medical diagnoses, and Claimant's subjective account of his pain symptoms, Dr. Goldman concluded in his IME report that it was not more likely than not that his essential duties at [Employer] were the causative reason for the development of his left wrist pain and subsequent treatment. In other words, he found Claimant's work activities did not cause Claimant's left wrist condition and need for medical treatment. *RHE E.*

24. While Dr. Goldman did state at the beginning of his testimony that he thinks Claimant's condition and need for medical treatment is based on an aggravation of a preexisting condition, he clarified his testimony by stating that it is his opinion that the aggravation was not caused by Claimant's work activities. It was his opinion that Claimant's work activities did not contribute at all to Claimant's need for medical treatment. *Hr'*g *Tr*., p. 62, 88, 89. Thus, Dr. Goldman also analyzed this case as an aggravation or exacerbation of a preexisting condition due to Claimant's slightly longer ulnar styloid.

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[1] Although Claimant did not describe a discrete wrist hyperextension occurring at work with Dr. Goldman, the medical records establish that Claimant attempted to climb over a fence and ultimately fell onto his left outstretched hand, an apparent hyperextension, in July 2019. *RHE F,* p. 43.

Hr'g Tr., p 64. In doing so, Dr. Goldman made an individualized causation assessment based on the Claimant's preexisting condition and his conditions of employment.

25. The ALJ finds Dr. Goldman's ultimate conclusion, that Claimant's work activities did not cause or aggravate Claimant's condition, or contribute to his pain and need for medical treatment, to be credible and persuasive for several reasons. First, he interviewed Claimant to determine his job duties. Second, he has experience evaluating delivery drivers for various medical conditions. Third, he has experience evaluating and treating Claimant's condition(s). Fourth, his use of the Medical Treatment Guidelines to assist in his causation assessment. Fifth, he teaches the Accreditation class for physicians, which includes teaching Rule 17, i.e., the Medical Treatment Guidelines. See *RHE E*; *Hrg, Tr*., p. 69. Sixth, he took into consideration Claimant's predisposition to this type of condition based on Claimant's slightly longer ulnar styloid. Seventh, he used all of the information he gathered, combined with his experience and expertise, to make his causation determination.

26. On June 29, 2022, Dr. Gary Zuehlsdorff was retained by Claimant to conduct an IME. Claimant, however, canceled the day before the evaluation. As a result, Dr. Zuehlsdorff was instructed to just issue an opinion based on the records supplied to him. *CHE 1*. p. 2.

27. Dr. Zuehlsdorff determined that "the patient's current clinical situation is positive work causal." *CHE 1*, p. 5. Dr. Zuehlsdorff pointed out that Claimant had "a preexisting abnormality of an excessively long ulnar styloid" – which was shortened by Dr. Master in the January 4, 2022, surgery. Dr. Zuehlsdorff stated:

> [W]hile the patient's preexisting ulnar positive variance syndrome, due to an excessively long ulnar styloid, was obviously preexisting and nonwork causal, it was only due to the application of years of multiple repetitive forces at the wrist and elbow, and thus an ulnar impaction syndrome that required surgical intervention. In other words, but for the application of the repetitive high physical forces in his job, as a [EMPLOYER] driver, with repetitively lifting, pushing, pulling, and carrying multiple boxes on a daily basis, the patient would not have progressed to a clinically positive subjective ulnar impaction syndrome. I would thus hold strongly that this case is 100% work causal." *RHE 1***,** p. 5.

28. Dr. Zuehlsdorff noted that Mr. Jacobs, the PA Claimant saw one time at Concentra, failed to appreciate the "obvious repetitive nature of his job, which is recognized as a form of cumulative trauma and is recognized in the work comp community as a viable work contributing factor." *Exhibit 1*, p. 6.

29. Dr. Zuehlsdorff also pointed out that with Claimant's excessively long ulna, "in certain positions you can cause compression of the TFCC between the ulnar styloid and the triquetrum, one of the carpal bones . . . due to (1) repetitive flexion and ulnar deviation when the forearm is pronated with the elbow flexed to 90 degrees and (2) supination/extension/ulnar deviation of the wrist on a repetitive basis." *Exhibit 1*, p. 5.

30. Dr. Zeuhlsdorff's report and analysis, however, is not as persuasive, credible, and comprehensive when compared to Dr. Goldman's report and hearing testimony. For example, Dr. Zuehlsdorff did not interview Claimant and obtain a detailed history – including any prior injuries or accidents. He was also unable to interview Claimant and obtain information about recreational activities or hobbies that might be the cause of Claimant's condition. Moreover, since Claimant failed to attend the IME, Dr. Zeuhlsdorff did not set up a telephone conference or virtual conference with Claimant to get pertinent information necessary to complete a comprehensive IME. *Tr. 47:16-20.* Instead, he just relied on a single interrogatory answer from Claimant and went to [EMPLOYER]' website to get a job description. At no point during the pendency of this litigation did Claimant speak with Dr. Zuehlsdorff. *Id. at 47:22-25.* Thus, his inability to get this critical information from Claimant detracts significantly from his causation analysis. In addition, the IME report written by Dr. Goldman was not provided to Dr. Zuehlsdorff at any time during the record review. *Tr. 49:6-20.* Thus, he did not get any additional historical information or analysis from Dr. Goldman's report that might have helped him perform his IME.

31. Additionally, Dr. Zuehlsdorff did not perform a causality analysis, like Dr. Goldman did, of Claimant's injury based on the Medical Treatment Guidelines. *CHE 1.*

32. In his report, Dr. Zeuhlsdorff also indicated that in formulating his opinion, he reviewed the "UpToDate medical website." There is not, however, any information about the quality of the information provided by this website or the breadth of the information. For example, is it a medical dictionary, is it a single page of basic information, does it contain articles - and if so - are the articles peer reviewed? Moreover, the phrasing of his opinion, "after reviewing UpToDate," gives the impression that his opinion is primarily based on the information contained on the website, and not his own opinion based on his own experience, knowledge, and training. While an expert is allowed to support his opinion with research, and the information obtained through such research, the credibility of that opinion is diminished when the foundation of the opinion might be based on information that could be from a source of questionable quality.

33. In addition, Claimant's actions of not attending the IME with Dr. Zeuhlsdorff and refusing to provide Dr. Goldman with details regarding his hobbies, recreational activities, and other information, detracts from Claimant's overall credibility. In essence, Claimant's refusal to attend the IME and refusal to provide Dr. Goldman such information prevented each IME physician, as well as the court, from determining whether any hobbies, recreational activities, or something else, did or did not, cause or contribute to Claimant's wrist problems and cause the need for medical treatment. In other words, Claimant refused to provide each physician with pertinent information necessary to determine whether work, or something else, caused Claimant's condition and need for medical treatment. While Claimant did admit on redirect examination that he did not engage in yoga, weightlifting, pushups, or hiking and using hiking poles, he did not indicate that he did not engage in golfing or playing tennis, which can affect the causation assessment. *See Tr.,* pp.72, 105,106*; MTG, Exhibit 5*, pp. 9, 18. Moreover, he did not provide this information when the causation assessments were being made by each physician before the hearing. As a result, Claimant providing

some of this information during the hearing does not overcome the negative credibility determination which has been found based on his failure to provide such information at the time of each IME.

34. Claimant failed to establish by a preponderance of the evidence that his left wrist symptoms represent the result of, or progression of, a condition that is related to his employment or was aggravated by his employment.

35. Claimant failed to establish by a preponderance of the evidence that he was involved in a work accident that caused an injury to his left wrist and caused the need for medical treatment or caused any disability.

36. Claimant failed to establish by a preponderance of the evidence that his left wrist condition(s) and need for medical treatment resulted directly from his employment or the conditions under which his work was performed.

37. Claimant failed to establish by a preponderance of the evidence that his left wrist condition(s) and need for medical treatment followed as a natural incident of his work activities. Therefore, Claimant failed to establish that his left wrist condition(s) can be fairly traced to the employment as a proximate cause.

38. Claimant also failed to establish by a preponderance of the evidence that his work activities aggravated an underlying preexisting condition of Claimant's left wrist and caused or accelerated his need for medical treatment or caused any disability.

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.

Furthermore, proof of causation regarding a compensable injury or occupational disease is not limited to credible medical evidence, but may be established by lay testimony. *See Savio House v. Dennis*, 665 P.2d 141, 142-43 (Colo. App. 1983).

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable accidental injury or occupational disease.

a. Whether Claimant Sustained an Accidental Injury

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce the need for medical treatment or disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression

of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's left wrist pain complaints came on gradually without any specific work incident or accident causing his wrist pain, need for medical treatment, or disability. While Claimant contends that at some point, he felt a twinge in his wrist at times while at work, the ALJ has not found that contention to be credible. Therefore, the ALJ does not find that to contention to be persuasive evidence of a work accident and resulting injury. Instead, the ALJ finds and concludes that Claimant's underlying condition was painful while he was at work, but the work did not cause the pain, need for treatment, or disability. Thus, the underlying condition and need for medical treatment was not caused or aggravated by his work activities. In reaching this ultimate conclusion the ALJ has relied on Dr. Goldman's opinions as set forth in his report and testimony-which have been found to be credible and persuasive. The ALJ has also considered Claimant's credibility, based on his refusal to provide Dr. Goldman information about his recreational activities and hobbies-when asked during the IME. The ALJ has also considered Claimant's cancellation of his in-person IME with Dr. Zeuhlsdorff. This refusal to answer fully all of Dr. Goldman's questions during the IME and his failure to attend the IME with Dr. Zeuhlsdorff detracts from Claimant's credibility and his contention that his condition was caused or aggravated by his job duties. As a result, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable accidentally injury.

b. Whether Claimant Sustained an Occupational Disease

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

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

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

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

In this case, Claimant has asserted that he suffered either an injury or an occupational disease-which may be in the form of an aggravation of a preexisting condition. In response to this assertion, Dr. Goldman evaluated Claimant, and credibly and persuasively concluded that there was no causal connection between Claimant’s work activities and his wrist condition and the resulting need for medical treatment or disability. Thus, he concluded that there was no causal connection between Claimant’s work activities and Claimant’s need for medical treatment and no causal connection between Claimant’s work activities and any disability.

Proof of causation regarding a compensable injury or occupational disease is not limited to credible medical evidence, but may be established by lay testimony. In this case, the ALJ found the expert opinion of Dr. Goldman to be credible and highly persuasive for the reasons found above as well as the following: Dr. Goldman used the Medical Treatment Guidelines to support his conclusions about the cause of Claimant’s wrist condition and need for medical treatment. He also used Claimant’s medical history, objective diagnostic reports, description of job activities, in-person interview, and his examination to form his conclusion in this case. Plus, Rule 17, Exhibit 5 of the Medical Treatment Guidelines, sets forth risk factors to consider, including the following: (1) traumatic hyperextension, (2) wrist posture in extension and repetitive supination of the

forearm and/or elbow extension; and/or (3) for occupational illness, usually unilateral with ulnar wrist pain while supinating and extending the wrist as part of the regular work duty. Dr. Goldman elaborated at hearing that Claimant's daily work activities did not qualify as risk factors per the Medical Treatment Guidelines. Alternatively, Claimant would have to have been using his wrist in a repetitive motion four to six hours per day, similar to the work of a factory worker. However, Claimant's job allowed him to use varying movements, and required a balance between driving and carrying boxes. Dr. Goldman emphasized that Claimant instead described variable and multi planar activities that did not rely specifically on repetitive unilateral left ulnar wrist supination and extension, nor prolonged wrist extension with repetitive supination of the forearm or elbow extension. In contrast, his history noted more symptoms at the time with flexion as opposed to extension. In addition, Dr. Goldman also analyzed this case as an aggravation or exacerbation of a preexisting condition. In doing so, Dr. Goldman made an individualized causation assessment based on the Claimant's preexisting condition and his conditions of employment.

While Dr. Goldman does acknowledge that the left wrist injury/condition could be symptomatic during work (and also while performing daily activities such as lawncare or grocery shopping), he ultimately concluded that the causation of the injury, per the Medical Guidelines, is not consistent with the repetitive work required by Claimant's job.

Claimant, on the other hand, introduced Dr. Zuehlsdorff's record review report into evidence as support for his argument that an occupational illness occurred due to Claimant's role at [EMPLOYER]. However, the report by Dr. Zuehlsdorff fails to establish a causal relationship for several reasons. First, Claimant confirmed at hearing that he was never examined by Dr. Zuehlsdorff before the report was authored, nor did he ever have a conversation or any communication with Dr. Zuehlsdorff. Second, Dr. Zuehlsdorff concluded that Claimant's situation was "positive work causal", noting that causality was based on the limited information claimant provided in his interrogatory answers to Respondents and his review of the medical records. Relying on Claimant's answers to interrogatories and underlying medical records to base a causality opinion is not a replacement of the physician engaging in firsthand questioning of the Claimant regarding the mechanism of injury, history of recreational activities, or a discussion of Claimant's actual day-to-day job duties. His analysis would be similar to a Respondent-sponsored IME that bases a causality opinion primarily on a written job description, without the opportunity to be able to question the Claimant as to the actual job duties performed on a day-to-day basis which would be determinative of causality per Level II training and the Medical Treatment Guidelines. Further, as Claimant never spoke with Dr. Zuehlsdorff, no type of information was relayed to Dr. Zuehlsdorff for the completion of his report related to Claimant's activities outside of work. Finally, Dr. Goldman's comprehensive IME report was not even provided to Dr. Zuehlsdorff. While Dr. Goldman's IME report relied on the Medical Treatment Guidelines, an examination of Claimant, an interview with Claimant, and prior treatment records, Dr. Zuehlsdorff's report only relies on the information provided to him by Claimant's interrogatory answer and what is contained in the medical records provided to him.

As with the determination of Claimant's claim for benefits in the form of an accidental injury, the ALJ relies on the same credibility factors in assessing whether Claimant has an occupational disease. This includes Claimant's refusal to provide Dr. Goldman certain information as well as his refusal to attend the IME with Dr. Zuehlsdorff- both of which detract from his credibility. The ALJ finds and concludes that Claimant has not proven that his left wrist condition(s) can be fairly traced to any aspect of his employment by a preponderance of the evidence. Moreover, Claimant withheld information related to outside activities that could have shown that he had been equally, or entirely, exposed to life events causing Claimant's left wrist condition and symptoms outside of work, bolstering the argument that a finding of compensability and occupational illness is not warranted. Thus, the ALJ finds and concludes that Claimant has failed to put forth credible and persuasive evidence that demonstrates a causal connection between his employment and the injury in the form of an accident or occupational disease.

As a result, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that his work activities caused or aggravated his wrist condition(s) and proximately caused the need for Claimant's medical treatment or resulted in any disability. Thus, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury in the form of an occupational disease.

Since Claimant failed to establish that he suffered a compensable accidental injury or occupational disease, the remaining issues are moot.

ORDER

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

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

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2022.

/s/ Glen Goldman

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the admitted average weekly wage (AWW) of $1,154.00 should be increased for purposes of permanent partial disability (PPD) benefits.

Whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

FINDINGS OF FACT

1. On January 30, 2020, the claimant suffered an injury at work. The respondent has admitted liability for the claimant's work injury. At the time of her injury, the claimant worked as the Chief Deputy Clerk and was paid $28.85 per hour. During her employment with the employer, the claimant had medical insurance, dental insurance, and vision insurance.

2. After her work injury, the claimant received various pay increases before resigning from her position on August 25, 2022. Those increases are as follows:

a) On June 15, 2020, the claimant's pay was increased to $34.00 per hour.

b) On December 11, 2020, the claimant's pay was increased to $35.70 per hour.

c) On January 28, 2021, the claimant's pay was increased to $42.2692 per hour; ($7,500.13 per month).

3. In April 2022, the claimant was placed on administrative leave without pay. On May 9, 2022, the claimant received a letter regarding continuation of medical insurance coverage pursuant to COBRA. In that letter, the claimant was informed that the monthly premium to continue her health insurance coverage would be $806.10. The claimant did not pay this premium.

4. On May 20, 2022, the respondent filed a Final Admission of Liability (FAL) admitting for a permanent impairment rating of 18 percent, whole person. The average weekly wage (AWW) identified in the FAL was $1,154.00

5. On June 20, 2022, the claimant received a letter from the Social Security Administration (SSA) confirming that the amount of $170.10 would be withheld for medical insurance premiums under Medicare.

6. The claimant asserts that her AWW should be increased to $1,726.15 to reflect the various raises she received after the work injury.

7. Due to her January 30, 2020 work injury, on September 24, 2020, the claimant underwent low back surgery that included L2-L3 microdiscectomy with laminectomy.

8. As a result of the September 24, 2020 lumbar surgery, the claimant has a disfigurement on her lower back consisting of a well-healed surgical scar that runs from just below her belt-line up her spine and measures 18 cm in length. This scar is a different color than the surrounding skin.

CONCLUSIONS OF LAW

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

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

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

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force **at the time of the injury**. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *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 v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply Section 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp., supra.*

5. A claimant's AWW must also include the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. Section 8-40-201(19)(b), C.R.S. It is not required that the employee actually purchase the insurance coverage for the AWW to be increased. *Ray v. Industrial Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005), aff'd. 145 P.3d 661 (Colo. 2006).

6. The claimant's AWW shall be increased to reflect the cost of continuation of insurance coverage. The monthly cost of insurance is $806.10. When multiplied by 12 months and then divided by 52 weeks in a year, this results in a weekly cost of $186.02. Therefore, the claimant's AWW shall be increased by $186.02 for a total AWW of $1,340.02. The ALJ recognizes that the SSA is withholding $170.10 per month for the claimant's Medicare coverage. However, the ALJ finds that the cost identified in the May 9, 2022 COBRA letter is reasonable and appropriate in determining the cost of replacement insurance coverage. Therefore, that amount is also reasonable in calculating the claimant's AWW. The ALJ declines to include the claimant's post-injury raises to her AWW.

7. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

8. As a result of her January 30, 2020 work injury and related surgery, the claimant has sustained a permanent disfigurement to areas of the body normally exposed to public view.

ORDER

It is therefore ordered:

1. For purposes of calculating PPD benefits, the claimant's AWW is increased to $1,340.02.

2. The respondent shall pay claimant $2,000.00 for her permanent disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

Dated October 25, 2022.

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

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

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained compensable work related injuries within the course and scope of her employment on February 17, 2022.

ONLY IF COMPENSABILITY IS PROVEN, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to authorized, reasonably and necessary medical benefits that are related to the work related injury.

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from February 17, 2022 to the present and ongoing until terminated by law.

STIPULATIONS

Claimant withdrew the issue of permanent partial disability benefits as premature. Respondents withdrew the issue of offsets.

FINDINGS OF FACT

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

A. Claimant's testimony:

1. Claimant was 31 years old at the time of the hearing and had been working for Employer for over 8 years. She was in the sales office as a Sales Agent. On the day of the incident on Thursday, February 17, 2022, Claimant was working the ticket window. She saw a man that looked like he was having a seizure. She joined the security officer, who was trying to get the man to lay flat on the floor. She went to get gloves on to go see if she could help, but another individual was helping the officer. The security officer could not find a pulse. He called for an ambulance and Claimant went outside to direct the Emergency Medical Technician to the lobby where the man was on the floor.

2. When she returned, the defibrillator that was placed on the man was reading no pulse, so the paramedics began CPR. Once she had directed the EMTs she started to have a panic attack. The EMTs started CPR but they could not revive the man. She had returned to her desk by this time, and she had a full view of what was going on in the lobby from her position at the window. She contacted her supervisor and requested to leave the premises and the response was she could leave but would not be paid for hours

not worked. Claimant stayed at her position as she could not afford the loss of pay. She watched while they tried to revive the man. She testified that they had continued with CPR for about forty minutes. Then the man was pronounced dead. The body was left in the lobby, which was closed by this point in time, while the coroner arrived. She stated that the body was left in the lobby for about two hours with a sheet over him. Several hours later, at approximately 1:30 p.m., her supervisor advised that she could go home if she felt the need to and would, after all, get paid for the rest of the day.

3. Claimant contacted the employee assistance program (EAP) requesting counselling. She was feeling very upset by what she had seen. She was able to reach them on that Thursday and was able to get counselling through the hotline by phone. They provided her with a list of therapists, and none she contacted were available to see her for several weeks. She also contacted her primary care provider (PCP) to get an appointment.

4. Claimant testified she had been diagnosed with anxiety prior to the February 17, 2022 work incident. Claimant stated that she had personal health conditions that were not work-related. She worried about these conditions. She further testified she was anxious about her medical conditions and had been diagnosed with insomnia. However, she denied having been diagnosed with depression or posttraumatic stress disorder (PTSD) before the incident.

B. Post-incident medical records:

5. On February 19, 2022 Claimant was attended by M. Shannon Arnsberger, D.O., her family medicine physician (PCP). Dr. Arnsberger noted that Claimant was diagnosed with post-traumatic stress disorder, for which she was prescribed medication, anxiety and acute reaction to situational stress. Dr. Arnsberger documented that Claimant required intensive therapy and she did not know how to obtain help from EAP since she could not get an in-person appointment. Dr. Arnsberger stated that she needed assistance through “WorkComp” to get therapy moving forward quickly. Claimant had reached out to a Kaiser therapist who talked to her by phone on Friday and was advised that she could follow up the following week by phone. Dr. Arnsberger took Claimant off work at that time, until she could get therapy.

6. Dr. Arnsberger took a history from Claimant that she had witnessed a death at work. Claimant initially saw the deceased having a seizure in the lobby where she worked. She watched security try to assist the person, including CPR being attempted and watched for approximately two hours until the individual was pronounced dead. She watched the lobby with the dead individual until the coroner came to take the body. Claimant requested leave from her boss but was told she wouldn’t get paid if she left early. A few hours later, her boss advised her she could leave if she felt the need. Dr. Arnsberger documented that Claimant was able to get phone counselling from EAP on the Thursday due to feeling very upset. Dr. Arnsberger documented that she had preexisting depression, anxiety and PTSD and was taking medications. Dr. Arnsberger noted that Claimant was crying through most of the visit. Dr. Arnsberger made a referral for a Psychologist through Clinical, Health and Forensic Psychology. The first available

visit set was for March 3, 2022. Patient tentatively scheduled for video visit with Dr. Moe on Friday at 8 am.

7. Dr. Arnsberger took Claimant off of work beginning February 19, 2022 and stated that maximum medical improvement (MMI) was unknown. She specifically noted that the objective findings were consistent with the history and work related mechanism of illness.

C. Reports of the incident:

8. On February 22, 2022 a Workers' Compensation Claim Intake Form was completed by Employer's investigating Adjuster, stating Claimant had worked for Employer since November 18, 2013. The investigator's description of the injury was that Claimant was working the window (ticket window). She looked out the window as she heard commotion and saw a man having a seizure. She observed the security officer (TSO) helping the man and laying him on the floor. Claimant went to get gloves on to see if she could help. The TSO could not find a pulse. Claimant went outside to show EMTs and the fire department (FD) personnel where the man was and started to have a panic attack. The EMT started CPR but they could not revive the man. Claimant advised her supervisor and took a break, getting some tea, trying to calm down. They noted that Claimant's window was closed and that Employer subsequently closed the lobby until the coroner was done. Eventually Claimant's supervisor told Claimant she could go home and would get paid. The report noted that Claimant first talked to EAP and to an online therapist, as well as her own therapist. On February 19, 2022 she went to her PCP and was referred to a specialist. The report noted Claimant was taking medications, and was having problems answering the Investigating Adjuster's questions, so they waived completing a questionnaire. The adjuster noted that she advised Claimant that this kind of claim would not be covered by workers' compensation as there would have needed to be an act of violence that caused a death that she had witnessed and Claimant did not report any acts of violence. Adjuster also advised Claimant that they would not be paying Claimant for her lost time from work.

9. The intake form included attached dispatch notes that stated as follows:

Dispatch Notes
CALL TYPE: MEDICAL
55/M 2/17/2022 9:38:39 AM
Currently seizing 2/17/2022 9:38:48 AM
Located inside west door 2/17/2022 9:39:01 AM
Requesting EMS 2/17/2022 9:39:21 AM
EMS responding 2/17/2022 9:39:46 AM
BTC 01 -3285 2/17/2022 9:39:57 AM
B1- requesting emergent response 2/17/2022 9:41:59 AM
Unconscious/Breathing 2/17/2022 9:42:09 AM
B1- has grabbed the AED 2/17/2022 9:43:22 AM
B1- has moved the party to the floor 2/17/2022 9:43:34 AM
updating EMS 2/17/2022 9:43:49 AM
B1- party has minimal breathing 2/17/2022 9:44:31 AM
Fire os 2/17/2022 9:45:02 AM
FD on scene 2/17/2022 9:45:04 AM
CPR in progress by FD 2/17/2022 9:45:22 AM

EMS on scene 2/17/2022 9:48:42 AM
CPR is still in progress 2/17/2022 10:02:23 AM
C4 via CCTV 2/17/2022 10:04:12 AM
PD on scene 2/17/2022 10:08:27 AM
PD requesting video, gave them VI phone number 2/17/2022 10:12:23 AM
CPR stopped 2/17/2022 10:13:34 AM
Party sits down on bench @ 930:45 2/17/2022 10:15:39 AM
FD and EMS are no longer OS 2/17/2022 10:21:11 AM
PD still OS waiting for coroner 2/17/2022 10:21:21 AM
Boulder Lobby shut down per Pd 2/17/2022 10:21:54 AM
BD notified 2/17/2022 10:25:30 AM
PIO notified 2/17/2022 10:33:07 AM
C4 via CCTV 2/17/2022 10:34:38 AM
name is [Deceased] 12-3-1973 2/17/2022 10:48:37 AM
BPD case number 2/17/2022 10:48:56 AM
22- 1535 2/17/2022 10:49:14 AM
SMS and Email sent 2/17/2022 10:57:45 AM
C4 via CCTV 2/17/2022 11:17:22 AM
Coroner is OS 2/17/2022 11:20:34 AM
C4 via CCTV 2/17/2022 11:42:01 AM
Corner is gone with body at 1135 hrs 2/17/2022 11:49:46 AM
Lobby shut down yet until cleaning crew cleans up. 2/17/2022 11:50:28 AM

10. The Narrative report of the investigator was consistent with the timeline issued by the dispatch notes and stated as follows:

> On Thursday, February 17, 2022, at approximately 0938 hours I, Officer [for Employer] along with Field Training Corporal [Redacted], responded to the Boulder Station located at [Redacted address] in the City of Boulder and County of Boulder for a report of a medical incident.
>
> Prior to arrival, Transit Police Communications two (TPC2) advised a male was in the lobby currently seizing. TPC2 noted Transit Security Officer (TSO)[1] [Redacted name] requested Emergency Medical service (EMS) and retrieved the Automated External Defibrillator (AED) for the male. [TSO] advised TPC2 the party had minimal breathing and EMS was on scene. TPC2 stated the responding fire department started CPR at 0945 hours and ended at 1013 hours. TPC2 stated the Boulder County Coroner was contacted for the incident. Upon arrival, I contacted Boulder Police Officer Morris (Badge #:1774) who stated Boulder fire department and American medical rescue were the responding medical services. Officer Morris explained Dr. Lund from Boulder Community Hospital was the Doctor that pronounced the male, [deceased], deceased at 1011 hours on 02/17/2022. Officer Morris stated the Boulder Police Department's case number is 22-1535 relating to this incident. A short time later, a Boulder Police department detective, Sarah Cantu (Badge #:5485) arrived on scene and took photographs of the scene. I also took photographs of the scene which will be uploaded to the case.
> I contacted [TSO] and asked if he would fill out a written statement to which he agreed. {TSO} stated he noticed [Deceased] at 0933 hours seated at the circular bench near the west side of the station. [TSO] explained he noticed [Deceased] was talking out loud to no one. At 0935 hours [TSO] asked [Deceased] to wear a mask to which [Deceased] stated he had a mask and would put it on. [TSO] then asked [Deceased] where he was headed. [Deceased] replied he had just got off a bus. [TSO] mentioned [Deceased] stated he was going to Pearl St.

[1] This ALJ infers that TSO from the Investigator's report and B1 from dispatch are one and the same person.

> {TSO] stated he returned to his desk for about 1-2 minutes after speaking with [Deceased], when he heard a female getting loud from the restroom area. [TSO] stated he went into the hallway to address the female in the bathroom area. After addressing the female, {TSO] noticed [Deceased] leaning to his right side and shaking as if he was having a seizure.
>
> [TSO] noted that [Deceased] had a blank stare on his face, and [TSO] was not able to get a strong pulse from multiple locations. At this point [TSO] observed [Deceased]'s breathing had slowed down, and he began to gasp. A patron in the lobby, later identified as Rey Alcala (unknown date of birth), offered to help. [TSO] stated Alcala helped place [Deceased] on his side. [TSO] stated he heard gurgling coming from [Deceased]. [TSO] explained him and Alcala put [Deceased] on the ground next to the bench. [TSO] noticed [Deceased] seemed to not be breathing and went to his desk to grab the AED.[2] [TSO] applied the AED and the device stated, "no shock was advised". Shortly after, [TSO] noticed Boulder Fire had arrived on scene, they began to preform CPR, and took control of the scene. See [TSO]'s written statement, which will be attached to the original case, for further.
>
> Boulder County Coroner Andrew Melvin arrived on scene at 1120 hours and took over the investigation. The Boulder County Coroner, Melvin, stated the initial investigation looks like a natural death and they would eventually take custody of the body. The investigation will be referred to [Employer] video investigations for further review.
>
> No further information at this date and time in reference to this incident.[3]

There was also a video timeline which was consistent with the investigator's report and the dispatch report above.

11. On March 7, 2022 Respondents filed a Notice of Contest stating that the claimed injury or illness was not work related.

D. Robert Kleinman, M.D.

12. On June 17, 2022 Dr. Robert Kleinman, a psychiatrist, evaluated Claimant at Respondent's request. He examined Claimant on June 15, 2022. The history taken by Dr. Kleinman was consistent with Claimant's testimony and the investigator's report. Claimant reported that she saw from her desk a man having a seizure. She put on gloves and went to the lobby to help the TSO, but when she got there, another man was helping. She watched the man have the seizure and then go limp. The TSO went to get the defibrillator. Claimant went to direct the paramedics to the man that had had the seizure. She noted that the defibrillator showed the man no longer had a pulse. She watched the paramedics try to resuscitate the man without result. Claimant asked her supervisor to allow her to go home as she felt traumatized by the incident. She was advised that she could go home but would not be paid. Claimant remained at work, since she could not afford to lose her pay. She was at her desk during the time the dead man laid on the ground. The investigator questioned her about what happened. They eventually closed the lobby and her supervisor allowed Claimant to go home with pay. Dr. Kleinman noted that Claimant contacted her therapist at Kaiser, who advised Claimant to get help from her employer. Claimant followed up with Employer, who completed some workers'

[2] Automated external defibrillator.
[3] Names redacted from the report and replaced with other identifiers.

compensation paperwork and, within a couple of days went to the WC doctor, who advised she had a lot of trauma and prescribed Ativan every eight hours. However, the adjuster told Claimant her claim was denied because she did not witness an act of violence. Dr. Kleinman noted that Claimant had not been back to work because of her emotional status.

13. Claimant explained to Dr. Kleinman that she had increased anxiety, depression and symptoms of traumatic stress, because she has her own medical conditions, and a defibrillator was used on her before. She had anxiety that she works behind a glass window and no one would see her if she had an episode. She dwelled on what happened to the man, thinking this could also happen to her. She had symptoms of anxiety, including racing heart, and feeling shaky. The anxiety attack gave her tingling, increased heart rate, sweating, feeling like she was having a heart attack. She also had depression, thinking she is worthless and useless, feeling exhausted, tired and her sleep patterns had varied. She also noted posttraumatic stress disorder, with distressing images of what happened in the lobby, with her mind racing, all of which are triggered by her own health problems. She struggled as she did not wish to be alone but could not tolerate being around people and she also was avoiding going back to the scene of the death.

14. Dr. Kleinman noted Claimant had a psychiatric medical history that dates back to when she was thirteen years old and currently continued seeing a therapist at Kaiser once a month at Kaiser Permanente. She was attending mental health appointments with Ms. Forest, went to an anxiety group for four (4) weeks in February and March 2022 and taking medications including Hydroxyzine, Ativan and a medication she could not recall. Claimant had open heart surgery in 2013 but subsequently had to undergo bypass surgery. She was in a medically induced coma, which is when she first started with anxiety. Following the birth of her child in 2015, Claimant had an embolic stroke, which caused some residual trauma. In 2018 she had a hysterectomy, and subsequent sepsis complications. In January 2022 her cardiologist advised her she required a defibrillator implant.

15. Dr. Kleinman noted that claimant continued to feel anxious, was not tolerant of being outside her home, and continued to feel exhausted. She felt she had no energy and her stepdaughter and her husband have had to help with her chores. Before this incident, Claimant was working forty hours a day for the past 9 years, took care of her children, completed her chores, and only missed work due to medical problems. Claimant reported that she had never missed work due to psychological problems.

16. Claimant was tearful throughout most of the interview with Dr. Kleinman. She was actively crying when discussing the incident. She was anxious and had anxiety attacks. Dr. Kleinman stated that Claimant had symptoms consistent with Posttraumatic Stress Disorder including intrusive memories, avoidance of triggers, negative alteration in cognition and increased arousal.

17. Dr. Kleinman reviewed the available medical records, which will be addressed below. He noted a history of depression and anxiety as well as multiple other medical problems as stated above, in addition to Marfan's disease. He opined that Claimant has had traumatic experiences in the past sufficient to cause Posttraumatic

Stress Disorder. Those include childhood abuse and more significantly medical crises with near death medical emergencies. With that, prior to and at the time of the date of injury, she was significantly stressed by concerns about her own chronic medical conditions. In addition, at about that time, her father had medical problems, as well. Despite that, she had been working full time for RTD and reported that she did not miss work for mental health problems. After the incident of February 17, 2022 Claimant reported symptoms that Dr. Arnsberger considered to be Posttraumatic Stress Disorder caused by the incident. Dr. Kleinman opined that it would have been more accurate to say that the incident triggered Claimant's anxiety about her own health, near death experiences, and fears of dying while at work, which included symptoms of PTSD. Nevertheless, witnessing a nonviolent death of a stranger, from a distance, would not typically be a sufficiently traumatic event to cause PTSD, though witnessing a death is one of the criteria listed in the DSM. But, taking into account the entire picture, considering Claimant as a whole, it was sufficient to trigger and exacerbate Claimant's anxiety about her own health and that she could have died already, and could die at work. Dr. Kleinman opined that Claimant's diagnosis were generalized anxiety disorder, persistent depressive disorder, posttraumatic stress disorder, psychological factors affecting a medical condition. He particularly noted that this event was traumatic to Claimant because of her personal medical history that included heart disease, heart surgery, stroke, and recent recommendation of a defibrillator implant. Medical records from Kaiser confirmed that Claimant's physical health stressors come first and are the major contributing factor to her depression and anxiety. Claimant's unique ongoing medical stressors and the several medical traumas that she has experienced predisposed her to anxiety and posttraumatic stress disorder (PTSD) symptoms after witnessing a death. Dr. Kleinman opined that another employee under the same circumstances would not have had the same response.

18. Dr. Kleinman testified at hearing that part of his Level II Accreditation training by the Division included determining causation as to whether a Claimant met the criteria for a compensable injury for a mental health condition. Dr. Kleinman addressed causation and opined, [Claimant] "does not meet the criteria for a compensable injury." Dr. Kleinman testified consistently with his IME report and his conclusions in which Claimant does not meet the criteria to have sustained a work injury on February 17, 2022 as her preexisting health conditions are the root of her ongoing mental health problems.

E. Medical Records prior to the incident:

19. While the Kaiser medical records are hard to read as they are not organized in a sequential manner and are riddled with abbreviations, for which this ALJ has had to extrapolate the meaning from the totality of record, they showed that Claimant had a significant prior history of psychological problems. For example, on visit date of January 22, 2016 there was a notation that Claimant had major depressive disorder (MDD)—recurrent episode, with a notation from PA Kristen Walden dated October 24, 2011, one from Felicia Gutierrez dated April 2, 2018 and another by Dr. Danette Silaban dated February 26, 2019. Then, on the same visit date of January 22, 2016, there was a diagnosis of major depressive episode—single episode, with a notation by Nicole Awuah on May 21, 2012 and one from Dr. James Walle on February 16, 2022. It looks like

Claimant was referred to a Licensed Clinical Social Worker for treatment of depression and prescribed bupropion (Wellbutrin), an antidepressant used for MDD.

20. The diagnosis of MDD continued on the January 28, 2016 visit date. On visit date of July 8, 2016 there was a mention that Mirtazapine, also an antidepressant, was being discontinued. Dr. Avi Kurtz recommended that Claimant try Remeron, another antidepressant to treat both the depression and problems sleeping. The diagnosis of MDD continued on December 8, 2017. On December 15, 2017 Claimant was seen due to depression (MDD-recurrent-moderate), anxiety and insomnia, which Claimant reported was worse over the last three months, and was again referred for counselling. At that time Dr. Silaban recommended an SSRI[4] medication. Also on this date Claimant was diagnosed with a generalized anxiety disorder (GAD). This also showed a notation by Dr. Daniel Smith dated February 11, 2021 and an overview addendum by Dr. Walle on February 16, 2022. This was followed by the following notations:

> Recently following with Psychiatry
> Complicated by panic attacks
> Was connected with therapists - poor rapport with 1st, 2nd left Kaiser, 3rd “changed departments”
> Rare Ativan p.r.n. use
> November 2021 starting p.r.n. Atarax for mild symptoms of anxiety, as needed - in February 2022 reports that had not been taken
> Patient with concern in the past that Zoloft 25 mg cause her to "hate her children”

21. On March 20, 2018 Claimant was referred by Mary Steele, PA to start chronic medication to treat her depressive symptoms. The clinical pharmacy specialist noted Claimant was prescribed Sertraline,[5] despite Dr. Silaban noting at that time that the MDD was in partial remission. However, it is clear to this ALJ that some of the notes are copied from one visit to the next as they had an identical wording and format.

22. On February 26, 2019, Claimant was diagnosed with Major Depressive Disorder, recurrent episode in partial remission.

23. Claimant reported on August 12, 2019 she had depression and anxiety. She was diagnosed with Depression—unspecified (chronic). Dr. Thomas Tsai noted that they had spent 20 minutes discussing her anger/depression/anxiety regarding her situation. This included near-death experiences with procedures. Claimant was referred to mental health.

24. On March 9, 2020, Dr. Danette Silaban evaluated Claimant. She diagnosed Claimant with insomnia and generalized anxiety disorder. She noted the anxiety disorder was uncontrolled. Claimant had tried medications in the past, which were not tolerated. She discussed alternatives. Claimant declined. Claimant was prescribed Trazadone for the insomnia.[6] Dr. Walle noted that Claimant had been non-compliant with her medication regime as she was taking medications intermittently.

25. On November 16, 2020 Claimant requested a letter from her cardiologist, Dr. Tsai because there were employees that were positive for COVID-19 and Claimant

[4] Selective serotonin reuptake inhibitors, a widely used antidepressants.
[5] Sertraline is a medication commonly used to treat MDD as well as anxiety and panic attacks.
[6] The notation found on December 15, 2017, cited in paragraph 20 above, was also found on March 9, 2020.

was terrified to go to work. Dr. Tsai issued the letter excusing her. Claimant continued to have the MDD and GAD diagnosis.

26. Dr. Tsai spoke with Claimant on January 5, 2021. She reported she had been having a lot of anxiety and panic attacks. It was noted the panic attacks were typical for her. She was meeting with a new behavioral health therapist.

27. Claimant reported on January 12, 2021, her anxiety was getting worse. She was “done trying to talk to the doctor.” Medications scared her and gave her more anxiety. She was worried about side effects. Claimant called and spoke to Andrea Machacek, RN who let her know Dr. Tsai had signed a letter to return Claimant to work. Claimant advised her that she really didn’t want to go back to work. She was continuing to have dyspnea and attributed it to Colorado altitude. She was tearful and said she was a "wreck." She stated that she could not function due to her anxiety, and trouble sleeping. Her father had CABG[7] and that added to her anxiety. She asked if Dr. Tsai would help her to get on disability due to her cardiac history and ongoing symptoms.

28. On February 11, 2021, Claimant was diagnosed with Generalized Anxiety Disorder complicated by panic attacks and rarely treated with Ativan.

29. Claimant reported on June 9, 2021 she had anxiety on a daily basis. She started Zoloft, but this made her hate her children, so she stopped. Dr. Walle noted that medications were subtherapeutic due to Claimant’s intermittent use. She had 10 pills of Ativan from her psychiatrist that she had not used. Dr. Walle recommended follow-up with psychiatrist however could trial SNRI in the future or Atarax

30. On July 16, 2021 Claimant followed up with Dr. Laura Caragol who documented that claimant was inconsistent with taking her heart medications, including the warfarin and antibiotics. Claimant talked to her counselor and was diagnosed with PTSD. Claimant reported that she didn’t have energy to do everything she needed to do, work 8 hours a day, then getting home so exhausted that didn't want to play with her 2 kids and felt guilty about this, stating it was not fair to her children. She worked in the sales department; and said it was not a stressful job.

31. On September 10, 2021 Dr Elisa Zaragoza Macias followed up with Claimant regarding the importance of taking her medications. They discussed change in medications she could take once per day at night. Dr. Zaragoza Macias noted Claimant continued with depression, anxiety and posttraumatic stress disorder and should follow up with the mental health clinic. Claimant reported that she felt fatigued, tired, breathless with even minimal activity, and that it was hard to take care of her 5 year old child as she continued to feel depressed, anxious and had PTSD as well as pain all over her joints.

32. On November 15, 2021, Claimant was prescribed Atarax for mild symptoms of anxiety as needed up to twice daily (changed from Ativan due to addictive nature). Her providers included a long list of diagnosis, for which they were providing, or attempting to provide, care, including but not limited to attention deficit disorder without hyperactivity, mitral valve disorder and mitro valve prolapse, Marfans Syndrome, dilatated aortic arch, idiopathic scoliosis, migraines, underweight, history of tobacco use, major depressive disorder, thoracic aortic aneurysm, cardiomyopathy, history of aortic valve replacement,

[7] Coronary artery bypass graft (CABG).

history of CABG, left facial weakness due to late effect of stroke, alteration of sensation due to stroke, mixed hyperlipidemia, long term anticoagulant therapy, history of DVT, adult obstructive sleep apnea, vitamin D deficiency, bacterial endocarditis, history of sepsis, tachycardia, diarrhea, gastroesophageal reflux disease, generalized anxiety, panic disorder, insomnia, posttraumatic stress disorder, urticarial and non-compliance with medication regime.

33. On January 17, 2022, Claimant reported having insomnia. This was due to multiple life stressors. She was requesting an appointment with Dr. Walle and he prescribed two weeks of doxepin for the insomnia.

34. The day prior to the work incident, on February 16, 2022, Claimant reported daily anxiety with many life stressors including pills. She reported thinking about her pills frequently. Her provider recommended a trial of Venlafaxine for generalized anxiety disorder. Dr. Walle noted that Claimant was intermittently tearful. He was concerned that the low range tachycardia was being caused by the anxiety.

F. Definitive Findings:

35. Claimant failed to show by a preponderance of the evidence that she has a compensable claim. This is a threshold question. Here, Claimant had to prove by a preponderance of the evidence that the incident of February 17, 2022 caused or aggravated her mental distress, which caused her disability and inability to return to work. The record shows a plethora of documentation that Claimant has a substantial psychological problem prior to the incident in question. Claimant was noncompliant with the treatment of her depression, anxiety and insomnia and declined to treat them with the medications that her providers were prescribing. It is clear that Claimant had an aversion to taking medications due to either concerns about her significant other medical problems, including the heart condition and the Marfans syndrome, and/or to becoming addicted to the medications.[8] Regardless of the reason, Claimant had a very significant preexisting history of conditions which have been present for a very long time, including the major depressive disorder, the anxiety, the posttraumatic stress disorder, the generalized anxiety disorder, the panic disorder as well as the insomnia. These diagnosis are repeated throughout the years of her care with Kaiser. While witnessing the death of an individual may have triggered a panic attack, it was not the cause of Claimant's continuing conditions and did not aggravate those conditions. Dr. Kleinman is credible in his opinion that Claimant does not meet the criteria to have sustained a work injury on February 17, 2022 as her preexisting health conditions are the root of her ongoing mental health problems.

36. Claimant argued that she was ready to assist the TSO with the man when she saw him have a seizure, going so far as to put on gloves in order to help, until she saw another individual helping the TSO. As found, Claimant did not stay to assist with

[8] Antidepressants are generally not a medical treatment that can be taken as needed. For them to work, a patient must take the medication on a daily basis, and even then, they do not start to work right away. It takes time to change the chemical composition of the body.

the deceased but went outside to guide the Fire Department EMT and paramedics/EMS to where the man was in the lobby, once they had arrived.

37. As found, the dispatch notes highlight that the medical call was made at 9:38 a.m. noting that a man was having a seizure. At 9:39 a.m. EMS was requested, EMS responded immediately and were on their way. At 9:42 a.m. the man was unconscious but breathing and the TSO (B1) retrieved the AED. At 9:44 a.m. the man had minimal breathing. By 9:45 a.m. the Fire Department personnel was on the scene and started CPR. At 9:48 a.m. the EMS ambulance was on the scene and took over CPR, and by 10:08 the police were on the scene.

38. If Claimant was the one to guide both the Fire Department and the Ambulance personnel to the correct area where the man was in the lobby, then Claimant was away from the scene from the time after emergency services were requested between 9:39 and when EMS arrived at 9:48 a.m. Claimant stated she started to have a panic attack at this time and that she returned to her desk once the personnel was present, so most of what Claimant saw was at a distance. Further, she was in the process of calling her supervisor and asking to be allowed to leave work and discussing whether she would be paid or not for the time off.

39. CPR was stopped by 10:13 a.m. Therefore, CPR was attempted for approximately 28 minutes. By 10:21 a.m. both FD and EMS were no longer on the scene and the lobby area was shut down. This ALJ infers that the deceased was covered at this time and the police were still on the scene awaiting the coroner. The coroner arrived at 11:20 a.m. and took the body by 11:35 a.m. Therefore, the body was in the lobby for approximately one hour and twenty minutes after EMS stopped CPR. According to Claimant, she was at her desk for this time period.

40. Further, while Claimant stated she did not miss any time from work due to any mental health conditions, this ALJ concludes from the evidence to the contrary. Claimant requested time off on November 16, 2020, as she was “terrified” of contracting COVID-19. She was also off when she was under mental distress due to her father undergoing coronary artery bypass surgery and feared for his life. She specifically told her cardiologist’s nurse on January 12, 2021, that she really didn’t want to go back to work. She was continuing to have dyspnea and attributed it to Colorado altitude. She was tearful and said she was a "wreck." She stated that she could not function due to her anxiety, and trouble sleeping. Her father had CABG and that added to her anxiety. She asked if Dr. Tsai would help her to get on disability due to her cardiac history and ongoing symptoms. This ALJ infers that Claimant was off work because of her ongoing symptoms, including her MDD and anxiety. Dr. Tsai issued the return to work letter, despite Claimant’s ongoing symptoms. This ALJ concludes Claimant was not off work the entire time from November 16, 2020 through January 12, 2021 but for two separate periods of time, and that her psychological condition played a great roll in obtaining time off, including her depression, posttraumatic stress disorder and anxiety causing panic attacks.

41. Testimony and evidence inconsistent with the above findings is either not 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. 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).

Claimant is making a claim for a mental impairment. As such, these claims are treated differently, effective July 1, 2018, pursuant to HB17-1229. Section 8-41-301(2) (a), C.R.S. (2022) governs any "mental-mental" claims and provides "A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist." While it was any "physician" prior to the statutory change, now it is any psychiatrist or psychologist. It further states that "The mental impairment that is the basis of the claim must have arisen primarily from the Claimant's then occupation and place of employment in order to be compensable."

Further, Sec. 8-41-301(2)(c), C.R.S. states that "The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment." And under Sec. 8-41-301(2)(d) "The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment." And Sec. 8-41-301(3) (b)(I) provides that "Psychologically traumatic event" means an event that "is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances."

When interpreting a statute, we must give effect to the legislative intent and "construe all terms of a statute harmoniously, avoiding a strained or forced construction of any of its terms." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1036 (Colo.2004); see also *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 326 (Colo.2004). ("The plain and ordinary meaning of the statute, if clear." *Anderson,* 102 P.3d at 326; *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1252 (Colo.1998).

To receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his or her employment. § 8–41–301(1)(c), C.R.S.2011; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000) ("Proof of causation is

a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded."). This case falls within the scope of "mental-mental" injuries, in which "mental impairment follows solely an emotional stimulus." *Oberle v. Indus. Claim Appeals Office*, 919 P.2d 918, 920 (Colo.App.1996). An injury that is "the product of purely an emotional stimulus that results in mental impairment," (*id*. at 921), requires a "heightened standard of proof" to "help prevent frivolous or improper claims." *Davison*, 84 P.3d at 1029. Under the express terms of the statute, "the testimony of a psychiatrist or psychologist" is required to establish a claim for mental impairment. *Oberle*, 919 P.2d at 921. The Colorado Supreme Court has interpreted this phrase broadly to include "the work product" of a provider which "may include letters, reports, affidavits, depositions, documents, and/or oral testimony." *Colo. Dep't of Labor & Emp't v. Esser,* 30 P.3d 189, 196 (Colo.2001).

However, not all components of such a claim must be proven by expert testimony. Rather, "[e]xpert testimony is necessary to prove that the event was psychologically traumatic, but the other elements can be proved by lay and/or expert evidence." *Davison*, 84 P.3d at 1033; *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 951 (Colo.App.2006). In addition, an expert need not use the precise statutory language to opine on a claimant's condition. "What is required is the presentation of sufficient facts such that the ALJ can find there existed a psychologically traumatic event or events." *City of Loveland*, 141 P.3d at 951; *Kieckhafer v. Indus. Claim Appeals Office of State*, 2012 COA 124, 284 P.3d 202 (Colo. App. 2012)

Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment claimant is seeking. *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. ICAO*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the medical care for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

Whether a claimant has met his or her burden of establishing a compensable mental impairment is a question of fact for determination by the ALJ. See *Pub. Serv. v. Indus. Claim Appeals Office*, 68 P.3d 583, 585 (Colo.App.2003) ("The causes of a claimant's mental impairment and the commonality of those causes are questions of fact to be resolved by the ALJ.").

Here, Claimant testified she had panic attacks, depression, insomnia following the February 17, 2022 incident of watching an individual through a seizure, unsuccessful attempts at resuscitation, and subsequent death. While they may be traumatic, they are not what caused the Claimant's need for medical care or for her loss of employment or disability from employment. The Claimant has underlying chronic conditions which

included her multiple medical conditions. Claimant has, requested work excuses due to her medical conditions, including her "anxiety," as well as requesting her providers' assistance with obtaining disability due to her medical conditions including heart disease. However, Claimant also has a long standing history of diagnosis of major depressive disorder, generalized anxiety disorder, posttraumatic stress disorder and insomnia as well as fatigue, and multiple other problems. The record of requesting medical assistance with these medical conditions was as recent as January and February 2022, before she witnessed the death on the job site. The records show that even when prescribed medication to assist with these problems, Claimant was not taking the medications as prescribed or was taking them intermittently, which is certainly contraindicated for most SSRI, depression or anxiety medications. Claimant also was inconsistent in taking other medications, such as the warfarin, a blood thinner medication.

Dr. Kleinman correctly opined and credibly testified another employee under the same circumstances would not have had the same response as Claimant. Dr. Kleinman credibly opined and testified Claimant does not meet the causative criteria to have sustained a mental health related work injury on February 17, 2022.

Claimant has failed to meet her burden of proving that it is more probably true than not that she suffered a mental health injury while in the course and scope of her employment on February 17, 2022. The persuasive and credible evidence shows that Claimant's asserted conditions were preexisting and do not meet the statutory criteria.

The ALJ finds the testimony of Dr. Kleinman as to the issues of causation of the asserted injury credible and persuasive. This ALJ accepts Dr. Kleinman's opinion the work incident of February 17, 2022 did not meet the criteria she sustained a mental health injury.

As Claimant has failed to show that she has a compensable claim, all other issues are moot.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits related to the incidents of February 17, 2022 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 26th day of October, 2022.

Digital Signature

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

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on February 17, 2022?

- If the claim is compensable, did Claimant prove he is entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked for the employer as an equipment operator for about 10 years. The Employer picks up trash and recycles. Claimant is a lead operator and operates a John Deere front-end loader. His job is to move recycling with his front-end loader from a pit to a belt where the recycling is sorted by two teams.

2. On February 17, 2022, Claimant alleges he injured his left shoulder when he was opening a large overhead warehouse door by pulling a chain. Claimant testified that he had excruciating pain immediately in the left side of his arm. Within 5 to 10 minutes after the incident he reported it to the facilities manager, EG[Redacted]. Claimant also testified that he was taken to Dr. Cynthia Schafer, the workman's comp doctor, following the injury by Mr. EG[Redacted]. (Hearing Transcript, p.19). Dr. Schafer is at UCHealth. (Claimant's Exhibit 7, p7). However, it does not appear that Claimant saw Dr. Schafer at UCHealth until after his initial visit UCHealth on March 9, 2022. He was actually seen by Jason Baker, PA-C at the time of the initial visit. He gave a history that he started having pain in early February and that when he was opening a heavy door with a chain and he felt a pop and sudden pain. (Claimant's Exhibit 7, p. 3).

3. The Claimant actually saw Dr. Schafer on March 15, 2022. The history given to Dr. Schafer is confusing. She took a history that on February 17 is when he pulled out on a chain on a rollup door with his right hand and felt a pop in the right shoulder with increased pain, a "stinger". It is unclear as to whether Claimant gave an inconsistent history or if Dr. Schafer incorrectly referred to the right shoulder instead of the left shoulder. Dr. Schafer eventually concludes that the left shoulder condition is not work related. However, because of the discrepancies in the history from the other medical records and the Claimant's testimony, I cannot accept her opinion as to the left shoulder condition as not being work related, and must look to other evidence to determine causation.

4. Prior to this incident, Claimant had a history of left shoulder pain. On November 26, 2018 he was seen at Optum Atrium by Megan Bartusek, N.P. with a chief complaint of "Left shoulder pain and range of motion". In the history portion of the report she states "Shoulder Pain: The patient present with complaints of gradual onset of constant episodes of severe left shoulder pain, described as sharp, radiating to the left upper arm. Episodes started 2 months ago. Symptoms are improved by restricted activity. Symptoms are made worse by shoulder motion and internal rotation Symptoms are unchanged (Pain started about 2 – 3 months ago, not injury related. Pain initially was

intermittent but now constant. Pain is worst with reaching, internal rotation. No locking but hears some clicking. Occasional tingling. Feels weak, but no troubles with grasping. Does a lot of steering with his left arm for work and the steering motion aggravates his arm symptoms.)." Ms. Bartusek prescribed Naproxen Sodium 550 mg and home exercises. (Respondents' Exhibit D, pp. 25 – 27).

5. The Claimant returned to Ms. Bartusek on January 18, 2019 to discuss the pain in his left shoulder. His diagnosis was "Biceps tendinitis of left upper extremity". He was prescribed Dicolofenac Sodium 1% transdermal Gel and referred to Orthopedics. She also order an X-ray of the left shoulder. (Respondents' Exhibit D, pp 28 – 30).

6. The next visit to Optum was on February 8, 2019 when the Claimant was seen by Dr. Plachta. He noted that the X-ray showed AC joint arthritis. His assessment was AC joint arthropathy. In addition to the Diclofenac Sodium gel, he prescribed Tramadol. (Respondents' Exhibit D, pp. 31 – 33).

7. Claimant had several visits to Optum for right shoulder pain between February 8, 2019 and November 18, 2021. On November 18, 2021, he complained of chronic pain of both shoulders. He denied any injury. Virginia Quiroz, N.P. administered cortisone injections into both shoulders. (Respondents' Exhibit D, pp. 50 – 54).

8. On February 1, 2022, Claimant was seen by Dr. Lockett and reported chronic shoulder problem for several months. She noted the prior cortisone shot in September and that he did ok until the past 2 weeks. He was also seen for left ring finger symptoms. (Respondents' Exhibit D, pp. 55 – 57).

9. Claimant returned to Optum on February 15, 2022, just 2 days prior to the incident with the warehouse door, complaining of bilateral shoulder pain. He was seen by Virginia Quiroz. Her assessment was Rotator cuff disorder. The plan was for an MRI of the left shoulder. Claimant was to follow up after the MRI was completed. (Respondents' Exhibit D, 58 – 61).

10. An MRI of the left shoulder was performed on February 17, 2022 at 5:18 p.m. (Respondents Exhibit E, p.79). The MRI showed:

> "1. AC joint arthrosis and mild osteoarthritis.
>
> 2. Complex SLAP tear with extension into the anterior labrum and horizontal split tear of the biceps tendon long head.
>
> 3. Partial thickness supraspinatus and infraspinatus tears.
>
> 4. Subacromial/subdeltoid bursitis.
>
> 5. Marrow reconversion."

11. Claimant returned to see Ms. Quiroz on February 24, 2022 to discuss the MRI. Based on the results, Ms. Quiroz referred the Claimant to an orthopedic surgeon for evaluation and treatment. (Respondents' Exhibit D, pp. 62 – 66).

12. Claimant was seen by Dr. Purcell at Orthopedic Centers of Colorado on March 8, 2022. Dr. Purcell's assessment was partial nontraumatic tear of both rotator cuffs. His impression was bilateral shoulder partial-thickness rotator cuff tears left greater than right; bilateral shoulder biceps tendinopathy; and work-related injury. He did not elaborate on his impression of work-related injury. He discussed surgery with the Claimant and indicated that surgery would be scheduled at their convenience. (Respondents' Exhibit F, pp. 135 – 139).

13. Claimant was referred to Dr. Lesnak by Respondents for an IME. Dr. Lesnak performed an IME of the Claimant on July 12, 2022. Dr. Lesnak performed a physical examination of the Claimant and reviewed medical records that predated and postdated the alleged work-related incident. Dr. Lesnak credibly testified in response to a question regarding whether the incident on February 17, 2022 caused a new injury or aggravated his preexisting problem in left arm that "his symptoms as documented by Ms. Quiroz, both before, right before and right after this reported incident are the same. His exam findings documented by Ms. Quiroz right before and right after this incident were the same. And his MRI showed no evidence of acute abnormalities that would in any way relate to an incident that was reported just several hours before that MRI was performed. So there's no evidence of any injury, no evidence of any aggravation of pre-existing symptomatic pathology as it pertains to the incident of February 17th." (Hearing Transcript p. 60).

14. Dr. Lesnak further opined that the need for the surgery recommended by Dr. Purcell is not related to the incident of February 17, 2022. (Hearing Transcript p.62). Dr. Lesnak's opinion is credible with respect to the cause of the need for surgery.

15. Claimant failed to prove he suffered a compensable injury to his left shoulder on April 5, 2021.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc*., W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than

its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove he suffered a compensable injury to his left shoulder on February 17, 2022. Although it is plausible that [Claimant] experienced pain in his left shoulder as reported to his supervisor, I conclude that the pain was a manifestation of the natural progression of preexisting shoulder pathology instead of as the result of a new injury or an aggravation of his preexisting condition. As found previously, Dr. Lesnak's testimony and written opinions, which are credible, supports this conclusion.

Claimant had a documented history of progressive shoulder pain for several years before the alleged accident. Claimant failed to prove his left shoulder condition was caused by or aggravated the incident on February 17, 2022 when he pulled on the chain to lift the warehouse door.

ORDER

It is therefore ordered that:

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

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

DATED: October 26, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-190-326 & 5-192-760

ISSUES

1. Did Respondents establish by a preponderance of the evidence that they met the statutory predicates to assert the intoxication penalty pursuant to section 8-42-112.5, C.R.S.?

2. If Respondents met their burden, did Claimants establish by clear and convincing evidence that Decedent's accident was not caused by the presence of any controlled substances?

STIPULATION

1. The parties stipulated that Decedent's average weekly wage was $824.17.

FINDINGS OF FACT

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

1. Decedent was a 31 year-old male who worked for Employer since February 26, 2020. (Ex. I).

2. On December 7, 2021, Decedent and DS[Redacted] were pulling new wire for a lighting repair in the parking lot, at DriveTime Auto in Denver, Colorado. Decedent was using an Elliot HiREACH L60 bucket truck. The truck has a walkway that extends from the main platform over the cab to the basket. (Ex. I).

3. Decedent and Mr. DS[Redacted] completed the job in the afternoon. Mr. DS[Redacted] went to another job, and Decedent stayed at the site to clean up and pick up his tools. Decedent called JN[Redacted] at Employer's office just before 2:00 p.m. to let him know the project was complete, and he planned to clean up. (Ex. I).

4. There is no evidence in the record that Mr. DS[Redacted] thought Decedent was impaired in any manner while they were working together on December 7, 2021.

5. There is no evidence in the record that Mr. JN[Redacted] thought Decedent was impaired in any manner when he spoke with Decedent around 2:00 p.m., on December 7, 2021.

6. Sometime between 2:00 p.m. and 3:00 p.m., Decedent attempted to egress from the man basket to the platform, but he slipped off the platform and fell head first on the pavement below. (Ex. I and Ex. 19).

7. At approximately 3:20 p.m. on December 7, 2021, the manager of DriveTime Auto found Decedent slumped over in his truck, disoriented, and "not acting normal." The manager called 911. (Ex. I).

8. Denver Health Paramedics responded to the scene. Decedent was groaning and unable to answer questions. The paramedics suspected that Decedent had been electrocuted. There were no medications or paraphernalia at the scene. The paramedics transported Decedent to the University of Colorado Health (UC Health) in Aurora. (Ex. 11).

9. According to the medical records, Decedent was admitted to the UC Health emergency department at 4:09 p.m. Decedent was agitated and at 5:20 p.m., Decedent was screaming in pain, "[p]lease let me go, I'm gonna freak out." Decedent was persistently confused and could not answer questions about what happened. The emergency department noted that no drugs or alcohol were found in Decedent's vehicle. (Ex. 12).

10. Decedent was intubated and taken to the neurosurgery operating room emergently for an intracranial hemorrhage. (Ex. 12) The medical team performed a suboccipital craniectomy for evacuation of the epidural hematoma. (Ex. G).

11. Despite substantial treatment at UC Health, Decedent died on December 21, 2022.

12. During the course of treatment, UC Health collected a sample of Decedent's whole blood, and a sample of Decedent's blood plasma. Both samples were collected at 4:15 p.m. on December 7, 2021, shortly after Decedent's admission. (Ex. 2 and Ex. 7).

13. UC Health also collected a sample of Decedent's urine, via catheter, at 9:29 p.m., about five and a half hours after his admission, on December 7, 2021. Decedent's urine test came back positive for benzodiazepines and cannabinoids. (Ex. G).

14. The ALJ finds that UC Health, a medical facility, conducted a forensic drug or alcohol test by testing Decedent's urine.

15. On December 10, 2021, a representative of Insurer called UC Health and requested a copy of Decedent's medical records. (Ex. G).

16. On December 13, 2021, Respondents sent a letter to UC Health demanding the hospital preserve Claimant's blood sample taken on December 7, 2021. (Ex. N).

17. On December 15, 2021, Respondents filed a General Admission of Liability, asserting a 50% penalty pursuant to section 8-42-112.5, C.R.S., and based on a safety violation. (Ex. A).

18. On December 15, 2022, Derrick McMillon, a Manager at UC Health, received an email indicating that specimens of Decedent's blood ***and*** urine samples had been retrieved and stored for preservation. He personally inspected and set aside three tubes of Decedent's fluids for preservation. One tube contained Decedent's whole blood (EDTA

anticoagulant). The second tube contained Decedent's plasma (lithium heparin with gel). The third tube contained Decedent's urine. (Ex. 14).

19. Respondents requested an emergency prehearing conference and represented that Decedent was in the ICU, incapacitated, and was not yet represented by counsel. Based on this representation, the PALJ held an *ex parte* hearing. Respondents were seeking to preserve "Claimant's blood sample taken on 12/7/21 that led to the positive controlled substance test results." On December 17, 2021, the PALJ granted Respondents' motions to preserve Decedent's blood sample and for leave to issue a subpoena to obtain a duplicate blood sample. (Ex. 17).

20. Decedent's medical records, which Respondents requested and reviewed, unequivocally state that the positive test for benzodiazepines and cannabinoids came from Decedent's urine sample, not his blood sample.

21. On January 12, 2022, Respondents filed a Fatal Case-General Admission and asserted a 50% penalty pursuant to section 8-42-112.5, C.R.S. In support of the penalty, Respondents attached the record of Decedent's December 7, 2021, positive urine drug test. (Ex. C).

22. On January 25, 2022, a pre-hearing conference was held on Claimants' request for the PALJ to reconsider his December 17, 2021 Order. Claimants asserted that the PALJ's Order "was based on incorrect factual information provided by Respondents' counsel. There was no blood sample tested for intoxicants. Rather, a urine drug screen indicated positive results for benzodiazepines and cannabinoids. This was indicated in medical records obtained from UC Health dated 12/7/21, which was in possession of Respondents as of 12/17/21." Ex. 18, p.75.

23. The PALJ found Claimant's request to reconsider his order to preserve the blood sample moot, as the blood was already preserved. Regarding Respondents' right to subpoena the blood, the PALJ stated "[w]hether or nor Claimant chooses to obtain the preserved blood sample for testing, if still available, will remain within Claimant's discretion. Nevertheless, there is no basis to permit Respondents to subpoena the blood sample and this portion of the 12/17/21 order is vacated." (Ex. 18).

24. On January 28, 2022, Mr. McMillon transferred the three tubes of Decedent's fluids to Wendy Degelman at Rocky Mountain Instrumental Laboratories. He stated in his affidavit that Decedent's urine sample, as established in the medical record, was taken and tested on December 7, 2021. (Ex. 14).

25. On January 28, 2022, Rocky Mountain Instrumental Laboratories took custody of the three tubes of Decedent's fluids: one tube of whole blood, one tube of plasma, and one tube of urine. (Exs. 1-10)

26. The Evidence Record – Custody form, from Rocky Mountain Instrumental Laboratories, notes a request for a quantitative analysis of Decedent's blood sample for THC/Benzos. There is no evidence in the record regarding the quantitative testing of Decedent's blood samples. (Ex. 1).

27. The ALJ finds that the only drug test that was positive for controlled substances, was the test conducted by UC Health on Decedent's urine on December 7, 2021.

28. According to the itemization of services, UC Health administered Midazolam to Decedent twice on December 7, 2021. They administered two units of Midazolam 1 mg/ml SOLN, and 50 units of Midazolam IN NS 50 mg/ 50 ml. There is no evidence in the record regarding the time Decedent received Midazolam on December 7, 2021. (Ex. 12, p.31).

29. Claimants retained Caroline M. Gellrick, M.D. to review Decedent's medical records and issues regarding his positive urine drug screen on December 7, 2021. Dr. Gellrick explained that Midazolam is a sedative hypnotic benzodiazepine used in emergency situations at hospitals, the ICU, and surgery centers. She specifically noted, "[i]t is well known that preop drugs and drugs that are used for agitation and sedation are in the benzodiazepine class and in this situation, Midazolam is a sedative hypotic benzodiazepine, and could have caused the positive drug screen for benzodiazepines." Dr. Gellrick opined that Decedent's positive test for benzodiazepines could be due to the Midazolam. (Ex. 13).

30. The ALJ finds that Decedent received benzodiazepines at UC Health on December 7, 2021.

31. Claimants assert that Decedent's urine sample was not separated into two samples prior to testing. Claimants further argue that an untested sample of urine was not saved, but the entire sample was tested and "dumped back into the tube." There is no evidence in the record to support this assertion.

32. Respondents retained toxicologist Michael Kosnett, MD., and he was admitted as an expert in medical toxicology. (Tr. 34:1-2).

33. Dr. Kosnett credibly testified that in his clinical experience with drug testing on urine, the original sample acts as a duplicate, as tests are not run on the whole sample, but on the portion that is separated off and tested, an aliquot. The remainder of the sample is untested and available for subsequent testing. He testified "when we talk about duplicate samples, we essentially would say that taking the same sample and then separating it represents a duplicate." (Tr. 37:14-38:24).

34. The ALJ finds that UC Health preserved a duplicate sample of Decedent's urine and made it available for testing.

35. In his report, Dr. Kosnett opined that Decedent's "positive urine drug test interpreted in isolation contributes relatively little if any information regarding the magnitude of the dose consumed, the date and time of consumption, and whether the donor was ever intoxicated by or under the influence of the drug. Many drugs and/or their metabolites, including those of THC and benzodiazepines, may be detectable in the urine for days to many weeks after the drug has last been consumed. This period of detection extends far beyond the interval of time that the drug exerts any pharmacodynamics effects, including neurocognitive or psychomotor impairment or intoxication. Acute

cannabis-induced decrements in psychomotor or neurocognitive performance, which may occur in some but not all users, typically resolve within six hour of cannabis smoking or vaping or within eight hours of cannabis ingestion." (Ex. J).

36. In his report, Dr. Kosnett cited a position statement from the American College of Medical Toxicology. The position statement noted: "[a] positive test for [THC] metabolite indirectly indicates that THC, a psychoactive compound in cannabis has been present in the body…The test results do not identify route of THC exposure, source of exposure, specific timing of exposure, dose, intentional or accidental nature of exposure, or clinical impairment." (Ex. J).

37. Dr. Kosnett credibly testified that the only test performed on Decedent, for controlled substances, the urine test, does not indicate when Decedent may have consumed any controlled substances. The test also does not indicate whether there were any active controlled substances present in Decedent's urine, or merely metabolites. Further, the positive urine test does not indicate whether Decedent was impaired in any way when he fell from the platform. (Tr. 44:18-45:9).

38. Dr. Kosnett opined "[i]n comparison to urine drug tests, analytical toxicology testing conducted on blood offers more informative data regarding the type of drug consumed, the dose administered, and the time since administration. . . . [T]here is a consensus that drug concentrations in the blood, rather than those in the urine, offer a better insight into the potential presence of impairing effects in an individual." (Ex. J)

39. The ALJ finds the opinions of Dr. Kosnett to be credible and persuasive.

40. The U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) issued a citation to Employer on April 29, 2022 for a serious level violation with respect to this incident. OSHA cited Employer for not providing and ensuring each employee uses a safe means of access and egress to and from walking-working surfaces. OSHA found Employer exposed employees to slip, trip and fall hazards, and that Decedent sustained serious injuries after falling to the parking lot while he was attempting to egress from the man basket to the platform. (Ex. 16).

41. OSHA determined that Employer modified the walking-working surface on Decedent's work truck. The platform that allowed Decedent to access and egress the bucket, while it was stowed over the head of the vehicle, was modified to a lower position. (Ex. 16).

42. Hellman & Associates conducted an investigation of the accident for Employer, and issued a report after viewing security footage and conducting interviews. In the report, Decedent's post-incident drug screen was noted as being positive for THC/Marijuana. This, however, was not listed as a contributing factor to the incident. Items that contributed to the incident included: used equipment unsafely, improper position/posture, and faulty design/construction. The "influence of intoxicant/drugs" was not found to be a contributing factor to the accident. (Ex. I).

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).

Presumptive Intoxication Offset

The presumptive intoxication statute states:

> Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed or of a blood alcohol

> level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. **A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense.** If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

§ 8-42-112.5, C.R.S. (emphasis added).

As the party seeking to impose a penalty, Respondents have the burden of proof to establish the predicates for application of the presumption. *Ray v. New World Van Lines,* W.C. No. 4-520-251 (ICAO Oct. 12, 2004) (citing *Lori's Family Dining v. ICAO,* 907 P.2d (Colo. App. 1995)). To apply the presumptive intoxication offset, Respondents must prove three factors: (1) the presence of a controlled substance during working hours; (2) as evidenced by a forensic drug test conducted by a medical facility or laboratory licensed or certified to conduct such test; and (3) that a duplicate sample from any test conducted was preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. §8-42-112.5, C.R.S.; *SkyWest v. Indus. Claim Appeals Office,* 2020 COA 131.

Respondents have met their burden of proof with respect to the first two factors. As found, on the day of the accident, Decedent underwent a forensic drug test at UC Health, a Medical Facility, and Decedent's urine drug screen was positive for benzodiazepines and cannabinoids. (Findings of Fact (FOF) ¶ 13). The disputed issue is whether the urine sample preserved by UC Health, and transferred to Rocky Mountain Laboratories, constitutes a ***duplicate sample*** for purposes of conducting a second test. While Decedent's blood and plasma samples were also preserved, made available for testing, and likely tested, these samples are not relevant. The only positive drug test was the test on Decedent's urine. (FOF ¶ 27).

Claimants argue that the single tube of Decedent's tested urine, does not constitute a "duplicate/second" sample of urine. Claimants rely on *Stohl v. Blue Mountain Ranch Boys Camp,* W.C. No. 4-516-764 (ICAO Feb. 25, 2005) for their position. In *Stohl,* the ICAO discussed the legislative intent behind the statutory requirement of a duplicate sample: "[t]he legislative history indicates that the requirement to preserve a second sample was enacted as a procedural protection against the possible reduction of benefits from a false positive result in the first blood sample testing. The General Assembly determined that given the magnitude of the evidentiary presumption created by an initial [positive] test result…the availability of a second sample for the Claimant to independently test is a necessary safeguard to the wrongful loss of benefits. . . . Therefore, the General

Assembly conditioned application of the penalty statute on the availability of a second sample for use by the Claimant to contest the accuracy of the initial test." *Stohl, supra.*

To discern the intent of the General Assembly, the examining authority must first examine the language of the statute. If the statutory language is clear and unambiguous, the words and phrases of the statute should be given their plain and ordinary meaning, and the statute must be applied as written unless the result is absurd. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 553 (Colo. 1998); *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176, 178 (Colo. App. 2002). Statutory interpretations that render provisions superfluous or meaningless must be avoided. *Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998).

To the extent the language in the intoxication statute regarding a duplicate sample is ambiguous, the statute must be construed in light of the apparent legislative intent and purpose. *Henderson v. RSI, Inc*., 824 P.2d 91 (Colo. App. 1991). This language, however, is not ambiguous. The *American Heritage College Dictionary* (Third Ed.) defines duplicate as "identically copied from an original" and "existing or growing in two corresponding parts." Dr. Kosnett credibly testified that when a urine sample is tested for drugs, the original sample acts as a duplicate, as tests are not run on the whole sample, but on the portion that is separated off and tested, an aliquot. The remainder of the sample is untested and would be available for subsequent testing. (FOF ¶ 33). This testimony is uncontroverted. As found, UC Health preserved a duplicate sample of Decedent's urine and made it available for testing. (FOF ¶ 34). There is no evidence in the record of any test results from the duplicate sample of Decedent's urine.

The ALJ finds that Respondents proved by a preponderance of the evidence that the intoxication presumption applies. Claimants, however, can overcome this presumption by clear and convincing evidence. Clear and convincing evidence is evidence that is highly probable and free from serious and substantial doubt. *Metro Moving & Storage Co v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

As found, OSHA cited Employer for modifying the walking-working platform on Decedent's work truck. OSHA considered this a serious level safety violation, and cited and fined Employer. OSHA determined that this modification exposed employees to slip, trip, and fall hazards. (FOF ¶¶ 40-41).

Notwithstanding the positive urine drug screen, there is no evidence in the record that Decedent was impaired in any way on December 7, 2021, leading up to and including his fall. First, the investigation report specifically noted the following contributed to the incident: used equipment unsafely, improper position/posture, and faulty design/construction. Notably, the "influence of intoxicant/drugs" was not found to be a contributing factor to the accident. (FOF ¶ 42). Second, there is no evidence in the record, that Decedent's colleague, Mr. DS[Redacted], who worked with him on the day of the incident, had any concerns that Decedent was impaired in any way. (FOF ¶ 4). Third, Decedent spoke with Mr. JN[Redacted] at Employer's office shortly before the fall. There is no evidence in the record that Mr. JN[Redacted] thought Decedent was impaired in any

way. (FOF ¶ 5). Fourth, the paramedics noted that no drugs, medications, or paraphernalia were found on Decedent or in his work truck. (FOF ¶ 8).

As found, Decedent received benzodiazepines at UC Health on December 7, 2021. (FOF ¶ 30). Further, Respondents' expert credibly testified that a urine test does not indicate whether Decedent had any active controlled substances in his system at the time of the accident. Similarly, the urine test does not indicate the timing, dose, and intentional or accidental exposure to any controlled substances. Lastly, the urine test does not indicate that Decedent was impaired in any way at the time of his fall. (FOF ¶¶ 35-37). Based on the totality of the evidence, the ALJ finds that it is highly probable that Claimant's fall was not caused by the presence of any controlled substances.

The ALJ finds that Claimant has established by clear and convincing evidence that Decedent's fatal fall was not due to intoxication.

ORDER

It is therefore ordered that:

1. Respondents established by a preponderance of the evidence that the statutory predicates have been met to assert the intoxication penalty under section 8-42-112.5, C.R.S.

2. Claimant has established by clear and convincing evidence that Decedent's fatal fall was not caused by intoxication.

3. Respondents shall pay unreduced death benefits under W.C. No. 5-192-760-001 from December 7, 2021, until terminable by law.

4. Respondents shall pay unreduced temporary total disability benefits from December 7, 2021 until December 21, 2021.

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: October 26, 2022

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the right shoulder arthroscopy with biceps tenodesis versus tenolysis and SAD requested by authorized treating physician (ATP) Michael Hewitt, M.D. is reasonable, necessary, and related to Claimant's admitted September 18, 2020 industrial injury.

FINDINGS OF FACT

1. Claimant is 47 years of age. Claimant has worked for Employer for approximately 14 years as a Technician I.

2. Claimant sustained an admitted industrial injury on September 18, 2020 when he was riding as a restrained passenger in the backseat of a work truck. The driver of the truck was reversing approximately 5-10 miles per hour to park and struck the dock.

3. Claimant testified at hearing that the vehicle was going at "high speed" and, immediately upon the truck hitting the dock, he was pushed back into the seat, his neck hit the head rest, and he experienced an immediate onset of neck and right-sided pain.

4. On September 21, 2020 Claimant presented Kelsey Smithart, M.D. at Denver Health with complaints of pain throughout the left side of his body. The "Location" section of the medical report lists left back, left hip, left knee, left lower leg and left shoulder. Claimant reported that he was in the jumpseat in the back of a truck that backed into a loading dock at approximately 5-10 miles per hour. Claimant reported that he did not feel much pain initially but realized he was in a lot of discomfort when he got home. Claimant complained of back stiffness/spasms, pain shooting down to the left knee, tingling in his left neck, and hip pain. Dr. Smithart noted,

> Pt reports his back was initially injured approx 9 years ago when he was driving snowplows for the city when he slid into a lightpole. Pt had lasting damage to the right side of his body and continues to work through the pain on a regular basis. Pt uses Tizanidine for his previous injury and takes Percocet every night. Pt stretches and continues his home PT exercises for right sided pain…Pt reports the left sided musculoskeletal pain is all new and from this most recent injury.

(Resp. Ex. A, p. 12.)

5. No new right-sided injury or complaints were noted. On examination, Dr. Smithart noted tenderness with the left-sided straight leg raise, as well as tenderness to the left clavicle and trapezius. There was tightness with palpation to the left trapezius. No

examination to the right side was documented. Dr. Smithart assessed Claimant with a muscle strain of lower back and placed Claimant on bilateral upper extremity restrictions. She referred Claimant for physical therapy and chiropractic treatment.

6. Claimant saw Alissa Koval, M.D. at Denver Health on October 28, 2020. The location of pain was noted as back, hip, neck and left shoulder. Dr. Koval noted Claimant presented for follow-up of his neck, left shoulder, upper back, and left hip. Claimant reported that the pain in his neck and left shoulder was largely unchanged, and that the pain was radiating into his hand and down into his upper back. No right-sided complaints were documented. Dr. Koval noted that she examined the general appearance and condition of the patient. No specific exam findings were documented. Dr. Koval assessed Claimant with a lower back strain, myalagia, and segmental and somatic dysfunction of the cervical, thoracic and lumbar regions. She referred Claimant to Robert Kawasaki, M.D.

7. On November 20, 2020 Dr. Koval again noted the location of Claimant's symptoms as his left neck and low back with no mention of right-sided complaints or findings.

8. On December 18, 2020, Claimant reported to Dr. Koval that his neck was bothering him more than his back. Neck and back exams were unchanged. Nothing was specified regarding Claimant's left or right side.

9. Claimant presented to Dr. Kawasaki on December 22, 2020. Dr. Kawasaki was familiar with Claimant, having provided maintenance treatment to Claimant for a prior low back injury. Regarding the mechanism of injury, Claimant reported that he was riding in the crew cab seat when the vehicle rammed into the loading dock in reverse traveling 5-10 miles per hour. Claimant reported that the crew cab seat was very tight and that the back seat did not have a headrest so the top of his shoulders were above the top of the seat, leaving his neck unsupported. Claimant further reported that he felt a jolting pain through his neck and low back when the collision occurred, and had since experienced pain from his neck down into his low back with increased pain in the neck and shoulder girdle region. Dr. Kawaski noted, "His pain was initially more on the left side but currently bilateral." (Resp. Ex. B, p. 54). Dr. Kawasaki did not document any examination of the left or right shoulders. He assessed Claimant with, *inter alia*, chronic pain syndrome, lumbosacral spondylosis without myelopathy and cervical spondylosis without myelopathy. He opined that Claimant suffered a new cervical strain with findings consistent of whiplash mechanism, and cervical spondylosis with facetogenic pain causing shoulder girdle myofascial irritation. Dr. Kawasaki ordered a cervical spine MRI.

10. Claimant continued to report pain at a telephone appointment with Dr. Smithart on January 8, 2021. Regarding the pain, Dr. Smithart noted, "Today it is primarily in his R shoulder and neck though it is typically in the center of his neck and in both shoulders." (Resp. Ex. A, p. 24).

11. At a follow-up evaluation with Dr. Kawasaki on January 18, 2021 Claimant reported increased pain, numbness and tingling down his right upper extremity. Dr. Kawasaki also noted pain in Claimant's neck and left shoulder.

12. Claimant returned to Dr. Smithart for a follow-up evaluation on January 22, 2021. The location of Claimant's injury was now noted to be the right neck and right shoulder. Claimant also endorsed occasional numbness and tingling of his right hand. On examination, Dr. Smithart noted active range of motion was limited by pain in the right upper extremity, full range of motion of the left upper extremity, and tenderness to palpation of right shoulder in the superior anterior quadrant, right upper scapula, and low thoracic spine.

13. On February 9, 2021 Claimant complained to Dr. Kawasaki of pain through his neck and shoulder girdles and into the right upper extremity.

14. On February 19, 2021 Claimant reported to Dr. Smithart fewer radicular symptoms in his right upper extremity, with sensations now only from the neck to right shoulder.

15. On February 23, 2021 Claimant's chiropractor, Mark Testa, D.C. remarked that Claimant's pain seemed to be more on the right, going into the right trapezius region.

16. On March 12, 2021, Dr. Kawasaki ordered an MRI of the right shoulder, which was obtained on March 24, 2021. Craig Stewart, M.D. gave the following impression of the MRI: "1. Moderate grade partial-thickness tear of the distal superior fibers of the subcapularis tendon. 2. Intact supraspinatus and infraspinatus tendons. 3. Sequela of an age-indeterminate low-grade acromioclavicular joint separation which may be chronic. Coracoclavicular ligaments are intact." (Cl. Ex. 4, p. 13).

17. Claimant reported pain in his neck, shoulder girdles and right shoulder at a follow-up evaluation with Dr. Kawasaki on April 6, 2021. On examination of the right shoulder, Dr. Kawasaki noted positive impingement signs, tenderness to palpation of the deltoid region, some give way pattern weakness with rotator cuff testing of supraspinatus testing, and some crepitus with motion particularly with abduction into overhead. He reviewed the right shoulder MRI, noting that Claimant had a partial tear of the subscapularis tendon.

18. Claimant presented to Michael Hewitt, M.D. on June 7, 2021. Claimant reported to Dr. Hewitt that he was injured when riding in the backseat of a work truck that struck a dock in reverse at approximately 20 miles per hour. Claimant reported that he experienced an immediate onset of cervical and shoulder pain, but did not lose consciousness. He denied a previous history of right shoulder issues. Claimant complained of lateral shoulder pain and night pain and radicular pain extending into his hand. On examination, Dr. Hewitt noted significant restriction of range of motion of the cervical spine. On the right side Dr. Hewitt noted positive impingement and positive biceps, and diffuse acromioclavicular bicipital groove and impingement. Dr. Hewitt reviewed the right shoulder MRI, noting no rotator cuff muscular atrophy, mild supraspinatus tendinopathy, leading edge subcapularis tearing with moderate biceps tendinopathy, and no displaced labral tear. He assessed Claimant with right diffuse shoulder pain with radicular symptoms status post whiplash injury. He noted that Claimant's shoulder findings on exam and MRI did not account for his primary pain complaints. Dr. Hewitt discussed treatment options, including conservative treatment,

injections and surgery. He recommended focusing on conservative management as Claimant's cervical spine appeared to be his primary pain generator.

19. On January 14, 2022 Dr. Kawasaki noted that Claimant had no relief from cervical medial branch block procedures. He noted that Claimant had a right C5-6 transforaminal steroid injection on December 17, 2021 with improvement 60-70% and improvement in his right arm but continued right arm pain. Dr. Kawasaki's January 14, 2022 report made no indication of a subacromial injection.

20. Dr. Hewitt reevaluated Claimant on February 7, 2022. He noted that Claimant underwent a subacromial injection with Dr. Kawasaki with significant improvement, but that Claimant's symptoms had since returned. A January 25, 2022 ultrasound report revealed subcapularis tendinopathy and medial subluxation of the biceps tendon. Dr. Hewitt opined that Claimant had undergone extensive conservative management and, given his persistent symptoms, MRI and ultrasound findings, as well as clinical examination, shoulder arthroscopy was medically appropriate.

21. On February 15, 2022, Dr. Hewitt requested authorization for right shoulder arthroscopy with biceps tenodesis vs. tenolysis and SAD, which was denied by Respondent.

22. On April 13, 2022, Michael Striplin, M.D. performed an Independent Medical Examination (IME) at the request of Respondent. Regarding the mechanism of injury, Dr. Striplin noted that Claimant was riding in the rear bench seat, the driver of the vehicle was backing up to the dock at the transportation department when the vehicle collided with the dock at approximately 20 to 25 miles per hour. Claimant reported being thrown forward and then thrown backward, striking his neck and right shoulder against the seatback and headrest. Claimant noted no immediate symptoms but an onset of neck pain and right shoulder girdle pain approximately 1.5 hours after the incident. Claimant complained of neck pain and right shoulder girdle pain and swelling of the right shoulder girdle and arm, limited right shoulder motion, and paresthesias in the right ring and little fingers occasionally involving the entire right hand. Claimant denied prior injuries or problems to his cervical spine, right shoulder and right upper extremity. On physical examination Dr. Striplin noted mild diffuse tenderness over the right shoulder girdle, and limited right shoulder range of motion.

23. Dr. Striplin noted that Claimant's report to him of neck and right shoulder pain the evening of the accident is inconsistent with medical records which indicate initial neck and left-sided symptoms, with focused attention to the right shoulder not occurring until March 12, 2021. He opined that Claimant's cervical pain is related to the September 18, 2020 work incident, but that Claimant's right shoulder complaints and right shoulder pathology on and ultrasound cannot be attributed to the work incident. Dr. Striplin explained that the March 2021 right shoulder MRI findings suggested a prior age undetermined injury. He noted that a right shoulder ultrasound performed on January 25, 2022 ultrasound showed an unremarkable right pectoralis tendon, apparent subcapularis tendinopathy or strain with at least moderate partial moderate partial articular surface

tear, and medial subluxation of the long head biceps tendon suggesting apparent biceps pulley mechanism dysfunction in addition to subcapularis tear.

24. Dr. Striplin's report documents a January 19, 2022 letter from Dr. Hewitt to Dr. Kawaski indicating that Claimant reported transient benefit from a right shoulder injection performed by Dr. Kawasaki, but the exact location of the injection was unclear. Dr. Striplin concluded that there was no actual evidence that Dr. Kawasaki performed a subacromial injection, let alone that Claimant had a diagnostic response to one. He opined that the diagnostic response that Claimant reported appeared to be from the cervical spine injections from the January 14, 2022 visit.

25. Claimant saw Jennifer Pula, M.D. on May 23, 2022. Dr. Pula noted that Claimant underwent a C5-6 transforaminal steroid injection and a C7 nerve block on the right on May 18, 2022. He reported that his right shoulder pain resolved for a few days but had since returned.

26. On June 3, 2022, Dr. Kawasaki noted that he was uncertain if the May 18, 2022 cervical transforaminal steroid injection was significantly helpful. Claimant continued to report pain in the right shoulder and down the right arm. Dr. Kawasaki stated he did not recommend additional injections for Claimant.

27. Claimant testified at hearing that prior to his admitted industrial injury he had no right upper extremity symptoms or limitations and was able to perform the full duties required of his position, that he has had pain in his right shoulder at the top going into the base of the trapezius and scapula since his admitted industrial injury of September 18, 2020. Claimant testified that references to left-sided complaints and symptoms in his early medical records are incorrect. He testified that he initially reported right-sided pain and was treating his right shoulder despite the medical records referencing the left shoulder. Claimant stated that he was unaware of any tear in his shoulder prior to March 24, 2021. Claimant testified that he had an injection in his shoulder performed by Dr. Kawasaki which provided temporary relief, but that the symptoms complained of in the shoulder extending into the scapula had returned.

28. On cross-examination, when Claimant was directed to a copy of the January 8, 2021 report by Dr. Smithart, Claimant testified that he did not know whether the subjective complaints in the report were accurate. Respondent's counsel pointed to the statements about the pain being primarily in Claimant's right shoulder and that the report documented Claimant reporting the pain typically being "in the center of his neck and both shoulders." Claimant responded, "I don't remember, honestly." (Hr'g Tr. 21:15). When asked to confirm that he did not remember specifically where his pain was, Claimant responded, "It was a year ago, honestly." (Hr'g Tr. 21:21). When asked whether he saw Dr. Koval after his first visit with Denver Health, Claimant testified that he did not see Dr. Koval until March 2021, despite the records showing that he saw Dr. Koval three times prior to March 2021, the earliest being October 28, 2020. Claimant then testified, "I don't really remember. It was so long ago. I think I seen about every doctor in that office." (Hr'g Tr. 20:16-18).

29. Dr. Striplin testified at hearing on behalf of Respondent as an expert in occupational medicine. He explained that it is difficult to be certain regarding Claimant's source of pain, stating it could be any or all of Claimant's MRI findings. He testified that does have pathology of the right shoulder evidence on MRI, but that the MRI does not evidence an acute injury. Dr. Striplin explained that the radiologist noted that the findings could suggest a prior injury. Dr. Striplin testified that the reported mechanism of injury is inconsistent with Claimant's MRI findings. He explained that shoulder injuries typically occur when falling onto a hand, when reaching over head or out to the side, or falling from a height and grabbing on to prevent the fall, and that being pressed back into a car seat would not cause injury to the shoulder. He discussed the discrepancies between Claimant's reports of the speed of the vehicle, testifying that he found it implausible that the vehicle was going 20-25 miles per hour. He testified that striking the dock at 5-10 miles per hour would not be expected to cause damage to the AC joint or produce a rotator cuff tear. Dr. Striplin further testified that he had never seen a shoulder injury whose symptoms did not manifest until months later. With regard to Dr. Hewitt's note that Claimant had a diagnostic response to a right shoulder injection, Dr. Striplin testified that he found no documentation in Dr. Kawasaki's reports that Dr. Kawasaki actually performed a right shoulder injection.

30. On cross-examination, Dr. Striplin testified that the recommended surgery is reasonable and that he does not dispute the necessity of the surgery. Dr. Striplin testified that, although there are references to the right shoulder in reports earlier than March 12, 2021, there remained a significant delay in Claimant's reports of right shoulder issues.

31. The ALJ finds the testimony of Dr. Striplin, as supported by the medical records, more credible and persuasive than the testimony of Claimant and the opinions of Drs. Kawasaki and Hewitt.

32. While the recommended right shoulder surgery is reasonable and necessary, Claimant failed to prove it is more probably true than not that the surgery recommended is causally related to his September 18, 2020 industrial injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Treatment

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

Claimant failed to prove it is more probably true than not the right shoulder surgery recommended by Dr. Hewitt is causally related to his September 18, 2020 industrial injury. Claimant's credibility is undermined by inconsistencies in his reports regarding the mechanism of injury and the onset and location of his symptoms.

Claimant reported to Dr. Smithart that the vehicle in which he was riding was going 5-10 miles per hour when it struck the dock and that he did not initially experience any pain. He then reported to Dr. Kawasaki the same speed, but that he experienced pain in his neck and low back during the collision. Dr. Kawasaki noted there was no headrest on Claimant's seat. Claimant later reported to Dr. Hewitt that the vehicle was going 20 miles per hour and that he experienced an immediate onset of neck and right shoulder pain. He later reported to Dr. Striplin that the vehicle was going 20-25 miles per hour, he struck the headrest, and experienced no immediate symptoms. Claimant testified at hearing that the vehicle was going at high speed and that he hit the headrest during the collision. Based

on the description of the accident, in which the driver was backing up into a dock to park, the ALJ is not persuaded it was likely the driver was going 20-25 miles per hour. Dr. Striplin credibly opined that it is not medically probable the mechanism of injury, striking the dock at 5-10 miles per hour, caused Claimant's right shoulder pathology and need for treatment.

Despite early medical records being devoid of any mention of right-sided complaints or findings, Claimant purports that he initially reported right shoulder and right-sided issues and that, since the beginning of his treatment, the treatment was focused on his right side. Claimant's contention is incredible based on a comprehensive review of the medical records. At Dr. Smithart's initial evaluation on September 21, 2020, she specifically made a distinction between Claimant's pre-existing right shoulder pain from a prior injury, and "new" left-sided pain from the September 18, 2020 incident. Additionally, the medical record from this evaluation does not document any examination of the right side. Claimant attended follow-up evaluations in October 2020 and November 2020, which also contain no reference to right-sided complaints or examinations of the right side. Dr. Kawasaki's December 22, 2020 medical note further contradicts Claimant's contention by stating that Claimant's pain initially was more on the left side but is currently bilateral. Dr. Smithart's January 8, 2021 note also undermines Claimant's argument in specifying that, on that particular day, Claimant's pain was primarily in the right shoulder although "typically center and both shoulders." While typographical errors in medical records are certainly possible, here, the ALJ is not persuaded that multiple providers at different over multiple visits failed to accurately document Claimant's reported symptoms and failed to examine the specific body parts about which Claimant allegedly complained.

Dr. Striplin credibly testified at hearing testified at hearing that Claimant's shoulder, had it been injured in the work incident, would have exhibited symptoms much sooner than three months after the date of injury. Dr. Striplin also credibly testified that the mechanism described by Claimant would not be anticipated to, and did not, cause a Claimant's shoulder injury. Based on the totality of the evidence, the preponderant evidence does not demonstrate the surgery is causally related to the September 18, 2020 work injury.

ORDER

It is therefore ordered that:

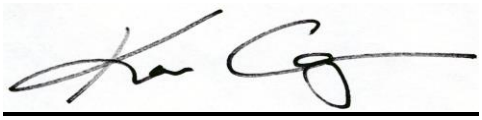
1. Claimant failed to prove by a preponderance of the evidence the right shoulder surgery recommended by Dr. Hewitt is causally related to his September 18, 2020 industrial injury. Claimant's claim is denied and dismissed.

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: October 27, 2022



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their General Admission of Liability (GAL) acknowledging that Claimant suffered an industrial injury during the course and scope of her employment with Employer on December 3, 2019.

FINDINGS OF FACT

1. Claimant is a 42-year-old female who began working for Employer on October 14, 2019 in the position of General Labor/Hand Pack. The hand packing job involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks together with both hands, straightens them, then pivots to place the cheese in a box. Each handful weighs anywhere from two to five pounds. Once the box is filled with 15-pounds of cheese, it is placed onto a roller to move to the next conveyor. The workers wear freezer gloves as well as one or two pairs of thick yellow gloves to help protect them from the cold product. The working environment is room temperature.

2. Claimant worked four days each week for 10 hours each day. She began her shift at 8:30 p.m. and worked until 6:00 a.m. Claimant received two 15-minute breaks and a 30-minute lunch period.

3. Employer's Processing Supervisor VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line box more cheese than those at the end of the line. In reviewing a photo of the hand packing line as one of the Exhibits, Ms. VF[Redacted] noted that individuals in stations 9-12 of the line had no cheese sticks to pack. She generally remarked that there are normally periods of time when workers near the end of line have no cheese to pack. Ms. VF[Redacted] also commented that employees rotate positions every hour on the line. Finally, she explained that employees are instructed to scoop the cheese with tucked elbows in armfuls of approximately two to five pounds.

4. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations every hour. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Instead, workers rotate approximately five to seven stations down the line. For example, if a worker started at station eight and proceeded five stations down the line, she would rotate to station 1. The worker would then rotate the next hour to station 6. Similarly, if a worker rotated seven stations hourly and began at station 1, she would move to station eight. Ms. VF[Redacted] remarked that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. So to alleviate that pressure, we rotate them." She summarized that rotating stations gives

employees on the line a “period of time where they can sit at the end of the line and, kind of, get a breather.”

5. Ms. VF[Redacted] explained that hand packing is not performed on a daily basis, and employees engage in a variety of related jobs on off-days. On certain days, workers will “pick cheese.” The process involves identifying defective cheese sticks moving down a conveyor belt. If a defective cheese stick is found, the employee picks it up and drops it into a nearby tub.

6. The “bag tuck” position is another job on non-hand-pack days. The duties involve flipping over each side of the plastic bag in a box of cheese. The worker then folds the bag over the cheese and closes the flaps of the box.

7. Another job is “bag spotting.” The employee observes the boxes proceeding down the conveyor belt to make sure the plastic bags inside the boxes are in the proper positions. They then straighten the bags when necessary.

8. Employees also perform cleaning tasks. The worker uses a grabber to pick up cheese that has fallen on the floor and drops it into a tub. On some days there is nothing to clean and on other days employees may have to pick up fallen cheese for about 20 minutes out of an hour.

9. During Claimant’s first several weeks working for Employer she received training. Specifically, from October 14-26, 2019 Claimant engaged in computer-based education. For the next couple of weeks, Claimant shadowed other employees and began learning her various duties.

10. On November 18, 2019 Claimant began working in the hand packing position without shadowing a fellow employee. Hand packing was not performed again until November 25, 2019, when Claimant worked a 10.25-hour shift. Claimant did not return to hand-packing until December 2, 2019, when she worked a 12-hour shift. On the morning of December 3, 2019 Claimant reported to Ms. VF[Redacted] that she felt an aching and throbbing pain in her index finger. Ms. VF[Redacted] removed Claimant from the rotation and limited her to picking cheese.

11. On December 3, 2019 Claimant visited Brush Family Medicine and saw Ryan Reiss, NP for an evaluation. Claimant told NP Reiss that her job was to constantly dip her hands into cheese, squeeze it together, and fold it over in a mixing motion. She complained of severe right wrist pain when moving her right thumb. Claimant felt that the pain had been building over the previous three to four weeks. Physical examination revealed pain to palpation of the right wrist at the base of the thumb. NP Reiss assessed Claimant with right wrist pain that was likely related to de Quervain’s tenosynovitis. Claimant received a thumb spica splint and was restricted to limited lifting and use of the right hand. She subsequently attended six visits of physical therapy.

12. Claimant was placed on light duty from December 3, 2019 until February 11, 2020. On February 13, 2020 she performed the cheese picking job. On February 18,

2020 Claimant worked as break relief with no hand packing. She then worked 4.5 hours on February 19, 2020 in an unknown capacity.

13. On February 18, 2020 Respondents filed a General Admission of Liability (GAL). Respondents acknowledged that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits as a result of her December 3, 2019 industrial injury.

14. Claimant returned to the hand packing line on February 20-21, 2020. She did not work on February 22, 2020 and no hand packing was performed on February 23, 2020. On February 24, 2020 Claimant covered breaks on the hand packing line and worked for a maximum of five hours. Claimant again performed hand packing on February 25, 2020. On February 26, 2020 Claimant's work duties included bag spotting, picking cheese and other non-hand packing tasks.

15. On February 27, 2020 Claimant returned to NP Reiss for an evaluation. He noted that Claimant had returned to full duty with no lingering complaints. Claimant reported that on her second day back to work, she experienced bruising on the palm of her hand. NP Reiss noted that the pain over the base of the thumb had resolved and Claimant now reported pain radiating down into all four fingers. He placed Claimant on restrictions of limited use of the right hand up to five pounds.

16. Claimant never returned to work for Employer after February 26, 2020. She subsequently applied for social security disability benefits.

17. On March 16, 2020 NP Reiss remarked that Claimant's pain was in a different location than the previous two visits. Instead of pain over the base of her right thumb or in the palm of her hand, she now reported pain in the right wrist. NP Reiss documented that Claimant's wrist pain occurred after working in her garage at home. He referred Claimant to Gregory Reichhardt, M.D. for further evaluation and a possible impairment rating.

18. Claimant first visited Dr. Reichhardt for an evaluation on April 21, 2020. She informed him that her job involved grabbing a five to six-pound bundle of cheese and placing it in a box. She explained that her right wrist, thumb and distal forearm had all turned purple. Dr. Reichhardt assessed possible carpal tunnel syndrome and de Quervain's tenosynovitis. He could not rule out Chronic Regional Pain Syndrome (CRPS). Dr. Reichhardt recommended an EMG nerve conduction study.

19. On August 18, 2020 Claimant continued to report pain to Dr. Reichhardt over the volar aspect of her right wrist. Dr. Reichhardt saw no evidence of allodynia, hyperpathia, vasomotor changes, skin, hair, or nail trophic changes, and no sudomotor changes. After reviewing an August 13, 2020 right wrist MRI, Dr. Reichhardt assessed a ganglion cyst.

20. On October 21, 2020 Dr. Reichhardt recommended a pain psychology evaluation due to Claimant's reported significant anxiety. He assessed Claimant with

delayed recovery. At a November 3, 2020 examination Claimant demonstrated allodynia over the ulnar aspect of the right hand.

21. On February 9, 2021 Claimant visited George Schakaraschwili, M.D. for a CRPS evaluation. After QSART and thermogram testing, Dr. Schakaraschwili determined the findings were consistent with CRPS.

22. On March 30, 2021 Joseph B. Blythe, MA, CRC, performed a Job Demands Analysis (JDA) for the position of General Labor/Hand Pack at Employer's facility. He noted that Claimant's job duties while performing hand packing involved gathering cheese sticks bilaterally from a conveyor line and placing them into a shipping box until it weighed approximately 15 pounds. Once the correct weight was attained, the employee pushed the shipping box across rollers to a conveyer. The worker then transferred shipping boxes from the line to a packing table and repeated the process. The work cycle of filling a box of cheese and starting a new one measured between 28 and 41 seconds.

23. Mr. Blythe remarked that Claimant had been diagnosed with de Quervain's tenosynovitis. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Mr. Blythe did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors. However, there were no others present.

24. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand pack process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant spent four hours of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

25. On June 7, 2021 Carlos Cebrian, M.D. conducted an independent medical examination of Claimant. After reviewing Claimant's medical records, performing a physical examination and considering Mr. Blythe's JDA, Dr. Cebrian conducted a causation analysis pursuant to the *Guidelines*. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated Primary Risk Factors. He initially noted that Claimant had been diagnosed with de Quervain's tenosynovitis.

26. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for

Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The category requires four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees. Other risk factors in the category are six hours of elbow flexion > 90 degrees or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Dr. Cebrian concluded Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the *Guidelines*.

27. Because there were no Primary Risk Factors, Dr. Cebrian reviewed the Secondary Risk Factors delineated in the *Guidelines*. Notably, any Secondary Risk Factor must be physiologically related to the diagnosis. In performing the JDA, Mr. Blythe determined that Claimant had a Secondary Risk Factor for exposure to handling frozen foods that were 10 degrees for four hours. Because of the presence of the Secondary Risk Factor, Dr. Cebrian considered the Diagnosis-Based Risk Factor Table for Claimant's specific diagnosis of de Quervain's tenosynovitis. Dr. Cebrian concluded there was no correlation between the handling of frozen foods and the development of de Quervain's tenosynovitis. Claimant thus did not suffer a cumulative trauma condition as a result of her work activities for Employer. Dr. Cebrian summarized that Claimant's "right upper extremity complaints were never causally related to her work [for Employer]. No treatment should have occurred under the 12/3/2019 claim."

28. On December 26, 2021 Vocational Evaluator Daniel Best authored a JDA for Claimant's position as General Labor/Packager at Employer's facility. He explained that Claimant's job duties involved standing at a conveyor and repeatedly grasping from two to three pounds of frozen mozzarella cheese sticks weighing two ounces each into a plastic lined shipping box. Once the box weighed approximately 15 pounds, the worker pushed it down a roller to another conveyor belt exiting the packaging area. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. A task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds. Mr. Best emphasized that each bilateral task cycle for Claimant's job duties requires reaching, twisting the hands to manipulate/grip/grasp/lift/move and transfer each handful of frozen cheese sticks.

29. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, Mr. Best explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. However, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also met the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the

Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more, such as handling frozen foods that are 10 degrees.

30. On May 27, 2022 Mr. Blythe performed a second JDA to evaluate the other duties Claimant performed after learning that the actual hand-packing job was only one of several tasks. He specifically considered Claimant's duties as Bag Tuck Helper, Bag Spotter, Picker and Cleaner. Mr. Blythe did not find any Primary or Secondary Risk Factors in the preceding job duties.

31. Mr. Blythe testified consistently with his JDA that Claimant did not exhibit any Primary Risk Factors pursuant to the *Guidelines* for the development of a cumulative trauma condition. The only Secondary Risk Factor involved the handling of frozen foods. He explained that his job is to ascertain the number of hours per day that risk factors exist in a job. Mr. Blythe remarked that the threshold for awkward wrist posture is four hours or more per day. He commented "that's extremely difficult to do, based on my, you know, thousands of observations of work sites because, essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold. Notably, although Mr. Blythe noted ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level because the workers were not in a static position. Furthermore, Mr. Blythe disagreed with Mr. Best's determination regarding the Primary Risk Factors of awkward posture and repetition/duration. He explained that Mr. Best did not visit Claimant's jobsite and was unable to time or count her activities. Moreover, Mr. Best did not specifically identify the Primary Risk Factors that were present within each category. He specifically did not mention whether awkward posture while performing the hand packing position involved flexion, extension or ulnar deviation.

32. Mr. Best also testified consistently with his JDA that Claimant satisfied the Primary Risk Factors of awkward posture and repetition/duration for the development of a cumulative trauma condition. Claimant also met the threshold for two Secondary Risk Factors. Mr. Best detailed that the activity of moving from a neutral position of the wrist to a scooping position constitutes a 90-degree supination. Furthermore, the grasping motion in placing the hands down to pick up a bundle of cheese involves an ulnar deviation. He remarked that in every picture in Mr. Blythe's report the employees are either engaging in ulnar deviation with their hands and wrists and/or elbow flexion at 90 degrees or more. Mr. Best emphasized that employees filled a box every 30 to 45 seconds. A task cycle occurs about every nine seconds during each shift. Therefore, the awkward posture of four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation of greater than 20 degrees met the minimum threshold to constitute a Primary Risk Factor under the *Guidelines*.

33. Mr. Best disagreed with Mr. Blythe's analysis. He explained that, according to OSHA, a repetitive task is one that is performed in the same way for a prolonged period. Mr. Best remarked that the hand packer position should be considered not just as filling a box with cheese every 28 to 41 seconds, but as grabbing handfuls of cheese every nine seconds to place them in a box. He specified that individuals are basically performing the same activity every minute until there is a break period. "So, it's a very highly repetitive job, and that's why they rotate those positions."

34. Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He reiterated that Claimant suffered from de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks while working for Employer. He commented that Claimant only worked as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering the JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. He compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

35. Dr. Cebrian explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, there is no mention of a requisite time period for the development of certain cumulative trauma conditions. Instead, "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." In specifically addressing Claimant's diagnosis, Dr. Cebrian noted that whether "she worked 20 years doing this job, she didn't rise to the level of having any kind of primary risk factor or a secondary risk factor that correlated with the diagnosis-based risk factor table that would come up with a cumulative trauma condition." He maintained that physicians exercise discretion and utilize clinical experience in determining whether an individual has suffered a cumulative trauma condition based on work exposure.

36. On August 25, 2022 the parties conducted the post-hearing evidentiary deposition of Dr. Reichhardt. He diagnosed Claimant with de Quervain's tenosynovitis and explained that the causes of the condition are typically activities that "involve gripping, grasping, repetitive movement of the thumb, the digits of the hand, the wrist, pronation and supination, repetitive wrist flexion, awkward postures with the wrist." In considering the causes of Claimant's condition, Dr. Reichhardt reviewed the JDA's prepared by Mr. Blythe and Mr. Best. However, after rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt detailed that the cycle time involved grabbing one bundle of cheese, not filling a box with cheese.

37. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma

condition. Dr. Reichhardt remarked that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS. However, Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing its evidence-based criteria probably did not involve subjects who had only been on the job for a few days. He also noted that individuals typically suffer a gradual onset of pain during the development of de Quervain's tenosynovitis.

38. Respondents have demonstrated that it is more likely than not that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019. A review of Claimant's job duties as a hand packer reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. The hand packing position involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks with both hands, straightens them, and pivots to place the sticks in a box.

39. Ms. VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line pack more cheese than those at the end of the line. Ms. VF[Redacted] remarked that there are normally periods of time when workers near the end of line have no cheese to pack. She also commented that employees rotate positions on the line every hour. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Ms. VF[Redacted] explained that workers rotate approximately five to seven stations down the line. She commented that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. Finally, Ms. VF[Redacted] remarked that hand packing is not performed on a daily basis and employees engage in a variety of related jobs on off-days.

40. Relying on the *Guidelines,* Mr. Blythe conducted a JDA and performed time studies of the hand packer position. He did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors, However, there were no others present. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the minimum threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant engaged in excess of four hours per day of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

41. Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He diagnosed Claimant with de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks. He commented that Claimant was only working as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering Mr. Blythe's JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

42. In contrast, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also had the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. He explained that a task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting, and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds.

43. After rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt explained that the cycle time involved grabbing a bundle of cheese and placing it in a box, not filling a box with cheese. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. Dr. Reichhardt concluded that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS.

44. Despite the JDA of Mr. Best and the medical opinion of Dr. Reichhardt, the record reflects that Respondents have demonstrated that Claimant did not likely suffer a cumulative trauma condition while working for Employer. Initially, Dr. Reichhardt's opinion was predicated on Mr. Best's determination that a task cycle lasted nine seconds. Mr. Best calculated the task cycle by using a rate of five handfuls every 45 seconds to fill a 15-pound box with cheese sticks. However, Mr. Blythe credibly commented that Mr. Best

did not visit Claimant's jobsite and was unable to time or count the activities of a worker on the hand packing line. He remarked that the threshold for awkward wrist posture of four hours or more per day is difficult to achieve because "essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold."

45. Although Mr. Blythe noticed ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level delineated in the *Guidelines* because the workers were not in a static position. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he calculated she spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe's time measurements are consistent with the *Guidelines*. The *Guidelines* specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive time are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

46. Mr. Best's analysis also failed to consider that workers on the cheese packing line rotate hourly to reduce the strain on employees at the beginning of the line. Ms. VF[Redacted] credibly remarked that the individuals at the front of the line pack more cheese than those at the end of the line. She detailed the reasons and process for rotating packing stations. Ms. VF[Redacted] noted that employees do not rotate stations sequentially because they will not have adequate time to rest. She explained that workers rotate approximately five to seven stations down the line. In contrast, Mr. Best simply relied on Claimant repeatedly picking up 2.5 pound handfuls of cheese every nine seconds throughout her shift. Although the preceding assumption may apply to workers at the front of the line, Employer purposely limited the occupational exposure of employees by rotating them down the line so there were fewer cheese sticks to grab.

47. The record reveals that Claimant was only on the hand packing line for three prior to her report of symptoms on December 3, 2019. Dr. Reichhardt commented that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. However, Dr. Cebrian persuasively explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, he noted "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." Dr. Cebrian maintained that physicians exercise discretion by using clinical experience to consider whether an individual has suffered a cumulative trauma condition based on work exposure. Furthermore. Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing evidence-based criteria probably did not involve subjects who had only been on the job for a few days.

48. Based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive

activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Respondents have thus demonstrated that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

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 litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. Generally, a claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.,* 989 P.2d 251, 252 (Colo. App. 1999). However, §8-43-201, C.R.S. provides that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." On February 18, 2020 Respondents filed a GAL acknowledging that Claimant was entitled to receive medical benefits and TTD benefits as a result of her December 3, 2019 industrial injury. Because Respondents seek to withdraw their GAL, they bear the burden of proof by a preponderance of the evidence.

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing at least two pounds. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, pp. 24-26.

8. Rule 17, Exhibit 5 instructs physicians about using risk factors for assessing causation of a cumulative trauma condition. After determining a diagnosis and defining the job duties of the worker, physicians should compare the worker's duties with the Primary Risk Factor Definition Table. The *Guidelines* specify that "[h]ours are calculated

by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive times are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

9. As found, Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019. A review of Claimant's job duties as a hand packer reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. The hand packing position involves manually picking up frozen string cheese sticks as they proceed down a conveyor belt. The worker gathers the cheese sticks with both hands, straightens them, and pivots to place the sticks in a box.

10. As found, Ms. VF[Redacted] explained there are up to 12 stations in the hand packing line. The individuals at the front of the line pack more cheese than those at the end of the line. Ms. VF[Redacted] remarked that there are normally periods of time when workers near the end of line have no cheese to pack. She also commented that employees rotate positions on the line every hour. Ms. VF[Redacted] detailed the reasons and process for rotating packing stations. She remarked that employees do not rotate stations sequentially because they will not have adequate time to rest. Ms. VF[Redacted] explained that workers rotate approximately five to seven stations down the line. She commented that the rotating process gives employees "variety where they're not getting that much cheese because we found out that the first two stations normally get the vast amount of cheese. Finally, Ms. VF[Redacted] remarked that hand packing is not performed on a daily basis and employees engage in a variety of related jobs on off-days.

11. As found, relying on the *Guidelines,* Mr. Blythe conducted a JDA and performed time studies of the hand packer position. He did not find evidence of any Primary Risk Factors involved in Claimant's job duties. The only Secondary Risk Factor involved the handling of frozen foods because the temperature of the cheese sticks was 10 degrees Fahrenheit or less. He emphasized that the Factor could not stand alone and required assessment in combination with other Secondary Risk Factors, However, there were no others present. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he determined she did not meet the minimum threshold in the *Guidelines*. Claimant specifically spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe also considered whether Claimant engaged in excess of four hours per day of supination/pronaton with task cycles of 30 seconds or less or awkward posture was used for at least 50% of task cycle. He found none. Finally, Mr. Blythe timed Claimant's elbow flexion > 90 degrees. He measured only 30.0 minutes each day or 17% of the 3.0 hours/day Secondary Risk Factor.

12. As found, Dr. Cebrian persuasively maintained that Claimant did not suffer a cumulative trauma condition while working as a hand packer for Employer. He

diagnosed Claimant with de Quervain's tenosynovitis. Dr. Cebrian noted that Claimant performed other duties besides hand packing cheese sticks. He commented that Claimant was only working as a hand packer for approximately five days prior to the development of her symptoms. Claimant's other job activities rendered her tasks less repetitive and forceful. They thus reduced her exposure to the only Secondary Risk Factor of a cold environment. Considering Mr. Blythe's JDA, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties on the hand packing line failed to meet the causation requirements for a cumulative trauma condition. In considering the Primary Risk Factor Definition Table for Force and Repetition/Duration, Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Claimant thus did not suffer an occupational disease in the form of de Quervain's tenosynovitis or subsequent CRPS.

13. As found, in contrast, in evaluating awkward posture and repetition/duration as a Primary Risk Factor, Mr. Best concluded that Claimant exhibited four hours of wrist flexion greater than 45°, extension greater than 30°, or ulnar deviation greater than 20°. He also found that Claimant engaged in four hours of supination/pronation with task cycles of 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Claimant also had the Secondary Risk Factor of three hours of elbow flexion greater than 90°. Finally, Claimant satisfied the Secondary Risk Factor of Ambient temperature of 45°F or less for four hours or more. Mr. Best noted that filling a shipping box takes about 30 to 45 seconds. He explained that a task cycle involves reaching to full forward extension, using hands/wrists/fingers to align the product, scooping and lifting approximately 2.5 pounds of frozen cheese sticks, twisting, and placing each bundle into a lined box. At the rate of five handfuls every 45 seconds, a task cycle is about 6.7 times each minute or every nine seconds.

14. As found, after rejecting Mr. Blythe's analysis based on cycle times, Dr. Reichhardt relied on the nine second task cycles calculated by Mr. Best. He concluded that Claimant satisfied the minimum threshold in the *Guidelines* for the development of a cumulative trauma condition. Dr. Reichhardt explained that the cycle time involved grabbing a bundle of cheese and placing it in a box, not filling a box with cheese. Dr. Reichhardt also addressed the length of time Claimant had engaged in hand packing while working for Employer. He explained that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. Dr. Reichhardt concluded that Claimant's de Quervain's tenosynovitis ultimately developed into CRPS.

15. As found, despite the JDA of Mr. Best and the medical opinion of Dr. Reichhardt, the record reflects that Respondents have demonstrated that Claimant did not likely suffer a cumulative trauma condition while working for Employer. Initially, Dr. Reichhardt's opinion was predicated on Mr. Best's JDA that a task cycle lasted nine seconds. Mr. Best calculated the task cycle by using a rate of five handfuls every 45 seconds to fill a 15-pound box with cheese sticks. However, Mr. Blythe credibly commented that Mr. Best did not visit Claimant's jobsite and was unable to time or count

the activities of a worker on the hand packing line. He remarked that the threshold for awkward wrist posture of four hours or more per day is difficult to achieve because "essentially, a worker almost has to be in a static posture for half of the workday" to meet the threshold."

16. As found, although Mr. Blythe noticed ulnar deviation while observing the hand packing position, the amount of time was insufficient to satisfy the threshold level delineated in the *Guidelines* because the workers were not in a static position. Mr. Blythe specifically conducted time studies of workers' awkward posture and repetition/duration during the hand packing process. In assessing whether Claimant engaged in four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees, he calculated she spent 22 minutes and 11 seconds over a two-hour period, or 11.1 minutes each hour, performing the activities. The measurements transferred to 1.9 hours each day or 48% of the 4.0 hours per day threshold. Mr. Blythe's time measurements are consistent with the *Guidelines*. The *Guidelines* specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive time are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

17. As found, Mr. Best's analysis also failed to consider that workers on the cheese packing line rotate hourly to reduce the strain on the employees at the beginning of the line. Ms. VF[Redacted] credibly remarked that the individuals at the front of the line pack more cheese than those at the end of the line. She detailed the reasons and process for rotating packing stations. Ms. VF[Redacted] noted that employees do not rotate stations sequentially because they will not have adequate time to rest. She explained that workers rotate approximately five to seven stations down the line. In contrast, Mr. Best simply relied on Claimant repeatedly picking up 2.5 pound handfuls of cheese every nine seconds throughout her shift. Although the preceding assumption may apply to workers at the front of the line, Employer purposely limited the occupational exposure of employees by rotating them down the line so there were fewer cheese sticks to grab.

18. As found, the record reveals that Claimant was only on the hand packing line for three prior to her report of symptoms on December 3, 2019. Dr. Reichhardt commented that, even if Claimant had only worked as a hand packer for a single day, she could have developed a cumulative trauma condition. However, Dr. Cebrian persuasively explained that the period of time an individual performs a job is relevant to determining whether she has suffered a cumulative trauma condition. In reviewing the *Guidelines* and considering Level II training, he noted "there are many factors that can go into a situation as to whether somebody has a cumulative trauma condition." Dr. Cebrian maintained that physicians exercise discretion by using clinical experience to consider whether an individual has suffered a cumulative trauma condition based on work exposure. Furthermore. Dr. Reichhardt acknowledged that the studies utilized by Rule 17 of the *Guidelines* in developing evidence-based criteria probably did not involve subjects who had only been on the job for a few days.

19. As found, based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive

activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Respondents have thus demonstrated that they are entitled to withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

ORDER

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

Respondents may withdraw their GAL acknowledging that Claimant suffered an occupational disease during the course and scope of her employment with Employer on December 3, 2019.

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: October 27, 2022.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that his right knee condition has worsened and if so, whether this worsening is causally related to his admitted December 6, 2016 industrial injury.

PRELIMINARY DISCUSSION

At the outset of hearing, the ALJ discussed with the parties the issues they intended to litigate. Claimant's Counsel represented that he had discussed with Respondents' Counsel a willingness to narrow the issues to medical benefits, specifically Claimant's entitlement to PRP injections recommended by Dr. Simpson and "worsening" of Claimant's right knee condition. Respondents' Counsel acknowledged that she had spoken to Claimant's attorney and was in agreement that "worsening" had been endorsed on Claimant's Application for Hearing but the issue of medical benefits had not. Claimant then advised the ALJ that he would proceed forward solely on the issue of "worsening". The ALJ advised Claimant's counsel that based upon his Application for Hearing, medical benefits had not been endorsed and that Respondents' counsel was not agreeing to litigate the issue of Claimant's entitlement to additional medical benefits. Accordingly, the ALJ advised the Claimant to limit his presentation of evidence to the alleged worsening of condition. The ALJ also granted Claimant leave to submit photographs of his alleged disfigurement to the ALJ rather than attempt a video viewing of the same.

FINDINGS OF FACT

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

Claimant's December 6, 2016 Industrial Injury, his Medical Treatment and Maximum Medical Improvement

1. Claimant suffered an admitted injury to his right leg/knee on December 6, 2016, while employed as a rail marshal. According to the medical record, Claimant was turning on loose gravel when he fell injuring his right knee. As he was unable to put weight on his right leg, Claimant was taken to EmergiCare for medical treatment. X-rays were obtained and showed mild bony spurring with no apparent fracture and quadriceps tendon enthesopathy. An MRI demonstrated a distal quadriceps rupture with 5.8 cm retraction. (Resp. Ex. L, p. 185; Resp. Ex. N, p. 202).

2. Claimant was referred to Dr. Michael Simpson who determined Claimant would need surgery to repair his ruptured quadriceps tendon. Claimant underwent surgery with Dr. Simpson on December 10, 2016, during which his quadriceps tendon was repaired and excision of exostosis of the proximal superior patella was performed.

(Resp. Ex. L, p. 185). Claimant subsequently underwent a manipulation of the knee under anesthesia along with a second arthroscopic surgery consisting of a lysis of adhesions and debridement, i.e. meniscal trimming on April 4, 2017, in an effort to improve his right knee range of motion. *Id.* at p. 186.

3. Claimant was placed at maximum medical improvement (MMI) on August 28, 2017 by his authorized treating provider (ATP), Dr. Douglas Bradley. (Resp. Ex. L. p. 187; Resp. Ex. N, p. 205). In an impairment rating report dated September 17, 2017, Dr. Bradley assigned 10% lower extremity impairment for the right knee, which converts to 4% whole person impairment. (Resp. Ex. N, p. 203-204). Claimant was released to full duties. *Id*. at p. 203. Dr. Bradley did not recommend specific maintenance care other than to indicate that Claimant was to perform his "home exercises and stretch daily". *Id.*

4. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bradley's September 17, 2017 impairment rating opinions on November 15, 2017. (Resp. Ex. E, p. 51).

5. Claimant objected to Respondents' November 15, 2017 FAL and requested a Division Independent Medical Examination (DIME). The DIME was performed by Dr. Wallace Larson on November 7, 2019. During the DIME, Dr. Larson confirmed that Claimant had suffered a ruptured quadriceps tendon. (Resp. Ex. K, p. 179). He also noted that Claimant had calcific tendinitis of the quadriceps. *Id.* He agreed with Dr. Bradley's MMI date and performed right knee range of motion measurements. *Id*. at p. 178. Following his physical examination, Dr. Larson opined that Claimant had sustained 11% lower extremity impairment, which converts to 4% whole person impairment. *Id.* at p. 179. Finally, Dr. Larson noted that "[n]o work restrictions [were] needed" and Claimant had no need for maintenance treatment. *Id.*

6. Respondents filed an Amended FAL on December 11, 2019, admitting to Dr. Larson's opinions concerning impairment and maintenance treatment as outlined in his November 7, 2019 DIME report. (Resp. Ex. F, p. 64).

7. Dr. Miguel Castrejon completed an independent medical examination (IME) of the Claimant on July 24, 2020. Dr. Castrejon obtained a history and completed a physical examination as part of the IME appointment. At his IME, Claimant reported "intermittent to occasional constant dull pain to the anterior aspect of the right knee and distal thigh that worsens with walking for more than 1-2 hours. (Resp. Ex. L, p. 184). He also reported swelling, perceived instability, occasional limping and difficulty ascending/descending stairs. *Id.* at p. 184. While Claimant reported that his knee condition had improved, it had begun to worsen by the time of the IME. *Id.*

8. Dr. Castrejon documented an alteration in Claimant's gait, trace effusion in the right knee, a slight decrease in baseline range of motion and strength along with "medial joint line tenderness and painful but negative McMurry" testing. (Resp. Ex. L, p. 189). Although Dr. Castrejon opined that Claimant was appropriately placed at MMI on August 28, 2017, he reported that Claimant had "recently experienced a worsening of his condition that was suspect for internal derangement". *Id.* Dr. Castrejon raised concern

surrounding the meniscal trimming that was required at the time of the manipulation and questioned whether Claimant sustained meniscal injury at the time of Claimant's slip and fall on December 6, 2016. While Claimant's exam was not suspect for quadriceps re-tear, Dr. Castrejon noted this could not be entirely ruled out. He recommended a right knee MRI to evaluate the integrity of the quadriceps repair as well as the meniscus. *Id.*

9. According to the medical record, Claimant's case was reopened on October 8, 2020. (Resp. Ex. G, p. 111). Claimant then returned to Dr. Simpson for "increasing right knee pain" on December 1, 2020. (Resp. Ex. Q, p. 221). Dr. Simpson documented that Claimant had done well following his quadriceps tendon repair surgery until around 4 months prior to his December 1, 2020 appointment, when he started to experience "increasing pain, achiness, and stiffness in his knee". *Id.* Examination of the right knee revealed some "obvious quadriceps atrophy" when compared to the left knee. Id. at p. 222. Nonetheless, Claimant demonstrated "full" extension and flexion of the right knee. Claimant also demonstrated "some patellofemoral crepitation" and "tenderness at the superior pole of the patella in the distal insertion of the quadriceps tendon". *Id.* Dr. Simpson expressed a "little" concern about Claimant's increasing symptoms noting that "[h]e may be developing some increasing quadriceps tendinosis", which could place him at risk of a repeat rupture. *Id.* Accordingly, Dr. Simpson recommended a repeat MRI, which he noted had been denied previously. *Id.* at p. 221-222.

10. Claimant underwent an MRI of the right knee on or about December 10, 2020 and this imaging was reviewed by Dr. Simpson during a follow-up appointment with Claimant on December 15, 2020. (Resp. Ex. O, p. 209; Resp. Ex. R, p. 225). Dr. Simpson noted that the MRI demonstrated:

> "[S]ignificant patellofemoral arthritis in his knee. They called this chrondromalacia, but I have reviewed his MRI and this is actually more progressive osteoarthritis of the patellofemoral joint. He has thickening of the distal pole of the quadriceps tendon with a recurrent spur at the distal insertion of the quadriceps tendon. Patellar tendon is also thickened.

Id. Dr. Simpson assessed Claimant with arthritis and quadriceps tendinitis of the right knee, noting further that Claimant had undergone a right quadriceps tendon repair. *Id.*

11. Regarding the cause of Claimant's arthritis, Dr. Simpson opined as follows: "I think given his altered patellofemoral mechanics from repair of his quadriceps tendon, the subsequent quadriceps weakness and chronic atrophy, as well as his job demands, he has developed progressive osteoarthritis in the patellofemoral joint". (Resp. Ex. R, p. 226). Accordingly, Dr. Simpson noted: "I think treatment of [Claimant's] knee osteoarthritis . . . should be covered under his workers' compensation claim". *Id.* Because Claimant had a history of "mild" hypertension, Dr. Simpson concluded that a corticosteroid injection and anti-inflammatory medications were contraindicated as treatment options for Claimant. Instead, Dr. Simpson recommended a series of PRP injections and increasing activities as tolerated. *Id.*

12. Claimant presented to Concentra for an unscheduled appointment on December 15, 2020, following his appointment with Dr. Simpson. (Resp. Ex. O, p. 209). Claimant was treated on an emergent basis for "chronic right knee pain". *Id.* Following a physical examination, Dr. Bradley noted, "MMI date unknown at this time because pain and therapy needed". *Id*. at p. 212. Dr. Bradley anticipated that Claimant would reach MMI by February 21, 2021. Id. at p. 208. (See also, Resp. Ex. P, p. 218).

13. Claimant returned to Dr. Simpson on June 1, 2021. (Resp. Ex. S, p. 229). During this appointment, Claimant continued to "struggle with pain and stiffness in his knee". *Id.* Claimant rated his pain at a 5/10, which represents an increase from the 3/10 pain he reported approximately 6 months earlier on December 15, 2020. Dr. Simson noted that the recommended PRP injections had been denied and that Claimant was treated with physical therapy instead. *Id.* Dr. Simpson opined that "based on recent studies", PRP injections would be the most effective treatment option for Claimant's condition but because "work comp is not willing to do any additional consideration, (for PRP injections) then I think effectively, I have nothing else to offer him". Consequently, Dr. Simpson released Claimant from his care. *Id*. at p. 230. Dr. Simpson opined further that Claimant could consider visco-supplementation under his private insurance. *Id.*

14. Dr. Bradley placed Claimant at MMI on June 14, 2021 without permanent medical impairment, noting that he was able to return to full duty work. (Resp. Ex. U, p. 240-242). During this appointment, Claimant reported 4/10 right knee pain while sitting. *Id.* at p. 238.

15. Respondents filed an Amended FAL on September 29, consistent with the opinions of Dr. Bradley regarding MMI and impairment as outlined in his June 14, 2021 medical report. (Resp. Ex. G). The September 29, 2021 FAL noted that the 11% permanent partial disability (PPD) award of $6,748.00 had previously been paid consistent with the November 7, 2019 DIME report of Dr. Larson. Because Dr. Bradley had opined that Claimant had reached MMI without impairment, Respondents noted that the prior PPD award of $6,748.00 was considered an overpayment. *Id.* at p. 88.

16. Respondents filed another Amended Final Admission of Liability on November 3, 2021 removing the asserted overpayment reflected in the September 29, 2021 FAL. (See Resp. Ex. H).

17. Claimant objected to the November 3, 2021 FAL and requested a DIME. Claimant's second DIME was completed by Dr. Nicholas Kurz, D.O. on April 11, 2022. (Resp. Ex. M). Dr. Kurz documented that at the time of the DIME, Claimant had not been treated with any injections, orthopedic evaluations or treatment through his primary care provider (PCP) for approximately one year. *Id.* at p. 193.

18. Dr. Kurz noted that while Claimant denied "new" injuries since December 6, 2016, he was "5 years older, and 22 pounds heavier with a BMI of 35.1". (Resp. Ex. M, p. 195). He opined further, that Claimant was "known to have right knee arthritic ongoing issues and complaints predating his DOI including visco-supplementation injections, indicating likely end-stage arthritic issues". Although he opined that Claimant had pre-

existing osteoarthritis in the right knee, the medical records review section of Dr. Kurz' DIME report is devoid of any specific records he reviewed to support this conclusion. (See Resp. Ex. M). Moreover, Dr. Kurz did not comment on Claimant's pain levels throughout his treatment. Nor did Dr. Kurz document Claimant's pain level at the time of the DIME appointment.

19. Dr. Kurz indicated that Claimant was appropriately placed at MMI on August 28, 2017. (Resp. Ex. M, p. 197). He also upheld the previous impairment of 11% lower extremity impairment for reduced range of motion. *Id.* at p. 198. Finally, Dr. Kurz opined that Claimant had no need for maintenance medical treatment. *Id*. at p. 199. In support of his opinion regarding maintenance care and the cause of Claimant's worsening symptoms, Dr. Kurz noted that at the time of his December 6, 2016 injury, "[Claimant] was 51 years old with documented bilateral knee osteoarthritis, left greater than right, including the large spur that broke off resulting in as quadriceps rupture, which was healed and treated properly per the division guidelines". (Resp. Ex. M, p. 198). He went on to note:

> Now years later, [Claimant] is a bit older and heavier and experiencing progressive bilateral lower extremity arthritis symptoms, which are not causally or temporally related to the mechanism of his original injury, which at the time was likely more related to his arthritis than a true work related mechanism, however it has been found compensable, treated and an impairment rating was completed.

Id. at p. 198.

20. Respondents filed an Amended Final Admission of Liability on May 23, 2022 based on Dr. Kurz's DIME report. (Resp. Ex. J). The May 23, 2022 FAL denied liability for maintenance care after MMI. *Id*. at p. 158. Claimant then filed an Application for Hearing on June 16, 2022 endorsing the issues of disfigurement, permanent partial disability benefits, worsening, and maximum medical improvement. (Resp. Ex. A). The Application for Hearing contains no endorsement for medical benefits as an issue for hearing nor is "Petition to Reopen Claim" endorsed on Claimant's application. *Id.* at p. 2.

Claimant's Hearing Testimony

21. Claimant testified that the surgery performed by Dr. Simpson did not resolve all the issues/pain in his right knee. He added that he underwent a synvisc injection with Dr. Simpson sometime in 2021, which helped relieve his symptoms for approximately 6 months before it wore off and his symptoms worsened. He described a steady deterioration and an increase in his pain/symptoms following this 6-month period. According to Claimant, this progressive worsening began before his DIME with Dr. Kurz and has continued since. Indeed, Claimant described the current condition of his knee as painful, tight, unstable and popping. Despite his claims of worsening pain/symptoms, Claimant has continued to work in an unrestricted full duty capacity since he was released to work by Dr. Bradley on June 14, 2021. (Resp. Ex. U, p. 240, 242).

22. During cross-examination, Claimant admitted to prior service connected left knee problems, which he testified required injection therapy through the VA medical system. He also admitted that because of his left knee pain/dysfunction he was overcompensating with his right leg and knee. Consequently, he developed right knee pain and underwent one or two steroid injections directed to the right knee.

The Testimony of Dr. Kurz

23. Dr. Kurz testified as a board certified Family Medicine specialist who has been practicing Occupational Medicine throughout his career. He is Level II Accredited.

24. Dr. Kurz agreed with Dr. Simpson that Claimant suffers from osteoarthritis and chondromalacia. He also testified that these conditions are progressive in nature and will not improve with time. While he agreed that Claimant had osteoarthritis, Dr. Kurz testified that a recent statement by the American Academy of Orthopedic surgeons concluded that PRP and visco-supplementation injections are not beneficial in treating arthritis. Consequently, he testified that workers' compensation insurers have stopped covering the cost of such injections.

25. Dr. Kurz testified that Claimant had treatment for pain associated with end stage arthritis as evidenced by his prior visco-supplementation injections. While the ALJ is persuaded that Dr. Simpson administered a synvisc injection to Claimant's right knee sometime in 2021, several years after the admitted industrial injury in this case, the record is devoid of any evidence/indication that he had any visco-supplementation injections to the right knee prior to his December 6, 2016 industrial injury. Rather, the evidence presented supports a conclusion that Claimant underwent a pre-injury steroid injection directed to the right knee for pain he was experiencing from overuse based upon the disability he was experiencing in the left knee at the time.

26. According to Dr. Kurz, Claimant's current pain and right knee symptoms are related to the natural progression of his pre-existing non-work related osteoarthritis. Dr. Kurz testified that this expected progression combined with aging, weight gain and deconditioning explains Claimant's persistent and worsening symptoms. In support of his opinion, Dr. Kurz testified that while the original MRI only assessed the condition of the distal quadriceps tendon rather than the knee, a subsequent December 10, 2020 MRI of the right knee did not establish an actual injury to knee, but rather the presence of osteoarthritis. He also testified that a quadriceps tendon rupture is not likely to accelerate the rate of degeneration in the knee. Accordingly, Dr. Kurz maintained his opinion that Claimant's right knee arthritis was not related to Claimant's December 6, 2016 injury. In fact, Dr. Kurz opined that Claimant's pre-existing non-work related osteoarthritis probably caused Claimant's quadriceps tendon to calcify and ultimately rupture on December 6, 2016.

Claimant's Disfigurement

27. Claimant is seeking a disfigurement award for surgical scarring associated with his right distal quadriceps tendon rupture repair surgery. As noted, Claimant attended the hearing via teleconference. Consequently, the ALJ granted Claimant's unopposed request for the ALJ to evaluate his disfigurement by photograph(s) submitted to the OAC with his post-hearing position statement.

28. Claimant submitted seven (7) photographs depicting the nature and extent of the disfigurement he claims is related to his December 6, 2016 industrial injury. The photographs are labeled collectively as "Claimant's Exhibit A" and admitted into evidence.

29. Based upon the photographic evidence, the ALJ finds that Claimant has a visible disfigurement to the body consisting of an approximately 5 ¾ inch long by ⅜ inch wide surgical scar located on the anterior (front) portion of the right knee. This scar traverses the length of the patella, is lightly pigmented and rough in appearance, when compared to the surrounding skin.

30. Although referenced by Dr. Simpson in his December 1, 2020 medical report, the ALJ is unable to perceive any atrophy, i.e. loss of muscle bulk in the right quadriceps muscle compared to the left thigh as the photographs fail to provide a side-by-side comparison of the upper legs.

CONCLUSIONS OF LAW

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

Generally

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

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

Claim Closure and Claimant's Alleged Worsening

C. A request for continuing medical treatment must be presented at the time of MMI, *Hanna v. Print Expediters Inc.*, 77 P. 3d 863 (Colo.App., 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo.App. 1994). Indeed, C.R.S. § 8-43-203(2)(b)(II) provides that a case will be "automatically closed as to the issues admitted in the [FAL] if the claimant does not, within thirty days after the date of the [FAL], contest the [FAL] in writing and request a hearing on *any disputed issues that are ripe for hearing*." . . . (emphasis added). *Olivas-Soto v. Indust. Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). "Once issues are closed, they may only be reopened on the grounds stated in C.R.S. § 8-43-303. C.R.S. § 8-43-203(2) (d). Among those grounds is a change in the claimant's condition. C.R.S. Section 8-43-303(1); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo.App. 2004); *See also, Milco Construction v. Cowan*, 860 P. 2d 539 (Colo.App. 1992) (a claim may reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Industrial Claim Appeals Office*, 833 P. 2d 780 (Colo.App. 1991).

D. Based upon the evidence presented, the ALJ is persuaded that Claimant objected to and filed an Application for Hearing contesting Respondents' May 23, 2022 FAL. Nonetheless, Claimant did not include an objection to Respondents denial of liability for future, i.e. maintenance treatment benefits in his Application for Hearing. Indeed, Claimant failed to endorse any issue surrounding Claimant's entitlement to additional medical benefits, which issues the ALJ concludes were ripe for hearing, whether such benefits were curative or maintenance in nature. Rather, Claimant simply endorsed MMI, PPD, disfigurement and worsening and narrowed the issues for hearing to a worsening of condition at the outset of the September 15, 2022 proceeding. Accordingly, the evidence presented persuades the ALJ that the issue of medical benefits, including post-MMI treatment is closed because it was not endorsed within thirty days of the FAL as required by § 8-43-203(2)(b)(II). Absent such an endorsement or an agreement to try the issue, which is not the case here, Claimant's entitlement to additional medical benefits is closed and cannot be litigated. *See, Olivas-Soto v. Indust. Claim Appeals Office*, *supra*.

E. As noted, Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). In seeking to reopen a claim, the Claimant shoulders the burden of proving his/her condition has changed and that he/she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo.App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or, as presented here, to a change in a Claimant's physical condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo.App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, October 25, 2006).

F. The question of whether a claimant has proven a change in condition of the original physical or mental condition, which can be causally connected to the original compensable injury, is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits relating to the original injury are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo.App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted). Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office, supra; Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo.App. 1988).

G. In this case, the medical record supports a finding/conclusion that Claimant's recommended need for PRP injections was foreseeable treatment that could support an award of maintenance treatment at the time he was placed at MMI. Claimant had the opportunity to challenge the denial of maintenance treatment but failed to do so before the claim closed. The fact that Claimant may now need additional treatment, further medical evaluation and/or testing alone is insufficient to support a reopening of the claim. *Bowles v. Energy Air Systems, Inc*., W.C. No. 4-400-573 (ICAO, December 26, 2003), citing *Anderson v. Ready Mix Concrete*, W.C. No. 3-948-266, (ICAO, June 19, 1992), *aff'd, Anderson v. Ready Mix Concrete* (Colo.App. No. 92CA1060, March 25, 1993) (not selected for publication). Rather, the relevant questions to be answered are whether Claimant established that he suffered a post MMI change in his physical condition and whether that change is causally related to his admitted December 6, 2016 industrial injury. While the ALJ is convinced that Claimant's condition has changed and his persistent symptoms are probably emanating from his work related injury/condition (per the causality statement of Dr. Simpson), the evidence presented supports a conclusion that Claimant failed to endorse medical benefits or petition to reopen the as an issue for hearing. As noted above, a reopening is not warranted if once reopened, no additional benefits under the claim may be awarded. *Richards v. Industrial Claim Appeals Office, supra.* Because Claimant failed to endorse/preserve medical benefits in connection with his request to reopen and because the need for future medical benefits was foreseeable and ripe at the time of MMI, there are no medical benefits that can be awarded if the claim is reopened based upon a change of condition. Simply put, the ALJ concludes that there is no issue endorsed upon which additional benefits can be awarded if the claim is reopened based upon a change of condition. Accordingly, the ALJ concludes that any request to reopen the claim for additional medical benefits must be denied and dismissed.

Disfigurement

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found at Finding of Fact, ¶ 29 above, Claimant has suffered a "disfigurement", i.e. an approximately 5 ¾ inch long by ⅜ inch wide lightly pigmented and rough appearing surgical scar located on the anterior

(front) portion of the right knee, which the ALJ concludes constitutes an observable alteration in the natural appearance of the skin covering the right knee. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits pursuant to C.R.S. § 8-42-108 (1).

ORDER

It is therefore ordered that:

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

2. Insurer shall pay Claimant $1,500.00 for his visible disfigurement.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: October 28, 2022

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

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of December 7, 2021 through December 12, 2021 and from March 29, 2022 through April 1, 2022 and from May 17, 2022 through ongoing?

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability ("TPD") benefits for the period of December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022?

- Whether Claimant has proven by a preponderance of the evidence that the medical treatment he received from Dr. Budiman with Grand Valley Primary Care was authorized medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

- Whether Respondents have proven by a preponderance of the evidence that Claimant committed a willful act that led to his termination of employment with Employer?

- If Respondents have proven Claimant committed a willful act that led to his termination of employment, whether Claimant has proven by a preponderance of the evidence that he subsequently sustained a worsening of his condition when he underwent surgery for his work condition which would result in Claimant being entitled to TTD benefits pursuant to *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004).

- What is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant sustained an injury arising out of and in the course of his employment on December 6, 2021 while pulling off a forklift tire. Claimant testified that while removing the forklift tire, his left shoulder popped and he immediately felt a sharp pain. Claimant testified he reported his injury to Ms. L[Redacted] at the "North Avenue store" on the date of injury, but was not given a list of designated providers at that time.

2. Claimant testified he sought medical treatment with Grand Valley Primary Care on December 7, 2021. According to the medical records from Grand Valley Primary Care, Claimant was evaluated by Dr. Budiman, who diagnosed Claimant with impingement syndrome of the left shoulder. Claimant testified at hearing that Dr.

Budiman was his primary care physician ("PCP"). The medical records document that Claimant reported to Dr. Budiman that he had left shoulder pain when he felt a pop in his shoulder last night and immediately felt severe pain in his left shoulder. Dr. Budiman noted that Claimant reported chronic right shoulder pain which was not as severe as the left shoulder pain. Dr. Budiman provided Claimant with injections into his bilateral shoulders and took Claimant off of work until December 13, 2021 after which time Claimant was released to return to work with restrictions of no lifting over 30 pounds for two weeks.

3. Claimant testified he was later referred to Work Partners by Employer. Claimant sought treatment with Work Partners on December 21, 2021 at which time Claimant was examined by Dr. Fay. Dr. Fay noted a history of right shoulder treatment and diagnosed Claimant with pain in the left shoulder and rotator cuff strain. Dr. Fay provided Claimant with work restrictions for his left upper extremity including no lifting over 10 pounds and no lifting overhead or away from his body.

4. Respondents completed a first report of injury on December 22, 2021 indicating that Claimant had reported the injury to Employer on December 6, 2021.

5. Claimant's work restrictions were decreased to five pounds on January 12, 2022. On January 26, 2022, Claimant's work restrictions were again modified to restrict Claimant from commercial driving.

6. Claimant underwent a magnetic resonance image ("MRI") on January 31, 2022. The MRI showed a partial-thickness tear of the supraspinatus tendon, superior labral tear, infraspinatus tendinopathy, and possible tear of the humeral attachment of the glenohumeral ligament.

7. Claimant was referred to Dr. Scheffel for orthopedic consultation and was evaluated on February 17, 2022. Claimant reported to Dr. Scheffel that he injured his left shoulder when he was working on a forklift tire on December 6, 2021 and felt a pop and a sharp pain in his shoulder. Dr. Scheffel reviewed the MRI scan and recommended that Claimant undergo surgical intervention in the form of left shoulder arthroscopic rotator cuff repair and biceps tenodesis. Dr. Scheffel noted that he would be unable to perform the surgery as Dr. Scheffel would be out of work for an extended period of time, but recommended that Claimant be referred to another shoulder specialist to perform the surgery, as Dr. Scheffel opined Claimant cannot wait several months to have the procedure performed.

8. Claimant returned to Work Partners on February 23, 2022 and was evaluated by physicians' assistant ("PA") Meyer. PA Meyer reported Dr. Scheffel's recommended left shoulder arthroscopy rotator cuff repair and biceps tenodesis and noted that Dr. Scheffel was unable to perform the surgery, so Claimant was referred to other local surgeons. PA Meyer recommended Dr. Vance as the new orthopedic surgeon.

9. Claimant filed a Workers' Claim for Compensation on March 1, 2022. Claimant had an appointment with Work Partners on March 14, 2022 that was canceled due the fact that Respondents had denied Claimant's workers' compensation claim. Claimant returned to his PCP on March 16, 2022 and was provided with work restrictions that included no lifting heavier than five pounds in the left shoulder and no lifting greater than 20 pounds with the right shoulder.

10. Claimant again returned to his PCP on April 1, 2022 and was released to return to work as of April 4, 2022. There is no mention of restrictions in the release to return to work. The ALJ notes, however, that this was during a period of time when Claimant was not working and Respondents had not admitted liability for Claimant's injury. Claimant was off of work and not receiving workers' compensation benefits. The ALJ does not interpret the April 1, 2022 report that released Claimant to return to work without mention of any restrictions as a bona fide medical authorization to return to work without restrictions.

11. Respondents filed a general admission of liability ("GAL") for Claimant's work injury on May 4, 2022 admitting for medical benefits only. The GAL admitted for an average weekly wage ("AWW") of $1.00.

12. Claimant testified at hearing that the store manager, Mr. S[Redacted], told him that the store was going to make it hard for Claimant if he retained at attorney for his work injury. Mr. S[Redacted] testified he did not recall making that statement to Claimant.

13. Claimant testified that when he returned to work with his restrictions, he continued to work his job, but was not working the overtime hours he was working prior to his injury. Claimant testified Employer was not providing him with work that was within his restrictions. Mr. S[Redacted] testified that Employer offered Claimant work within his work restrictions. Mr. S[Redacted] testified he observed Claimant performing work outside of his work restrictions and when he saw Claimant performing work outside of his restrictions, he told Claimant not to exceed his work restrictions.

14. Mr. S[Redacted] testified that if Employer was unable to accommodate Claimant's restrictions, they would not have him work. Mr. S[Redacted] further testified that Employer would have been able to accommodate the work restriction provided after Claimant's surgery of no lifting great than paper weight.

15. DD[Redacted] runs wholesale operation for Employer. Mr. DD[Redacted] testified that Claimant would sometimes ask to run Mr. DD[Redacted]'s routes but that he did not ever direct Claimant to do so. Mr. DD[Redacted] testified that he is not a manager for Employer.

16. WK[Redacted] is a service manager for Employer. Mr. WK[Redacted] testified that he was in a management position for Employer in 2021, but was not a direct supervisor of Claimant. Mr. WK[Redacted] testified he requested Claimant perform certain tasks for him that Mr. WK[Redacted] believed were within Claimant's work restrictions. Mr. WK[Redacted] testified he never asked Claimant to perform work outside of his work

restrictions. Mr. WK[Redacted] testified he never witnessed Claimant show his genitalia to other employees.

17. Claimant testified that post injury there were times that he missed work for various reasons, including dental appointments and if Claimant's use of Ibuprofen caused stomach issues. Claimant testified his use of ibuprofen was increased post-injury due to his shoulder pain. Claimant testified he missed work between March 29 and April 1, 2022 due to stomach issues related to his use of ibuprofen. Claimant testified that on the occasions he needed to leave work early, he would ask permission from Employer prior to leaving work early.

18.Mr. S[Redacted] testified that Claimant returned to work at the same rate of pay and hours following his work injury, though business was slower in the wintertime. Mr. S[Redacted] testified Claimant was offered overtime after his work injury. Mr. S[Redacted] testified Claimant was offered light duty work that included delivering tires or driving. Mr. S[Redacted] testified Claimant applied for a position in sales after his work injury but was not offered that position because they were working through some issues with regard to Claimant's communication with teammates.

19.Claimant was terminated from his position with Employer on May 17, 2022. Mr. S[Redacted] testified Claimant was terminated for sexual harassment. Mr. S[Redacted] testified he found out on May 16, 2022 that Claimant was showing his genitalia to other employees and terminated Claimant for violating Employer's sexual harassment policy. Mr. S[Redacted] testified Employer had a no tolerance policy with regard to sexual harassment.

20.Claimant testified at hearing that he had exposed himself to co-workers at work several times in the previous five years as a joke. Claimant testified that the culture for Employer included horseplay and testified he had been "mooned" by a co-employee in the past. Claimant testified that at work co-employees would joke with each other and throw tools towards co-workers' crotches, or light fire crackers in the shop area. Claimant also testified that his co-workers would have "uncomfortable touch Tuesday." With regard to Mr. S[Redacted], Claimant testified he was aware that Mr. S[Redacted] was "not a hugger" and at the Christmas party in 2021 he approached Mr. S[Redacted] to give him a hug. Claimant testified that Mr. S[Redacted] responded by swatting him in the testicles with his hand.

21.Mr. S[Redacted] testified on cross-examination that he did hit Claimant in the testicles at the 2021 Christmas party and did so because he was protecting himself from getting a hug. Mr. S[Redacted] confirmed in his testimony that he is not a hugger. Mr. S[Redacted] testified that his action of striking Claimant in the testicles could be a violation of Employer's sexual harassment policy.

22. Respondents put into evidence written statements from three co-workers of Claimant, CR[Redacted], and JP[Redacted], who indicated in their written statements that Claimant had exposed himself to them. The statements from Mr.

CR[Redacted] and Mr. E[Redacted] did not indicate when Claimant had exposed himself. Respondents provided a letter from "J[Redacted]" that indicated Claimant approached him and asked him if he wanted to see or touch his "balls". The letter from "J[Redacted]" is likewise not dated and does not reference when the alleged comments were made by Claimant.

23. Claimant testified at hearing that he showed Mr. E[Redacted] his genitalia. Claimant testified he did not recall if he showed his genitalia to Mr. CR[Redacted]. Claimant denied asking "J[Redacted]" if he wanted to see his genitalia.

24. Mr. CR[Redacted] testified at hearing in this matter. Mr. CR[Redacted] testified that in the Summer of 2021, Claimant asked Mr. CR[Redacted] if Mr. CR[Redacted] wanted to see his belt buckle. Mr. CR[Redacted] testified Claimant then exposed himself to Mr. CR[Redacted]. Mr. CR[Redacted] testified he did not report this to any supervisor until May 2022. Neither Mr. E[Redacted] nor "J[Redacted]" testified at hearing in this matter.

25. Mr. S[Redacted] testified he did not believe there was a culture of sexual harassment at the workplace. Mr. S[Redacted] testified that he only became aware of Claimant exposing himself the day before he decided to terminate Claimant's employment with Employer. Mr. S[Redacted] testified that he was unaware of employees "mooning" each other while at work.

26. Claimant testified that he did not expose himself to other employees following his work injury. Claimant testified that his conduct prior to his work injury was performed in jest and was in relation to other work place behavior such as throwing tools at co-employees' crotches and "uncomfortable touch Tuesday".

27. Claimant remained on work restrictions following his initial visit with Dr. Budiman. Claimant was off of work pursuant to these work restrictions from December 7, 2021 (a Tuesday) through December 12, 2021 (a Sunday).

28. Claimant subsequently underwent surgery under the auspices of Dr. Vance. Dr. Vance performed a diagnostic arthroscopy, subacromial decompression, and distal clavicle excision on June 16, 2022. Claimant returned to Dr. Brown at Work Partners on June 30, 2022, following his surgery and reported his pain was 8 out of 10, which was an increase from 5 out of 10 prior to his surgery. Dr. Brown provided Claimant with increased restrictions that included no lifting, carrying, pushing, or pulling above paperweight with his left upper extremity.

29. Claimant returned to Dr. Brown on July 14, 2022. According to the WC164 form completed by Dr. Brown, Claimant's work restrictions continued to be no lifting, carrying, pushing or pulling above paperweight with the left upper extremity.

30. Claimant testified at hearing that after being terminated and undergoing surgery, he has not returned to work. Claimant testified that he has looked for work, but has not been able to find work within his restrictions.

31. Mr. S[Redacted] testified that Employer had administrative work that was within Claimant's work restrictions that Claimant could have performed for Employer following his surgery.

32. Dr. Brown testified by deposition in this matter. Dr. Brown opined that he believed the tearing of the posterior labrum constituted an aggravation of Claimant's preexisting shoulder issues. Dr. Brown testified Claimant's pain and lack of functionality of the shoulder led to Claimant's surgery. Dr. Brown testified that when he first saw Claimant on June 30, 2022, Claimant's pain had been aggravated by the surgical procedure with Dr. Vance. Dr. Brown testified that the physical examination of Claimant on that initial visit on June 30, 2022 was limited due to Claimant having just undergone shoulder surgery.

33. Dr. Brown testified that the physical examination on July 14, 2022 was again limited due the fact that Claimant remained in a lot of pain post-surgery and continued to wear a sling. Dr. Brown testified that Claimant was attempting to wean himself off of needing to use the sling, but this led to increased pain and Claimant again began to use the sling. Dr. Brown testified that Claimant's pain levels were higher than hoped for due to the fact that he was not tolerating use of the meloxicam, which caused Claimant an upset stomach. Dr. Brown further testified that Claimant's use of Cyclobenzaprine produced drowsiness.

34. Dr. Brown testified that as of the date of his deposition, Claimant had not been released by Dr. Vance or himself to do any increased activity beyond lifting at a paperweight level. Dr. Brown testified that he did not expect there to be a significant change in Claimant's work restrictions at his next scheduled evaluation.

35. Claimant testified he continues to experience pain and restricted range of motion, weakness, and lack of sleep as a result of his work injury. Claimant presented the testimony of Ms. I[Redacted] who lives with Claimant. Ms. I[Redacted] testified that Mr. [Claimant] continues to be limited around the house due to pain. Ms. I[Redacted] testified that the work injury has resulted in Claimant being unable to sleep as he would toss and turn at night following his injury.

36. Both parties argued in their position statement that in the twelve (12) weeks prior to Claimant's injury, Claimant earned $12,511.85 in wages from Employer. The ALJ therefore finds that Claimant's proper AWW is $1,042.65. Claimant's cost on continuing his health insurance ("COBRA") benefits effective June 1, 2022 was $188.61, increasing Claimant's AWW to $1,231.65.

37. Claimant argued at hearing that Claimant received a raise from Employer effective April 3, 2022 that increased his hourly rate from $20.70 to $21.48, an increase of 3.77%, which should be taken into account when calculating Claimant's AWW post April 3, 2022. The ALJ does not find that Claimant's post injury raise should be included in the AWW calculation under the facts of this case.

38. The mere fact that Claimant received a raise post-injury does not require that the AWW be increased for Claimant's claim based on the post-injury raise. The ALJ recognizes that an injured workers' post injury earnings may be used to calculate the Claimant's AWW, but declines the invitation to use the ALJ's discretion to raise the AWW based on post-injury earnings based on the facts presented in this case.

39. The facts in this case establish that following Claimant's work injury, he reported the injury to Employer and then sought medical treatment with his personal physician. Claimant's testimony that he reported the injury to Ms. L[Redacted] on the date of the injury was not rebutted by any credible evidence at hearing, and is supported by the Employer's First Report of Injury which indicates that the Employer was notified of the injury on December 6, 2021. Additionally, Claimant's testimony that he was not provided with a list of medical providers by Employer after reporting his injury to Employer on December 6, 2021 was not rebutted at hearing and is found to be credible.

40. Employer argues that they should not be responsible for the cost of Claimant's medical treatment with Dr. Budiman, despite the fact that there is no credible evidence that Employer properly referred Claimant to a medical provider in compliance with Section 8-43-404(5), C.R.S. Where the Employer fails to comply with Section 8-43-404(5), the choice of medical provider authorized to treat Claimant for his injury reverts to the injured worker. In this case, Employer failed to comply with Section 8-43-404(5), C.R.S. until Mr. S[Redacted] referred Claimant to Work Partners on or about December 20, 2021.

41. Based on the evidence presented in this case, the ALJ finds that Claimant's treatment with Dr. Budiman was authorized medical treatment necessary to cure and relieve the Claimant from the effects of the work injury. Respondents are therefore liable for the cost of the medical treatment provided by Dr. Budiman pursuant to the Colorado Medical Fee Schedule.

42. The ALJ further finds that Claimant's return to Grand Valley Primary Care in March and April 2022 was a result of his appointment with Work Partners being cancelled. Therefore, Claimant's treatment in March and April 2022 with Grand Valley Primary Care is likewise found to be authorized medical care related to Claimant's compensable work injury.

43. Claimant was taken off of work by Dr. Budiman from December 7, 2021 through December 12, 2021. Respondents argue that they are not responsible for TTD benefits during this period of time, even though Claimant was missing work as a result of his work injury. The ALJ is not persuaded.

44. Claimant was off of work pursuant to work restrictions from Dr. Budiman from December 7, 2021 through December 12, 2021. In order to prove entitlement to TTD benefits, an injured worker 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. In this case, Claimant's shoulder injury

resulted in a disability as evidenced by Dr. Budiman taking Claimant off of work for the period of December 7, 2021 through December 12, 2021. As found, that disability was related to Claimant's work injury.

45. After Claimant was evaluated by Dr. Fay at Work Partners, Claimant was provided with work restrictions that prohibited Claimant from performing his usual employment. The wage records entered into evidence establish that Claimant's earning after returning to work on December 13, 2021 were lower that his pre-injury earnings. Claimant testified at hearing that following his work injury, he was not provided with the same overtime hours he was prior to his work injury.

46. Mr. S[Redacted] testified at hearing that Claimant's lack of overtime hours after he returned to work was the result of a slow down in work that occurs after holidays. However, the wage records entered into evidence in this case demonstrate that Claimant was working less overtime hours after the work injury through the Spring than Claimant was working prior to his work injury. Therefore, the ALJ finds that Claimant has established that he is entitled to an award of TPD benefits for the period of December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022.

47. With regard to Claimant's missed time from work between March 28, 2022 and April 2, 2022, Claimant testified at hearing that he was having issues with regard to his stomach that was caused by his increased use of ibuprofen as a result of his work injury. Claimant's testimony in this regard is found to be credible and persuasive. This testimony was supported by the deposition testimony of Dr. Brown who referenced Claimant having reported having issues with regard to his medications following his work injury. The ALJ therefore finds that Claimant's missed time from work for the period of March 28, 2022 through April 2, 2022 is a result of Claimant's work injury and Claimant is entitled to an award of TTD benefits for this period of time.

48. Respondents argue that Claimant is not entitled to TTD benefits beginning May 17, 2022 because Claimant was responsible for his termination of employment. The ALJ is not persuaded that Respondents have established that Claimant was responsible for his termination of employment in this case.

49. In this case, Mr. S[Redacted] testified that Claimant was terminated from his Employment with Employer for violating the company policy with regard to sexual harassment. Mr. S[Redacted] testified that Employer has a zero tolerance policy with regard to sexual harassment. The incident in this case that was testified to by Mr. CR[Redacted] occurred in the Summer of 2021 according to Mr. CR[Redacted]'s testimony. Moreover, Mr. CR[Redacted] did not report the incident to Employer until May 2022. The written statement from Mr. E[Redacted] was corroborated by Claimant's testimony in this case. However, Claimant testified this occurred well before his work injury and was in relation to the nature of the employment. The ALJ therefore finds that Claimant would not reasonably be aware that such an action could lead to his termination of employment.

50. The other reported instances of sexual harassment in the written statements of "J[Redacted]" the co-employees is not found credible as it represents an out of court written statement that is not dated and not corroborated by other credible evidence at hearing.

51. Mr. S[Redacted]'s testimony that Employer has a zero tolerance policy with regard to sexual harassment is found to be not credible in light of the testimony regarding his striking Claimant in the genitals at the Christmas party in 2021.

52. Claimant's testimony with regard to the atmosphere at work among the employees is found to be credible. Claimant's testimony that employees would have "uncomfortable touch Tuesday" and would throw tools at the crotch of other employees is found to be credible. The ALJ does not condone the actions of Claimant in this case, but finds that the actions in this case were remote in time in relation to the work injury and represented actions by Claimant that he believed to be in the joking context of the employment situation with Employer.

53. Based on the foregoing, the ALJ finds that Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that Claimant reasonably should have known would lead to his termination of employment with Employer.

54. Based on the finding that Claimant was not responsible for his termination of employment, the ALJ need not make a finding as to whether Claimant has proven that it is more likely than not that he sustained a worsening of his condition after his termination of employment, which would result in a new award of TTD benefits after the worsening.

55. The ALJ therefore finds Claimant is entitled to TTD benefits beginning May 17, 2022 through May 31, 2022 at an AWW of $1,042.65 and from June 1, 2022 through ongoing at a rate of $1,231.26.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. 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* §§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).

4. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits commencing December 7, 2021 through December 12, 2021 and March 29, 2022 through April 1, 2022 and May 17, 2022 through ongoing. As found, Claimant was taken off of work by Dr. Budiman on December 7, 2021 and Claimant's loss of wages during this period of time is found to be related to his December 6, 2021 work injury. As found, Claimant's testimony that he missed work from March 29, 2022 through April 1, 2022 due to stomach issues related to his use of ibuprofen to treat his shoulder injury is found to be credible. Therefore, Claimant is entitled to an award of TTD benefits for this period of time. As found, Claimant was off of work with restrictions related to his work injury starting May 17, 2022 and is entitled to an award of TTD benefits beginning May 17, 2022.

5. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

6. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TPD benefits beginning December 13, 2021 through March 28, 2022 and from April 2, 2022 through May 16, 2022. As found, Claimant was under work restrictions for most of these periods of time (with the exception of the vague work release from Grand Valley Primary Care on April 1, 2022 that was found to not represent a bona fide release to return to work without restrictions) and was earning less wages than prior to his work injury. Therefore, Claimant is entitled to an award of TPD benefits during these periods of time.

7. Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he or she precipitated the employment termination by a volitional act that he or she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment. As found, Claimant's actions in exposing himself to new employees was consistent with the general nature of the employment setting in which Claimant worked. As found, this employment setting included co-employees mooning each other and employees tossing tools towards the crotch of other employees and actions such as "uncomfortable touch Tuesdays". Additionally, Mr. S[Redacted]'s testimony that Employer had a "no tolerance" policy for sexual harassment is found by the ALJ to be not credible based on Mr. S[Redacted]'s own actions in slapping Claimant in the testicles in an effort to avoid being hugged at the 2021 Christmas party.

9. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The parties agreed in their position statements that Claimant's pre-injury AWW was $1,042.65. The ALJ therefore finds that the proper AWW is $1,042.65.

10. Claimant argued in his position statement that the AWW should be increased by 3.77% based on Claimant's post injury raises. As found, the ALJ is not persuaded that Claimant's AWW should be increased based on Claimant's post-injury raises. Notably, Section 8-40-201(19)(a), provides in pertinent part:

> "Wages" shall be construed to mean the money rate at which the services rendered are recompensed *under the contract of hire in force at the time of the injury*, either express or implied. (emphasis added)

11. The ALJ therefore determines that Claimant's AWW for purposes of this injury is properly calculated at $1,042.65 based on Claimant's earnings in the twelve (12) weeks prior to his industrial injury..

12. The parties further agree that Section 8-40-201(19)(b) provides that the AWW should be increased based on the employee's contribution for any COBRA benefits. The parties agree that the COBRA contribution for Claimant was $188.61 and became effective as of June 1, 2022. Therefore, Claimant's AWW increased to $1,231.26 effective June 1, 2022 to account for the COBRA contribution.

13. 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). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

14. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

15. As found, Claimant reported his injury to Employer but was not initially provided with a list of physicians authorized to treat Claimant for his injury. The ALJ therefore finds that the treatment provided by Dr. Budiman and Grand Valley Primary Care is authorized medical treatment that was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury based on Employer's failure to refer Claimant to a treating physician after Claimant reported his injury.

16. As found, Claimant's return to Grand Valley Primary Care in March and April, 2022 after Claimant's March 14, 2022 medical appointment with Work Partners is likewise found to be authorized as Claimant's treatment with Grand Valley Primary Care was the result of his medical care with Work Partners being cancelled after he filed a Workers' Claim for Compensation.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits based on an AWW of $1,042.65 for the period of December 7, 2021 through December 12, 2021 and March 29, 2022 through April 1, 2022 from May 17, 2022 through May 31, 2022.

2. Respondents shall pay Claimant TTD benefits beginning June 1, 2022 at an AWW of $1,231.26 based on the increased AWW due to Claimant being eligible for COBRA coverage.

3. Respondents shall pay for Claimant's medical treatment with Grand Valley Primary Care that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury including the medical treatment with Dr. Budiman on December 7, 2021, March 16, 2022 and April 1, 2022.

4. Respondents shall pay statutory interest on all benefits not paid when due.

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

DATED: October 28, 2022

Keith E. Mottram

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a low back injury in the course and scope of her employment on February 16, 2022.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she established a refusal to treat for non-medical reasons and the right to select a physician passed to Claimant who selected Karin Gallup, N.P. at La Casa of Denver Health.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 2, 2022 on the issues of compensability, medical benefits, AWW and TTD benefits from February 21, 2022 ongoing.

Respondents filed a Response to Claimant's May 2, 2022 Application for Hearing on June 14, 2022. No additional issues were listed.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, then the average weekly wage was $800.00 based on $20.00 per hour, 40 hours a week. The temporary total disability benefits (TTD) rate would be $533.33.

The parties further stipulated that, if the claim was deemed compensable, then Claimant would be entitled to TTD from February 21, 2022 until terminated by law. The parties agreed that, if TTD was paid, Respondents were entitled to an offset for short-term disability benefits beginning February 21, 2022 through August 19, 2022 in the amount of $250.00 a week, which would result in a payment of TTD of $283.33 per week while the offset lasted.

The parties also agreed that Concentra was an authorized treating provider.

The stipulations of the parties are accepted by this ALJ and shall become part of the order in this matter.

FINDINGS OF FACT

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

1. Claimant was 45 years old at the time of the hearing. Claimant was a machine operator for Employer since approximately August of 2021. She began her work through a temporary agency then was hired by Employer permanently in January 2022. She would fill the machine casings with molding powder. After the material was "cooked" she would take them out of the casings and trim the remnants of plastic parts with a tool that had a wood handle and a metal blade of approximately three to four inches long and about two inches wide. The blade was provided by her employer. She would generally start her work at 3:00 p.m. and work to 11:00 p.m.

2. Claimant had a slip and fall injury while at work for a prior employer, a hospital, where she performed housekeeping duties. She injured her low back, but not in the same way as in this case. It was higher up on her spine. She was prescribed a steroid that help her problem really well. The injury resolved and she was released from care.

3. On December 2, 2019 Claimant was seen at Denver Health for a UTI and complained of back pain. The provider suspected muscle strain but made no recommendations nor provided treatment.

4. In December 2020 she had a slip and fall on snow and injured her left foot. The fracture was reduced in the emergency department and she wore a cast for several weeks. She was again evaluated on December 17, 2020 for ankle pain but x-rays could not visualize any abnormality regarding the left ankle due to the cast obscuring details. There was no mention of a low back problem during this visit. Further, of note, there have been several left foot incidents as far back as September 12, 2017, including an old left fifth metatarsal fracture of unknown age.

5. Claimant was assessed by telehealth on January 8, 2021 due to complaints of lower back problems. However, those complaints clearly resolved by the next visit as there was no mention in the February 1 or February 2, 2021 follow ups and evaluations.

6. On September 17, 2021 Claimant injured her left knee injury, which occurred while working for the temporary agency, who had placed Claimant at Employer's business to perform work as a machine operator. She last treated for that claim on March 9, 2022 for the last time in follow up of a third viscosupplementation injection. Claimant has not sought any further care for that left knee injury.

7. While working for Employer, Claimant would take her breaks in her car because she would frequently be making personal phone calls on one of her 15-minute breaks and she did not like to do that in the breakroom. The employees were allowed to take their breaks anywhere on the Employer's premises. Claimant's car was required to be parked in the Employer's parking lot, which was enclosed by a fence.

8. On February 16, 2022, while working for Employer, Claimant was taking her break and she slipped on the snow, without warning. She landed hard on her buttocks. She had been going to her car when the fall happened. She has had pain in her lumbar region and her buttocks since that time and the pain seemed to be deep in the bone at the base of her spine or buttocks, causing pain to radiate to her low back and cause muscle spasms. She stated that she sat in her car a while on her break. She had her tool in her back pocket, which she generally takes out when she sits in her car. After her

break, she got out of her car to return to work, forgetting her blade. When she realized she left her blade in her car, she returned to get it to continue working.

9. Claimant testified she told the man, who was training her on the machine she was working at, about her fall while on break on February 16, 2022. She laughed it off but her pain slowly increased during her shift her. She mentioned her fall again, letting him know her back pain was getting worse, but he did not seem to care about the incident

10. As the days went on the pain in her buttocks and low back started to really get worse. Claimant called the HR Department to advise the HR representative about the injury and request medical attention. Claimant did not hear back from the HR representative on where Employer wanted her to go for care so she determined to go to an urgent care facility for treatment as her low back pain continued to worsen.

11. On February 22, 2022 Claimant presented at Federico F. Pena Family Health Center – Urgent Care at Denver Health for an evaluation of her low back pain, where she was treated by Amy N. Quinones, N.P. Nurse Quinones treated Claimant for "acute back pain" and took Claimant off of work from February 22, 2022 to February 24, 2022.

12. When Claimant took the note from Nurse Quinones to Employer, she was advised she could not return to work until she was fully recovered. Her Employer did not contact her after this conversation to follow up or provide her with a designated provider list.

13. On March 4, 2022 Claimant returned to Denver Health where she was evaluated by Alicen M. Nelson, M.D., whose assessment was that of "bilateral low back pain without sciatica occurring after a fall three weeks ago."

14. At the March 4, 2022 visit, Claimant had two trigger point injections in the low back area. The working diagnosis was that of chronic bilateral low back pain without sciatica.

15. On March 9, 2022 Employer filed a Workers Compensation "First Report of Injury or Illness" (FROI) stating that Claimant had injured herself on February 16, 2022, that the time of the injury occurred at approximately 6:00 p.m., and that Employer was notified on February 16, 2022 of the injury. The report documented that Claimant had "slipped on the snow, fell on her bottom, hurting her back." The report was filed by the HR manager and indicated that Claimant had reported the injury to another Employer representative (PC) on February 16, 2022.[1]

16. On March 11, 2022 Claimant had her first visit with authorized treating physician ("ATP") Theodore Villavicencio, M.D. at the Concentra Medical Centers in Lakewood where ATP Villavicencio took a history of injury as follows:

> Reason for Visit
> Chief Complaint: The patient presents today with new injury, slip and fall on 02/16/2022 injured back, reports that she has pain in back and night pain. Self reported.

[1] This ALJ infers that the trainer advised the HR representative despite Claimant's impression that he did not seem to care about the fall.

At that visit, Dr. Villavicencio assessed that Claimant had a lumbar contusion and a strain of the lumbar region. He started her on a muscle relaxer, and provided her work restrictions of lifting 10 lbs. and pushing/pulling up to 20 lbs. with no forward bending, noting that she should be working only sedentary office type work. He gave the opinion that Claimant's objective findings were "consistent with history and/or work-related mechanism of injury/illness." In fact, all the Work Status reports from March 11, 2022 through April 19, 2022 all show the same causation analysis. Dr. Villavicencio also indicated that MMI was unknown.

17. On March 16, 2022 Claimant started physical therapy at the Concentra offices in Lakewood with Christi Galindo, P.T. This was the first of six visits programed. She documented Claimant's back pain was 3/10 but could rise to about a 7. The impairments identified during the examination prevented Claimant from performing her standard activities of daily living and/or work activities. Ms. Galindo noted abnormal range of motion, pain, abnormal muscle performance and gait. She proceeded with therapeutic exercises, neuromuscular reeducation, manual therapy and therapeutic activities. The treatment was provided by Austin Lyons SPT under Ms. Galindo's supervision.

18. Respondents filed a Notice of Contest on March 18, 2022, stating that the injury or illness was not work related.

19. On March 25, 2022 Claimant returned to Concentra and this time was evaluated by ATP Autumn Schwed, D.O. who noted that Claimant indicated that physical therapy "is not helping, but got cupping which has helped" and that Claimant was 25% of the way to meeting the physical requirements of her job. Dr. Schwed referred Claimant to Dr. Samuel Chan, a physiatrist, for an evaluation.

20. Dr. Schwed referred Claimant for an MRI and noted that the indications were for back pain and sacrococcygeal disorder. It was performed on April 1, 2022. It was read by Dr. Scot E. Campbell as showing a disc bulge at the L3-4 level with left paracentral small extrusion, mild facet arthropathy, mild left subarticular recess stenosis, and mild right neural foraminal stenosis. He noted a central disc protrusion at L4-5 with mild facet arthropathy, mild right subarticular recess stenosis and mild right neural foraminal stenosis. He also noted a right paracentral protrusion at the LS-S1 level with mild facet arthropathy. Dr. Campbell concluded that Claimant had degenerative disc disease and facet arthropathy without high-grade stenosis or nerve root impingement.

21. Claimant was evaluated by Dr. Samuel Chan on April 12, 2022.[2] Claimant described pain in the low back spine as well as radiation into the groin but not the lower extremities. On exam, he noted that Claimant's pain was centered around the PSIS and the sacral sulci. Claimant was also positive for Patrick's, Gaenslen's, FABER's, and Yeoman's[3] testing. Dr. Chan concluded that Claimant's exam was most consistent with sacroiliac joint dysfunction and recommended sacroiliac joint injections should her symptoms persist. He also diagnosed lumbar contusion and strain of the lumbar region.

[2] Pages are missing from this report.

[3] Medical tests used to detect musculoskeletal abnormalities and inflammation of the lumbar vertebrae, but more commonly the sacroiliac joint.

He indicated Claimant was to return in four weeks. He also noted that objective findings were consistent with the work-related mechanism of injury.

22. On April 19, 2022 Claimant returned to Concentra where she was evaluated this time by Chelsea Rasis, PA-C. ATP Rasis noted that the muscle relaxer (flexeril) helped at night with the low back pain and that cupping therapy was also providing temporary relief, stating that Claimant had more sessions scheduled. ATP Rasis documented that Dr. Chan had offered Claimant cortisone injections and that Claimant was looking into the side effects. She ordered six visits of chiropractic care and six acupuncture sessions. She continued the prior sedentary restrictions.

23. Claimant's last visit with Concentra was on May 13, 2022, when Claimant was released from care by ATP Rasis to have her care and "work restrictions to be managed" by her primary care provider (PCP).

24. Claimant testified that Ms. Rasis advised Claimant to go to her PCP for further care as the claim had been denied by the Insurer. She did not allow Claimant to return to Concentra for further care. She further advised Claimant that her PCP would have to provide any further medical care, such as the injections, work restrictions and that she was being released to her PCP's care.

25. Claimant started physical therapy on June 9, 2022 at Select Physical Therapy pursuant to Karim Gallup's referral. Jon Baird, PT noted that Claimant had a slip and fall in February 2022 and landed on her "butt." He documented that Claimant had had lumbar back pain, left greater than right, ever since then. Mr. Baird noted that Claimant ambulated slowly with a stiff spine pattern, a slight flexed trunk and stands with an increased lumbar lordosis. He provided exercise education and training, as well as manual intervention modalities. He recommended ongoing therapy for a period of 3 months.

26. Claimant's return visit to Denver Health, documented in the evidence presented, was for June 23, 2022, following Concentra's refusal to continue to treat Claimant at Concentra Medical Centers. She was evaluated by Morris M. Askenazi, M.D. who indicated that Claimant continued to have significant pain and limitations and would be unable to work at that time. He ordered continued physical therapy for the following two months. He stated Claimant should be on work restrictions of no lifting more than 5 pounds overhead, no repetitive bending, limited reaching/stretching, and anticipated the limitations to continue for the following two months.

27. Following Concentra's refusal to treat, Claimant's counsel wrote to Respondents indicating that if Claimant could not get follow-up care at Concentra, Claimant was requesting to change physician to Karin Gallup, N.P. at La Casa--Denver Health, based upon that refusal to treat.

28. Claimant credibly testified that she had had previous episodes of back pain, which typically resolved quickly. As found, immediately prior to February 16, 2022 Claimant had no ongoing medical care for back pain and was symptom free.

29. As found, there was a medical record from Denver Health which references back pain on January 8, 2021 and resulted from the fall where Claimant injured her left ankle. At the follow-up visit on February 1, 2021, however, there was no reference to

back pain, but rather only to the old metatarsal fracture of Claimant's left foot. Claimant testified that she had no problems with her low back immediately prior to the work injury. Claimant is found credible and persuasive.

30. Claimant is found to be credible and persuasive. As found Claimant was injured in the course and scope of her employment when she slipped and fell in Employer's parking lot while on her break. This is specifically not considered a deviation as Claimant was allowed to take her breaks on any area of Employer's premises and the parking lot was within Employer's premises.

31. As found, Claimant injured her low back, coccygeal area as well as her SI joint, causing a need for medical care and disability.

32. From the documents in evidence, Claimant's last appointment at Denver Health was on July 19, 2022. She was advised that they anticipated proceeding with steroid injections into her lumbar spine. She was advised that she needed to await the scheduling of the injections but had not received a call back with the scheduled appointment to date. As found, Claimant continues to require medical attention.

33. Further, as found, Concentra refused to continue seeing her and Respondents have not provided a new designated provider willing to provide care for the work related injuries. Claimant has shown that the right to select a medical provider passed to Claimant, that Claimant selected Nurse Gallup at Denver Health and that the Denver Heath system, including Nurse Gallup are authorized treating providers.

34. Claimant has remained under temporary work restrictions which the employer could not accommodate, but have paid Claimant, as noted by the stipulation of the parties, Employer funded short-term disability benefits from February 21, 2022 through August 19, 2022. Claimant continued to be off work in accordance with documentation from the medical providers at Denver Health.

35. Any evidence or testimony not consistent with the above findings is specifically found not relevant, 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. Compensability

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. Sec. 8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. 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.

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). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). 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); *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008).

The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

Claimant's was credible and persuasive in her description of her injuries, symptoms and pain complaints cause by the February 16, 2022 slip and fall at work. The arguments made by Respondents regarding Claimant's veracity are not persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable low back injury during the course and scope of her employment with Employer on February 16, 2022 when she fell in the designated parking lot for employees and landed on her bottom. This is supported by the opinions of Nurse Quinones, Dr. Chan, Dr. Villavicencio and Dr. Schwed and the Work Status Reports covering March 11 through April 12, 2022 indicating that Claimant's objective findings were consistent with a history of work-related mechanisms of injury. It is even supported by the Employer's First Report of Injury of injury filed by Employer's HR representative on March 9, 2022.

Moreover, although the records reflect that Claimant suffered at times from back symptoms prior to February 16, 2022, those incidents did not cause the need for significant medical care and Claimant credibly testified that they were short lived symptoms that did not require the care that has been consistent since Claimant's injury of February 16, 2022. Accordingly, Claimant's work injuries were proximately cause by

the February 16, 2022 accident and aggravated, accelerated or combined with any pre-existing conditions to produce the need for medical treatment. Thus, Claimant suffered a compensable lumbar injury during the course and scope of her employment with Employer on February 16, 2022.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. Sec. 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the

respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonably necessary and causally related medical benefits for her work related injuries cause by the fall of February 16, 2022, including for her low back, SI joint and sacrococcygeal injuries. Respondents noted that they had notice of the injury on February 16, 2022. However, there is no record that Respondents gave Claimant a designated provider list within the allowed seven days.[4] Claimant went to the Denver Health Medical Center (DHMC) --Urgent care and was evaluated by Nurse Quinones for acute low back pain on February 22, 2022[5], and Claimant provided the note to Employer. Claimant then followed up with DHMC on March 4, 2022 and was treated with injections by Dr. Nelson. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care. Claimant was not provided an appointment with Concentra until March 11, 2022.[6] Claimant eventually saw Dr. Villavicencio on March 11, 2022 at Concentra and he found that Claimant's mechanism of injury was work related and that she required medical care.

Claimant argued at hearing that Concentra's refusal to treat was for non-medical reasons, and thus the right to select a physician passed to Claimant. Claimant selected La Casa which operates under the auspices of Denver Health. Respondents argued at hearing and in their position statement that because the Claimant was under a denial of care there was no obligation to treat and that the designated provider remained designated, and thus they did not waive the right to select the medical provider. Sec. 8-43-404(5), C.R.S. implicitly contemplates that the Respondents will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ*. Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260. Here, it is specifically found that Ms. Rasis, as a Concentra representative, refused to treat Claimant. Claimant is credible and persuasive in her testimony that Ms. Rasis advised Claimant her claim was being denied and that Concentra would no longer treat her for her injuries. As found, Ms. Rasis in effect, advised Claimant to pursue care with her primary care provider (PCP).[7] Claimant's counsel sent a letter to Respondents that specifically notified

[4] Seven days from February 16, 2022 was February 24, 2022.

[5] The February 22, 2022 visit would normally be considered only an emergency visit.

[6] In fact, this ALJ considers that Respondents lost the right to designate a provider at all since Claimant was not sent to a provider until well after the date of injury and later than the seven day period required by statute. Claimant's choice of DHMC for the initial urgent care visit and all the follow up medical care at DHMC, indicated that DHMC should be an authorized treating provider.

[7] This, in effect, was a referral to her PCP.

Respondents of Concentra's refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified her PCP to be the providers at Denver Health Medical Center and specifically Nurse Gallup. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Nurse Gallup of DHMC, who is now Claimant's treating provider.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that she sustained compensable work related injuries to her low back, coccyx and SI joint within the course and scope of her employment on February 16, 2022.

2. The Stipulations of the parties are approved and become part of this order.

3. Claimant's average weekly wage is $800.00.

4. Respondents shall pay temporary total disability benefits at the rate of $533.33 beginning February 21, 2022 until terminated by law.

5. Pursuant to the parties' stipulation, Respondents may take an offset due to payment of short-term disability benefits in the amount of $250.00 per week from February 21, 2022 to August 19, 2022.

6. Respondents shall pay interest at the statutory rate of eight percent (8%) on all benefits that were not paid when due.

7. Claimant is entitled to medical benefits that are reasonably necessary and related to the February 16, 2022 injuries to her low back, coccyx and SI joint. As stipulated by the parties, Concentra is an authorized treating provider. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care.

8. Claimant has shown by a preponderance of the evidence that selection of provider passed to Claimant due to a refusal to treat for non-medical reasons and that La Casa--DHMC and Nurse Gallup are now authorized treating providers.

9. 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 31st day of October 31, 2022.

Digital Signature

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

PROCEDURAL HISTORY

A hearing took place on August 17, 2022. The parties were provided through September 21, 2022 to submit post hearing positions statements, briefs or proposed orders. The proposed Findings of Fact, Conclusions of Law and Order were timely filed. This ALJ issued Findings of Fact, Conclusions of Law and Order (FFCL) on September 22, 2022[1] with instructions to the parties to provide supplemental wage information, if the parties were unable to reach an agreement with regard to the issue of average weekly wage as the information provided during trial was insufficient to make a determination. The FFCL was an order on both the October 23, 2020 claim, WC 5-153-595-002 and the September 1, 2021 claim, WC 5-184-071-002.

On October 14, 2022 Respondents filed a Petition to Review the FFCL on multiple issues including objecting to a finding of this ALJ "that Claimant proved by a preponderance of the evidence that she sustained an occupational disease or injury in the form of carpal tunnel syndrome during the course and scope of her employment."

The parties communicated that they were unable to reach an agreement regarding average weekly wage and provided the records on October 26, 2022, now labelled as Respondents' Exhibit L, which were admitted into the record. This Findings of Fact, Conclusions of Law and Order is only to address the issue of average weekly wage and the calculation of benefits due and owing pursuant to the September 22, 2022 FFCL, regarding the September 1, 2021 claim, WC 5-184-071-002. All other issues before this ALJ were addressed in the prior FFCL issued by this ALJ on September 22, 2022.

ISSUE

I. Whether Claimant has proven by a preponderance of the evidence the amount of Claimant's average weekly wage (AWW) applicable to the compensable September 1, 2021 claim, W.C. No 5-184-071-002.

II. Calculation of Temporary Partial and Temporary Total disability benefits based AWW and prior award dated September 22, 2022.

FINDINGS OF FACT

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

1. Claimant was a mechanical service technician for Employer since sometime in 2018 or 2019 and was 54 years old at the time of the hearing.

[1] Served on September 26, 2022.

2. On September 1, 2021, Claimant was working on the roof of a building, replacing a fan motor of a condenser. He climbed up to the roof by ladder. A portion of the roof was pitched (slanted slope) and then the condenser was on a flat part of the roof further up. When he was standing on the pitched portion of the roof with his left foot, in the process of stepping onto the flat portion of the roof with his right foot, Claimant twisted his left knee and felt a pop. At that point, his left knee twisted while his left foot was planted on the 8 or 9 pitched roof, which was approximately a 36 to 38 degree pitch, causing a popping in his left knee. He was carrying a condenser part and his tools at the time. Claimant stated that all his weight was on the left leg because he had lifted his right foot to step from the pitched area to the flat roof area.

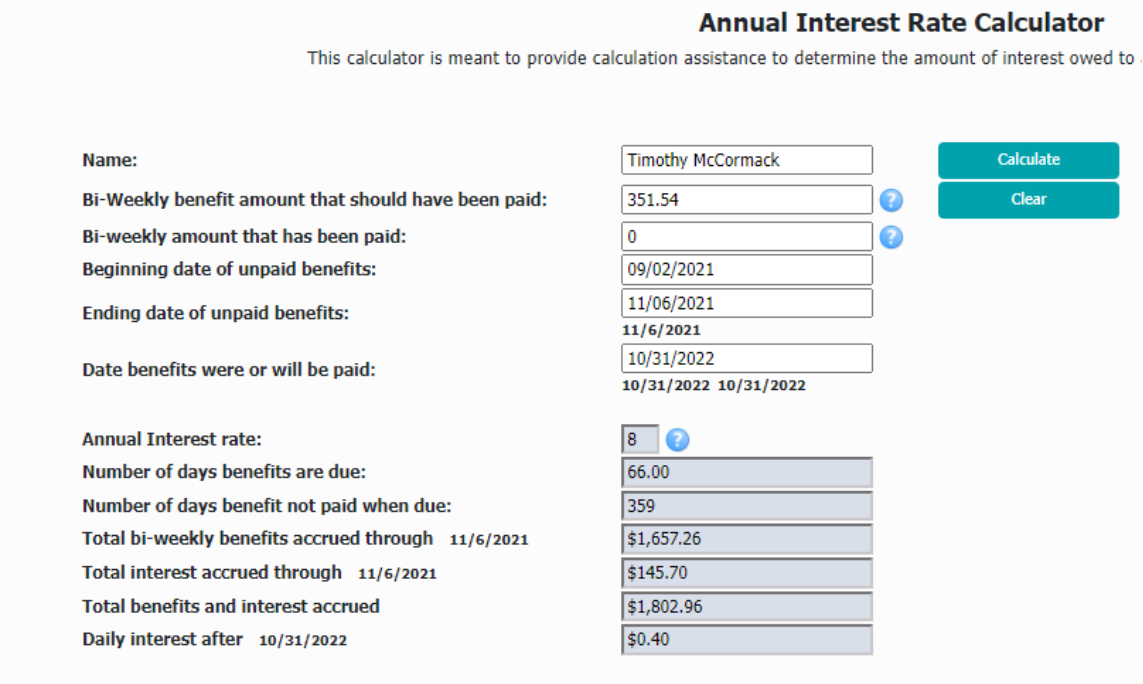
3. Claimant stated that something snapped in his knee. Claimant did not feel immediate pain but by approximately 30 minutes later, the pain in his knee started to intensify on top of the knee as well as inside and on the outer portion of his knee. Initially he thought he might have pulled a muscle. Since he was on the last job of the day, Claimant went home, thinking he would sleep on it and see how he was feeling in the morning. But his knee continued to hurt and swelled up, with a horseshoe swollen area above the knee cap. He reported the injury the following day and was sent for a drug test that day at Concentra. This claim was found compensable in the Findings of Fact, Conclusions of Law and Order dated September 22, 2022. See prior order.

4. The wage records, Respondents' Exhibit L, show Claimant received a pay increase for pay period ending May 22, 2021 which includes wages beginning as of May 9, 2021. When considering wages earned from May 9, 2021 through August 28, 2021, the last complete pay period prior to the September 1, 2021 date of injury, Claimant earned a total of $13,844.78. As found, the total wages divided by the 16 week period renders an average weekly wage of $865.30.[2] This provides a temporary Total Disability rate of $576.87. This ALJ finds that this is the Claimant's fair approximation of his average weekly wage.

5. The September 22, 2022 FFCL ordered Respondents to pay either temporary partial or temporary total disability benefits beginning September 2, 2021, as Claimant had shown by a preponderance of the evidence that he was entitled to wage loss benefits related to the September 1, 2021 work related injuries. This ALJ is now able to calculate the benefits owed as the parties communicated that they could not reach an agreement.

6. Based on the wage records from pay period ending September 4, 2021 through pay period ending November 6, 2021 (10 weeks or 70 days), Claimant earned an average of $602.03. Claimant's AWW was $865.30. The difference is $263.27 per week for September 2, 2021 through November 7, 2021. Therefore, Claimant is owed a total of $1,657.26.70 in temporary partial disability benefits plus interests of $145.70, which is calculated as follows:

[2] The total wages of $13,844.78 divided by 112 days multiplied by 7 days a week and rounded to the closest decimal.



Annual Interest Rate Calculator

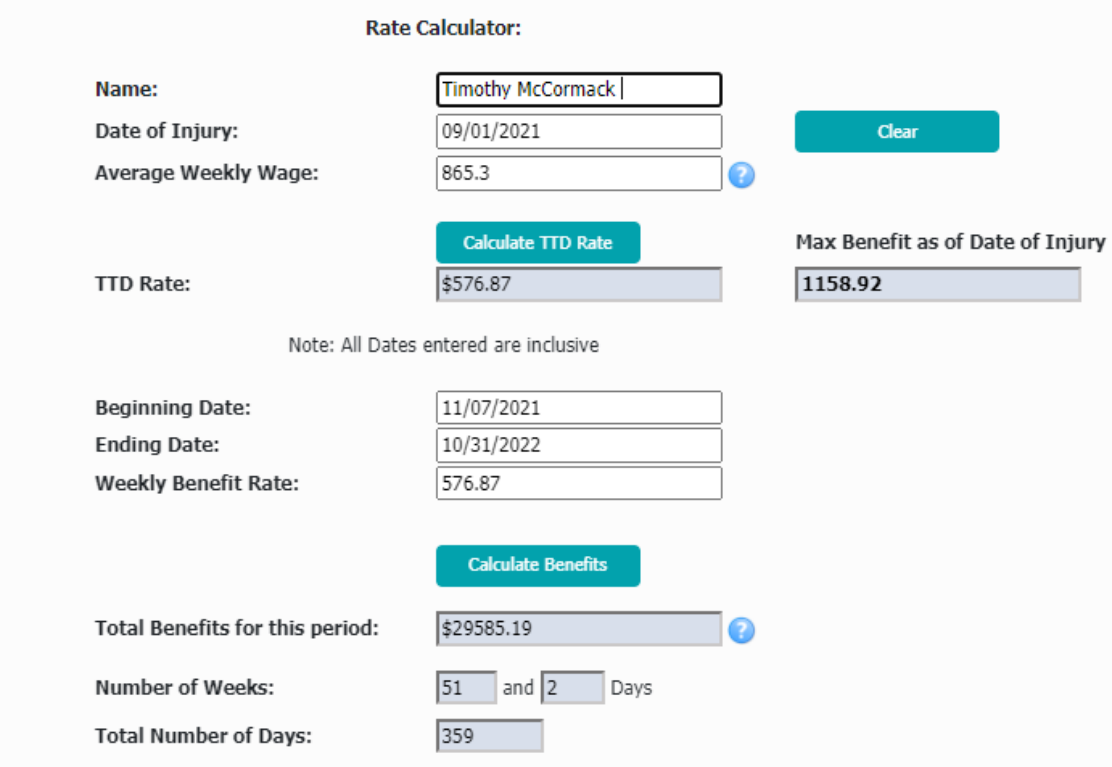
This calculator is meant to provide calculation assistance to determine the amount of interest owed to

Name:	Timothy McCormack
Bi-Weekly benefit amount that should have been paid:	351.54
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	09/02/2021
Ending date of unpaid benefits:	11/06/2021 11/6/2021
Date benefits were or will be paid:	10/31/2022 10/31/2022 10/31/2022
Annual Interest rate:	8
Number of days benefits are due:	66.00
Number of days benefit not paid when due:	359
Total bi-weekly benefits accrued through 11/6/2021	$1,657.26
Total interest accrued through 11/6/2021	$145.70
Total benefits and interest accrued	$1,802.96
Daily interest after 10/31/2022	$0.40

Calculate

Clear

7. Claimant is also owed temporary total disability benefits beginning the week of November 7, 2021 through the present and continuing until terminated by law. Neither party indicated that Claimant had been earning wages after November 7, 2021 and no further wage records were submitted after this date. For the period of November 7, 2021 through the date of this order, October 31, 2022 there was a period of 359 days, including the last day. TTD was calculated as follows:



Rate Calculator:

Name:	Timothy McCormack
Date of Injury:	09/01/2021
Average Weekly Wage:	865.3
TTD Rate:	$576.87
Max Benefit as of Date of Injury	1158.92

Clear

Calculate TTD Rate

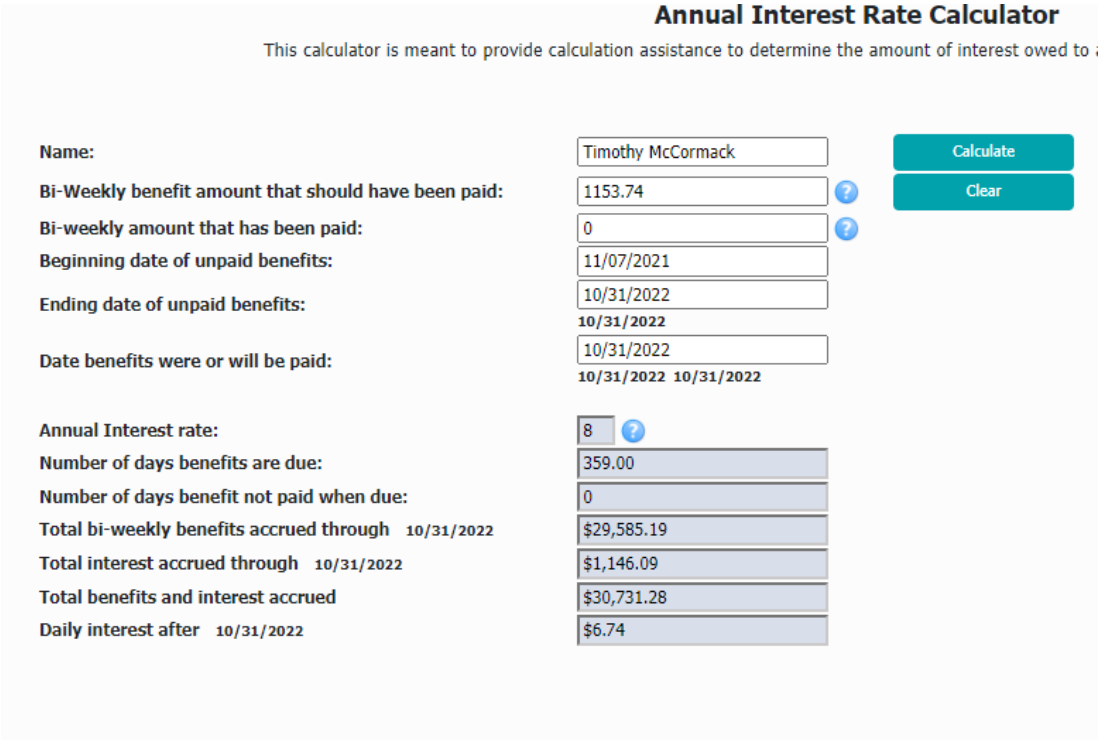
Note: All Dates entered are inclusive

Beginning Date:	11/07/2021
Ending Date:	10/31/2022
Weekly Benefit Rate:	576.87
Total Benefits for this period:	$29585.19
Number of Weeks:	51 and 2 Days
Total Number of Days:	359

Calculate Benefits

Claimant is owed TTD in the amount of $29,585.19.

8. Interests are due related to the benefits, which were not paid when due, in accordance with Sec. 8-43-410(2), C.R.S. Interests are calculated as follows:



Annual Interest Rate Calculator

This calculator is meant to provide calculation assistance to determine the amount of interest owed to

Name:	Timothy McCormack
Bi-Weekly benefit amount that should have been paid:	1153.74
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	11/07/2021
Ending date of unpaid benefits:	10/31/2022 (10/31/2022)
Date benefits were or will be paid:	10/31/2022 (10/31/2022 10/31/2022)
Annual Interest rate:	8
Number of days benefits are due:	359.00
Number of days benefit not paid when due:	0
Total bi-weekly benefits accrued through 10/31/2022	$29,585.19
Total interest accrued through 10/31/2022	$1,146.09
Total benefits and interest accrued	$30,731.28
Daily interest after 10/31/2022	$6.74

Calculate

Clear

When adding the $1,146.09 in interest due for TTD for pay period of November 7, 2022 through October 31, 2022 and the interest due for TPD for pay period from September 2, 2021 through November 6 2021 for the amount of $145.70, the total interest due for both periods is $1,291.79

CONCLUSIONS OF LAW

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). As found, the Claimant's fair approximation of actual wage loss and diminished earning capacity caused by the September 1, 2021 industrial injury is an average weekly wage of $865.30. This renders a temporary total disability rate of $576.87.

Temporary Disability Benefits

The September 22, 2022 FFCL ordered Respondents to pay either temporary partial or temporary total disability benefits beginning September 2, 2021, as Claimant had shown by a preponderance of the evidence that he was entitled to wage loss benefits related to the September 1, 2021 work related injuries. This ALJ was able to calculate the benefits owed as the parties communicated that they could not reach an agreement and provided this ALJ with records going back to April 2021 until Claimant lost his employment.

The parties submitted the wage records on October 26, 2022, which were admitted as Respondents' Exhibit L. Based on the wage records from pay period ending September 4, 2021 through pay period ending November 6, 2021 (10 weeks or 70 days), Claimant earned an average of $602.03. Claimant's AWW was $865.30. The difference is $263.27 per week for September 2, 2021 through November 7, 2021. Therefore, Claimant is owed a total of $1,657.26 in temporary partial disability benefits plus interests of $145.70.

Claimant is also owed temporary total disability benefits beginning the week of November 7, 2021 through the present and continuing until terminated by law. Neither party indicated that Claimant had been earning wages after November 7, 2021 and no further wage records were submitted after this date. For the period of November 7, 2021 through the date of this order, October 31, 2022 there is a period of 359 days, this day included. Claimant is owed TTD in the amount of $29,585.19.

Interest is due related to the benefits, which were not paid when due, in accordance with Sec. 8-43-410(2), C.R.S. in the total amount of $1,291.79.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant proved by a preponderance of the evidence that the Claimant's average weekly wage is $867.30. Temporary Total disability benefits shall be paid at the rate of $576.87.

2. Pursuant to the September 22, 2022 Findings of Fact, Conclusions of Law and Order, Claimant was awarded temporary disability benefits beginning September 2, 2021.

3. Respondents shall pay Temporary Partial Disability from September 2, 2021 through November 6, 2021 in the amount of $1,657.26.

4. Respondents shall pay Temporary Total Disability Benefits from November 7, 2021 through the present and continuing until terminated by law. Benefits are calculated from November 7, 2021 through October 31, 2022 in the amount of $29,585.19. Subsequent to this date, TTD shall continue at the rate of $576.87 per week.

5. Interests owed from September 2, 2021 through October 31, 2022 is $1,291.79. Entitlement to interest shall continue until payments are made in accordance with this order.

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 31st day of October, 2022.

Digital Signature

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